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VOLUME 274

PERMANENT EDITION

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

SEPTEMBER — NOVEMBER, 1921

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

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.
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SECOND CIRCUIT

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Hon. CHARLES F. LYNCH, District Judge, New Jersey.....Newark, N. J.
Hon. JOSEPH L. BODINE, District Judge, New Jersey.....Trenton, N. J.
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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] Died September 15, 1921.
[2] Resigned June 30, 1921.
[3] Became Circuit Judge, October 5, 1921.

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FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice[4] ..... Washington, D. C.
Hon. WILLIAM HOWARD TAFT, Circuit Justice[5] ..... Washington, D. C.
Hon. MARTIN A. KNAPP, Circuit Judge ..... Washington, D. C.
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Hon. EDMUND WADDILL, Jr., Circuit Judge ..... Richmond, Va.
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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.
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Hon. ARTHUR C. DENISON, Circuit Judge ..... Grand Rapids, Mich.
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Hon. WALTER EVANS, District Judge, W. D. Kentucky ..... Louisville, Ky.
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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.

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

Hon. EVAN A. EVANS, Circuit Judge.....Baraboo, Wis.
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Hon. KIMBROUGH STONE, Circuit Judge .....Kansas City, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas..... Little Rock, Ark.
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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.
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Hon. TILLMAN D. JOHNSON, District Judge, Utah .....Salt Lake City, Utah.
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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

CASES REPORTED

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

SEVENTH CIRCUIT.

EIGHTH CIRCUIT.

NINTH CIRCUIT.

DISTRICT OF COLUMBIA.

See End of Index for Tables of Federal Cases in Other Reports

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

PICKENS et al. v. MERRIAM et al.*

(Circuit Court of Appeals, Ninth Circuit. June 6, 1921. Supplemental Opinion, August 1, 1921.)

No. 3624.

1. **Executors and administrators ⊂=59—Evidence held to show notes not in inventory were separate property of decedent's wife.**
   In a suit to set aside quitclaim deeds covering the interests of grantors in the estate of a decedent, on the ground that the grantors were overreached by the administrators, evidence *held* to show that certain notes which were not included in the inventory of the estate were the separate property of the widow, who was one of the administrators, so that they were not to be considered in ascertaining the value of the interests conveyed by quitclaim deeds.
2. **Courts ⊂=367—State decision, establishing effect of language in a conveyance, controls.**
   Though ordinarily the interpretation of a contract presents a question of general law, on which the federal courts are not bound to follow the state court, decisions by the highest court of the state that a contract by which the owner agreed to convey if the payments were made at the times specified did not work an equitable conversion of the property, where the owner died before the time of performance of the contract, which had become a rule of property in the state before the execution of the contract in controversy, is binding on the federal courts.
3. **Courts ⊂=366(16)—State decision, requiring equitable conversion of real property, is controlling.**
   It is the exclusive province of the courts in the state in which the land is situated to determine its ownership and devolution and transfer, and whether there has been a conversion of the property from one sort to another.
4. **Descent and distribution ⊂=90(4)—Evidence held not to show heirs were overreached by administrators.**
   In a suit to cancel quitclaim deeds given by the heirs of decedent to the widow, who was one of the administrators, evidence of the value of the estate and the possibility of litigation regarding it *held* not to show that the administrators overreached the other heirs in procuring the quitclaim deeds for their interests in the estate; there being no misrepresentation of the facts.

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

*Rehearing denied October 10, 1921.

5. **Descent and distribution ⟸84—Use of estate funds, which would go to widow to pay for deeds to her, not fraud.**
Where all of the personal property belonging to an estate would go to the widow in any event, the use of the funds of the estate to pay for quitclaim deeds by the heirs to the widow is not a badge of fraud.

6. **Descent and distribution ⟸84—Administrators owe utmost good faith in dealing with heirs.**
The administrators of an estate owe to the heirs the utmost good faith and fair dealing in procuring from them quitclaim deeds conveying their interest to the widow, who was one of the administrators.

Supplemental Opinion.

7. **Descent and distribution ⟸12—Under California statutes a widow can dispose, in her lifetime or by will, of property inherited from husband.**
Under Civ. Code Cal. § 1386, subd. 8, providing that separate property of decedent's spouse, which came to decedent by descent, devise, or bequest, shall go to the children of the spouse or to the next of kin, the surviving spouse may dispose in her lifetime of any part of the property inherited from the deceased spouse, and may even make testamentary disposition of it, to the exclusion of the heirs of the deceased spouse.

8. **Descent and distribution ⟸12—Property inherited from spouse descends to spouse's heirs, unless its identity has been lost.**
The mere fact that property inherited by decedent from a predeceased spouse has changed its form, because of substitution of other property, does not affect inheritance by the heirs of the predeceased spouse, under the California statutes; but if the property has been so commingled with the survivor's other property that its identity cannot be traced, inheritance by the heirs of the predeceased spouse could not attach.

9. **Descent and distribution ⟸12—Widow's half of real estate is not inheritance under Kansas statutes.**
The right of a widow, under Gen. St. Kan. 1901, § 2510, to one-half of the real estate in which the husband at any time during marriage had a legal or equitable interest, is not an inheritance, but springs into existence by operation of law, and is not subject to the California statutes governing the descent of property inherited by a widow from her husband.

10. **Descent and distribution ⟸12—Widow's right to homestead under California statutes is not acquired by descent.**
The widow's right to the homestead set apart to her under the California statutes by the probate court is not a right acquired from her husband by descent.

11. **Deeds ⟸61—Delivery with intent to surrender control to third person, to be delivered after grantor's death, is effective.**
Where a grantor gave possession of a deed to a third person, with instructions to deliver it to the grantee on the grantor's death, and intended thereby to part with all control of the property during her lifetime, the deed becomes effective to pass the present title to the grantee, leaving the grantor a life estate only, and the third party is constituted a trustee for the grantee.

12. **Wills ⟸88(4)—Reservation of control of deed given to third person for delivery after grantor's death invalidates conveyance.**
Where the grantor, who gave a deed to a third person, to be delivered to the grantee after grantor's death, retained the right to control the deed during her lifetime, the conveyance is void as an attempted testamentary disposition without compliance with the required formalities.

13. **Deeds ⟸56(2)—Delivery depends on intent.**
The question of completed and effectual delivery of a deed is one of intent, to be gathered from the circumstances under which the attempted delivery was made.

14. **Deeds ⊂⊃56(1)—Delivery may be constructive, as well as actual.**
An actual and formal delivery of the deed is never necessary, but delivery may be constructive, if from all the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another.

15. **Deeds ⊂⊃61—Authority to agent to sell property and replace it defeats deed given to agent for delivery at grantor's death.**
Where grantor gave deeds executed by her to her agent, with instructions to deliver them immediately upon her death, her authority to the agent to sell any of the property in the meantime, if he could do so at a profit, renders the attempted delivery invalid, even though it was accompanied by directions to replace the property sold by other property.

16. **Cancellation of instruments ⊂⊃34(1)—Delay of six years after record of deeds and possession thereunder held laches, barring attack for want of delivery.**
Where the heirs waited six years after acquiring constructive notice of deeds delivered at grantor's death by the recording thereof, and after possession was taken by the grantees and the property was omitted from the inventory of the grantor's estate, during which time the grantees had made improvements on the property and had sold some of it, the heirs were guilty of such laches as bars their right to attack the deed for want of failure of delivery in grantor's lifetime.

17. **Equity ⊂⊃87(1)—Laches does not depend on statute of limitations.**
Laches does not depend on the statute of limitations, but may be incident to a term of longer or shorter duration than the statute prescribes.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit by Louisa Pickens and another against J. H. Merriam and others to set aside quitclaim deeds. Charles F. Fensky and others intervene. Decree for defendants, and complainants appeal. Affirmed.

The complainants are sisters and two of the eight heirs at law of Ferdinand Fensky, deceased, aside from the widow. Fensky died intestate at San Pedro, Los Angeles county, Cal., August 7, 1903, being a resident and inhabitant thereof at the time. He left property, both real and personal, in Shawnee county, Kan., and in Los Angeles and Orange counties, Cal. M. T. Campbell was appointed administrator of his estate in Kansas, and the widow, Jeanette Fensky, administratrix of his estate in California. The estate in Kansas, classified for convenience and clarity, consisted of, first, real property; second, a number of contracts executed by Fensky and wife for the sale of real property, by which the purchasers obligated themselves to pay the balance of the purchase money to Fensky; and, third, personal property, consisting in the main of notes and mortgages to secure their payment.

The estate in Kansas was finally settled June 6, 1905, and that in California April 11, 1905. Jeanette Fensky, the widow, later died testate as to the Kansas property, being at the time a resident of Los Angeles county, Cal. Letters of administration with the will annexed of the estate in California were issued to J. H. Merriam, one of the defendants, August 14, 1908. On or about October 9, 1908, M. T. Campbell was appointed in Kansas administrator with the will annexed. These estates were both settled in due time.

The heirs at law of Ferdinand Fensky, namely Louisa Pickens, Johanna Schutt, Ida Wendt, Augusta Krauss, and Hulda Richter, sisters, Frederick Fensky and Charles Fensky, brothers, and George Fensky, nephew, prior to the settlement of the estates of Ferdinand Fensky, each assigned by quitclaim deed all right, title, and interest in and to all the real and personal property, wherever located, of Ferdinand Fensky, to Jeanette Fensky, the

widow, for the consideration of $1,000 each, except Frederick Fensky, to whom the consideration paid was $1,100. These assignments ranged in date from July to December, 1904, except Frederick's, which was executed in March, 1905.

In the settlement of the Ferdinand Fensky estates, both in Kansas and in California, the sales agreements or contracts for sale of real property, entered into prior to the death of Fensky, were treated as real property. As such they would descend to the widow under the Kansas statutes of descent.

It is claimed by complainants that Campbell, the administrator in Kansas, prior to March 30, 1905, remitted to Jeanette Fensky in cash and secured notes, being the proceeds of the assets of Fensky's estate, more than $30,000, and it is further asserted that, by reason of assignments of the heirs of Ferdinand Fensky of their title and interest in the estate to Mrs. Fensky, she was, upon the final account of her administration of the estate in California, awarded the entire estate as the only person entitled thereto; that she sold the real property in California, and realized therefrom more than $26,000; that with the money derived from these sources she purchased numerous parcels of real property in California; that prior to her decease, however, she conveyed, but without consideration, these parcels as designated in the bill of complaint, namely, items 1 and 6 to her sister, the defendant Alma J. Schmidt, items 2, 4, 9, 11, and 12 to her brother, the defendant Eugene Wellke, items 5, 7, and 8 to her sister, the defendant Amanda Katzung, item 3 to defendant Minnie S. Farnsworth, and item 10 to Corrine Loveland; that the defendant Don Ferguson claims to be the owner of item 3; and that after Jeanette Fensky's death the defendant J. H. Merriam became administrator of her estate, and administered a small amount of personal property only, which personalty was distributed to the heirs of Mrs. Fensky, except that $200 was paid to Laura M. Coughlin, which she claimed as a gift from deceased causa mortis.

The plaintiffs complain that the deeds from the heirs of Ferdinand Fensky, whereby they assigned and conveyed all their right, title, and interest in the Fensky estate to the widow, Jeanette Fensky, were procured by the misrepresentation, deceit, and fraud of M. T. Campbell, the administrator in Kansas, and the widow, whereby they were deceived and misled to their injury in that they were given to understand, and believed at the time and prior to the execution of such deeds, that the contracts for the sale of the real property entered into prior to Fensky's death, were real property, and were legally to be treated as such in the settlement of the estate, and as such descended to the widow, whereas their legal effect was to work an equitable conversion of the realty, and such contracts or agreements constituted personalty in the hands of the vendor, and as well in the hands of his estate, and as such would be distributed to the widow and heirs of deceased. It is further alleged that Campbell, the administrator, failed to account to the estate for certain personal property, namely, a note signed by W. C. Stein, and another by Simms, which notes, or their proceeds were turned over to the widow as her separate property.

It is also further alleged that the deeds made by Mrs. Fensky prior to her decease, to her brother and sisters, and to the defendants Farnsworth and Loveland, were without consideration, and were not delivered until after her death; that the defendant Merriam, well knowing that the real property described in the deeds did not pass thereby, yet nevertheless wholly omitted the property from his inventory of her estate, and settled the estate without accounting therefor; and, further, that he distributed the personalty to the heirs of Jeanette Fensky.

The prayer is that an account be taken of the property of Ferdinand Fensky, deceased, owned and possessed by him prior to his death; that the deeds of release and quitclaim executed by complainants to Jeanette Fensky be annulled; that an account be taken of the property and estate of Jeanette Fensky, and the sources from which the same were derived; that upon final hearing it be determined that all of the property owned by her at the time of her death is distributable among the heirs at law of Ferdinand Fensky; that it be deter-

mined that the deeds from Jeanette Fensky, under which the defendants, except Merriam, claim are invalid and void; that Merriam be required to account for the moneys distributed by him to the heirs of Mrs. Fensky; and for general relief.

The defendants Merriam, Wellke, Schmidt, and Farnsworth answered. Charles F. Fensky (a son of Charles Fensky, named in the complaint, now deceased), F. C. Richter (a son of Hulda Richter, named in the complaint, now deceased) and George J. Fensky, one of the persons named in the complaint, were permitted to intervene, and they demand relief substantially as prayed in the original bill. The decree was for defendants, and the complainants appeal.

Francis G. Burke, of Los Angeles, Cal., for appellants and intervener Charles F. Fensky.

J. H. Merriam and Jay D. Rinehart, both of Pasadena, Cal., and Robert B. Murphey and Hunsaker, Britt & Cosgrove, all of Los Angeles, Cal., for appellees.

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

WOLVERTON, District Judge (after stating the facts as above). It is conceded that real property in Kansas descends to the widow, to the exclusion of the other heirs at law of the husband, and the personal property one-half to the widow and one-half to the heirs; that in California the widow is entitled to one-half of the separate property of the husband, both real and personal, but as to community property that the widow is entitled to three-fourths. It is further conceded that the real property of the decedent in Kansas was subject to distribution under the laws of Kansas, and that the personal property, whether in Kansas or California, and the real property in California were subject to distribution under the laws of descent in California.

The record shows by the inventory of the administrator that Fensky left certain real property, which is described, and which does not seem to have been appraised. This property, without question, descended to the widow.

By stipulation of counsel, it is agreed that prior to April 6, 1903, Ferdinand Fensky and wife executed contracts for sale of realty for about 29 tracts or parcels, and that the amount due on such contracts at the time of the death of Fensky was the sum of $22,965.75. The real estate in California was appraised at $6,200. Of this amount the homestead, valued at $3,000, was set aside to the widow in her own right, leaving for distribution $3,200.

The personalty in Kansas, consisting of notes secured by mortgages, was appraised at $16,630.50. To this should be added $4,297.14 money in hand, aggregating $20,927.64, found in the hands of the administrator, as per his inventory. On final settlement the administrator was directed to turn over to the widow all this property, less taxes and expenses of administration, which were $437.44. This does not include the administrator's charges for administering the estate, which were subsequently adjusted between the administrator and Mrs. Fensky at $1,500, by Mrs. Fensky canceling a note for that amount which she held against him.

The personal property in California was appraised at $500, to which should be added $100 as rent collected during administration. The taxes paid and expenses of administration, including allowance to widow, amounted to $1,719.62, of which the widow paid from her own funds $1,119.62. Thus it will be seen, of the property in California, both real and personal, $2,080.38 remained, all of which was turned over to the widow.

This accounts for the whole of the estate of Ferdinand Fensky, unless it be that certain other items should be added thereto, which will now be considered.

[1] The evidence shows quite clearly that the Stein notes, not included in the inventory, were the separate property of Mrs. Fensky. The notes were taken up, and another note given for $2,400, July 15, 1903, covering the whole, and made payable to Mrs. Fensky. This was prior to the death of Fensky. Aside from this, the notes were treated by both Campbell and Mrs. Fensky as her property. As to the Simms note, Simms states that prior to Fensky's death he borrowed money from Fensky. The widow claimed, however, that her husband gave her certain notes prior to his decease, and it will be found that the Simms note was treated by Campbell and Mrs. Fensky from the first as her property. The Kimmerle note was also so treated. Campbell's own note for $1,500 seems to have been so treated, and there is no evidence to the contrary showing it to have been the property of the estate.

The money claimed by plaintiffs on the two bank accounts in California by fair inference belonged to Mrs. Fensky, and so of the money paid to her through Campbell, her agent in Kansas, by the Citizens' State Bank of Kansas. The evidence, therefore, shows nothing to modify materially the foregoing results as to the amount of personalty of the Fensky estate coming into the hands of Mrs. Fensky, both from Kansas and from California, which, together with the balance of the realty, aggregates as nearly as can be ascertained $21,070.58. This takes no note of the contracts of sale. Of this sum the widow was entitled to one-half, and the other heirs each one-sixteenth.

A crucial question involved by the controversy is whether the contracts for the sale of the real property theretofore belonging to Fensky were legally and properly treated in the hands of his estate as real property, and as such descended to the widow. The Supreme Court of Kansas has passed upon the question in consideration of the very contracts here involved. Pickens et al. v. Campbell et al., 104 Kan. 425, 179 Pac. 343. The complainants herein sued M. T. Campbell and his bondsmen in the district court of Shawnee county, Kan., with a view to annulling the final settlement made by Campbell, as administrator in the Fensky estate, and compelling an accounting on the part of him and his bondsmen of the assets of the estate, and, to the end that plaintiffs might share in the result of the accounting, it was sought to set aside the releases given to Mrs. Fensky by complainants. A decree was rendered against the plaintiffs, and they appealed to the Supreme Court. The question determined was whether or not an equitable conversion had taken place by reason of the conditions of the contracts for

sale of the realty, and it was held that, because of the stipulation for forfeiture, time was made of the essence of the contracts, and therefore there was not an equitable conversion. We quote liberally from the opinion to show the final judgment of the court:

"It will be observed that the form of contract used was not one of present sale; it was one to sell. No obligation on the part of the vendor to convey arose, except on receiving the stipulated sums of money, at the time and in the manner specified. In case of default, the right to forfeit and to re-enter was expressly reserved. The forfeiture clause is identical with that appearing in the contract considered in the case of Drollinger v. Carson, 97 Kan. 502, 505, 155 Pac. 923. It was there said that such provisions are sometimes held to make time of the essence of the contract, citing 39 Cyc. 1369, 1370. It was not necessary to declare that such was the effect in that case, because, after default of the vendee, the vendor made time essential by demanding payment within a stated period, under penalty of forfeiture. That is just what the contract under consideration did at the beginning of the relations between the vendor and the vendee. Title was withheld; performance by the vendee at the time stipulated was a condition precedent to the acquisition of title; default entailed forfeiture of payments already made, and right of possession; the vendor was then at liberty to re-enter or to invoke the remedy of ejectment; and insertion of the formula, 'Time is of the essence of this contract,' would have been superfluous. * * * In this case most of the lots were sold for small payments, to be made during considerable periods of time, and it is quite clear that Ferdinand Fensky intended to forestall lawsuits by requiring purchasers to accept contracts which provided for strict performance, under penalty of forfeiture. The result is the contract is identical in all its legal aspects with the contract considered in Brown v. Thomas, Sheriff, 37 Kan. 282, 15 Pac. 211, and the vendor continued to be the owner of the land."

The court makes ample reference to the Kansas cases supporting its holding, and distinguishes them from other cases which it was contended held to the contrary. As this case is the last word of the Supreme Court of Kansas upon the question, we will not attempt further review of its utterances pertaining thereto.

[2] It is insisted, however, that the question is one of general character, involving the interpretation of a contract not in any way dependent upon the construction of state law, and that in such a case the federal court is not bound to follow the decisions of the state court construing the contract, but will impose its own independent judgment. The general proposition is sustained by authority, but it is without application here. It is now the settled rule of law by the federal courts that—

"Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state." Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360, 30 Sup. Ct. 140, 143 (54 L. Ed. 228).

See, also, Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Bucher v. Cheshire Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795.

The rule applicable is well stated in Keene Five Cent Sav. Bank v. Reid, 123 Fed. 220, 226, 59 C. C. A. 225, 230, by the Court of Appeals, Eighth Circuit, as follows:

"Now, it is a well-settled doctrine that the proper interpretation of a private contract presents a question of general law, concerning which the federal courts are entitled to express an independent judgment, unless the contract is one relating to the sale or conveyance of real or personal property, and it contains words or phrases that, in virtue of local decisions, have acquired a definite meaning, and have thus become rules of property within the state. When such is the case the federal courts will interpret a contract as the state courts would interpret it."

[3] Aside from this, there is another principle which has application here. It is stated by Judge Story in his work on Equity Jurisprudence (volume 2, par. 1107):

"It is the exclusive province of the courts of the state of the situs of the property to determine its ownership, and its devolution and transfer, and whether or not there has been a conversion of the property from one sort to another. This is essentially so from the very nature of things, or else the state would have certain classes of property within its boundaries completely subject to the caprice and desires of nonresidents, and thus render nugatory its laws enacted for the purpose of protecting its own citizens and their property rights."

That the decisions of the Kansas Supreme Court have established a rule of property as respects contracts of the kind involved here can scarcely be disputed. The construction of the contract given in the Pickens Case, supra, seems to have been first announced in Douglas County v. U. P. Ry. Co., 5 Kan. 615, 621, and has since been consistently followed. Brown v. Thomas, Sheriff, 37 Kan. 282, 15 Pac. 211; Drollinger v. Carson, 97 Kan. 502, 155 Pac. 923.

These considerations lead to the conclusion that these contracts of sale did not work an equitable conversion of the real property concerned; that in their legal status, in view of the construction given them by the Kansas Supreme Court, they were properly to be considered and treated as real property, in the hands both of the vendor and his estate; and that they were rightfully so regarded in the administration and settlement of the estate. This disposes of the $22,965.75 item. The complainants could have no right, title, or interest therein.

[4] Turning, now, to the question, which is one of fact, whether the complainants have been misled and overreached in their transactions with Campbell and Mrs. Fensky, we have to consider the evidence bearing upon the subject. It is clear that Campbell and J. B. V. Goodrich, who was Mrs. Fensky's attorney and legal adviser in California, considered the question as to whether these contracts should be treated as realty with a good deal of care before any negotiations were attempted with the heirs of Ferdinand Fensky for the purchase of their interests in the estate by Mrs. Fensky. They concluded, and it seems rightly from a legal standpoint, that they should be so regarded. It was on this basis that Campbell carried on the negotiations with the heirs for the purchase of their interests. While it is true that he was at all times extremely solicitous that the heirs should not be advised as to the legal question involved, lest a lawsuit arise and thus delay the final settlement of the estate, it is obvious that he never at any time made any misrepresentations on the subject calculated to mislead them, or to induce them to do otherwise than they would have done with a

full understanding of the legal status of these contracts. In his endeavor to get a settlement for Mrs. Fensky, he wrote letters to some of the heirs, of which the following is a sample:

"5th July, 1904.

"Mr. Frederick Fensky, Leavenworth, Kansas—Dear Sir: Under the law of California, where Ferd Fensky died intestate, one half of his real and personal property in that state goes to his widow, and the other half to his brothers and sisters. The same rule applies to his personal property in this state, and I have been appointed administrator of his estate here, and have three years from the date of my appointment to close up the estate. The personal property here consists of notes and mortgages, and on their face amount in the aggregate, including money collected, to about $21,000. Quite a number of the debtors want more time in which to pay, and if Mrs. Fensky, the widow, was the sole owner of the notes, she could accommodate these people, and still collect nearly all of the money in the course of time. I can't be at all sure how much each heir, besides Mrs. Fensky, will be likely to realize out of the whole estate after all expenses and losses are paid, but I think somewhere in the neighborhood of $1,000. I have advised Mrs. Fensky that, if she can buy out each of the other heirs for $1,000 or less, to do so, and then make whatever terms she desires with those debtors who want more time on their notes. If you think favorably of the suggestion, and are willing to accept $1,000 in full of your share, please let me know soon, and I will will prepare an assignment of your interest and send you without delay. I am making the same proposition to the others, and think it will be accepted as the best thing for all parties concerned under the circumstances."

Considering the amount of property involved, that is, the personalty and the real property in California, with the trouble and expense to attend the settlement of the estate, and a possible failure in making some collections, this was not an unfair statement. At least, it does not have the earmarks of an attempt to mislead. Frederick Fensky, one of the heirs, however, looked into the matter very carefully, and employed a lawyer to advise him, and then reached a settlement. He was not called as a witness in the case.

Oscar L. Krauss, the husband of Augusta Krauss, advised his wife and others of the heirs, including Mrs. Pickens, as to their settlement with Mrs. Fensky. He was furnished by Campbell with the inventory of the estate filed in Kansas, and had a general knowledge of the affairs of the deceased, having known him for many years. Campbell told him pointedly that the "transactions in the so-called Fensky addition were all real estate." A good deal of time was taken up in procuring the settlements and the quitclaim deeds, and the heirs had ample opportunity to advise themselves particularly touching the condition of the estate before arriving at the settlements, and the record does not show that they were misled or overreached.

[5] It is true a part of the money which was the consideration for the quitclaim deeds was taken from the funds of the estate, but it was in anticipation of procuring the interests of the heirs that it was used, and the act can hardly be considered a badge of fraud. Mrs. Fensky was to come into the whole of the estate in the end.

By far the larger part of the testimony material to the issue consists in correspondence between Campbell and Goodrich and Mrs. Fensky. This correspondence speaks for itself. Campbell and Mrs. Fensky are both dead, and cannot speak for themselves. Goodrich has

not been called. The correspondence is voluminous, but, from a careful reading of it, it does not impress us as proving an imposition of fraud by Campbell and Mrs. Fensky upon the heirs of such a nature as to require a setting aside of the quitclaim deeds. As has been indicated, the heirs had ample opportunity for investigating for themselves, by independent inquiry, if need be, respecting the condition of the estate, and, finding no misrepresentation on the part of Campbell and Mrs. Fensky, or other imposition calculated to deceive or mislead them, we are impelled to the conclusion that the quitclaim deeds were not unfairly or fraudulently obtained, and should not be set aside or avoided.

[6] We have not overlooked the fiduciary relations existing between Campbell and Mrs. Fensky and the heirs, which require the utmost good faith and fair dealing, where the trustee is dealing with the cestuis que trustent respecting the property of the trust. But in the present inquiry we find no such violation of the rules of propriety in this respect as to warrant a disturbance of the solemn contracts of the heirs, made with ample knowledge, or the ready means of acquiring it, of the conditions affecting them. A like conclusion has been reached by the Supreme Court of Kansas upon practically the same testimony, and that court speaks in high terms of Mr. Campbell and vindicates his good faith and sagacity as a business man.

Concluding, as we do, that the releases or quitclaim deeds of the heirs should not be disturbed, it results that the entire assets of the estates became the property of Mrs. Fensky at the time of the execution and delivery of the deeds, and what she was pleased to do with such assets subsequently would be no concern of the Ferdinand Fensky heirs.

This renders it wholly unnecessary to review the further questions presented by the record.

Affirmed.

Supplemental Opinion.

A vital contention of appellants was overlooked in the former opinion in this case. The contention is that the complainants, being the sisters and a descendant of a deceased brother of Ferdinand Fensky, under the California statute were the heirs of Mrs. Fensky, there being no children of the marriage. This, it is claimed, is in pursuance of the second paragraph of subdivision 8, § 1386, Civil Code, which provides that:

"If the deceased is a widow, or widower, and leaves no issue, and * * * if the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

This can have relation to such property only as came from the deceased spouse to the decedent by descent, devise, or bequest. Such

property as the decedent acquired otherwise would not be affected by the statute.

[7, 8] The Supreme Court of California has given construction to the first paragraph of subdivision 8, which has relation to community property (In re Brady's Estate, 171 Cal. 1, 151 Pac. 275), and the construction, it is obvious, is alike applicable to the latter paragraph. After the death of the spouse, if there be no issue, the property, if community property, the whole of it, becomes that of the surviving husband or wife, as the case may be, to deal with as though it were his or her own, and the heirs of the deceased spouse have a bare expectancy, which becomes effective, or ripens into an inheritance, at the death of the surviving spouse, and then only as to such of the property as he or she at that time possessed or owned. The surviving spouse may dispose of the property, or any part thereof, in any way desired, during his or her lifetime, and may even make testamentary disposition of it. In re Hill's Estate, 179 Cal. 683, 178 Pac. 710. The mere fact that the property has changed its form, type, or character, because of substitution of other property, does not affect the inheritance; but if the property is so commingled with the survivor's other property that its identity cannot be traced, then, of course, inheritance by the heirs of the deceased spouse could not attach.

[9] Mrs. Fensky did not acquire all the property of which she died possessed from her husband by descent. By section 2510, Gen. Stat. Kan. 1901:

"One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him."

The Supreme Court of Kansas has determined that the estate coming to the wife under this statute is not an inheritance, "but springs into existence by operation of law upon a concurrence of the seisin and the marriage relation," and it was further determined that the only function that the probate court exercised in setting aside the property to the widow was to ascertain its value, and set it apart, "not as an heir of her deceased husband, but as her separate and absolute property in fee simple." McKelvey v. McKelvey, 75 Kan. 325, 89 Pac. 663, 121 Am. St. Rep. 435.

[10] Mrs. Fensky, therefore, became the owner in her own right, and not by descent from her husband, of one-half of the contracts for sale of realty in Kansas existing at the date of Ferdinand Fensky's death. These contracts amounted, as we have previously shown, to $22,965.75. Furthermore, Mrs. Fensky became the owner, in her own right, by purchase from the heirs, of one-half of the realty in California owned by her husband at the time of his death, as well as of his personalty. She also became the owner in her own right of the homestead set apart to her by the probate court in California in course of her settlement as administratrix of his estate. This she did not acquire by descent. Besides this, she had some property of her own, arising

from earnings before her marriage, including an amount, "a few hundred dollars," left her by a former sweetheart; and, as has been previously ascertained, the Stein notes, and the Simms, Kimmerle, and Campbell notes, and certain bank accounts, were her separate property. So that she became and was the owner, in her own right, and not acquired by descent from her husband, of much more than one-half of the property that came into her possession after the death of her husband.

It is very difficult to trace the property from the time Mrs. Fensky came into its possession, through the negotiations that took place prior to the settlement of Ferdinand Fensky's estates in Kansas and California, and through such settlement. By the record, there is no disclosure of any specific transfers of property, whether real or personal, prior to the time Mrs. Fensky attempted to deed different parcels of realty and assign certain mortgages to certain of her heirs; the specific date being September 18, 1907. She apparently sold all the real property in California that Ferdinand Fensky left at the time of his death, except the tract designated in the pleadings as item 8, and lot 10, Peck's subdivision of block 74, San Pedro, Cal., which latter parcel was a part of the homestead set apart to the widow. We find, however, that prior to and on the 18th day of September, 1907, Mrs. Fensky was the owner of the several tracts set forth in the pleadings, designated as items 1 to 12, inclusive. This as to the real property.

The only available evidence to be gathered from the record as to the amount of the personal property, with the exception of some items that will be noticed later, is the final account of the administrator touching Mrs. Fensky's estate. This account shows balance for distribution after payment of claims and charges for administration, $1,956.84, consisting of cash on hand, $906.84, and note of Don and Ona N. Ferguson, $1,050. This amount was distributed to Eugene Wellke, Alma J. Schmidt, and Amanda Katzung, share and share alike, after deducting $200 paid to Laura Coughlin, which was deemed a gift to her causa mortis, the obligation for which arose on account of the last illness of the deceased. The other items spoken of are the Stein note for $1,000, which was the separate property of Mrs. Fensky, and the Campbell note, also for $1,000. The latter was divided between Corrine Loveland and Minnie Farnsworth; $100 being paid in cash to each, and a note of $400 given to each by Campbell, which settled the obligation so far as he was concerned. This was done after the death of Mrs. Fensky, but in pursuance of her direction to Campbell in her lifetime, to wit, October 10, 1907, by letter which stated:

"Minnie to hold note. Corrine's share of principal and interest to be paid through Minnie."

The note was treated by the administrator as a gift to these parties causa mortis, and was not included in the assets of the estate. In addition to these items, two mortgages were assigned on September 18, 1907—the Ed. and Hattie Halbriter mortgage, to Eugene Wellke, and the Frank E. and Clara M. Webster mortgage to Amanda Katzung and Alma J. Schmidt—and given to Ferguson to hold in the meanwhile,

and to deliver to the assignees upon the death of the assignor. This took place at the same time the deeds were delivered to Ferguson to be held by him, and to be recorded at the death of the grantor, and was really part of the same transaction. The amount of these mortgages does not appear, but the Halbriter mortgage was paid prior to the death of Mrs. Fensky, presumably to her, through her agent, Don Ferguson.

The question is presented whether the several deeds signed by Mrs. Fensky, and acknowledged by her on September 18, 1907, and placed of record subsequent to her decease, purporting to convey distinct parcels of real property to the following individuals: Minnie S. Farnsworth, Eugene Wellke, Amanda Katzung, Alma J. Schmidt, and Corrine Loveland—were properly and legally delivered to the grantees so as to convey title. Lucius A. Parmele drew the deeds at the request of the decedent, who at the time was ill and confined to her bed, and took them to her bedside, where they were duly signed and acknowledged by her. Parmele relates the circumstances under which the deeds were given, in effect, that Mr. Ferguson, in the morning, gave him a list of the properties owned by Mrs. Fensky, and the names of the parties to whom she wished them deeded, and he drafted the deeds accordingly; that several persons were present at the time the deeds were signed; that—

"After she had signed the deeds, the question came up in regard to mortgages. She asked every one except Mr. Ferguson and myself to leave the room. They all left at her request. After they left the room she told me to which one she wanted the mortgages assigned. She directed Mr. Ferguson to take the papers and keep them—to continue to have control and charge of the property, and at the time of her death to record the papers covering such properties as she might have at the time of her death. She directed him to sell the property, or handle it just as if the deeds had not been given; that any property she owned at the time of her death, covered by the deeds, those deeds were to be recorded."

On cross-examination he said:

"She told me to deliver the deeds to Mr. Ferguson, and that Mr. Ferguson take them and keep them. * * * She directed Mr. Ferguson to keep the deeds in escrow, and to record any covering the property which she might own at the time of her death. * * * Q. Did she say anything to him as to how he might dispose of the property prior to her death? A. Not further than to handle it the same as it was her property, the way he had been handling, selling, buying, and trading property."

There was a will executed at the same time, by which Mrs. Fensky gave what property she owned in Kansas to the nieces and nephews of her deceased spouse.

Don Ferguson testified that he had bought and sold real estate for Mrs. Fensky from about 1905 until her death in 1908; that she spoke to him about making the deeds to her people, and that she wanted them all to have a home. He says:

"She stated that I was to hold the deeds until her death. * * * She said that she wanted to know that her people had a home and that if anything was sold it would be replaced, or words to that effect. She said I was to hold the deeds until her death and then put them on record immediately. She told me if I got a chance to sell any of this property at a profit to do it, and that

we would make it right, or words to that effect. I don't remember the wording. * * * The instructions were to hold them [the deeds] until her death. * * * At the time she delivered the deeds to me she made the remark that if I got a chance to sell anything at a profit to sell it and she would replace it. I think that is the word she used. She told me to record the deeds upon her death, and I did so."

Mrs. Farnsworth, the only other person to testify on the subject, says she heard Mrs. Fensky say to Ferguson to take the papers and hold them, and in case of her death to "record them the next day," and that she did not hear her say to Ferguson that he could sell the property or handle it as he used to. It further appears that prior to Mrs. Fensky's demise she gave a deed to one Chenoweth to a piece of property known as the Lewis tract, which was included in one of the deeds she executed on September 18, 1907. This property, however, it seems, she had sold to Chenoweth, on contract, prior to September.

[11] The question attending the delivery of a deed by the grantor to a third person, to be delivered to the grantee at the grantor's death, is one of intent, depending upon the attending circumstances and conditions under which the delivery is made. If it is the intention of the grantor to make such delivery absolute, and to place the deed beyond his power thereafter to revoke or control, the act becomes effective to pass the present title to the grantee, which leaves in the grantor a life estate only in the property conveyed, and the third party is constituted the trustee, as respects the deed, for the grantee. Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; In re Cornelius' Estate, 151 Cal. 550, 91 Pac. 329.

[12] If, however, it is the intention of the grantor that the title shall not pass to the grantee at once, nor until after his death, the transaction partakes of the nature of a testamentary disposition, and does not become effective to vest the title in the grantee. The law has provided how such disposition shall be made, and, unless so made, it cannot be upheld.

"And," says the court, in Williams v. Kidd, 170 Cal. 631, 638, 151 Pac. 1, 3 (Ann. Cas. 1916E, 703), "the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery."

An apt illustration is afforded by the case of Moore v. Trott, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131. There Moore mailed to one Tietzen some deeds to land, with directions to deliver them to the parties in case of his not returning from the hospital, where he had gone to have a surgical operation performed, and it was held that there had been no delivery, because the directions left the inference that, if he returned from the hospital, the deeds were not to be so delivered. The case afterwards came up under a different showing, whereby it appeared that Moore, after coming out of the hospital, made declarations to several persons, other than Tietzen, that the deeds would be delivered when he would not be here, and, in effect, that he had disposed of a great deal of his property—had "deeded it," and left

the deeds with Tietzen to be delivered when he should pass away—and it was held that there was a delivery of the deeds, although Tietzen had not been advised of the grantor's changed determination. Moore v. Trott, 162 Cal. 268, 122 Pac. 462.

[13, 14] As has been previously stated, the question of a completed and effectual delivery is one of intent, to be gathered from the attending circumstances and conditions under which the attempted delivery is made. An actual and formal delivery is never necessary, and delivery may be constructive, as well as actual.

"Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed and the title conveyed, are sufficient." Kelsa v. Graves, 64 Kan. 777, 68 Pac. 607.

And so it was said in Moore v. Trott, supra, last cited:

"The delivery is sufficient and complete, if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another."

[15] The principle being thus settled, we may inquire whether, by the delivery of these deeds to Ferguson, it was the fixed intent on the part of Mrs. Fensky that the title to the property covered by them should presently pass to the grantors. That Mrs. Fensky intended to make some disposition of the property is obvious. She was ill and confined to her bed. She had previously directed Ferguson, who had been for some years her agent in buying and selling real property, to have Parmele draw the deeds. A time was set for their execution, and there were present at the bedside of Mrs. Fensky, when the deeds were executed, besides Parmele and Ferguson, her sisters, Mrs. Schmidt and Mrs. Katzung, and her niece, Mrs. Farnsworth. The deeds were carefully executed and acknowledged, and a will was made by her at the same time, disposing of all the property in Kansas to the nephews and nieces of her deceased spouse in Kansas. The occasion was a solemn one for her, and she supposed, no doubt, that she was making proper distribution of the property touched by the deeds and the will among those who, she believed, ought to have it. She directed Ferguson to take the papers and keep them; but, according to Parmele, she further directed him to continue to have control and charge of the property, and at the time of her death to record the papers covering such properties as she might then have; to sell the property, or to handle it just as though the deeds had not been given, and "that any property she owned at the time of her death covered by the deeds, those deeds were to be recorded." Parmele did not attempt to give the exact language employed, because he could not recall it, but believed he had given the substance of what was said. Ferguson gives a somewhat different version of the instructions given him. He says:

"She said that she wanted to know that her people had a home, and that if anything was sold it would be replaced, or words to that effect. * * * She told me, if I got a chance to sell any of this property at a profit, to do it, and that we would make it right, or words to that effect."

Mrs. Farnsworth evidently did not hear all that was said, and it is probable that she was not immediately present at the time the directions were given. Now, what was Mrs. Fensky's real intent at the time of the delivery of these deeds to Ferguson? She does not seem to have retained any control over the deeds. They were gone beyond her recall, so far as the testimony shows. She did, however, authorize Ferguson, her agent, to sell such of the property as he could make a profit on, saying she would make it good, as we construe the testimony, to the grantee affected. This signified a purpose on her part that the deeds should not become presently effective, but that the lands should be dealt with by her as if the deeds had not been made, and an intention to convey good title to whomsoever the property might be sold to in the meantime. True, she signified her intention of making good to the grantees for any lands sold prior to her death; but this only strengthens the idea that she entertained a purpose to dispose of the property in the meantime, notwithstanding she was then deeding it to the parties designated.

The case, cited by appellees, of Haydon v. Easter, 24 S. W. 626, 15 Ky. Law Rep. 597, does not cover the precise situation, and is therefore not controlling. The idea is consistent, however, with a purpose to make a testamentary disposition of the property rather than a present passing of the title by irrevocable conveyance. The parties advising her on the occasion were not lawyers, and it was probably supposed that such a disposition was legally sufficient. For these reasons, we conclude that it was not the real intent and purpose on the part of Mrs. Fensky to convey a present title to the lands covered by the deeds, and therefore that the deeds were not effective to pass the title to the grantees named.

Appellees insist, however, that appellants have been guilty of such laches that a court of equity will not accord them the relief sought. The position thus asserted has relation to the transactions pertaining to the delivery of the deeds last above considered, and the settlement of Mrs. Fensky's estate, and the failure of complainants to take action with reference to the property concerned until such lapse of time as to render it inequitable for the court to take action in the premises. Mrs. Fensky died July 9, 1908. Petition was filed for appointment of an administrator August 1, 1908, and in pursuance thereof the defendant J. H. Merriam was appointed administrator with the will annexed. The administration pertained to personal property only, and the final account, as we have seen, showed for distribution among the heirs $1,956.84. This was distributed to Mrs. Fensky's heirs, after payment to Laura Coughlin of $200, and the administrator was discharged about October 13, 1909. This cause was commenced July 8, 1914.

Attempt has been made to charge Merriam with fraud and concealment in connection with his administration of the estate, which were detrimental to appellants' alleged interests in the property; but, without attempting to review the testimony relating to the subject, it is sufficient to say that, upon a careful examination thereof, we find that Merriam has been guilty of no fraud or deceit affecting appellants injuriously. The estate was settled in the usual course, and Merriam

was regularly discharged from his trust. The deeds Mrs. Fensky made to her heirs were filed and recorded the day after her death, and the grantees named therein entered into possession very soon thereafter. It was not deemed that the lands covered by the deeds were properly a part of the estate, and hence there was no attempt to administer thereupon. So that the entry into possession must have been nearly six years before the institution of this suit. The grantees, except as to certain parcels they have sold to outside parties, have been in continuous possession ever since, claiming title adversely to all the world.

The statute of limitations for the recovery of real property, which is five years (section 318, Code of Civil Procedure, Deering, 1915), has been pleaded, but stress is laid upon the laches of the complainants, as a defense to the suit, in the arguments and briefs of appellees.

[16] Mrs. Pickens, one of the appellants, testifies that the first knowledge she had that Mrs. Fensky had made the deeds to her heirs was in 1913. No other witness was called to the same purpose. Of course, Mrs. Pickens had constructive notice of the execution of the deeds from the date they were recorded. But, beyond this, the estate was administered in the usual way, accompanied with the legal notices and formalities required by law. Of this she must have had constructive notice, also. The evidence, however, tends to show that shortly after Mrs. Fensky's death some of the heirs of her deceased husband were inquiring into the affairs of the estate. This is particularly so of Fred Fensky and Richter. In this relation, it should be said that F. C. Richter and George J. Fensky are not now interveners in this cause, as erroneously indicated in the statement preceding the former opinion. They, with Charles F. Fensky, did seek to intervene, but later withdrew their petition.

The record of the deeds was open to inspection, and the fact was there apparent touching the date of the deeds and the date of their recording. This of itself was sufficient to induce inquiry why the deeds were not recorded until the day after the death of Mrs. Fensky. The two principal witnesses to the execution of the deeds, Parmele and Ferguson, were accessible. Had complainants gone to them, they would have readily obtained the truth in the premises. Instead of prompt action being taken, the estate of Mrs. Fensky was allowed to be closed and the balance of the property on hand to be distributed. In the meantime the grantees in the deeds have, in some instances, sold the lands deeded to them, in others they have paid off mortgages in considerable sums which were upon the property when it came to them, and in most instances they have made improvements and kept up repairs, and have paid the taxes incident thereto.

[17] Laches does not depend upon the statute of limitations, but may be incident to a term of longer or shorter duration than the statute prescribes. We think that, considering the attending circumstances and conditions, complainants have been guilty of such neglect in the prosecution of their suit as to leave them without remedy. Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335; Raymond v. Flavel, 27 Or. 219, 40 Pac. 158; Wilson v. Wilson, 41 Or. 459, 69 Pac. 923. We come

the more readily to this conclusion as it carries into effect the manifest purpose of Mrs. Fensky, she having the right to dispose of the property as she might desire, and upon the whole we deem it equitable and just, considering the disposition of the property in Kansas to the Fensky nephews and nieces.

Affirmed.

JEEMS BAYOU HUNTING & FISHING CLUB et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 10, 1921.)

No. 3522.

1. **Public lands ⇐26—Natural monument does not govern, where there is fraud or gross error in survey.**
   The rule that where a patent to public land refers to a plat, which shows that the land is bounded by a lake or other body of water, the surveyed line along what the plat indicates as the border of such water is treated as a meander line, and the water and not the line forms the boundary of the tract, does not apply where, through the fraud or gross mistake of the surveyor, the line is manifestly not the water line.
2. **Public lands ⇐28—Land erroneously omitted from survey as under water may be resurveyed.**
   Where a portion of the public lands was erroneously omitted from a survey thereof as being under water, either because of a mistake or fraud of the surveyor, when in fact it was dry land, the Land Department, upon discovering the error, has power to cause the omitted land to be surveyed and to dispose of it.
3. **Public lands ⇐26—Large body of land between meander line and shore held not included in patent.**
   Where the line in a patent to public land, which was shown by a plat to be the shore of a lake, was in fact a half mile from the shore at its nearest point, and there was a large body of high land between the line and the shore, it is obvious the line was not the meander line of the shore, as shown by the plat, and the patent did not convey title to the shore of the lake, but only to the line described, especially where that line included more than twice the quantity of land paid for.
4. **Mines and minerals ⇐7—Oil lessees held not willful trespasssers on land omitted from survey.**
   Where the lessor had been in possession of land for a long time, claiming it under a patent issued to a remote grantor, though the land in controversy was outside of the line of the patent shown on the plat as the meander line of a lake, and no claim to the land was made by the government until after lessees had struck oil thereon and were removing the oil therefrom, lessees are not willful trespassers on the public lands, and are entitled, on an accounting for the oil taken, to credit for the expense of producing it.

Appeal and Cross-Appeal from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Bill in equity by the United States against the Jeems Bayou Hunting & Fishing Club and others, to have the United States adjudicated to be the owner of a certain tract of land, and to compel defendants to account for oil and gas removed therefrom. There was a decree that the United States was entitled to the land in controversy, and that defendants should pay the full value of oil removed therefrom, less

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

the expense of removal, and defendants appeal, and the United States files cross-appeal from so much of the decree as allowed defendants credit for expenses of removal of the oil. Decree affirmed.

N. C. Blanchard, of Shreveport, La. (Hampden Story, H. C. Walker, Jr., and Elias Goldstein, all of Shreveport, La., on the brief), 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. By the bill in equity in this case the United States, claiming to be the owner of land now known and described as lots 8, 9, and 10, in township 20 north, of range 16 west, situated in the parish of Caddo, La., containing 85.22 acres, as shown by a plat of survey approved March 28, 1917, by the Commissioner of the General Land Office, sought relief which included the following: An adjudication that the above-described land is the property of the plaintiff, free and clear of all claims of the defendants to the suit, and that the possession of said land be restored to the plaintiff; that the defendants be enjoined from setting up any claim to said land, or to any oil, gas, or other minerals on or under the same; an accounting by the defendants for oil and gas removed or extracted from said land, and for all moneys derived from the sale or disposition of the same, and for all rents, royalties, and proceeds arising from the sale or lease of the same; and for the recovery from the defendants of all such sums so received by them. The defendants were three corporations, namely, the Jeems Bayou Fishing & Hunting Club, the Producers' Oil Company, and the Texas Company.

The bill contained averments to the effect that the Producers' Oil Company, acting under a pretended lease made to it by the Jeems Bayou Fishing & Hunting Club, wrongfully entered upon said land and took therefrom a large quantity of oil and gas, which it sold to the Texas Company, and that it paid as a royalty part of the value of such oil and gas to the Jeems Bayou Fishing & Hunting Club. The plaintiff's assertion of right to the relief sought was resisted on the ground that title to said land was acquired by Stephen D. Pitts by a patent issued to him on October 1, 1860, for the "southwest fractional quarter of section 10, in township 20, of range 16 west, in the district of lands subject to sale at Natchitoches, La., containing 23 acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General," and that that title thereafter was duly acquired by the Jeems Bayou Fishing & Hunting Club, which leased said land to the Producers' Oil Company.

By the court's decree the first above-mentioned land was adjudged to be the property of the plaintiff; the Producers' Oil Company and the Texas Company were adjudged in solido to pay to the plaintiff the ascertained value of oil taken from said land, less the ascertained cost of producing it, and less the amount paid as royalty to the Jeems Bayou Fishing & Hunting Club; the three defendants were adjudged

in solido to pay the ascertained amount paid as royalty to the Jeems Bayou Fishing & Hunting Club; and interest from the date of the Master's report, which was confirmed, was allowed on the amounts adjudged to be paid to the plaintiff. The defendants appealed from the decree, and complain of it so far as it was adverse to them. The plaintiff sued out a cross-appeal, and complains of the part of the decree which credited the defendants, or any of them, with the amount of the cost of producing oil from the land. The respective parties are referred to herein as plaintiff and defendants.

The official plat of survey which was referred to in the above-mentioned patent issued to Stephen D. Pitts was one of the township mentioned made in 1839 by A. W. Warren, deputy surveyor, which was filed in the General Land Office after being approved in writing on August 31, 1839, by H. T. Williams, Surveyor General. A large part of the space included within the exterior lines of said township 20 is covered by a body of water which was designated on the Warren plat as "Ferry Lake." According to that plat the only land in the southwest part of section 10 of that township is a narrow peninsula, bounded on most of its eastern side and on all of its southeastern, southern, southwestern, and western sides by Ferry Lake; the plat also showing that the shore line of the land in the township north of the southwest fractional quarter of section 10 is an irregular one, running generally a little west of north from the point at which the east and west line running through the center of section 10 ends at at the lake shore a short distance west of the center of that section. That plat does not indicate even approximately the actual location of Ferry Lake with reference to the land included within the traverse line, being the broken line of different courses and distances, shown by Warren's survey to have been run by him around the land designated on his survey and plat as the southwest fractional quarter of section 10.

Evidence adduced proved that there is a compact body of high land, comprising 528.99 acres, lying between the actual shore line of Ferry Lake and the line which Warren's plat indicates is the shore line of lands in sections 10 and 3; that omitted land being south, southwest, and west of Warren's traverse line extending northwardly from its southernmost point in fractional southwest quarter of section 10 to the northern boundary of the township. Southeast, south, and southwest of the land included within the traverse line run by Warren around the tract in the southwest fractional quarter of section 10 surveyed by him is a considerable body of high land, part of which by a proper survey would have been included in that fractional subdivision, and the remainder of which lies south of the line between sections 10 and 15, which line, in consequence of Warren's error as to the location of the margin of Ferry Lake, was not run by him at all. The average distance in a westerly direction of Ferry Lake, or James or Jeems Bayou, as that part of the body of water in the township is now called, from Warren's traverse line along the western side of the above-mentioned peninsular-shaped tract surveyed by him is considerably more than 2,500 feet; the distance from a number of points on that line being over 3,000 feet.

Portions of the above-mentioned lands, which were omitted from the survey made by Warren, were surveyed prior to 1913 under orders of the Commissioner of the General Land Office. In September, 1913, that official directed Arthur D. Kidder, supervisor of surveys, to make a resurvey of the township for the purpose of determining whether Ferry Lake was a navigable body of water in 1812, when Louisiana was admitted as a state, and whether Warren's survey correctly meandered the lake as it existed at the time of Louisiana's admission. That resurvey was completed in May, 1914, and the result was shown by hydrographic and topographic plats and by a resurvey map, accompanied by field notes, all of which were approved by the Commissioner of the General Land Office. The resurvey plat mentioned showed land, including that involved in this suit, lying between Warren's traverse lines and the mean high-water mark of Ferry Lake as it existed in 1812 and 1839. On December 1, 1916, the Commissioner of the General Land Office ordered Mr. Kidder to survey the uplands which the above-mentioned resurvey disclosed as existing between Warren's traverse lines and the mean high-water line of the lake. The survey was made as ordered, and is represented by an official plat approved by the Commissioner of the General Land Office on March 28, 1917.

The last-mentioned survey included the lands involved in this suit; the three subdivisions, called in that survey lots 8, 9, and 10 of section 10, township 20, etc. (those three lots containing in the aggregate 85.-22 acres), being most of the land in the southwest portion of that section which was omitted from the Warren survey. Warren's survey and plat do not show any land in section 9, which adjoins section 10 on the west, in section 15, which adjoins section 10 on the south, or in section 16, which adjoins section 9 on the south. That plat makes no mention of sections or fractional sections numbered 9, 15, and 16. So far as is disclosed, Warren ran no line which is a boundary of any of the three last-mentioned sections. Evidence adduced abundantly supported findings that the lands in section 10, outside of the lines run therein by Warren, and the lands in sections 9, 15, and 16, which were disclosed and described by the Kidder survey and plat, were high lands in place, and above the mean high-water level of Ferry Lake, in 1812 and 1839. By the lines and distances set forth in Warren's survey there are 48 acres in the subdivision granted by the above-mentioned patent to Pitts, being more than twice as much land as that instrument show the patentee paid for.

[1] The defendants, in support of their claim to the land in question and to oil taken therefrom, invoke the rule that where a patent granting public land refers to a plat for identification of the land granted, and the plat so referred to shows that such land is bounded by a lake or other body of water, the surveyed line along what the plat indicates is the border of such water is treated as a meander line, with the result that the water, and not such meander line, is the boundary of the land granted. Warren's survey and plat on their face indicate that the traverse line run by him around the peninsular-shaped tract in the southwest quarter of section 10 was a meander

line of the border of Ferry Lake. Evidence other than that furnished by such survey and plat demonstrated that that part of the traverse line mentioned which ran along the southeastern, southern, southwestern, and western sides of the peninsular-shaped tract was run without any regard whatsoever to the location of that tract with reference to Ferry Lake. Warren's plat was wholly false as a representation or indication of a state of fact, in so far as it was capable of being used as a basis for an inference that the just-mentioned part of his traverse line around the peninsular-shaped tract was a meander line run along or near the margin of Ferry Lake.

The opinion in the case of Mitchell v. Smale, 140 U. S. 407, 11 Sup. Ct. 819, 35 L. Ed. 442, after stating the rule invoked and applying it, with the result of recognizing that a patentee of a subdivision of land which a plat referred to in the patent showed was bounded by a lake was entitled to a tongue of land extending out into the lake beyond the surveyed line, which the plat indicated was a meander line of the margin of the lake, contained the following statement:

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud, in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government."

[2] It is well settled that where public land was improperly omitted from a survey in consequence of the surveyor, influenced by such a mistake or fraud, treating as under water what at the time of his survey actually was high land within the limits of the area which was the subject of his survey, the Land Department, upon discovering the error, has power to deal with the land so improperly omitted, to cause it to be surveyed, and lawfully to dispose of it. Lee Wilson & Co. v. United States, 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128. The existence and exercise of such power are not inconsistent with the rights of one who acquired a subdivision of land included in such survey under a patent containing a reference to the surveyor's plat, which falsely indicated that the land patented, along the whole or part of the line surveyed around it, bordered on a body of water, when in fact that line was remote from any body of water.

[3] The well-established fact that when Warren's survey was made there was, as there is now, between the western surveyed line of the peninsular-shaped tract and the margin of Ferry Lake, a strip of high land nearly half a mile wide in its narrowest part, requires the conclusion that the making and return of that part of Warren's plat which had the effect of representing that that western line disclosed the location on that side of the tract of the margin of Ferry Lake was due to either gross error or fraud on the part of the surveyor. A result of the omission from the survey of the large compact body of land containing over 500 acres, of which the just-mentioned strip is a part, was that there was, as to a material part of the land in the township, a failure to comply with requirements of law governing the

survey ordered to be made, in that section lines were not run and section corners were not established and marked in the omitted area, and none of the land therein was surveyed or assigned to its appropriate subdivision. R. S. §§ 2395, 2396 (Comp. St. §§ 4803, 4804); Brown's Lessee v. Clements, 3 How. 650, 11 L. Ed. 767.

Controlling authorities fully support the propositions that, on the state of facts disclosed by the evidence in this case, the above-mentioned patent to Pitts confers on those claiming under it no right or title to land not included in the surveyed lines and distances of the subdivision patented, which in fact contained more than twice the number of acres stated in the patent, and that there is no merit in their claim to land outside such surveyed lines, based upon the false representation of the plat referred to that the land patented bordered on Ferry Lake. Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662; Id., 87 Minn. 97, 91 N. W. 304, 63 L. R. A. 157, 94 Am. St. Rep. 684; French Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; Horn v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68. The following was said in the opinion of the Supreme Court of the United States in the first-cited case on the subject of a surveyed line being a boundary, though a plat referred to indicated that it was run along or near the margin of a body of water; part of the statement being a quotation from the opinion of the Supreme Court of Minnesota in the same case:

"Upon this subject it was well said by the state Supreme Court in this case as follows: 'The official plat was only intended to be a picture of the actual conditions on the ground; but the fraudulent mistake in the plat in this case was so gross that no man actually viewing the premises could possibly be misled, or believe that the shore line of the lake was intended as the boundary line of the lots. He would understand at once that the meander line as traced on the plat was the actual boundary line of the lots. This case, then, is one where the call for the natural monument, the lake, must be disregarded; for the admitted facts show that it is an impossible call. * * * It falls within the rule that a meander line is not, as a general proposition, a boundary line; yet the boundaries of fractional lots will not be indefinitely extended where they appear by the government plat to abut on a body of water which in fact has never existed at substantially the place indicated on the plat. In such exceptional cases, the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits.' That this was a fraudulent survey cannot be denied. Still the government is concluded by such survey, so far as the lands actually described, granted and paid for are concerned, but it will not be concluded in regard to other lands, which were not within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, when such lake or body of water is in fact and always has been more than half a mile away from such lots, and where the patentee has received all the land that he actually paid for."

[4] We do not think that under the circumstances disclosed the defendants are liable as willful trespassers for the taking of oil from the land in question. It was in 1910 that one of the defendants, the Jeems Bayou Fishing & Hunting Club, made the lease to another defendant, the Producers' Oil Company, of land described as the fractional southwest quarter of section 10, etc., for the purpose of drilling wells and exploring for oil, gas, etc. At the time that lease was made,

and for many years prior to that time, the land now in question had been treated as having been acquired by Pitts under the patent issued to him. During that time there was no assertion by the government of a claim that that land remained a part of the public domain. It was not disclosed that when the lease was made, or when the lessee drilled wells on the land and took oil therefrom, either the lessor or the lessee realized that the land in question belonged to the United States. It was not made to appear that, when those things were done, either the lessor or the lessee was aware of the state of facts having the effect of making the surveyed line around the above-mentioned peninsular-shaped tract the boundary of the subdivision granted by the patent which was the source of their title.

If the original survey of the township had been made in pursuance of the requirements of law, both the land in question and that within the lines run by Warren around the peninsular-shaped tract would have been included in a subdivision properly called the fractional southwest quarter of section 10, etc. It was after the lessee had drilled oil-producing wells on the land in question that the exhaustive investigation was made at the instance of the Commissioner of the General Land Office, which resulted in disclosing the existence of such a state of facts at the time Warren made his survey as required the conclusion that his surveyed line around the above-mentioned peninsular-shaped tract shown on his plat was the boundary of the subdivision patented to Pitts. The evidence adduced was consistent with the conclusions that the drilling of wells on the land in question and the taking oil therefrom were unaccompanied by any intention on the part of the defendants, or either of them, to violate any law or to do any wrongful act, and that the defendants acted under a mistake of fact as to the location of the boundary of the land described in the lease, and without knowledge of the facts which require the conclusion that title to the land in question has not passed out of the United States. On the facts disclosed the court properly ruled that the measure of liability for the oil taken from the land in question was the value of that oil, less the cost of producing it. United States v. St. Anthony R. Co., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed. 548.

The decree under review is affirmed.

In re ANN ARBOR MACH. CORPORATION.

In re BOURNE-FULLER CO.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1921.)

No. 3569.

1. Bankruptcy ⇐440—Order refusing to vacate adjudication reviewable on petition to revise.

An order denying a petition to set aside an adjudication is not reviewable by appeal, but only by petition to revise, under Bankruptcy Act, § 24b (Comp. St. § 9608).

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

2. Bankruptcy ⟸446—On petition to revise, court cannot find facts.
In a proceeding to revise, under Bankruptcy Act, § 24b (Comp. St. § 9608), only questions of law can be determined, and those questions must arise out of the facts found by the court below or admitted by the parties.

3. Bankruptcy ⟸43—Directors of corporation held to have power to authorize voluntary petition.
Directors of a Delaware corporation, with by-laws conferring on the directors power to manage the business and property of the corporation, and also general power to do all lawful acts and things not directed or required to be done by the stockholders, *held* to have power to authorize the filing of a petition in voluntary bankruptcy.

4. Bankruptcy ⟸47—Creditor cannot contest voluntary proceedings.
It is not open to a general creditor to raise the question of the regularity of the convening of the meeting of a lawfully constituted board of directors of a corporation, at which voluntary proceedings in bankruptcy were authorized.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the Ann Arbor Machine Corporation, bankrupt. The Bourne-Fuller Company, a creditor, appeals from an order denying its motion to vacate adjudication. Appeal dismissed.

A. F. Freeman, of Ann Arbor, Mich. (Millis, Streeter, Murphy & Berns and Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, on the briefs), for appellant.

Max Finkelston, of Detroit, Mich. (Finkelston & Lovejoy, Guy A. Birge, Clark, Emmons, Bryant, Klein & Brown, and B. J. Lincoln, all of Detroit, Mich., on the briefs), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. [1] This is an appeal from an order of the District Court denying the petition of a creditor of the bankrupt to set aside an adjudication of bankruptcy made upon voluntary petition. The order in question is not reviewable by appeal, but is subject to review only by petition to revise in matter of law, under section 24b of the act (Comp. St. § 9608). Brady v. Bernard (C. C. A. 6) 170 Fed. 576, 579, 95 C. C. A. 656; In re De Camp Glass Casket Co., decided by this court April 15, 1921, 272 Fed. 558. And see Vallely v. Insurance Co., 254 U. S. 348, 356, 41 Sup. Ct. 116, 65 L. Ed. ——. The appeal must therefore be dismissed.

The case has been fully heard on the merits, and we are naturally disposed to exercise the authority, if we have any, to treat this review as under section 24b; there being no statutory limitation of time within which the petition to revise must be presented, although our amended rule 34 (261 Fed. v, 171 C. C. A. v) contains a limitation of 20 days from the time the order sought to be reviewed was entered, and this 20-day period has long since elapsed. But, were we to assume (we do not so decide) that we have such authority, it seems clear that its exercise could not help petitioner.

The bankrupt was incorporated under the laws of Delaware. Its principal place of business was at Ann Arbor, Mich., where it had

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

an office. About July 1, 1920, being financially embarrassed, although claiming to be solvent, in the bankruptcy sense, it called a meeting of its creditors, which resulted in a written agreement, entered into by a considerable number of its creditors, providing for an extension of maturity of debts and their payment in installments, that no attempt be made by any of the creditors to secure preferences, and for the appointment of an executive committee composed of five of the larger creditors, to whom the conduct and control of the company's affairs should be committed. The agreement provided that it should be null and void unless executed on or before July 6, 1920, by creditors holding at least 95 per cent. of the amount of the company's liabilities. In connection with this creditors' arrangement, an agreement was prepared providing for the deposit by shareholders, pending settlement with creditors, of their stock in escrow with a named trustee, with authority in such trustee to vote the stock in the election as directors, during the pendency of the escrow agreement, of the five members of the creditors' committee, including the election of a successor director in case the office of any should become vacant.

Appellant contends that the contemplated creditors' committee was duly elected and continued to act until the petition in bankruptcy was filed, except that one of the members resigned and was replaced by another; that all of the corporate directors duly resigned, and that their offices were filled by the respective members of the creditors' committee, thereby creating the only duly elected and qualified board of directors. Appellant meanwhile obtained a judgment against the bankrupt for several thousand dollars, and on and before September 1, 1920, levied upon the property of the bankrupt and advertised the same for sale on September 18, 1920. On September 11, 1920, five members of the original board of directors assembled at Detroit, Mich., and passed a resolution authorizing the president to file on behalf of the corporation a petition in voluntary bankruptcy, whereupon the president caused such voluntary petition to be filed. Appellant's proposed execution sale was accordingly enjoined. Appellant contends that in the situation stated the directors who passed the bankruptcy resolution were not the lawful directors, and so were without authority to act; also that the board of directors, even if lawfully constituted, had no authority either by charter or by-law to authorize the filing of petition for adjudication of bankruptcy, without affirmative vote of the holders of a majority of the stock, which vote was not had; that such directors had no authority to take the action in question at Detroit, but, if at all, only at the bankrupt's office at Ann Arbor; and that the resolution authorizing the bankruptcy proceedings was thus without authority, and the District Court without jurisdiction to adjudicate.

The issues presented by the motion to set aside the adjudication of bankruptcy were referred to the referee in bankruptcy as special master, who, on testimony taken, found specifically that the original board of directors, as constituted previous to the formation of the creditors' committee, continued to hold meetings after such appoint-

ment, although without written records thereof (except on one occasion), until the meeting at which the filing of bankruptcy petition was authorized; that in the letter accompanying the proposed agreement sent to creditors by the committee the proposed resignation of the then directors was expressly stated to be "contingent upon all the creditors accepting this propostion on or before July 6, 1920"; that the creditors' agreement was never accepted by 95 per cent. of the creditors; that all of the stockholders did not execute the escrow agreement referred to; that, while there was submitted at a meeting of the creditors' committee the tender by six of the directors of their resignation as such, such written resignation expressly stated that it was made "with the understanding that we stand resigned only during such time as the creditors' committee, elected under date of June 15th, does properly function in accordance with the agreement sent to creditors under date of July 1st, and as further set forth under the terms of the agreement in escrow by the stockholders of the corporation now on deposit," etc.; that the resignations of these six directors were never acted upon by any one, although later the resignation of the seventh director (who did not take part in the Detroit directors' meeting referred to) was accepted by the creditors' committee; that the corporate by-laws provided that directors should act until their successors are elected and have qualified; that during the time the creditors' committee conducted the business of the bankrupt it recognized the board of directors as a legal board. The referee further reported that he did not find that the trustee under the stockholders' escrow agreement ever held a stockholders' meeting, or accepted the resignation of the board of directors, or attempted to elect another board, although as a member of the creditors' committee he took part in accepting and acting upon the resignation of the seventh director already referred to.

The referee concluded as ultimate facts that the original board of directors continued as the only board of directors of the bankrupt up to the time the petition in bankruptcy was filed; that the conditions under which the directors' resignations were made were not met; that the resignations were never accepted; that there was no attempt to elect a new board of directors; that the creditors' committee did not consider themselves, and the referee did not find as a fact that they constituted, the board of directors of the corporation; that the creditors' committee in permitting appellant to obtain a preference under its execution was not properly functioning; and that the original board of directors, as the only de facto and de jure board, was in the exercise of its legal authority in calling the Detroit meeting, at which the resolution was passed. The referee therefore concluded, as matter of law, that the motion to set aside the adjudication was not sustainable. The District Judge overruled the exceptions to the referee's findings of fact and conclusions of law, and formally affirmed the same.

[2] In a proceeding to revise under section 24b of the act only questions of law can be determined, and those questions must arise out of the facts found by the court below or admitted by the parties.

In re Holden (C. C. A. 6) 203 Fed. 229, 233, 121 C. C. A. 435, and cases there cited; Matter of Loving, 224 U. S. 183, 188, 32 Sup. Ct. 446, 56 L. Ed. 725; In re De Ran (C. C. A. 6) 260 Fed. 732, 737, 171 C. C. A. 470. We cannot determine questions of fact involved in the order sought to be reviewed when there is any substantial evidence to support the findings. In re Stitt (C. C. A. 6) 252 Fed. 1, 6, 164 C. C. A. 113. If, therefore, we were to treat this review as under section 24b, we should be bound to accept the conclusion of fact adopted by the court below, that the directors who authorized bankruptcy proceedings were the lawfully constituted and acting directors of the bankrupt; for there was substantial evidence tending to sustain such findings, which are expressly provided for by subdivision 2 of rule 34 (202 Fed. v, 118 C. C. A. v) of this court. This being so, there would remain for determination two questions of law: First, whether under the laws of Delaware and the charter of the bankrupt its board of directors had power, without the stockholders' authorization, to institute proceedings for adjudication of bankruptcy; and, second, whether the adjudication of bankruptcy is reversible because the directors' meeting which authorized the petition was not lawfully convened.[1]

[3] The first question is foreclosed by In re De Camp Glass Casket Co., supra (certiorari denied by the Supreme Court June 6, 1921 [1]), which case involved the authority of a board of directors, under the incorporation statute of Delaware and the charter of that corporation. The certificate of incorporation of the present bankrupt provides that the by-laws may "confer powers upon its directors in addition to the foregoing, and in addition to the powers and authorities expressly conferred upon them by the statute." The by-laws provide that—

"The property and business of this corporation shall be managed by its board of directors, seven in number, * * *" and (14) "in addition to the powers and authorities of these by-laws expressly conferred upon them, the board may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders."

The articles of incorporation expressly empower the board of directors to "authorize and cause to be executed mortgages and liens upon the real and personal property" of the corporation. The requirement of stockholders' authorization, contained in both the statute and the articles of incorporation, is confined to the selling, leasing or exchanging of "all its property and assets, including its good will and corporate franchises." Under the authorty of the De Camp Case, there clearly is no limitation upon the power of the directors to authorize bankruptcy proceedings.

[4] As to authority to convene at Detroit: The by-laws authorized the directors to hold their meetings at the office of the corporation at Ann Arbor "or at such other place as they may from time to time

[1] Solvency of an alleged bankrupt is not open as a defense to a voluntary adjudication. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 191, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[1] 255 U. S. —, 41 Sup. Ct. 624, 65 L. Ed. —.

determine." Passing the question whether this provision would authorize a majority of the board of directors to hold a meeting elsewhere than at Ann Arbor unless pursuant to previous determination by the board [2] (which is not shown), we think appellant precluded from raising this question; for the reason that a creditor has no right to oppose an adjudication in bankruptcy except as expressly given by statute (which gives him no right to contest an adjudication upon a voluntary petition), and so cannot maintain a petition to vacate an adjudication in such case after it is made. In re Ives (C. C. A. 6) 113 Fed. 911, 913, 51 C. C. A. 541; In re Guanacevi Tunnell Co. (C. C. A. 2) 201 Fed. 316, 318, 119 C. C. A. 554. In the Ives Case the ground of the motion to vacate was that when the petition was filed and the adjudication had one member of the bankrupt firm (who joined in the petition through an attorney in fact) was mentally incompetent. The decision was, however, put upon the ground, not that the sane partner had the authority, when acting alone, to file the petition, but that the bankruptcy court acquired jurisdiction of the proceeding on the filing of the petition, and that although (inferentially) the adjudication might be set aside on behalf of the partner who was mentally incompetent, the creditor, having no right to contest the adjudication, "had no right to petition for its vacation after it was made." [3] In the Guanacevi Case the grounds of attack included the proposition that only a majority of the shareholders could under the laws of the state of incorporation dissolve a corporation prior to the time fixed in the articles of incorporation. The court there said:

"We will examine his contention, although we think it is one which the creditor has no standing to make in the case of a voluntary petition."

Upon the authority of these cases, we think it not open to appellant to raise the question of the regularity of the convening of the meeting of a lawfully constituted board of directors at which the bankruptcy proceedings were authorized. It thus seems plain that appellant can gain nothing by a hearing upon this record as if under section 24b.

We content ourselves with dismissing the appeal from the order denying the motion to vacate.

[2] The record here does not affirmatively show a notice or call for the meeting, except that the resolution recites that a special meeting was had "pursuant to waiver of notice attached"—the waiver, however, not appearing in the record.

[3] The petition for adjudication in the instant case is not in the record, but appellant presents no contention that it failed to state the jurisdictional facts required by the statute.

JEWETT, BIGELOW & BROOKS v. DETROIT EDISON CO.*

(Circuit Court of Appeals, Sixth Circuit. June 17, 1921.)

No. 3473.

1. Damages ⊂=78(6)—**Provision in sale contract for liquidated damages for breach valid and enforceable.**

In a contract for the sale and purchase of coal, to be shipped during a year, provisions that the seller should pay 20 cents per ton for each ton short in shipping as liquidated damages, and that the purchaser should pay 20 cents per ton for such tonnage as it should not accept as liquidated damages, *held* valid, under the rule of the federal courts and also under the law of Michigan, and to measure the amount recoverable by the purchaser, which prepared and submitted the written contract, for a shortage in shipments by the seller.

2. Sales ⊂=88—**Whether coal was "mined," within meaning of contract, question for jury.**

Defendant, which was a seller of coal in large quantities, but not a mine owner or operator, contracted to furnish with 30,000 tons of "2" nut and slack coal" from certain named mines, to be delivered within one year, the contract providing that, "if less than the scheduled tons of coal is mined from these mines during any month or months, and all the coal so mined is shipped to" plaintiff, no damages should be charged to defendant. "2" nut and slack coal," as known in the trade, was a grade obtained by screening run of mine coal. Sufficient run of mine coal was taken from the mines named to produce the quantity of "2" nut and slack," if it had been screened; but, owing to the fact that the mine owners, over whom defendant had no control, did not screen a large part of it because of a scarcity of cars, sufficient "2" nut and slack" was not produced to fill the contract. In an action for failure to deliver the quantity required, the question whether sufficient coal of the kind called for was "mined," within the meaning of the contract, was one for the jury.

3. Accord and satisfaction ⊂=26(2)—**Evidence tending to establish such defense held admissible.**

Where defendant was short in delivery of coal to plaintiff under a contract, and for that avowed reason offered to secure for plaintiff a contract with other mines for a large quantity of coal at less than the market price, which offer was accepted and the contract made, evidence of such transaction was admissible, in an action for breach of the first contract, as tending to prove an accord and satisfaction, or at least as a defense pro tanto.

4. Customs and usages ⊂=17—**Custom cannot be shown to alter express terms of contract.**

A trade custom, though known to both parties, cannot be shown to alter or vary the express terms of a written contract.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan.

Action at law by the Detroit Edison Company against Jewett, Bigelow & Brooks. Judgment for plaintiff and defendants bring error. Reversed.

On the 1st day of July, 1916, Jewett, Bigelow & Brooks entered into a contract with the Detroit Edison Company, the important parts of which contract are as follows:

"Witnesseth, that the coal company sells and the Edison Company buys twenty thousand (20,000) tons of 6" mine run coal from the Harlan mines, located at Harlan, on the Louisville & Nashville Railroad, Kentucky. The

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 52, 65 L. Ed. —.

coal company agrees and guarantees to ship between the 1st day of July, 1916, and the 20th day of June, 1917, the coal herein mentioned in accordance with the following schedule: * * *

"(1) If during any month or months covered by this contract period, there shall have been mined the amount scheduled, or more tons of coal at the mines mentioned herein, and less than the scheduled tons shall have been shipped to the Edison Company during this period, then the Edison Company shall have the right to charge the coal company as its liquidated damages twenty (20) cents per ton for each ton short in shipping, and the Edison Company may deduct such damages from any moneys due to the coal company.

"(2) If, however, less than the scheduled tons of coal is mined from these mines during any month or months, and all of the coal so mined is shipped to the Edison Company, then no damages shall be charged to the coal company; but it shall be obligatory on the part of the coal company to furnish evidence satisfactory to the Edison Company that less than a total of the scheduled tons of coal was mined, and that all of the coal which was mined was shipped to the Edison Company.

"(3) The Edison Company agrees to accept the full tonnage covered by this agreement, provided same is shipped within the contract period and under the conditions stipulated in the contract or pay liquidated damages in the sum of twenty (20) cents per ton to the coal company for such tonnage as it shall not accept.

"It is also understood and agreed that nothing in this agreement is to relieve the Coal Company from its obligation to ship the Edison Company all or part of the tonnage scheduled for each month provided sufficient coal is mined."

The contract further provided that the Edison Company would pay to the coal company, for this coal, $1 per ton, f. o. b. mines. On the same day the coal company made a proposition in writing that it would sell to the Edison Company during any month or months within the period of this agreement an additional tonnage of coal from the mine or mines referred to in the agreement, up to 10 per cent. of coal scheduled for that month or months, at the same price and under the same condition as covered by the agreement, provided the Edison Company would notify it 30 days in advance that it would require such additional tonnage.

On the same day another contract, separate and distinct from the first contract herein referred to, was entered into between the same parties, by the terms of which the coal company agreed to sell, and the Edison Company agreed to buy, 30,000 tons of 2" nut and slack coal from the Harvey and Varilla mines, located at Hazard, on the Louisville & Nashville Railroad, Kentucky, at an agreed price of 85 cents per ton, f. o. b. mines, to be delivered within one year from that date in monthly installments specified therein. All the other provisions of this contract are identical with the provisions in the first contract for run of mine coal.

Accompanying this contract there was also a written proposition by the coal company, agreeing to increase this tonnage 10 per cent. upon the same terms and conditions named in the proposition accompanying the first contract. It does not appear that the Edison Company ever gave any orders for additional coal, in accordance with the terms of these two separate propositions; but it does appear that on July 3, 1916, it ordered 1,000 additional tons run of mine coal for July, which order was accepted by the coal company. It further appears that in August another additional 1,000 tons of mine run coal was ordered and accepted, and in the same month an order was placed for 10,000 additional tons to be delivered at the rate of 1,000 tons per month, commencing in September of that year, and continuing for the remaining 10 months covered by that contract. This made a total tonnage of 32,000 tons run of mine to be delivered under the terms and conditions named in the first contract and these three supplemental contracts, and 30,000 tons of 2" nut and slack on the second contract.

The Harlan mines include a large number of mines in Harlan county, Ky., which mines produced a much larger quantity of 6" run of mine coal than the amount named in the first contract, including the 12,000 additional tons. The Harvey and Varilla mines consist of but two mines located near Hazard, Ky. The output of these mines would have been sufficient to produce 30,000 tons of 2" nut and slack had the same been screened; but very little of this coal was screened by the owners and operators of these mines because of the shortage of cars. Jewett, Bigelow & Brooks were not the owners of these mines, and had no control over their operation; they were simply coal brokers who bought from the mine operator and sold to the retailer or consumer.

It appears from the evidence that the plaintiff delivered upon the first contract an excess of the monthly requirements, except for the months of October and November, 1916, and May, 1917. However, it further appears that by agreement between the parties the excess tonnage of run of mine coal shipped during any of these months should be credited upon the nut and slack contract, so that, notwithstanding the coal company shipped substantially the full amount of the run of mine tonnage from the Harlan mines covered by this contract and the supplemental contracts during the year, nevertheless it was short in the scheduled tonnage for these three months.

Upon the second contract for nut and slack the defendant shipped in July, 1917, 139 tons, and in August 445 tons, a total of 584 tons, and no more. The Edison Company brought action against the coal company to recover damages in the sum of $100,000 sustained by it by reason of the breach of these contracts by defendant. This was later increased to $125,000. The declaration averred the making and execution of these two separate contracts, one for 20,000 tons run of mine coal from the Harlan mines, the other for 30,000 tons 2" nut and slack from the Harvey and Varilla mines, and also the three separate contracts covering the additional 12,000 tons of run of mine coal from the Harlan mines, but stated the default as a joint default on both contracts to the full amount of the coal not shipped by the defendant, after first deducting from the tonnage actually delivered the 12,000 tons covered by the supplemental contracts. The defendant, however, made no objection to the averment of one default in gross upon these separate contracts, but pleaded the general issue, and gave notice of several special pleas or defenses, the more important of which will be discussed in the opinion.

Upon the issue so joined the jury returned a verdict for the plaintiff in the sum of $86,850.19, upon which verdict judgment was rendered by the trial court. The plaintiff in error seeks to reverse this judgment upon 7 separate grounds of alleged error; the more important of which will be considered in detail in the opinion in this case.

Hal H. Smith, of Detroit, Mich. (Beaumont, Smith & Harris, of Detroit, Mich., on the brief), for plaintiff in error.

James O. Murfin and James V. Oxtoby, both of Detroit, Mich. (Oxtoby & Wilkinson, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] It is insisted by the plaintiff in error that this judgment should be reversed for error of the court in holding that the provisions of the contracts relating to stipulated damages gave the Edison Company a right to elect to accept such damages, or to recover its actual damages. The provision of the contract in that respect is not subject to such construction. The term "liquidated damages" means a definite sum or amount, which has been determined by agreement of the parties or by litigation. At the time this contract was written, these damages had not

been ascertained by litigation. Therefore the provision in this contract that "the Edison Company shall have the right to charge the coal company as its liquidated damages 20 cents per ton for each ton short in shipping" necessarily means that the parties had determined, or believed they had determined, by agreement between themselves, the precise amount of damages the Edison Company would sustain by reason of any failure on the part of the coal company to keep its contract and deliver the amount of coal named therein. Otherwise the term "liquidated damages" would have no place or meaning in this contract.

The further provision of that paragraph, that "the Edison Company may deduct such damages from any moneys due to the coal company," can in no way change or alter the terms of the contract in reference to liquidated damages. The intention and purpose of the parties to ascertain and determine by agreement a sum certain as liquidated damages for a breach of the conditions of this contract by either party further appears by the provisions of paragraph 3 of the conditions written therein, in which paragraph it is provided that, upon the failure of the Edison Company to accept the full tonnage, it would pay to the coal company liquidated damages in the sum of 20 cents per ton for such tonnage as it fails to accept. Under this provision of the contract, if it is not invalid for other reasons, the coal company would be bound to accept 20 cents a ton in full of its damages. There is nothing in this contract to indicate that these two provisions as to liquidated damages in case of default by either were not correlative, and equally binding on each of the parties thereto.

In the construction of this contract it must also be remembered that these contracts were on printed forms or order contracts used by the Edison Company in the conduct of its business, and must therefore be construed more strongly against the contracting party, that prepared and used these printed forms for this purpose. Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 626, 22 Sup. Ct. 253, 46 L. Ed. 358; Bank v. Employers' Liability Ins. Co. (C. C. A.) 270 Fed. 567. However, recourse to this rule of construction is hardly necessary in this case. The language of the contract in this respect is sufficiently clear to indicate the intent and purpose of the parties to fix by agreement, binding on both parties, a fixed and definite amount as liquidated damages in case of default by either of the contracting parties. It is not to be presumed that the Edison Company, studiously and adroitly, so framed this contract that any part of its terms and provisions should be optional as to it, but binding on the coal company. In any event, it must be held to the terms of the contract as written, and, construing this contract as a whole, the conclusion follows that the provision as to 20 cents a ton as liquidated damages necessarily means that such liquidated damages have been determined by agreement between the parties, which agreement, if valid, is mutually binding upon both parties to this contract.

Upon the question as to the validity of this provision for liquidated damages, it is insisted on the part of the defendant in error that these

are Michigan contracts, and must be construed in the light of the decisions of the Supreme Court of that state; that under these decisions, in the state of Michigan, liquidated damages may be agreed upon only when the actual damages are not capable of being readily ascertained. The decisions of the Supreme Court of Michigan were fully discussed and considered by this court in the case of Board of Commerce of Ann Arbor v. Security Trust Co., 225 Fed. 454, at page 461 et seq., 140 C. C. A. 486. From the opinion in that case, it appears that this court reached the conclusion that the Supreme Court of Michigan had not limited the validity of contracts for liquidated damages to cases only, in which the loss cannot be measured by a pecuniary standard, but that, even in cases where such damages are capable of being readily ascertained, the court will disregard the express stipulation of the parties only where it is obvious, from the contract before it and the whole subject-matter of the contract, that the principle of compensation has been disregarded. The conclusion reached by this court in that case is fully sustained by the leading Michigan cases on this subject.

In the case of Jaquith v. Hudson, 5 Mich. 123, Christiancy, J., discussed at great length contracts of this character applying to cases where actual damages might be readily ascertained, and in conclusion, at pages 136, 137, said:

"The foregoing remarks are all to be confined to that class of cases where it is clear, from the sum mentioned and the subject-matter, that the principle of compensation has been disregarded."

Then he proceeds to discuss a second class of cases, in which actual damages are not easily ascertainable, and concludes with this statement:

"In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach"

—but further says that, even in this class of cases, the law does not lose sight of the principle of compensation, but merely accepts the estimate of damages fixed by the parties as the best and most practicable mode of ascertaining the sum which will produce just compensation. The contract before the court in that case was such a contract, so that what the learned judge said in reference to provisions in other contracts for liquidated damages, where the damages are easily ascertainable, is wholly obiter; nevertheless in subsequent Michigan cases the Supreme Court of that state has discussed the opinion of Judge Christiancy at great length, especially in the case of Calbeck v. Ford, 140 Mich. 56, 103 N. W. 516, and Ross v. Loescher, 152 Mich. 386, 116 N. W. 193, 25 Am. St. Rep. 418, in each of which cases the contract under consideration was one within the second class named by Judge Christiancy.

It is, however, expressly stated in the opinion in Jaquith v. Hudson, supra, that—

"The court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter that the principle of compensation has been disregarded."

Discussing this question further, the court said:

"The violation or disregard of this principle of compensation may appear to the court in various ways—from the contract, the sum mentioned, and the subject-matter. Thus, where a large sum (say $1,000), is made payable solely in consequence of the nonpayment of a much smaller sum (say $100) at a certain day, or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is made payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum, * * * yet as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce."

These illustrations, as to the various ways in which a violation or disregard of the principle of compensation may appear to the court, are very well exemplified in the case of Davis v. Freeman, 10 Mich. 191, where one party agreed to draw for another a quantity of timber at $1.50 per thousand, $1 per thousand of which was to be paid defendant, and the remainder to be "settled, fixed, and liquidated damages" in case the contract was not completed. It was held that the sum so fixed was to be regarded as a penalty, since otherwise the nearer the contract was completed, the greater the damages to be recovered, while if the party should fail to draw any of the timber there could be no recovery. The court in the opinion in that case said:

"If the contract had provided for the payment of 50 cents per thousand feet as liquidated damages for timber not drawn, the case would be altogether different."

Christiancy, J., in a concurring opinion, said:

"It is very clear that 50 cents per thousand feet was never estimated by the parties as the actual or probable damages to result from a breach, and that in fixing upon this sum they had no reference to the idea of compensation."

In the contract now under consideration the provision as to stipulated damages is not a fixed sum in gross, regardless of the extent of the breach; but, on the contrary, it is a specific amount for each ton that defendant failed to deliver, so that if the breach is trifling the damages will be trifling. In this respect it does not contain the objectionable feature in the contract under consideration by the Supreme Court of Michigan in Davis v. Freeman, supra, but, on the contrary, is just such a contract as meets the suggestion in the opinion of Manning, J., that—

"If the contract had provided for a payment of 50 cents per thousand feet as liquidated damages for the timber not drawn, the case would be altogether different."

It would therefore appear that the Michigan rule as to contracts for liquidated damages is not substantially different from the modern federal rule, further than that the Michigan Supreme Court has declared that, where damages are not difficult of ascertainment, the court is inclined to treat the stipulated damages as a penalty and inquire into actual damages. Noble v. Sturm, 210 Mich. 462, 178 N. W. 99. Notwithstanding this statement as to the attitude of the court toward con-

tracts of this character, it fully appears from all of the decisions of that court that such contracts will be upheld in cases where damages may be readily ascertained, provided only it appears from the contract itself, the subject-matter of the contract, and the amount named therein, that the question of compensation has not been disregarded, but that the parties have in good faith intended and attempted to fix a sum certain as reasonable compensation for breach, and not penalty.

The later Michigan cases are all based upon Jaquith v. Hudson, supra, announced May 26, 1858, which opinion was at that time consistent with the decision of other courts upon the same question. The Supreme Court in the case of Wise, Trustee, v. U. S., 249 U. S. 361–365, 39 Sup. Ct. 303, 63 L. Ed. 647, calls attention to the fact that that court in the case of Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, applied in U. S. v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731, stated:

"The result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at, or as to imply fraud, mistake, circumvention, or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced."

The court then calls attention to the fact that the cases in which courts had refused to enforce contracts for liquidated damages were decided at a time when courts were disposed to look upon such provisions in contracts with disfavor, and to construe them strictly, if not astutely, in order that damages, even though termed liquidated, might be treated as penalties, so that only such loss as could be definitely proved could be recovered. Following this statement, the court says:

"The later rule, however, is to look with candor if not with favor upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights as promoting prompt performance of contracts."

This is not substantially different from the statement of Judge Christiancy in Jaquith v. Hudson, supra, that contracts for liquidated damages will not be sustained "where it is clear from the sum mentioned and the subject-matter that the principle of compensation has been disregarded." Even if the Michigan rule were different from the federal rule, the decision of a state court of last resort is not controlling upon the federal courts on questions of general jurisprudence. Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356.

Mr. Brennan, the purchasing agent of the Edison Company, testified that there had been a variation in the price of this character of coal in April and May of 1916 of possibly 5 cents a ton, and within the year probably 10 to 15 cents a ton, and that in July, 1916 (when these contracts were written), and prior to that time, the price was constantly rising, so that a fixed sum of 20 cents a ton would not seem to be so excessive as to evidence that the parties to this contract had disregarded the principle of compensation in arriving at liquidated damages. But the parties, in reaching an agreement as to damages, had the right to take into consideration, not only the possible fluctuation in price, but also the inconvenience, trouble, and expense to the Edison Company in finding and purchasing other coal, or to the coal company in securing other customers. That was a matter of some importance, and that it entered into the consideration of the parties, at least the Edison Company, fully appears by its contracts shortly thereafter with other coal companies, especially with the Paige-Jellico Company and the Big Creek Coal Company, in both of which contracts it is provided that the damages shall be the difference in the market price plus 15 cents a ton to the Edison Company "to cover the expense of so purchasing such coal."

It also appears from the evidence that the Edison Company was operating a public utility in the city of Detroit, that its coal requirements were very large, and that it was absolutely essential that it should have a large supply of coal on hand at all times, in order that it might be in position to render proper service to the public, and therefore the possible failure of the coal company to make deliveries might easily result in special damages to it. In the construction of this contract, this court must not overlook the fact that the contracting parties were both familiar with the coal business in all its details. The Edison Company bought and consumed large amounts of coal each year; the coal company was engaged in selling coal in equally large quantities. The conditions of the coal trade from year to year were fully known and understood by each of the contracting parties. They may not have fully appreciated the disturbance of the coal market by reason of the World War, for this nation had not yet entered into that conflict. Nevertheless, the premonitions were ominous; the war had already affected the price of some commodities in this country, and these were things to be taken into consideration by these experienced managers of the respective corporations, parties to these contracts, and, while it is true that in the construction of these contracts, we must take the situation as it then existed and as it then appeared to them, and not in the light of later developments, nevertheless, from these facts, and particularly the range of the fluctuation of prices within the preceding year, the then present tendency to a rising market, considered in connection with the delay, annoyance, inconvenience, and expense of finding and purchasing other coal, the practical difficulty of proving specific damages, the nature of plaintiff's business, and the absolute necessity of its maintaining an ample supply of fuel at all times, it does not appear that the amount stipulated in this contract as liquidated damages is so extravagant or

disproportionate to the amount of possible property loss, as to show that "compensation was not the object aimed at, or as to imply fraud, mistake, circumvention, or oppression." Therefore no reason appears from the evidence in this case why this court should set aside and hold for naught a solemn contract, entered into between men of affairs, largely experienced and fully advised as to conditions and incidents of the business to which the contract relates and substitute its own judgment for the judgment of the contracting parties. Wise v. U. S., supra; Sun Printing Ass'n v. Moore, supra; U. S. v. Steel Co., supra; Sorenson v. U. S., 51 Court of Claims, 69–80; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Diestal v. Steveson, 2 K. B. 345; Davis v. Cement Co., 142 Fed. 74, 73 C. C. A. 388.

The conclusion reached by this court as to the validity of the provision in each of these contracts for stipulated damages is based entirely upon the assumption that in this case the plaintiff's damages may be measured by a pecuniary standard, but that, notwithstanding that fact, the amount named by the parties as liquidated damages is not so excessive or disproportionate to the probable property loss as to indicate that in fixing this amount the principle of compensation was disregarded. Yet, even though the rule as to the measure of damages in cases of this character is fixed and certain, nevertheless it fully appears by the record in this case, and particularly the conflicting claims of the respective parties, that the application of that rule is not so easily accomplished in this particular class of cases where the great bulk of the business, at least 65 per cent. of the output of the mines, is usually controlled by contracts, which vary not only in price as to contract coal, but differ materially from the market price of spot coal. Laundry Co. v. Carney, 88 Wash. 327, 153 Pac. 5. It further appears that these contracts provide for the purchase and sale of a very large quantity of coal, and if, as contended on the part of the Edison Company, the contract on the part of the coal company to deliver is absolute and unconditional, regardless of car shortage, embargoes, or any other hindrance to deliveries beyond the control of the coal company, it would seem only fair, reasonable, and right that the coal company should insist that a limitation of its liability for failure to deliver should be written into this contract.

Consideration should also be given to the fact that the coal company, against whom this recovery for damages is sought, is not contending that the provisions in this contract as to liquidated damages is void, because the amount is so large that it amounts to a penalty and not compensation. On the contrary, it is the Edison Company that is making this contention, and is making it in view of the uncontradicted evidence that by reason of later developments this provision is wholly inadequate to cover compensation for actual loss. While it is perhaps true that, if this contract is invalid, the courts will wholly disregard it and award actual damages (Noble v. Sturm, 210 Mich. 462, 178 N. W. 99), yet a court will not disregard the express provisions of a contract in reference to liquidated damages upon the theory that the amount named is too small, but rather only for the reason that the amount named is so

extravagant and excessive as to indicate that it was intended as a penalty, and not compensation, or that the amount was so excessive as to imply fraud, mistake, circumvention, or oppression.

Naturally the plaintiff does not attack this agreement as to liquidated damages, because the amount named is so excessive as to imply fraud, mistake, circumvention, or oppression; but it does ask the court to disregard this provision in the contracts it prepared on its own printed blanks, and in which it inserted, or caused to be inserted, the amount stipulated as liquidated damages, and as so prepared presented the same to the other contracting parties for its acceptance and signature, for the reason, as it now contends, the sum agreed upon as liquidated damages is so excessive as to amount to a penalty and not compensation. The presumption obtains that the plaintiff acted in good faith when it insisted upon this provision being written into the contract for its own protection; that it arrived at the amount it deemed ought to be paid as damages for breach of this contract from the then situation of the coal trade and its past large experience as a purchaser of coal. Certainly the conditions that had developed since these contracts were written could have no tendency to induce plaintiff to believe that it had, at the time the contracts were written, demanded such an extravagant sum that it should now be construed as a contract for penalty and not for compensation. The underlying principle upon which courts grant relief from contracts of this character is based upon the theory that the party seeking to recover the damages stipulated in the contract drove a harsh and unconscionable bargain with the other contracting party, and for that reason courts of equity first, and later courts of law, refused to lend aid in the enforcement of such harsh provisions, where it was apparent, from the sum mentioned and the subject-matter of the contract, that the contract was for penalty and not for compensation.

In this case the plaintiff is now asking to have this contract set aside, because this provision in its interest and for its protection names a sum as liquidated damages so extravagant and excessive that it amounts to a penalty, and at the same time is asking for damages largely in excess of the amount it agreed to accept in full satisfaction of any loss or damage it might suffer by reason of a breach of this contract by the coal company. Under such circumstances a court will be slow to accept the present opinion of a plaintiff that may be influenced by the hope of a larger recovery, as against its former opinion, deliberately reached and solemnly written into the contracts, and, at its instance and request, set aside this contract because it provided for extravagant and excessive damages and awarded it damages in a much larger sum. The position is necessarily an inconsistent one. Nevertheless, if the contract was void when written, it could not operate to the advantage or disadvantage of either party thereto.

[2] Both of these contracts provide that, if less than the scheduled tonnage of coal were mined from the mines named during any month or months, and all of the coal so mined was shipped to the Edison Company, then no damages should be charged to the coal company. The

coal company offered as a defense to this action the failure of the mines in question to mine and furnish the kind of coal specified in these contracts. From the evidence it appears that much more 6" run of mine coal was mined from the Harlan mines than the total tonnage named in the first contract. It further appears that sufficient run of mine coal was mined at the Harvey and Varilla mines, named in the second contract, to produce enough 2" nut and slack to fill this contract, if the same had been screened, but that the owners and operators of these mines refused to screen the same because of a car shortage; that in order to screen coal it is necessary to have a number of cars under the tipple at one time, this number depending entirely upon the different sizes that are desired; that if more than one car is used, and they are but partly filled at quitting time, these cars are charged to that mine on its next day allotment of cars; that is to say, if 3 cars were under the tipple and partly loaded at quitting time on one day, and the mine was entitled to an allotment of 10 cars for the next day, these 3 cars would be deducted from that number, and only 7 cars would be furnished to it. Upon this question the trial court charged that when coal was brought up out of the mines, put over the tipple and into the cars, even though it was not screened, that it was mined.

There is, of course, no question but that the coal that was "put over the tipple and into the cars" was mined as run of mine coal; but the question here is whether 2" nut and slack was mined when it was not screened and put into a separate car, so that it could be marketed as such. It is clear from these contracts and the evidence in this case that there is a distinct and substantial difference recognized in the trade between run of mine coal and 2" nut and slack; that run of mine coal, although it contains 2" nut and slack, does not come within the designation of nut and slack, but that it is only when this nut and slack is separated from the run of mine coal and deposited in separate cars that it answers to that description. It would seem that the screening of this coal and separating it into the different sizes known to the trade is a part of the mining operations, yet if this coal company had been the owner and operator of this mine, and had authority to control the screening of the same, it could not be heard to say in its own defense that, because it did not screen the coal and separate the 2" nut and slack from the run of mine, that therefore the 2" nut and slack had not been mined. But this defendant coal company was not the owner of or in control of the mining operations at the Harvey and Varilla mines. It had no authority whatever to dictate to the owners and operators of these mines what coal they should screen and what coal they should not screen. Therefore the question of whether sufficient nut and slack was mined from the Harvey and Varilla mines to fill this second contract was a question of fact to be determined by the jury, and ought to have been submitted to it under proper instruction, if there was any conflict whatever in the evidence, either as to how much was actually produced or as to what constituted mining of nut and slack within the contemplation of this contract. The failure of the court to do this was prejudicial error.

[3] It is insisted upon the part of the plaintiff in error that, after the breach of the contract by it, it entered into an agreement of accord and satisfaction with the plaintiff by the terms of which it was to secure from the Paige-Jellico mines a contract for the plaintiff for a large quantity of coal at much less than the market price. It appears from the evidence that the defendant coal company was not the owner of the Paige-Jellico mines, but that some of defendant's stockholders were so largely interested in the Paige-Jellico Company that it was able to influence the conduct of its business, and that the defendant, through Mr. Jewett, its president, offered to Mr. Brennan, purchasing agent of the plaintiff, a contract with the Paige-Jellico Company for a large amount of coal at much less than the then market price. Mr. Jewett testifies in reference to this as follows:

"I went up and saw Mr. Brennan about the contract with the Paige coal. That would, I imagine, mine about 50,000 to 60,000 tons a year. I told him I had appreciated that we had fallen down on the contract for the delivery of coal, which we could not help. I told him by purchasing this coal he could make up any losses that he was in for on this present contract, and I not only told Mr. Brennan that once, but I told him three or four times, and the contract was decidedly under the market price at that time."

In answer to the question why he was offering this contract under the market price, Mr. Jewett answered:

"Why, to make up the shortage on our present contract."

Mr. Jewett further testified that he had two or three conversations with Mr. Brennan covering a period of two or three weeks, and urged him to sign this contract, and that eventually the contract came back signed by Mr. Brennan, as purchasing agent for the Detroit Edison Company. The court, however, excluded this evidence, and charged the jury in reference thereto as follows:

"I charge you as a matter of law that under the undisputed proof in this case the so-called Paige-Jellico contract was not a settlement of this contract. The language used in connection with that, in entering into that contract by the plaintiff with another corporation, although it was closely related to this defendant, that the language used there, and what occurred, does not amount to a settlement of these differences."

This charge, in view of the testimony of Mr. Jewett, to which attention has just been called, was clearly erroneous and prejudicial to plaintiff in error. If the jury believed this testimony of Mr. Jewett that he tendered this contract for the Paige-Jellico coal to Mr. Brennan at less than the market price, upon the condition stated, and that although Mr. Brennan did not then accept his proposition, but later signed and returned this contract and received the benefits thereof, it might very properly reach the conclusion that the contract was signed and accepted and the benefits received by the Edison Company under the terms and conditions proposed by Mr. Jewett. Even if the jury had not found that the Paige-Jellico contract was accepted by the plaintiff as a full accord and satisfaction of the damages it sustained by reason of the failure of the defendant to deliver coal under its con-

tract, nevertheless it might have found from this evidence, that whatever benefits inured to the plaintiff company under the Paige-Jellico contract should be considered in mitigation of damages, and at least a defense pro tanto.

[4] It is also insisted upon the part of the plaintiff in error that the court erred in excluding evidence of a custom in the coal business, well known to the parties to this contract, when a shortage of cars occurs, to prorate the available cars in the shipments made upon existing contracts. A custom, to control the construction of a written contract, must be reasonable, and not contrary to law or public policy, or opposed to any express terms of the contract, and must be so general as to justify the presumption that the parties contracted with reference thereto.

Both the contract for the 6" run of mine coal and the contract for the 2" nut and slack expressly provide that the amount of coal named therein shall be shipped to the Edison Company, "if during any month or months covered by this contract period there shall have been mined the amount scheduled or more tons of coal at the mines mentioned herein." A custom that would permit the prorating of cars among the various customers of the plaintiff in error would be in direct conflict with this provision of the contract that the Edison Company was to have all of the coal of the character named, mined at these mines, if such total output was necessary to meet the contract requirements, and that, if less coal were mined during any one month than the amount named in the schedule, then the defendant would not be liable in damages, provided it shipped the entire output to the Edison Company. For this reason, this custom of prorating cars, no matter how well known to the parties, cannot be permitted to vary or alter the express terms of these contracts that are clearly in conflict therewith. The Gazelle and Cargo, 128 U. S. 474–486, 9 Sup. Ct. 139, 32 L. Ed. 496; Jenkins S. S. Co. v. Preston, 186 Fed. 609–612, 108 C. C. A. 473.

The shortage of cars is important only in its effect upon the production of the character of coal named in the contract, at the mines mentioned therein. This contract fully protected the defendant in case sufficient coal was not mined, regardless of the reason for the failure to mine the same.

It is further claimed by the plaintiff in error that the performance was rendered impossible by reason of the embargo placed by the Louisville & Nashville Railroad Company upon all shipments of its cars to points off its own line. It is wholly unnecessary to consider whether the impossibility of performance arising from such a cause would relieve this plaintiff in error from the obligations of its contract, for the reason that it clearly appears from the evidence that this embargo did not render performance impossible. On November 1, 1916, the coal company wrote the Edison Company a letter in reference to the danger of the railroad company declaring such an embargo. The following paragraph is a part of that letter:

"I think that we had better do all we can now to get cars from other lines here that we can send to designated mines, and have them loaded promptly for your contract. I hope you will do everything you can along this line to see if equipment cannot be gotten."

It is true that the coal company also wired the Edison Company on March 17, 1917, that the Louisville & Nashville Railroad Company had placed an embargo against all shipments to points off their own line, and in this telegram made the further statement:

"Which means it will be impossible for us to ship any more coal to you until this restriction has been lifted."

Nevertheless, from the statement in its letter of November 1, 1916, the plaintiff in error cannot now be heard to say that it was not possible to procure cars from other lines, or that it was not fully advised of such possibility. Therefore the evidence in this record presents no question of impossibility of performance.

In view of this court's construction of the provisions in these contracts as to liquidated damages, the charge of the court in reference to the duty of the plaintiff to mitigate its damages becomes wholly unimportant.

For the reasons above stated, the judgment of the District Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

APPLEBAUM v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1921.)

No. 2860.

1. **Criminal law ⟸600(1), 1052—Refusal of continuance held not to require reversal.**
   A conviction for crime will not be reversed because of refusal to grant a continuance on account of the absence of a witness, where no exception was taken, and where the court, with the district attorney's consent, permitted defendant to read to the jury as evidence a written statement of what the witness would have testified to if present, and the prosecution introduced no evidence to contradict the statement.

2. **Receiving stolen goods ⟸3, 7(2)—Intention to convert to own use is not essential, and need not be alleged.**
   Though a receiver of stolen goods cannot be convicted, unless he intended to deprive the owner of the possession of the goods, an intention by the receiver to convert the goods to his own use is not essential, and an indictment which charged that the possession was unlawful and felonious is not bad for failure to charge an intention to convert to defendant's use.

3. **Criminal law ⟸1038(3), 1056(1)—Exceptions and requests essential to review of incompleteness of instruction.**
   Where accused took no exceptions to the instruction and made no requests, and the charge was correct so far as it went, the conviction will not be reversed because the charge was not more explicit in places.

4. **Criminal law ⟸731—Functions of judge and jury are the same as in civil cases.**
   In the trial of a criminal charge, the respective functions of the judge and jury are the same as in civil trials, though the burden of proof is different.

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

5. **Criminal law ⊂=935(1)—Right to set aside verdict on weight of evidence discretionary with trial judge.**
In criminal trials, as well as in civil, the right to set aside the verdict of the jury on the weight of the evidence is within the discretion of the trial judge, who heard the testimony while it was being presented to the jury.

6. **Constitutional law ⊂=316—Review is not essential to due process.**
All the requirements of due process of law in a criminal prosecution are met in the trial court, and Congress was not required by the Constitution to provide for any review in such cases.

7. **Criminal law ⊂=1159(3)—Reviewing court is limited to questions of law.**
The court reviewing a conviction for crime, is limited to questions of law, which include the question whether there is evidence to establish each essential element of the offense charged, but do not include the question whether the verdict is against the weight of conflicting evidence.

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

Ike Applebaum was convicted of having felonious possession of property stolen from an interstate shipment, and he brings error. Affirmed.

Certiorari denied, 255 U. S. ——, 41 Sup. Ct. 625, 65 L. Ed. ——.

C. B. Thomas, of East St. Louis, Ill., for plaintiff in error.

A. B. Dennis, of Danville, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. Applebaum was convicted of having felonious possession of property stolen from an interstate shipment.

[1] Complaint is made of the court's refusal to grant a continuance on account of the absence of a witness. No exception was taken; and furthermore the court, with the district attorney's consent, permitted defendant to read to the jury as evidence a written statement of what the witness would have testified to if present. And as the government introduced no evidence to the contrary, the written statement stood as uncontradicted testimony.

[2] Though the indictment charged that defendant, knowing the property to have been stolen, had "unlawful and felonious possession," defendant contends that the indictment is bad because it failed to allege that he had the property in his possession "with the intention of converting it to his own use." No such conditioning element is found in the statute. Of course a person should not be condemned for having innocent possession of stolen property, for example, for the purpose of turning it over to the true owner or to the public authorities. But a knowing possession for the benefit of the thief or any knowing possession with the intent and effect of depriving the owner of his property would be a felonious possession.

[3] No exceptions were taken to the instructions, and defendant made no requests. It is conceded that the charge is correct as far as it goes, but the suggestion is offered that the jury may have been misled because the charge was not more explicit in places. If reversals

may thus be obtained, refraining to ask explicit instructions would become a sure anchor to windward against convictions.

Defendant's real reliance for reversal is on the alleged insufficiency of the evidence.

For the government the evidence was largely circumstantial. From a broken-open car and the absence of goods shown to have been loaded therein, the jury, we must assume from their verdict, inferred the theft. Railroad detectives testified to following wagon tracks from the plundered car into defendant's barnyard and to finding in defendant's barn property of the same kind and amount as that which had been stolen. When defendant, in his store at the front of the yard, was asked by the detectives concerning property missing from the railroad car, defendant, according to the detectives, was evasive until it became apparent that they knew of similar property in his barn. He then claimed that he had bought it of Weisman, a feed merchant. His attention was called to cinders among the feed. He then admitted that he had not obtained it from Weisman, but claimed that his horse and wagon had been taken during the night without his knowledge or consent, that he had found his rig in the barnyard in the early morning, that the feed was then in the wagon, and that he had put the feed in his barn to protect it. When asked why he had not notified the police, he replied that he had not had time, though the interview with the detectives was several hours after the feed had been put in the barn. And finally "he wanted to know if he couldn't square this thing up without its going any farther and without taking it up in court."

On behalf of defendant the jury had to consider his previous good reputation, the presumption of his innocence, his explicit denial of every incriminating circumstance against him adduced by the government, and the undisputed testimony (in the statement of the absent witness, the wife of the chief of police) that he had telephoned to the home of the chief of police soon after he found the feed in his wagon and before the detectives came to interview him, but without stating the purpose of the telephone call or leaving any message.

Defendant's proposition is that, if the members of an appellate court, after a careful study of the transcript of the evidence, entertain a reasonable doubt of the defendant's guilt, a reversal of the judgment must follow. Such may be the rule or method in some state tribunals; but in making that urge here we think defendant is misapprehending the respective functions of the jury, of the trial judge, and of the reviewing judges, in federal procedure. And since the same contention is being made with some frequency, we deem it advisable to state briefly those respective functions.

[4] When a conflict in evidence in a civil case is submitted to the jurors for their determination of the truth of the issues of fact, the trial judge instructs them that they cannot find for the plaintiff unless the preponderance of the evidence establishes the issues in the plaintiff's favor, and, in a criminal case, that they cannot find the defendant guilty unless on considering the presumption of innocence and weighing all the evidence they find that guilt is established beyond a reason-

able doubt. In each case, criminal as well as civil, the jurors are citizens who for the time are as fully public judicial officers as is the judge. Their oaths bind them to apply to the conflicting evidence the law given them by the judge, exactly as the judge's oath binds him to give the jurors a full and accurate exposition of the law applicable to the case. Between the criminal case and the civil case there is a difference in the law of presumptions and burden of proof; but when the judge has instructed the jurors as to the law, their duty to apply the law to the evidence is the same in either case. It is the exclusive function of the jurors to return a verdict; that is, a true saying of proven facts.

[5] If a defendant asks that a verdict be set aside because it is not supported by the required weight of evidence, his motion is addressed to the discretion of the trial judge. In order properly to exercise that discretion it is manifest that the trial judge, as well as the jurors, should attentively consider and weigh the evidence as it is being introduced, because in that respect he is sitting as the thirteenth juror. It is the exclusive and unassignable function of the trial judge to grant or refuse a new trial in cases of conflicting evidence.

[6, 7] If, a new trial having been denied, a defendant prosecutes a writ of error, he is availing himself of a grace granted by the lawmakers. Day in court, confrontation of witnesses, trial by jury, and all other elements of due process of law are provided in the trial court, and Congress was not compelled by the Constitution to provide for any review. The review that is allowed is limited to questions of law arising at the trial, such as sufficiency of pleadings, admissibility of evidence, and instructions to the jurors. It is also well established that the question whether every material allegation of a pleading is supported by evidence may, by proper motions, rulings, and exceptions, be made a question of law arising at the trial. But the review of that question of law is the exercise of a function that should not be confused with the nontransferable function of the trial judge in acting as the thirteenth juror.

In the present case we find that every material allegation of the indictment is supported by evidence; that the evidence, not violating any laws of nature, is credible; that it was for the jurors to decide what facts and circumstances were proved beyond a reasonable doubt, and for them to draw the inferences deducible therefrom (Keith v. State, 157 Ind. 376, 61 N. E. 716); and that, as the inference of guilt was fairly to be drawn from the circumstances of which there was evidence, the action of the jurors and of the trial judge in finding the truth to be in accordance with the government's evidence presents in federal procedure no reviewable question of law.

The judgment is affirmed.

EUGENE SOL LOUIE v. UNITED STATES.

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

No. 3380.

Indians ⟸38(2)—Federal courts without jurisdiction of crime committed by Indian allottee in fee.

Criminal Code § 328 (Comp. St. § 10502), *held* not to give courts of the United States jurisdiction of the crime of murder committed by an Indian of the Cœur d'Alene tribe against another Indian of the tribe on land to which the defendant has received a patent in fee under Act Feb. 8, 1887, § 5 (Comp. St. § 4201); but under section 6 of the act, as amended by Act May 8, 1906 (Comp. St. § 4203), providing that "when the lands have been conveyed to the Indian by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of, and be subject to the laws both civil and criminal, of the state or territory in which they may reside," the state courts have exclusive jurisdiction of the offense, and it is immaterial that the place where it was committed was within the boundaries of the Cœur d'Alene reservation, in Idaho.

Gilbert, Circuit Judge, dissenting.

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

Criminal prosecution by the United States against Eugene Sol Louie. Judgment of conviction, and defendant brings error. Reversed.

W. B. McFarland, of Cœur d'Alene, Idaho, for plaintiff in error.

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

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Louie was tried and sentenced for the murder of Adeline Louie, a Cœur d'Alene Indian and a ward of the United States, in Benewah county, Idaho, alleged to be in an Indian country within the limits of the Cœur d'Alene Indian reservation in Idaho. By writ of error the question presented is whether the United States had jurisdiction of the defendant Louie, plaintiff in error here. Eugene Sol Louie v. United States, 254 U. S. 548, 41 Sup. Ct. 188, 65 L. Ed. —— (January 17, 1921); Id. (C. C. A.) 264 Fed. 295.

The prosecution is based upon section 328 of the Penal Code of 1910 (Comp. St. § 10502), which provides that all Indians committing murder within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory, and shall be tried in the same manner as are all other persons charged with a commission of said crime. The statute provides:

"And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person, within the boundaries of any state in the United States, or within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

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It is alleged that Louie was a Cœur d'Alene Indian, who had theretofore been declared competent by the authorities of the Department of Indian Affairs, and that he was a member of the Cœur d'Alene tribe of Indians, by reason of the fact that he then and there had, in common with all other members of said tribe, an interest in certain tribal funds thereafter to be disbursed to the members of said tribe, including Louie.

Louie held a patent in fee to certain lands in the Cœur d'Alene Indian reservation, and prior to receiving patent held trust patent, the United States holding the land in trust for him. The land patented is within the boundaries of the Cœur d'Alene Indian reservation as the limits thereof were prior to the time the last cession was made. There are no tribal lands on the Cœur d'Alene reservation and all lands that had not been allotted were open to settlement on May 2, 1910. At the time of the assault the victim was living on the land that was patented to Louie. It appears that there were 18,000 acres of land which had never been settled upon and which were included in the cession by the Cœur d'Alene tribe back to the United States; the Indians having an interest in these lands to the extent that they will get the money to accrue from the sale thereof. The land itself, however, is owned by the United States, and is thrown open and platted by white people.

What are called Indian lands now consist of the individual allotments in severalty to the members of the tribe and certain townsites on the reservation. By the cession of the 18,000 acres the Indians relinquished their rights to the land and when the patents are issued they are made direct to the purchasers from the United States. Louie has had his share of one distribution already made of the proceeds of sales of part of the 18,000 acres. He lived on the land included in the allotment to him, and had power to rent or sell the land. The patent to Louie was issued under the provisions of the Act of May 8, 1906 (chapter 2348, 34 Stat. 182 [Comp. St. § 4203]), amending section 6 of the Act of February 8, 1887. It provides that at the expiration of the trust period, and when the lands have been conveyed to the Indian by patent in fee, as provided by section 5 of the act (section 4201)—

"then each and every allottee shall have the benefit of and be subject to the laws both civil and criminal, of the state or territory in which they may reside, and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: * * *. Provided, the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, that until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, that the provisions of this act shall not extend to any Indians in the Indian Territory." Barnes' Fed. Code, p. 801, § 3598.

In 1887 the United States made a treaty with the Cœur d'Alene Indians, and Congress ratified the same in 1891 (26 Stat. p. 1028), whereunder the Cœur d'Alene Indians ceded all right, title, and claim to large tracts to the United States. By article 5 of the treaty it was provided that, in consideration of the cession and agreements, the Cœur d'Alene reservation—

"shall be held forever as Indian land and as homes for the Cœur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity, and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

In 1906 provision was made for the selling and disposition of unallotted lands in the Cœur d'Alene Indian reservation (34 Stat. p. 335) "to all persons belonging to or having tribal relations on said Cœur d'Alene Indian reservation," and upon approval of such allotments by the Secretary patents were to issue therefor under the provision of the general allotment law of the United States. It was also provided that upon completion of said allotments to said Indians the surplus lands not allotted or reserved for Indian school agency or other purposes of the Cœur d'Alene reservation should be classified as agricultural, grazing, or timber lands, and should be appraised by legal subdivision, and upon completion of the classification and appraisement such surplus land shall be open to settlement and entry under the provisions of the homestead laws at not less than the appraised value, by proclamation of the President.

Section 5 of the Act of Congress of February 8, 1887 (24 Stat. 388), provides that, upon the approval of the allotments provided for by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is situated, and that at the expiration of said period the United States will convey same by patent to said Indian or his heirs as aforesaid in fee, discharged of said trust, and free of all charge or incumbrance whatsoever. Inasmuch as patent was issued under the Act of May 8, 1906, amending section 6 of the Act of February 8, 1887, we think that Louie as an allottee became subject to the laws, civil and criminal, of the state in which he resided.

The fact that the land was situate within the limits or boundaries of an Indian reservation is immaterial, because the allottee of the fee-simple patent was expressly declared to be subject to the laws of the state within which the land is situated. This view is strengthened by the fact that the proviso of section 6 (chapter 2348, Act May 8, 1906, the amendatory act heretofore referred to) expressly declares that, until the issuance of fee-simple patents, all allottees to whom trust patents shall thereafter be issued shall be subject to the exclusive juris-

diction of the United States. Such emphatic retention of exclusive jurisdiction until fee-simple patent shall issue brings into relief the equally positive prior declaration that after patent shall have issued the allottee shall be subject to the laws of the state in which he resides.

Counsel for the government cites United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195. There the Indian committed murder within the limits of the Tulalip Indian reservation, and the patent the Indian had received for land was within that reservation. Jurisdiction was challenged upon the ground that when the offense was committed there had been allotted to Celestine certain lands on the Tulalip Indian reservation within the territory of Washington under the provisions of the treaty of January 22, 1855 (12 Stat. 927), and that in accordance with executive order patent had been issued in May, 1885; that the Indian was then a member of the Tulalip tribe and was a citizen of the United States, and therefore subject to the laws of the state of Washington. The court held that, although Celestine had received a patent for the land within the Tulalip Indian reservation, and although the woman he murdered was the owner of another tract within such limits, also patented, both tracts remained within the reservation until Congress excluded them therefrom. The court also held that, although Celestine was made a citizen of the United States and of the state of Washington, it did not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation.

Stress was laid upon the fact that, notwithstanding the gift of citizenship, Celestine and the murdered woman remained Indians by race, and that the crime was committed by one Indian upon the person of another and within the limits of the reservation, and that unless there was in terms a subjection of the individual Indian to the laws, civil and criminal, of the state, it should be held that the United States had jurisdiction. The court, however, pointed out that the patents to Celestine and to the murdered Indian woman were issued under the authority of the treaty with the Omahas of 1854 (10 Stat. 1043) and the treaty of Point Elliott of 1855 (12 Stat. 927), and that the first sentence of section 6 of the Act of February 8, 1887, hereinbefore cited, was applicable only to patents made under the authority of the act cited; whereas the sentence to the effect that an Indian born within the territorial limits of the United States to whom an allotment was made under the provisions of the act is declared to be a citizen of the United States, entitled to the rights, privileges, and immunities of such citizen, refers to allotments made under the act of 1887, or under any other law or treaty. The court therefore, held that the plea raised only the point that Celestine had been given a citizenship in the United States, and that it did not follow that the United States had lost jurisdiction over him for offenses committed within the limits of the reservation. The court said:

"There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

At once we find a clear distinction between Celestine's Case and Louie's, in that the terms of the statute under which patent to Louie issued have made him "subject to the laws, both civil and criminal, of the state or territory" in which he resides, whereas no such terms are found in the Celestine Case. Congress by its legislation has therefore, in a sense, abandoned its guardianship of Louie and has left him subject to all the privileges and burdens of one sui juris.

We are not unmindful of the general rule that no radical departure of the policy which has prevailed with respect to Indians is intended; but, when the purpose of Congress is made as clear as we think it is by the language to which we have referred, we must give effect to such intent. It results that in the present case the defendant was not subject to the jurisdiction of the United States, and that the judgment against him must be set aside, and the cause remanded, with directions to discharge him.

Reversed.

GILBERT, Circuit Judge (dissenting). It is contended that the offense was not within the jurisdiction of the court below for the reason that the particular parcel of land whereon the crime was committed had been patented in fee simple to the plaintiff in error, and that by the issuance of such patent he had been made subject to state laws under the provisions of the act of 1887 (24 Stat. 390) providing that, upon the patenting of lands to the allottees under that act, every allottee should "have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which he resided," and the amendment of May 8, 1906 (34 Stat. 182), providing that at the expiration of the trust period, and when the lands have been given to the Indians by patent in fee, "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

But the fact that the plaintiff in error had been made subject to state laws does not seem to be the controlling consideration. The real inquiry is: Was the crime committed within the limits of an Indian reservation? If it was, the court below had jurisdiction under the provisions of section 328 of the Criminal Code. The crime was committed within the limits of an Indian reservation, unless the law be that the issuance of a patent in fee to a parcel of land within an Indian reservation of its own force takes the patented land out of the limits of the reservation. Said the court in United States v. Celestine, 215 U. S. 278, 290, 30 Sup. Ct. 93, 97 (54 L. Ed. 195):

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another and within the limits of a reservation."

The further language of the court in that case, in which it was said:

"There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the present jurisdiction of the United States"

—is taken by the majority of this court to be an expression of opinion that, if in that case Celestine had received the final patent in fee to

the land whereon the crime was committed, the United States District Court would have been without jurisdiction. But obviously the learned justice who wrote the opinion, and arguendo made the remarks which are relied upon, did not mean to say that if Celestine had been subjected to the civil and criminal laws of the state, and had been granted the benefit of those laws, the court would have been without jurisdiction. The reverse of that has been held in United States v. Pelican, 232 U. S. 442, 34 Sup. Ct. 396, 58 L. Ed. 676, and Apapas v. United States, 233 U. S. 587, 34 Sup. Ct. 704, 58 L. Ed. 1104, where it was ruled that the federal courts had jurisdiction irrespective of citizenship or race where the crime was committed against a full-blood Indian ward of the government, and was committed upon Indian lands.

I submit that the statute which authorized the conveyance of lands to individual Indians in fee simple is limited by the provisions of section 328 of the Criminal Code, and that, although the patentee of an allotment of such lands is rendered subject to state laws, the jurisdiction of the courts of the United States over offenses committed by such patentee on said allotment is retained so long as the land remains within the limits of an Indian reservation. The limits of the reservation must be taken to be the exterior boundary lines thereof. Within those lines there still remain unpatented allotments. How many the record does not show. It is not to be supposed that Congress intended that jurisdiction within those lines should be divided between federal and state courts.

It would seem that the statute is also to some extent limited by the treaty with the Indians, made in 1887, and ratified by Congress in 1891 (26 Stat. 1028). In article 5 it was stipulated:

"In consideration of the foregoing cession and agreements, it is agreed that the Cœur d'Alene reservation shall be held forever as Indian land, and as homes for the Cœur d'Alene Indians now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity, and no part of said reservation shall ever be sold, occupied, opened to white settlement or otherwise disposed of, without the consent of the Indians residing on said reservation."

The Act of 1906 provided for the allotment of lands to Indians in severalty, and that after the allotments were made the remainder should be thrown open to settlement by white people. There has been no treaty abrogating the provisions of the treaty of 1887, except the treaty of 1899, by which a certain town site and a small body of land adjacent thereto were disposed of and opened to white settlement. In Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520, the court especially recognized the binding force of a treaty with the Indians, and held that the Prohibition Act (section 2139, Rev. Stat., as amended in 1892 [Comp. St. § 4136a]), must be interpreted in connection with the special agreement which the United States had made with the Indians in regard to the extinguishment of the title and the retention of control over lands ceded by the United States. And although it may be said that a treaty stands on no higher plane than does an act of Congress, and an act of Congress may repeal a prior

treaty, it is a settled rule of statutory construction that such a repeal by implication is not to be favored, and will not be held to exist if there be any other reasonable construction. Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248.

PHŒNIX COTTON OIL CO. v. CHURCHILL.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3439.

Bailment ⊜18(1)—Charges for compression of cotton held governed by contract between the parties.

Plaintiff, a compress company, which established and published a tariff schedule of charges for the various customary services in connection with cotton to be handled during the ensuing season, before the season opened, made a contract with defendant, a dealer in cotton, by which in consideration of being given all of defendant's cotton for compression, it agreed to furnish certain services, in part those enumerated in its tariff schedule and in part differing therefrom, including storage, at stated prices. *Held*, that such contract was not merely a modification of plaintiff's tariff in favor of defendant, on condition of receiving all of defendant's cotton, and which otherwise did not become effective, but an independent contract, which governed all named charges for handling defendant's cotton during its term, and that defendant's agreement to give plaintiff all of its cotton was a covenant of the contract, for breach of which plaintiff could recover compensation in damages.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by A. F. Churchill against the Phœnix Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Reversed.

In the cotton season of 1917–18, Churchill (hereafter called plaintiff) was operating a cotton compress establishment at Dyersburg, Tenn., and the Phœnix Cotton Oil Company (hereafter called defendant) was operating or taking the cotton from several gins in that vicinity. The record is somewhat indefinite, but it tends to show that on September 17, 1917, these parties entered into a written contract, in the form of a proposition made by plaintiff and accepted by defendant providing that: "In consideration of the Phœnix Cotton Oil Company and its allied interests, during the season of 1917–18, giving us all their Dyersburg and Dyersburg territory cotton and cotton linters for compression at Dyersburg, we will furnish them shed room for the storage of cotton, and, in addition thereto, receive and receipt for, store, handle, and protect said cotton while in our custody, for the following charges: Receiving, weighing, and sampling 10 cents per bale; storage first 30 days, free; storage after first 30 days, per month or fractional part thereof, 10 cents per bale."

During the season, about 17,000 bales of defendant's cotton were handled by the compress. Plaintiff had an established and published tariff or schedule of charges for the various customary services in connection with cotton handled, and this tariff was known to the defendant. Its first item fixed a charge of 20 cents per bale for "receiving cotton from cars, wagons, or drays, tagging, weighing, lining for examination, assorting into storage by ship marks, inserting weights in receipts given, including one month's storage," and it provided further specified charges per bale for loading on cars, for sampling, for patching, and for each of several other items of occasional serv-

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ice. From month to month plaintiff rendered bills to defendant, said to be made out according to tariff schedule. It is not possible, with the aid of the record alone, to identify the items of the tariff and of the bills rendered. No charge for compression, as such, is given in the schedule, or appears in the bills rendered, excepting in three rather trifling instances. The chief item in the bills rendered is for "handling" at 25 cents per bale. This item is not found in the schedule but it may be made up of the schedule item for receiving, etc., plus sampling or some other schedule 5-cent item. There was neither objection to, nor express approval of, these bills rendered, but the defendant paid a lump sum on general account. Toward the end of the season, plaintiff notified defendant that some of defendant's cotton had been diverted from the compress; that the defendant was, therefore, not entitled to the special rates provided in the contract of September, 1917; and that plaintiff would insist upon receiving the full tariff rate for all services which had been rendered.

No further payments being made, this action was commenced in the court below by Churchill. The declaration was for services rendered under a promise to pay schedule rates, and the bills rendered were attached as specifying the particulars of the demand. The defendant pleaded that it did not owe and did not promise. The total indebtedness specified, exclusive of interest, was about $11,300. The testimony seems to be undisputed that about $1,000 of the items specified accrued before or after the season of 1917–18, and that about $2,800 was for items of services within the year covered by the schedule, but not within the special contract, leaving over $7,000 for rates claimed to be specified both in the special contract and in the general tariff. It was said that there would be a difference of about $2,300, according as the computation was made upon one or the other basis. Upon the undisputed testimony, plaintiff seems to have been entitled to a verdict for the amount of the out of season charges, in addition to those not reached by the special contract, and after making proper application of the general payment.

The existence of the special contract appeared soon after the opening of plaintiff's case. Defendant thereupon and thereafter insisted that the case should be dismissed, or a verdict for the defendant directed, because the contract declared upon was not the true contract between the parties, and the action should have been planted upon the special contract. It appeared that the defendant intended to claim that its cotton did not receive the protection and shelter specified by the special contract, and that damages had thereby resulted, which it would be entitled to offset in an action brought on the special contract, and the balance of which in its favor it would be entitled to recover in that or some other action. It was thus argued that the objection to proceeding further under the existing pleadings was not merely formal, but was essential to preserve the defendant's rights. The court below took the view that the tariff schedule should be treated as the main basis of contract, and that the special contract between the parties was one for a variation of some of the rates named in the general tariff, on condition that all the cotton for the season was furnished, and, being further of the opinion that the undisputed evidence showed the nonperformance of this condition, whereby the provision for a special rate never became effective, directed a verdict for the plaintiff for the full amount claimed.

John D. Martin, of Memphis, Tenn., for plaintiff in error.

C. L. Sivley, of Memphis, Tenn. (Sivley, Evans & McCadden, of Memphis, Tenn., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). The assignments of error which complain of the refusal to direct a verdict for the defendant would necessarily be overruled, even if they were in due form. Plaintiff was entitled to a verdict upon portions of the

demand sued for. All the assignments of error are also informal, and might be disregarded, in that they are directed to the action of the court in overruling a motion for new trial, and not to the ruling of the court upon the trial. Error cannot be assigned upon the refusal to grant a new trial, unless in exceptional instances not here present. However, counsel's intent to obtain a review of the rulings on the trial is so evident that we are inclined to overlook this informality in the assignment, and consider an exception to the admission of evidence, which was properly saved on the trial, and as to which error is assigned in this indirect manner. It was conceded that 100 bales of Phœnix cotton, from the Tiptonville gin within the prescribed territory, had not been sent to the Churchill compress, but had been shipped away in uncompressed form. The court took the view that, as matter of law, the special contract was merely that a certain modification would be made in the tariff rates upon the full performance of a certain condition, that the diversion of these 100 bales demonstrated material nonperformance of the condition, and that therefore the special contract was to be eliminated. Accordingly, the defendant's evidence, offered to show that plaintiff's damage from this nonperformance was only nominal, was rejected. This ruling necessarily opens the subject of the character of the special contract, and this, in turn, leads to a consideration of the plaintiff's right to recover upon so much of his demand as was within the special contract, if that was in force. It is therefore permissible for us to consider these subjects, reaching them only through the roundabout way afforded by an exception to the admission of evidence; but we think it desirable to do so, since there must be a new trial, and the questions will arise again.

We are confident that the special contract could not, as matter of law, upon this record, be rightly held to be merely a conditional modification of the tariff rates. If it had been collateral to an initiated course of business under the tariff, or had been only for a special price to be granted upon one or more of the items of service covered by the tariff, it might have this conditional character; but we cannot say that this was its substance. It preceded the doing of any business for this season; it did not include all of the particulars of service specified in the first item of this schedule, neither tagging, nor lining, nor assorting; and it did cover two matters not named anywhere in the schedule, furnishing shed room for storage, and protecting the cotton while in plaintiff's custody. It also covered an agreement to "handle," whatever that may mean. It may be that, according to the customs of the business or the accepted trade meaning of words, promises to protect and furnish shed room for storage included nothing in addition to the obligations of the plaintiff as bailee under the general tariff, and that the tagging, lining, and assorting were negligible; but the record does not demonstrate this identity of obligation, and the natural inference seems to be the other way. We are clear, also, that this lack of identity, taken in connection with the whole record, at least tended to show that the provision about "giving us all your cotton" was not a mere condition, but was a covenant on the part of the defendant. As to this conclusion, a fuller dis-

closure of the facts regarding the execution of the contract and the circumstances might be material, but the conclusion was not wholly inadmissible upon this record. Of course, if there was a covenant, rather than a condition, and there was thus a bilateral contract, its breach by defendant, in this trifling degree, would not justify its entire repudiation by the plaintiff, but would only call for deduction of the profits which plaintiff lost through the diversion of the 100 bales. The record suggests other breaches of the same covenant, but they cannot be intelligently considered, because their existence did not appear.

If this contract was not rightly construed as merely one for a conditional modification of the general tariff, it necessarily follows that it governed and controlled the liability of the defendant for those services covered thereby, and the plaintiff could not recover upon an implied contract to pay the regular tariff for a class of service covered by one of the items thereof, in the face of an express specific contract for service of the same general class, but different in detail and for a different price. This conclusion is confirmed by observing that the special contract was for the general and primary service which would be required as to all the cotton and which actually constituted nearly three-fourths of the items claimed for this season, while the general tariff had sole application only to special items that might or might not be required as to any particular lot of cotton, and that, in a majority of instances, were not called for. If the facts, as more fully developed on the new trial, lead to the finding by the court or jury that there was not identity of obligation under the special contract and under any parts of the general tariff, and that the special contract was, therefore, not a mere conditional rate modification, it must certainly result that the plaintiff cannot recover for the items covered by the special contract until he amends his pleadings and declares thereon, or at least so far discloses it in his declaration as to make a basis for defendant to counterclaim any damage it may prove.

For the error pointed out, the judgment must be reversed, and the case remanded for a new trial in accordance with this opinion.

QUINLIVAN et al. v. DAIL-OVERLAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1921.)

No. 3434.

1. Courts ⇐322(2)—Bill held not to show on its face that defendant should be aligned with plaintiff, so as to defeat diversity of citizenship.

In a suit by a North Carolina corporation against a Virginia corporation, from which it had contracted to purchase automobiles and parts, and an Ohio corporation manufacturing such automobiles and parts, the Ohio corporation's striking employees, and others, for an injunction, the bill *held* not to show on its face that the Virginia and Ohio corporations, or either of them, should be aligned with plaintiff, thus defeating diverse citizenship, where it alleged that the Ohio corporation had closed its plant and refused to reopen it in spite of plaintiff's demand,

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and that the strike had created a reign of terror, which might make it to the Ohio company's interest to let its contracts be partially unfulfilled.

2. Injunction ⇐9—**Bill held to present justiciable question whether or not plaintiff had any interest in the matter sought to be enjoined.**
In a suit by a North Carolina corporation against a Virginia corporation, which had contracted to sell it automobiles and parts, and an Ohio corporation, which manufactured such automobiles and parts, striking employees, and others, to enjoin interference with the operation of the factory, where the bill asserted a right and interest in plaintiff to compel the carrying out by the Ohio corporation of its contract with the Virginia corporation, it presented a justiciable question whether or not plaintiff was right in such contention.

3. Injunction ⇐119—**Cross-bill for injunction held properly filed.**
In a suit by a North Carolina corporation against a Virginia corporation, which had contracted to sell it automobiles and parts, an Ohio corporation, manufacturing such automobiles and parts, striking employees, and others, to enjoin interference with the operation of the factory, a cross-bill by the Virginia corporation for the same relief was properly filed.

4. Courts ⇐317—**That corporations had same vice president held not to show identity of interest.**
That a Virginia corporation, filing a cross-bill against an Ohio corporation, its striking employees, and others, had the same vice president as the Ohio company, did not alone show identity of interest, defeating diversity of citizenship.

5. Appeal and error ⇐837(3)—**When bill and cross-bill taken as confessed, allegations taken at their face value.**
Where a bill and cross-bill to enjoin interference by striking employees and others with the operation of a factory, which stated a flagrant case of unlawful interference with the operation of the factory, were taken as confessed, their allegations must be taken at their face value on appeal, and the court cannot speculate as to what the result would have been, had the case gone to trial on its merits.

6. Injunction ⇐21—**Relief not denied because plaintiff's contract with one of defendants revocable, when not revoked.**
In a suit by one having a contract for the purchase of automobiles and parts to enjoin interference by striking employees and others with the operation of the automobile factory, the fact that its contract was revocable at will did not defeat its right to relief, where neither party had attempted to revoke the contract, and it was not obliged to do so.

7. Injunction ⇐21—**Expiration of contract with one defendant before final order held not to defeat relief.**
In a suit by one having a contract for the purchase of automobiles and parts against the other party to the contract, the manufacturer of the automobiles and parts, its striking employees, and others, to enjoin interference with the operation of the factory, the right to an injunction was not defeated by the expiration of the contract term before the final order was made, where it did not affirmatively appear that plaintiff had obtained all the automobiles and parts called for by the contract, and the bill had been taken as confessed before the contract expired.

8. Courts ⇐354—**Failure to comply with rule as to continuance held not to defeat jurisdiction to make final order.**
Under equity rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv), requiring causes to be placed on the trial calendar on the expiration of the time for taking depositions, which under rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi) runs from the time the cause is at issue, lack of formal compliance with rule 57, relative to the continuance of causes on the trial calendar beyond the term, did not deprive the court of jurisdiction to make a

final order at a subsequent term, especially where it made a formal order continuing to the next term all pending cases, motions, and matters.

9. **Injunction ⊂=101(1)—Right to keep business running is "property right," within statute limiting injunction in labor disputes.**
The right of an employer to keep his business running is a "property right," under Clayton Act, § 20 (Comp. St. § 1243d), forbidding injunctions in cases between employers and employees, etc., unless necessary to prevent an irreparable injury to property or to a property right, etc.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

10. **Injunction ⊂=118(4)—Bill and cross-bills held to show that there was no adequate remedy at law.**
In a suit to enjoin striking employees and others from interfering with the operation of a factory, allegations of the original bill and the cross-bills as to the irresponsibility of certain of the defendants *held* to show sufficiently that there was no adequate remedy at law.

11. **Injunction ⊂=190—Not erroneous because prohibiting peaceful persuasion or picketing.**
Where at the time a final order was made granting a permanent injunction against interference with the operation of a factory in connection with a strike, there was no longer any controversy between the employer and its employees respecting terms and conditions of employment, and the plant was running at full capacity and full production, and the strike had long ceased to exist, except for certain annoying manifestations on the part of a comparatively few people, who could no longer be regarded as employees, the final order was not erroneous, because it enjoined peaceful persuasion and peaceful picketing.

12. **Injunction ⊂=104—Against striking employees and others held not to violate Clayton Act.**
A final order granting a permanent injunction restraining striking employees and others from interfering with the operation of a factory *held* not to violate Clayton Act, § 6 (Comp. St. § 8835f), providing that the existence and operation of labor organizations, etc., is not forbidden, and that such organizations and their members shall not be held to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

13. **Injunction ⊂=114(4)—In suit to enjoin interference with operation of factory, another manufacturer held properly made a defendant and permitted to file a cross-bill.**
In a suit against an automobile manufacturer, its striking employees, and others for an injunction, where the automobile manufacturer in its answer alleged as one reason for its inability to operate that a manufacturer of starting, lighting, and ignition equipment, with which it had contracts, was unable to comply with its contracts because of a strike, and asked that such other manufacturer be made a party defendant, it was properly made a defendant and permitted to file a cross-bill for an injunction against interference with the operation of its plant; there being the necessary diversity of citizenship.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by the Dail-Overland Company against John J. Quinlivan and others, in which various other parties filed cross-bills. From a final order granting a permanent injunction (263 Fed. 171), the defendant named and others appeal. Affirmed.

Rob V. Phillips, of Toledo, Ohio (Daniel L. Cruice, of Chicago, Ill., on the brief), for appellants.

George D. Welles, of Toledo, Ohio (F. C. Harding, of Greenville, N. C., and Tracy, Chapman & Welles, of Toledo, Ohio, on the brief), for appellee Dail-Overland Co.

Benjamin T. Batsch, of Toledo, Ohio (James E. Kepperley and Rathbun Fuller, both of Toledo, Ohio, on the brief), for appellee Willys-Overland Co.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Appeal from an order granting permanent relief in a strike injunction case. The original bill was filed by the Dail-Overland Company, which is a corporation organized under the laws of North Carolina, is a citizen and resident of that state, and engaged in the distribution and sale of automobiles and automobile parts and equipment. The defendants were (a) the Willys-Overland Company, a corporation organized under the laws of Ohio, a citizen and resident of the Western division of the Northern district of Ohio, and engaged in manufacturing and selling automobiles and automobile parts in that district and division; (b) the Willys-Overland, Incorporated, a corporation organized under the laws of Virginia, a citizen and resident of that state, having its principal office and place of business at Toledo, Ohio, and being the organization by which the automobiles and parts manufactured by the Willys-Overland Company were marketed; (c) Toledo Lodge, No. 105, International Association of Machinists, an unincorporated labor union, having its principal place of business at Toledo, Ohio, many of its members being employees of the Willys-Overland Company; (d) the Automobile District Council, an unincorporated association composed of sundry unions and members thereof, whose members are engaged in sundry trades connected with the automobile industry in Toledo, where it has its principal office, many of its members being employees of the Willys-Overland Company; (e) a large number of individuals, including officers of one or the other of the two last-named defendants, and organizers and business agents of different labor unions. For convenience we shall refer to the Willys-Overland Company as the "Overland," to the Willys-Overland, Incorporated, as the "Overland Inc.," and the Toledo Lodge, the Automobile District Council and the individual defendants as the union and labor defendants. All were residents and citizens either of the district and division in which the suit was begun or of a state other than North Carolina.

The bill, which was filed June 5, 1919, is elaborate in statement; its substance, sufficient for present purposes, is this: The Overland Inc. had a contract with the Overland Company for the purchase from the latter of all of its product manufactured and bought by the latter during the year 1919. Plaintiff had a contract with the Overland Inc. for the purchase during the period from January 4, 1919, to October 31, 1919, of 2,400 Willys-Overland automobiles, subject to allotment during the season on the basis of monthly production, and to ratable reduction in case sufficient automobiles were not manufactured for the Overland Inc. to enable it to meet all its contracts.

The agreement also provided for the purchase of automobile parts at certain discounts. Plaintiff had the sole right to sell and distribute these automobiles and parts in certain counties of North Carolina and South Carolina, respectively. The bill further alleged that shortly before May 8, 1919, certain labor agitators, including the so-called union and labor defendants, entered into an unlawful combination and conspiracy in restraint of trade and commerce in automobiles and automobile parts among the different states of the Union, in furtherance of which they conspired to prevent and restrain all interstate commerce in automobiles and automobile parts manufactured, purchased from and shipped by the Overland Company, and to that end demanded of that company impossible terms and conditions of employment, including closed shop and control by labor organizations; the controversy culminating in a strike at the Overland Company's plant at Toledo, Ohio, on May 8, 1919, its reopening on May 26th, and continued operation until June 3d, when it finally closed because of its inability to continue operation in the face of the strike and in lack of police protection. As the result of the strike plaintiff received but a small portion of its May allotment of automobiles, and none whatever for the month of June. Plaintiff accordingly, when the bill was filed, was entirely sold out of automobiles and short of necessary supplies and parts. Plaintiff had an effective selling organization, maintained at a large monthly expense, a valuable business and good will yielding large profits, which would be lost by the failure to obtain automobiles and parts under its contract. It will be noted that plaintiff had no contract with the Overland Company. In support of its claim to relief, the bill stated that previous to the execution of the contract the Overland Inc. publicly gave out and stated to plaintiff and its other dealers that there would be produced for distribution among such distributors, including plaintiff, in the year 1919, 180,000 automobiles, and (on information and belief) that such statements and representations were made by the Overland Inc. "with the knowledge and consent of the defendant Willys-Overland Company, and in consequence of and pursuant to representations and statements made by said Willys-Overland to said Willys-Overland Inc. that the defendant the Willys-Overland Company proposed and intended to manufacture during the year 1919 for delivery to said Willys-Overland Inc. at least that number of automobiles." The bill alleged that it was the duty of the Overland Company to continue in operation, and a demand by plaintiff that it do so, and its failure to comply.[1]

[1] The allegation is this: Plaintiff further says that, notwithstanding the failure of the mayor and police force of the city of Toledo to perform their duty and fulfill their promises to furnish adequate police protection to the Willys-Overland Company and its employees, it was and is the duty of said the Willys-Overland Company to continue in operation and to obtain protection through the courts or otherwise for itself and its employees who are desirous of remaining at work, from intimidation, threats, assaults, and violence of all kinds by said defendant unions and their members and fellow conspirators, and that plaintiff has served a demand upon said defendant the Willys-Overland Company and also upon the defendant the Willys-Overland Company [Inc.?] that such steps be taken by said defendant, but that said

On June 9th, four days after the filing of the original bill, an order was made, after notice to appellants, reciting the inability and failure of the Overland Company to perform "its contract obligations with complainant" by reason of the riotous, disorderly and intimidating conduct of the union and labor defendants, and enjoining the latter from interfering with the conduct of the business by the Overland Company except by peaceful persuasion. An elaborate system of picketing, under specific limitations, was provided by the order. The next day, by leave of court, the Overland filed its answer and cross-bill, admitting and alleging in detail each of the facts set up in the original bill, and asserting its willingness to continue operation under police protection, excepting, however, the allegation that it could and should have continued in operation, notwithstanding the efforts of the labor and union defendants to close the plant. It also alleged, as another reason for its inability to operate, that the Electric Auto-Lite Corporation (a Delaware corporation), with which it had contracts for starting, lighting, and ignition equipment and otherwise, was unable to comply with its contracts because of a strike against its plant of the same general nature as that directed against the Overland plant. It accordingly asked that the Auto-Lite Corporation be brought in as a party defendant, that it be directed to fill its orders from the Overland Company, and that it be restrained from keeping its factory closed, and ordered to obtain the necessary force of employees to enable it to execute such orders. It also asked for restraint of the labor and union defendants with respect to the Auto-Lite Company strike. On the same day an order was issued restraining interference with the Auto-Lite plant. Two days later, on plaintiff's application, an order was made directing the Overland Company to resume operations, and on its representation of inability to do so, or to comply without protection, the court appointed a special chief officer to take charge of and enforce the opening and operation of the Overland plant and to enforce the restraining order as to both the Overland and Auto-Lite plants. Under this order the Overland and Auto-Lite plants were opened on June 13th, and have remained open and in operation ever since.

A few days later the Overland Inc. filed its answer and cross-bill, likewise specifically admitting and averring each of the facts set up in the original bill of complaint, including the alleged public statement of the Overland Inc. regarding the production for the year in question, and plaintiff's information that it was made with the knowledge and consent of the Overland, etc., and praying for restraining order and injunction against the labor and union defendants. The next day the Auto-Lite Corporation filed its answer and cross-bill, admitting and adopting the allegations in the Overland's answer and cross-bill relating to the Auto-Lite Corporation, setting out in great detail the history of the strike directed against its plant, its inability to operate without protection, its failure to receive the same and that it, to-

defendants and each of them have failed to take such steps or any of them and said defendant the Willys-Overland Company has again ceased the manufacture of automobiles.

gether with many other manufacturers of automobiles, had exhausted their supplies of electric lighting, starting, and ignition systems, and asking for restraining order and final injunction in substantially the terms contained in the orders relating to the Overland. On July 1st both the original bill and the cross-bill of the Overland Company were taken as confessed by each of the labor and union defendants for lack of plea, answer or demurrer, and on August 2d the cross-bills of the Overland Inc. and the Auto-Lite Company were likewise taken as confessed for the same reason. On January 15, 1920, motions of the labor and union defendants to dismiss the original suit for lack of jurisdiction, and because the case had not been continued from the April term to the October term of the District Court, were overruled, and on motions of the plaintiff, the Overland Inc., and the Willys Corporation (which had succeeded to the Electric Auto-Lite Corporation), a permanent injunction was granted substantially in the terms of the temporary injunction, except that picketing was forbidden.[2] This appeal is by the union and labor defendants from that order of permanent injunction.

The grounds of jurisdiction relied on by plaintiff are diversity of citizenship and that the bill is directed aganst a conspiracy in violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827-8830). Appellants assail the order appealed from both for lack of jurisdiction in the District Court to make it and upon the merits.

Passing the question of alignment of the parties and collusion as affecting diversity of citizenship, if the validity of the order in question is to be tested solely by the allegations of fact in the original bill (as admitted by appellants), the right to the relief granted would be open to question. The strike was at the Overland Company's plant. Plaintiff had no contract with that company; its contract was with the Overland Inc. alone. The bill does not allege any legal or equitable identity between the Overland Company and the Overland Inc., or any control by one of them over the other. We are cited to no authority which, to our minds, clearly sustains plaintiff's right to maintain this suit on the ground of the existence of a special interest in the subject-matter of the strike. So far as brought to our attention, in each of the cases most strongly supporting the right of a third party to enjoin strike operations there was a direct and immediate relation between the plaintiff and the one against whom the strike was conducted.[3] These authorities would be pertinent to a suit for relief by the Overland Inc. against the Overland Company, or to one by plaintiff against the Overland Inc.; but plaintiff's case here is one step farther away. It scarcely need be said that, if plaintiff's interest is too indirect and remote to enable it to enjoin the strike because gen-

[2] For the opinion of the District Court, see Dail-Overland Co. v. Willys-Overland, 263 Fed. 171.

[3] See Chesapeake & Ohio Coal Agency v. Fire Creek Coal & Coke Co. (C. C.) 119 Fed. 942; Carroll v. Chesapeake & O. Coal Agency Co. (C. C. A. 4) 124 Fed. 305, 61 C. C. A. 49; Ex parte Haggerty (C. C.) 124 Fed. 441; Fortney v. Carter (C. C. A. 4) 203 Fed. 454, 121 C C. A. 514; Jennings v. United States (C. C. A. 8) 264 Fed. 399.

erally an unjust interference with its rights, the same consideration would extend to the claim of violation of the Anti-Trust Act. But we find it unnecessary to pass upon this question, for the reason that, in our opinion, the District Court had jurisdiction otherwise to make the order in question.

[1] The original bill did not on its face show a lack of jurisdiction of the District Court in respect of either parties or subject-matter, or collusion between plaintiff and the Overland or the Overland Inc., or either of them. It thus did not, as matter of law, show that the Overland Company was bound to be aligned as a party plaintiff and thus defeat jurisdiction on the ground of diverse citizenship, in view of the allegation of adverse attitude on the part of the Overland Company in closing its plant and refusing to reopen it in spite of plaintiff's demand that it do so. This was at least a claim of adverse relation, and we think it cannot be said, as matter of law, that the Overland Company had no interest in letting its contracts be partially unfulfilled rather than endure the stress and danger of a strike characterized by the bill as creating a "reign of terror." So much for the jurisdiction over parties.

[2, 3] As to the subject-matter: The bill asserted a right and interest in plaintiff to compel the carrying out by the Overland of its contract with the Overland Inc. This assertion presented a justiciable question, whether or not we may think plaintiff was right in its contention. Although a court may not have jurisdiction to proceed to judgment, it may have jurisdiction to take cognizance of a case in the first instance, and until facts showing lack of jurisdiction appear. In this juncture we think the Overland Inc., which was under direct contract relations with both plaintiff and the Overland, could (in the absence of collusion) properly file a cross-bill to restrain unlawful obstruction to the performance of its contract with the Overland Company, through the alleged unlawful strike directed against that Company. The Overland Inc. had an interest sufficiently direct to have enabled it to file an original bill. In such case there would prima facie be diversity of citizenship; and this would be so had the Overland Inc. joined with plaintiff in filing the original bill. Again assuming the absence of collusion, there was no lack of jurisdiction in the District Court to entertain the cross-bill of Overland Inc. City of Toledo v. Toledo Ry. & Lt. Co. (C. C. A. 6) 259 Fed. 450, 170 C. C. A. 426; Springfield Co. v. Barnard Co. (C. C. A. 8) 81 Fed. 261, 263 et seq., 26 C. C. A. 389.

[4] As to collusion: While there are circumstances from which it might be surmised,[4] they are not such as to establish it; not only in the absence thereof outside of what may be thought disclosed by

[4] For example: The original bill of complaint and the answer of the Auto-Lite Company are indorsed by the same solicitors; the respective answers and cross-bills of the Overland Company and the Overland Inc. are verified by the same person as vice president of each corporation, and also indorsed by the same solicitors; and the bill and both answers and cross-bills were filed in rapid succession, the bill on June 5th, the Overland Company's pleading on June 10th, and that of the Overland Inc. on June 11th.

the pleadings, but in view of the express action of defendants, in allowing not only the bill of complaint, but each of the cross-bills, to be taken as confessed, which, of course, amounted to an admission of the truth of the pertinent facts there alleged. The mere fact that the Overland and the Overland Inc. had the same vice president did not, standing alone, show identity of interest between the two companies. West v. United States, 258 Fed. 413, 417, 418, and cases there cited. The case is thus not brought within Niles Co. v. Iron Molders' Union, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. ——, nor is it within Davis v. Henry (C. C. A. 6) 266 Fed. 261. See, also, Blair v. Chicago, 201 U. S. 400, 448, 26 Sup. Ct. 427, 50 L. Ed. 801; Toledo v. Toledo Ry. & Lt. Co. (C. C. A. 6) 259 Fed. at pp. 455, 456, 170 C. C. A. 426. This conclusion makes it unnecessary to consider in this connection the effect of the Overland Company's cross-bill. If the order in question was supported by either the original bill or the cross-bill of the Overland Company Inc., or both, it is immaterial whether or not relief could have been granted under the Overland Company's cross-bill.

[5] As to the merits: The allegations of the original bill, as well as those of both cross-bills (which must be regarded as admitted by appellants), state a flagrant case of unlawful interference with the operation of the Overland plant, and of long-existing conditions of intimidation, violence, and bloodshed, justifying relief so far as the court below had jurisdiction to give it. Hitchman Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Eagle Glass Co. v. Rowe, 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286. Taking, as we must, the allegations of fact contained in the bill and cross-bills at their face value, such of the complaining parties as had a sufficient interest in the Overland's operation were entitled to relief, at least on the ground of an unlawful interference with property rights. On this subject we cannot speculate as to what the result would have been, either upon the question of collusion or otherwise, had the case gone to trial upon its merits. This conclusion makes it unnecessary to consider the question of alleged interference with interstate commerce.

Appellant presents a large number of formal objections to the relief given, whose nature will sufficiently appear from what is said in disposing of them.

[6] We see no merit in the proposition that relief should be denied plaintiff, for the reason that its contract with the Overland Inc. was revocable at will. Neither party in fact attempted to revoke it, nor was it obliged to do so. Moreover, the results of such cancellation might well have proven disastrous to plaintiff's business.[5]

[5] The business, whose good will was alleged to be established, was the handling of Overland automobiles and parts. In case of cancellation, plaintiff would have been obliged to sell back to the Overland Inc. all new automobiles of current models which plaintiff might own or have in its possession, as well as all new parts, subject under the policy of the Overland Inc. to return for credit, and also to turn over all outstanding sales agreements between plaintiff and dealers, subject to the latter's consent.

[7] The fact that the contract term had expired when the order appealed from was made is not conclusive against the right of injunction. It does not affirmatively appear that plaintiff had by that time succeeded in obtaining the full quota of automobiles and parts which its contract filled for. The bill had been taken as confessed more than five months before the final order was made, and several months before plaintiff's contract had expired. Indeed, the record seems to suggest that some of the testimony taken in connection with the final order is not in the record before us.

[8] Nor do we think the trial court lost jurisdiction to make the final order for lack of formal compliance with equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), which provides that after a cause is placed on the trial calendar it shall not be continued beyond the term save in exceptional cases by order of the court, upon good cause shown by affidavit. The April term seems to have expired on October 27, 1919. Previous to that time not only the original bill, but both cross-bills had been taken as confessed. No issue as to the facts longer remained; under equity rule 56 the cause goes on the trial calendar on the expiration of the time for taking depositions, which under rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi) runs from the time the cause is at issue. Moreover, on October 27, 1919, the court made a formal order continuing to the next term of court "all cases, motions and matters now pending in this court and not otherwise disposed of."

[9-12] It is settled that the right of an employer to keep his business running is a property right under section 20 of the Clayton Act (Comp. St. § 1243d), notwithstanding the existence of a strike. Hitchman Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; King v. Weiss and Lesh Co. (C. C. A. 6) 266 Fed. 257, 260. The allegations of the original bill (as well as those of both cross-bills) as to the irresponsibility of appellants sufficiently answer the objection of adequate remedy at law. The allegations respecting the damage which plaintiff would suffer by continuance of the strike indicate prima facie that the jurisdictional amount is involved. The objection that peaceful persuasion and peaceful picketing were improperly forbidden by the final order is, to our minds, sufficiently answered by the considerations announced by the trial judge, viz. that there was no longer a controversy between the Overland Company and its employees respecting terms and conditions of employment; that the plant was then running at full capacity and full production; that the strike had then long ceased to exist, except for certain annoying manifestations on the part of a comparatively few people; and that none of those so engaged could longer be regarded as employees. We cannot say that the order complained of violates section 6 of the Clayton Act (Comp. St. § 8835f).

[13] We find no reversible error in the provision forbidding interference with the operation of the Auto-Lite plant. The cross-bill of that company (which was a Delaware corporation) showed on its face diversity of citizenship, and stated a case justifying relief from interference with the Overland operation, provided the Auto-Lite Com-

pany was properly made a defendant. The pleading of the Overland, confessed by appellants, asserted the necessity of relief as to the Auto-Lite Company if the Overland was to be operated. The cross-bill of the Auto-Lite, also taken as confessed, after the restraining order of June 10th had been made, showed its inability to perform its contracts with the Overland. Its protection from interference was thus to that extent, at least, germane to the subject-matter of the original bill and the other cross-bills, and we think there was no error in making the Auto-Lite a defendant for the purpose stated. Neither the Auto-Lite restraining order, nor the order directing the operation of that plant by the special officer were ever complained of by appellants, unless by the general motion before mentioned (presented after the making of the motion for permanent injunction) to dismiss the entire case for lack of jurisdiction and alleged lack of proper continuance. The considerations applicable to the injunction relating to the Overland operation seem to pertain equally to the Auto-Lite.

Our conclusion is that, upon the record presented here, the final order (which is the only action by the court which is appealed from) should not be reversed. The order of the District Court appealed from is affirmed.

GABLE et al. v. VONNEGUT MACHINERY CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1921.)

No. 3450.

1. **Courts ⊜317—Plaintiff and manufacturer held to have identity of interest in suit to enjoin interference with operation of factory.**
   In a suit against a manufacturer, its striking employees, and others to enjoin interference with the operation of the factory, brought by a corporation of another state, alleging that for many years it had been and then was the agent of the manufacturer, etc., plaintiff and the manufacturer *held*, under the evidence, to have such identity of interest as required their alignment on the same side for purposes of jurisdiction.

2. **Courts ⊜289—Federal court without jurisdiction to enjoin interference with operation of factory, though products sold in interstate commerce.**
   Though the greater part of a manufacturer's business was the sale and delivery of articles manufactured by it to points outside the state, requiring their transportation and sale in interstate commerce, acts in connection with a strike, obstructing the operation of the plant and only incidentally and indirectly affecting interstate commerce, do not constitute interference with interstate commerce, under the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), and the Clayton Act, which may be enjoined by a federal court, in the absence of diversity of citizenship, as manufacturing is not commerce.

3. **Monopolies ⊜24(1)—Private parties cannot maintain suit under Sherman Act.**
   Private parties cannot maintain a suit to enjoin acts in restraint of interstate commerce under Sherman Anti-Trust Act, § 4 (Comp. St. § 8823).

4. **Monopolies ⊜24(1)—Private person can enjoin act in restraint of trade only where immediately directed against interstate commerce.**
   Though under Clayton Act, § 16 (Comp. St. § 8835*o*), a private party may maintain a suit to enjoin acts interfering with interstate commerce,

the requirement that the acts complained of must be immediately directed against interstate commerce is not done away with.

5. Courts ⇐280—**Bill and cross-bills for injunction should be dismissed, without waiting for final hearing, when court without jurisdiction.**

Where, in a suit to enjoin interference with the operation of a factory in connection with a strike, it appeared on application for a temporary injunction that the District Court did not have jurisdiction, either by reason of diverse citizenship or because interstate commerce was involved, the bill and cross-bills should have been dismissed, without waiting for final hearing.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by the Vonnegut Machinery Company against William Gable and others. From an order granting a temporary injunction (263 Fed. 192), the defendant named and others appeal. Reversed and remanded, with directions.

Rob V. Phillips, of Toledo, Ohio, for appellants.

Richard D. Logan, of Toledo, Ohio, for appellee Vonnegut Machinery Co.

Harold W. Fraser, of Toledo, Ohio (Marshall & Fraser, of Toledo, Ohio, on the brief), for appellee Toledo Machine & Tool Co.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Appeal from a temporary injunction in a strike suit. The strike here involved is a sequel of the strike at the Overland plant, at Toledo, Ohio, involved in Quinlivan v. Dail-Overland Co., 274 Fed. 56, No. 3434 in this court, this day decided. The Toledo Machine & Tool Company, which is an Ohio corporation, was operating at Toledo, Ohio, a plant for the manufacture of machinery and tools. On August 13, 1919, a considerable force of its employees walked out, thus inaugurating a strike.

On the 16th day of January, 1920, the Vonnegut Machinery Company, which is an Indiana corporation, doing business in that state, claiming to have contracts with the Tool Company for the manufacture and sale of a large amount of machinery, whose manufacture and delivery were interfered with by the Tool Company's strike, filed its bill in equity in the court below. The original bill is not in the record. An amended bill was filed January 21, 1920. The defendants therein were the Tool Company, two labor unions, and a number of individuals alleged to be either officers or representatives of one or the other of the unions, or concerned as pickets or otherwise with the strike; the defendants other than the Tool Company being alleged to be citizens and residents of the Western division of the Northern district of Ohio. It is alleged that the individual defendants, conspiring with each other and with others unknown, had assembled at the plant of the Tool Company and had obstructed and interfered with the performance of said contracts and with the shipment of said materials in interstate commerce, and unless restrained and enjoined would continue to do so; that to facilitate such practices they had erected a shanty on the property of the Tool

Company, wherein they congregated to keep warm; that they gathered at or near the entrance to the Tool Company's plant at the times when its employees were entering and leaving, and called them vile and offensive names, and heckled and nagged at such employees, and so annoyed and frightened them that they had threatened to quit their employment unless such abuses were stopped; that by similar actions the individual defendants were by threats and intimidation attempting to prevent other persons from seeking employment with the Tool Company.

It further alleged that the Tool Company operated its factory on the "open shop" plan, refusing to, and being bound by contract not to, discriminate between so-called union labor and non-union labor, but to operate an "open shop"; that defendants other than the Tool Company, by the strike activities referred to and otherwise, were interfering with, hindering, and obstructing the performance of the contract between the Tool Company and its employees, were seeking through such unlawful conduct and through oppression, fear, and intimidation to induce either the Tool Company or its employees to break the same, and by such unlawful conduct have interfered with the Tool Company in the performance of its obligations to the plaintiff, and have been and were then unlawfully obstructing the Tool Company in the delivery of the machinery, etc., to plaintiff and the shipment of the same in interstate commerce.

The prayer of the amended bill, as to the Tool Company, is that it be restrained from interrupting the manufacture, delivery, and shipment of the machinery and tools for whose manufacture, etc., the Tool Company was alleged to be under contract, and that the Tool Company be directed to employ such force of workmen as should be necessary to enable such production and to complete and carry out its alleged contract with plaintiff for such manufacture and delivery.

As to the labor unions and individual defendants, the prayer, speaking generally, was for restraint against interference with and obstruction of the Tool Company's business of manufacturing the machinery in question, from congregating about the Tool Company's plant and about the homes of its employees, from abusing, annoying, threatening, and intimidating that company's employees, or those desiring to become such, from attempting to induce employees to violate their contracts of employment, and from maintaining the shanty referred to.

The asserted grounds of federal jurisdiction are diversity of citizenship and the existence of a conspiracy to restrain interstate commerce, On the filing of the amended bill, the court below overruled a motion by the defendants other than the Tool Company to dismiss the suit for lack of either jurisdiction, cause of action, or good faith, and, upon the bill of complaint and testimony both oral and by affidavit, granted a restraining order against the defendants other than the Tool Company substantially as prayed.

The Tool Company filed an answer and cross-bill, admitting (with one exception not presently important) all the allegations of plaintiff's bill, specially averring its open shop policy, its contract with its employees to maintain the same, and the attempts of the labor and union defend-

ants, by the strike complained of, to break up the "open shop" and to unionize the plant, substantially as set forth in the bill—asking substantially the same relief as did the original bill. The other defendants filed answer denying all unlawful conduct charged against them, asserting the continued existence of a strike and a dispute concerning terms and conditions of employment, and collusion between the Tool Company and the Vonnegut Company in bringing the suit for the sole purpose of obtaining jurisdiction on the part of the federal court, in preference to that of a state court. They joined issue on the cross-bill, after renewing motion to dismiss the original bill, and moving to dismiss the Tool Company's answer and cross-bill, for reasons including collusion and lack of jurisdiction.

Upon oral and other testimony taken January 26 and 27, a temporary injunction was ordered on February 7, 1920, against the defendants (except the Tool Company, one labor defendant, and one union defendant), conforming substantially to the prayer of the cross-bill and the terms of the restraining order. This appeal is from that order of injunction.[1]

On March 21, 1921, the Tool Company filed in this court a motion to dismiss the appeal, on the ground that the questions raised thereby had become moot by reason of the asserted fact (of which the movant offers to make proof) that each of the appellants has long since entered into contracts of employment elsewhere, and is now neither in the employ of nor seeking employment with the Tool Company. The appellants have not formally replied to this motion. We think the question of the jurisdiction of the District Court should be disposed of.

[1] In our opinion jurisdiction was lacking so far as it depended upon diversity of citizenship, for we think that upon this record the Tool Company must be aligned as a party plaintiff, thereby destroying the alleged diversity. The bill alleges that plaintiff "for many years has been and is now the agent of the defendant Tool Company in that part of the state of Indiana above described, and it has built up and now has and enjoys a large and extensive business in buying, selling, and dealing in machines and machinery, and particularly a large and profitable business in buying, selling, and dealing in presses, tools and equipment manufactured by the Tool Company." The Tool Company's secretary and treasurer testified thus:

"Q. The Vonnegut people are your sales agents, are they not? A. They are. Q. On commission basis? A. They are."

The vice president and sales manager testified that the Vonnegut Company—

"have the right to sell goods in certain territory. They get a price from us and sell at that time [price?] and when they pay their bills they deduct 7½% commission;" that the Tool Company has "but one price, and when we quote them the price they are supposed to quote that price and sell our machines at that price. * * * Of course, when we quote the Vonnegut, it is necessary that they are to quote that price, or there would be a confliction of price from one place to the other. Q. So as a matter of fact you do fix the price, don't you? A. Yes, sir. Q. And all the Vonnegut Machine Company

[1] For opinion of the District Court, see 263 Fed. 192.

get out of your business is 7½ per cent. commission for transacting this business for you, don't they? A. So far as I know; yes, sir." (It is not suggested that any one had better means of knowledge than this sales manager.)

True, the Tool Company in its answer to the bill does not admit that the plaintiff has been or is its agent, but says that for many years plaintiff has purchased and sold tools and equipment manufactured by this defendant, and has built up and now enjoys a large and extensive business in such tools and equipment; that it never has had and now has no power and authority to bind the plaintiff—doubtless meaning the Tool Company. But the case was not heard on pleadings alone, and the testimony of the Tool Company's two officers, as already given, is opposed to the answer. It is also true that in a portion of the bill of complaint, later than that from which we have quoted, plaintiff alleges that it has from time to time during the past six months ordered, contracted, and purchased from the Tool Company, and the latter has contracted to manufacture and deliver a large number of presses, tools, dies, and other material and machinery manufactured by the Tool Company—specifying in that connection as among the machines "covered by said contracts," certain presses and dies purchased by plaintiff for the Nordyke & Marmon Company, at an agreed price of $144,000; also a press for another Indiana company at a price of $32,850, as well as six presses ordered by plaintiff "for its own use" (the price thereof not being mentioned nor the damage, if any suffered by delay in their furnishing) and that the "total amount of the contracts *or orders* [2] given by plaintiff to the * * * Tool Company and accepted by said Tool Company, is in excess of $203,000." True, also, the Tool Company's vice president and sales manager, on examination by its counsel, said that "the Vonnegut Machinery Company have no agency contract with us," which conflicts with his previous testimony, unless the witness was seeking to distinguish between a written and a verbal agreement. He also states:

"We look to them for our compensation," and charge to the Vonnegut Company all the work done "on their orders."

But the fact that the Tool Company looked to the Vonnegut Company for its "compensation," and accordingly charged to that company the work covered by its orders, is not inconsistent with a purely agency commission contract. In this view of the case there is nothing inconsistent with the existence of an agency contract in the statement "the Vonnegut Machinery Company buy and sell our machines," for in that same connection it appears, for example, that while the Nordyke & Marmon order may have been charged to the Vonnegut Company, the sales manager testified that some of the Tool Company's negotiations were carried on through the Vonnegut people and some directly with the Nordyke & Marmon Company," and that the "Vonnegut people were to receive only the 7½ per cent. commission on this contract." Naturally the Tool Company makes its deliveries according to "instructions from the Vonnegut Machinery Company."

[2] Italics ours.

The suggestion is made that the Tool Company does not always know what price the Vonnegut Company receives for the Tool Company's goods. But, considering the entire testimony, this can only mean that, if the Vonnegut Company receives a higher price than the Tool Company charges, the former violates its agreement with the latter. That the plaintiff has no authority to bind the Tool Company does not negative identity of interest in this litigation. However the relation between the plaintiff and the Tool Company may be labeled, when the entire record is taken into account, including not only the Tool Company's testimony taken as a whole, considered in connection with the sworn allegations of the bill, but the fact that no representative of plaintiff has testified regarding its relation with the Tool Company or on any other subject, we think there is disclosed an identity of interest between the two corporations in respect to the filling of the orders given by the Vonnegut Company to the Tool Company, and thus, in restraining the strike which prevented or obstructed manufacture, and that this identity of interest requires the aligning of the two corporations as plaintiffs for purposes of jurisdiction. Dawson v. Columbia Trust Co., 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713; Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74; Niles-Bement Co. v. Iron Moulders Union, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. ——; Davis v. Henry (C. C. A. 6) 266 Fed. 261.

We deem the principle of the two cases last cited in point.[3] In the Niles-Bement Case an anti-strike injunction was asked upon the ground that the petitioner had manufacturing contracts with the Tool Works, the performance of which was being delayed by the strike. It was held that there was such an identity of interest between plaintiff and the Tool Works as required their alignment as coplaintiffs. In Davis v. Henry a salesman for a manufacturing corporation, who received part payment in commissions, filed a bill to enjoin the striking employees of the corporation from interfering with other employees—the corporation's ability to fill the salesman's orders, and thus to earn his commission, being seriously threatened by the strike. It was held that the salesman had no such interest in restraining the strike as to permit the filing of the bill without making the employing corporation a party, which would result in destroying diversity of citizenship. It is true that the instant case differs from the Niles-Bement Case, in that there the defendant corporation was, through stock ownership and otherwise, subject to the control of the plaintiff, and that the latter asked no relief against the former, and that the case before us differs from Davis v. Henry in that there the manufacturing corporation had not been made a party at all, and the goods sold were not charged up to the salesman or he apparently made responsible therefor; but the differences are in degree only.

In both cases cited, as well as in the instant case, the plaintiff was attempting to restrain strike activities against the manufacturing plant because they interfered with plaintiff's rights, through his or its relations with the manufacturer to have the manufacturing carried on.

[3] The decisions of the Supreme Court in the Niles-Bement Case and of this court in Davis v. Henry were made since the instant case was decided below.

The controlling principle involved in each of the three cases is to our minds essentially the same, viz. that there was no collision of interest between the plaintiff and the manufacturer, but that such interests were identical. If there was no collision of interest, the fact that in the instant case the manufacturer was made a party, and that relief was in form asked against it, is not important.

There is here no contention that the Tool Company was not an indispensable party. Indeed, such contention would be unsustainable in view of the allegations both of the bill and cross-bill, that the purpose of the strike was to unionize the plant. Niles-Bement Co. Case, supra; Davis v. Henry, supra. The Tool Company had a direct and predominant interest in putting an end to the strike and in protecting itself against the alleged attempt to unionize its plant. The plaintiff had an interest in the operation of the plant to the extent that the orders in which it was interested be filled, but its interest went no farther. Plaintiff had thus no special or peculiar interest in ending the strike. If it was injured thereby, so was the Tool Company, and in the same way (although in other ways as well), viz. its inability to fill its contracts, resulting in the loss of profits. The two corporations were "privileged to assert their respective interests upon the same grounds." The case is to our minds clearly distinguishable from cases like C. & O. Agency v. Carroll ([C. C.] 119 Fed. 942; Id., 124 Fed. 305, 61 C. C. A. 49), and the other cases discussed in Davis v. Henry, supra, at pages 263 and 264.[4]

We find nothing in the record to indicate collision of interest between the two corporations. The fact that the bill formally asked relief against the Tool Company is not enough to show such collision. The allegation of the Tool Company's default [5] appears strained and artificial, especially in view of the record in the Overland Case, introduced in evidence by the Tool Company, which showed on its face the conclusion of the trial court that the public authorities could not (or would not) give effective protection to the Overland. Indeed, the Tool Company's answer alleges that it had done everything it could to overcome the interference caused by the strike, and has appealed to the public authorities of Toledo without avail, and that the latter have not only

[4] The Toledo Company asserts in its answer that it had for many years made a practice of inserting in all of its letters a statement that all orders, contracts and agreements are subject to delays arising from strikes, fires, accidents, or causes beyond its control; that its practice in that regard was known to the plaintiff and that such stipulation was understood and agreed to be a part of the contracts and orders, whereby delays in the performance thereof not within the Tool Company's reasonable control were excusable. The record contains no assertion that plaintiff was not entitled to the same immunity as between it and those to whom the machinery was to be shipped.

[5] The only general allegation which may plausibly be thought to indicate collision is that of repeated demands by plaintiff on the Tool Company to carry out its contracts and the latter's refusal to do so. The Tool Company's only specifically asserted default is a neglect, refusal and failure to demand of the authorities of the city of Toledo, or of the county or state, suitable and proper protection to enable it to conduct its business and fulfill its contract obligations without interference by defendants other than the Tool Company or those in sympathy with them.

done nothing to protect the Tool Company and its employees and its rights, but, on the contrary, have assisted the defendants in the performance of alleged unlawful acts and practices.[6] However, it would seem enough to say that there was no evidence whatever of any failure on the Tool Company's part to try to get protection. The allegations in the bill of plaintiff's inability to procure the machinery in question elsewhere than from the Tool Company do not affect the question of alignment of parties plaintiff.

[2] In our opinion the District Court did not obtain jurisdiction of the case as one involving interstate commerce. The only allegations in the bill pertinent to that question are that the greater part of the Tool Company's business is the sale and delivery of articles manufactured by it to points outside the state of Ohio, requiring the Tool Company to transport such articles and deal therein in interstate commerce; that the practices of the labor and union defendants complained of have restrained and do restrain interstate commerce and trade unlawfully, in that such acts interfere with, hinder, and obstruct the performance of the contract between plaintiff and the Tool Company and the delivery in interstate commerce of the machines, etc., purchased by the former from the latter; that certain of the defendants have unlawfully interfered with persons en route from points outside the state of Ohio to the Tool Company's plant. (We find no testimony supporting this latter statement.)

But all these statements combined fall short of alleging interference with interstate commerce under either the Sherman or Clayton Acts. Neither of these statutes furnishes a remedy against acts merely because they incidentally and indirectly affect interstate commerce; they apply only to acts which directly and immediately relate thereto. Manufacturing is not commerce. None of the cases cited support the theory that a manufacturer may invoke the jurisdiction of the federal court merely because a strike interferes with the manufacture of his products which are sold generally in interstate commerce. Loewe v.

[6] Presumably the Tool Company's attitude in that regard was not unknown to plaintiff, especially as its relations with the Tool Company were intimate enough to enable it to attach to its amended bill 26 affidavits taken, as testified to by the Tool Company's secretary, "under the instruction of some officer of that company [the Tool Company] and a notary and employee of the company." The secretary says that "one of the attorneys of the company, who represented it at that time, prepared the affidavits" and "took charge of them after they were taken." Neither the attorney in question, nor the notary was produced as a witness. The attorney referred to did not appear as such in the instant case, so far as appears. Under these circumstances, the fact that the Tool Company's secretary (who gave the affidavits to the attorney a few days after they were taken) did not personally know how plaintiff got them and gave no instructions "as to what was to be done with them, nor did he [the attorney] say why he wanted them," and that the secretary did not know at the time that the Vonnegut Company was "proposing to bring an action against us as defendants and those other defendants," and says the affidavits "were taken because we had expected at some time or other something would be brought up whereby we would need something of that kind and so I instructed that they would be taken," does not tend to negative the apparently artificial character of the charge of wrongful refusal on the part of the Tool Company to ask for protection against the strike.

Lawler, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, involved a boycott of a manufacturer's goods on his refusal to unionize his shops, and to prevent the sale of such goods in states other than his own. Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, also involved a boycott of a manufacturer's goods which was designed to interfere with their sale in other states. Eastern Lumber Assn. v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, involved a combination between retail associations throughout the country to prevent wholesale dealers from selling directly to consumers, and thus directly involving interstate commerce.

[3, 4] Private parties cannot maintain a suit for injunction under section 4 of the Sherman Anti-Trust Act (Comp. St. § 8823). Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256. But section 16 of the Clayton Act (Act Oct. 15, 1914, c. 323; C. S. § 8835*o*) supplements the Sherman Act by giving a private party a right to maintain suit for injunction. Duplex Co. v. Deering, 254 U. S. 443, 465, 41 Sup. Ct. 172, 65 L. Ed. ——. It does not, in our opinion, do away with the requirement that the acts complained of must be immediately directed against interstate commerce. There is nothing in the Duplex Case to the contrary. That case involved a country-wide secondary boycott of goods manufactured in Michigan and shipped therefrom to New York. The acts complained of had nothing to do with the conduct and management of the factory in Michigan, but related to interference with the hauling, handling, installation, and repair of plaintiff's goods elsewhere, thereby discouraging their movement in interstate commerce.

[5] The record before us is barren of evidence that the object of the strike was to interfere with interstate commerce. So far as appears, either directly or inferentially, the strikers' only object was to obstruct the operation of the Tool Company's plant. The fact that shipment was interfered with, only because goods were not manufactured, merely incidentally and indirectly affected interstate commerce. Our conclusion is that the District Court failed to acquire jurisdiction either by reason of adverse citizenship or because interstate commerce was involved, and that the order for injunction was thus a nullity. The bill and cross-bill should have been dismissed, without waiting for final hearing. Harriman v. No. Securities Co., 197 U. S. 244, 287, 25 Sup. Ct. 493, 49 L. Ed. 739; Lyons v. Empire Fuel Co. (C. C. A. 6) 262 Fed. 465, 472. Such action is now especially appropriate in view of the contention that the meritorious questions have become moot.

This case differs radically from the Overland Case, in that here the bill and cross-bill were not taken as confessed, but testimony was heard, the lack of jurisdiction in a federal court appeared on the face of the bill, and the allegations of the cross-bill would not support original jurisdiction in that court. The conclusion of lack of jurisdiction makes it unnecessary to consider the merits of the case.

The order complained of is reversed, and the record remanded to the District Court, with directions to dismiss the bill of complaint and cross-bill.

DIERKES v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)
No. 3362.

1. **Indictment and information ⟸60—Indictment charging clearly every element of offense generally sufficient.**
In general, an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

2. **Indictment and information ⟸110(3)—Sufficient to describe offense in words of statute.**
Generally, in an indictment for a statutory offense, the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.

3. **War ⟸4—Indictment for seditious utterance sufficient.**
In an indictment under Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for using disloyal, scurrilous, and abusive language about the military forces of the United States, and language intended to bring the military and naval forces into contempt, scorn, contumely, and disrepute, it is not necessary to set forth the circumstances and setting in which the words were uttered.

4. **Constitutional law ⟸90—Disloyal utterances during war not within protection of Constitution.**
Language charged to have been used by defendant in referring to the President and the army when the United States was at war, in violation of Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), *held* not within the protection of Const. U. S. Amend. 1.

5. **War ⟸4—Indictment under Espionage Act need not allege criminal intent.**
An indictment for violation of Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for uttering disloyal, scurrilous, and abusive language about the military forces when the United States was at war, need not charge a specific criminal intent not made by the statute an element of the offense.

6. **War ⟸4—Indictment under Espionage Act sufficient.**
In an indictment under Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for using scurrilous and abusive language about the army when the United States was at war, it is not necessary to name the person or persons to whom the words were spoken; but under the settled practice such information can be obtained by defendant, if desired, by demanding a bill of particulars.

7. **Criminal law ⟸371(1)—War ⟸4—Evidence of prior statements admissible in prosecution under Espionage Act.**
In a prosecution under Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), for uttering disloyal, scurrilous, and abusive language about the army when the United States was at war, evidence of previous statements made by defendant, either before or after the amendment of the statute, showing that he was disloyal to this country and favored Germany in the war, *held* admissible as showing his mental attitude and the intention with which the words charged were used.

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

8. **Criminal law ⊂=1172(3)—Mistake as to evidence in instructions held not reversible error.**
That the court in its instructions assumed that there was evidence that defendant made a certain statement charged in the indictment, whereas the testimony of the witness who testified to such statement had been stricken out, *held* not ground for reversal, where defendant virtually admitted the statement when on the stand, and where the court's attention was not called, by exception or otherwise, to the mistake, which was shared by defendant's counsel, at whose request an instruction dealing with the statement was given.

9. **Criminal law ⊂=698(2)—Failure of court to prevent cross-examination of defendant, not objected to, not error.**
That the court did not intervene on its own motion to prevent the asking of questions on cross-examination of defendant, which were answered without objection from defendant or his counsel, *held* not error.

10. **War ⊂=4—Conviction for violation of Espionage Act sustained by evidence.**
The indictment and evidence *held* to warrant the conviction of defendant for using disloyal, scurrilous, and abusive language about the army when the United States was at war, in violation of Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister and Andrew M. J. Cochran, Judges.

Criminal prosecution by the United States against J. Herman Dierkes. Judgment of conviction, and defendant brings error. Affirmed.

Froome Morris, of Cincinnati, Ohio, and Fred W. Schmitz, of Covington, Ky. (Sherman T. McPherson and Edward H. Brink, both of Cincinnati, Ohio, on the brief), for plaintiff in error.

James R. Clark, U. S. Atty., and Thomas H. Morrow, Asst. U. S. Atty., both of Cincinnati, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error was convicted upon the second and third counts of an indictment under section 3 of the Espionage Act of June 15, 1917 (40 Stat. c. 30, p. 217), as amended by the Act of May 16, 1918 (40 Stat. c. 75, p. 553 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c]). Each of these counts charged defendant with uttering, while the United States was at war with Germany and Austria, certain language, which in the second count is characterized as "disloyal * * * scurrilous, and abusive," and "about the military forces of the United States," and in the third count as "intended to bring the military and naval forces of the United States into contempt, scorn, contumely, and disrepute." The alleged errors presented relate to the sufficiency of the indictment, the sufficiency of the proof, the admission of testimony, and the charge of the court.

1. The alleged insufficiency of the indictment was presented by demurrer, which was overruled, and, after verdict, by motions for new

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

trial and in arrest of judgment both of which were denied. The language, which is the subject of the indictment, was alleged therein to have been spoken "in the hearing and presence of divers persons," and was this:

"The poor slob—I feel sorry for him. I would rather serve a term in the penitentiary than wear a uniform in Wilson's Wall Street war. Mohr would look like hell toting a gun in Wilson's Wall Street war."

The sufficiency of the indictment is challenged (a) as failing to state the person or persons to whom the words set out in the indictment were spoken; (b) in that the words so set out are not violative of the statute, because incapable of being construed as either disloyal or profane, scurrilous, or abusive, when spoken about the military forces of the United States, or so construable as to bring the military and naval forces of the United States into contempt, scorn, contumely, and disrepute; (c) that the words in question are protected by the First Amendment to the Constitution of the United States; and (d) that each count fails to charge a criminal intent.

[1, 2] The general rules as to the sufficiency of indictments are that the charge must be definite enough to enable the accused to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions, and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had. The elements of the offense must be set forth with reasonable particularity of time, place, and circumstances. And while it is not always enough to charge a statutory offense in the language of the statute, yet, in general:

"An indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial is sufficient." Armour v. United States, 209 U. S. 56, 83, 84, 28 Sup. Ct. 428, 52 L. Ed. 681.

And generally:

"Upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense." Ledbetter v. United States, 170 U. S. 606, 612, 18 Sup. Ct. 774, 42 L. Ed. 1162; Armour v. United States, supra, 209 U. S. at page 84, 28 Sup. Ct. 428, 52 L. Ed. 681.

[3] The statute here in question completely defines the offense, and the indictment before us follows the language of the statute, and omits no element of the offense there defined and denounced. It was not necessary that the indictment set forth the circumstances and setting within which the words were uttered. Whether the language charged to have been used by defendant had a natural tendency to show the commission of the unlawful act charged was ultimately a question for the jury. Pierce v. United States, 252 U. S. 239, 244, 249, 250, 40 Sup. Ct. 205, 64 L. Ed. 542. At the very least, it cannot be said, as matter of law, that the language set out is, in appropriate environment, incapable of being reasonably construed as disloyal as to the military forces of the United States, and such as to bring those forces into contumely and disrepute, having in mind that the United States was

then at war, and that President Wilson was, by virtue of such office, commander-in-chief of the army and navy of the United States.

[4] The proposition that the language used is protected by the First Amendment to the Constitution is, in our opinion, answered by what is said in Schenck v. United States, 249 U. S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470; Frohwerk v. United States, 249 U. S. 204, 206, 39 Sup. Ct. 249, 63 L. Ed. 561; Abrams v. United States, 250 U. S. at pages 618, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173; Wimmer v. United States, (C. C. A. 6) 264 Fed. 11, 12, 14.

[5] Of the objection that neither count charges a criminal intent it would seem enough to say that the clauses of the statute charged to have been violated (which were added by the amendment of 1918, for the purpose of broadening the scope of the statute) do not in express terms require a criminal intent, except as the word "intended" is used in the clause involved in the third count, and which is so charged therein. It is sufficient that the language be disloyal, profane, scurrilous, or abusive, that it be willfully used, and that it relate to the form of government, the Constitution, the military or naval forces, the flag or the uniform of the army and navy of the United States, or that the language is intended to bring any one of them into contumely or disrepute.[1] The words "willfully and feloniously" prima facie import an unlawful intent. Pierce v. United States, supra, 252 U. S. at page 244, 40 Sup. Ct. 205, 64 L. Ed. 542. Comparatively little help is to be had from decisions under section 3 of the act as originally passed, which was limited to specific intent to interfere with military operations, or actual attempt to cause mutiny, or actual obstruction of recruiting or enlistment.

[6] The indictment was therefore not subject to demurrer, unless for failure to state the name of the person or persons to whom the language set out in the indictment was addressed. In our opinion this omission was not fatal. While it is the general rule that the name of one injured either in his person or property by the act of the accused, or one whose identity is essential for the proper description of the offense should be stated in the indictment if known, or if not known, the failure to state it should be excused by the averment that it is not known; yet it is not usually necessary to state the names of persons only indirectly connected with the offense. Clark's Criminal Procedure, § 9. But whatever may be the decisions elsewhere, under the rule prevailing in the federal courts (where the practice of requiring bills of particulars is so thoroughly settled), we think the omission of the name of the person in whose presence the language in question was uttered does not vitiate the indictment. Kirby v. United States, 174 U. S. 47, 63, 19 Sup. Ct. 574, 580, 43 L. Ed. 890.[2]

[1] On the trial the jury was instructed that the language in question was not profane.

[2] In a common-law declaration for slander, it was neither necessary nor customary to set out the name of the person or persons to whom or in whose presence the alleged slanderous words were spoken. 17 R. C. L. title "Libel and Slander," § 141. The stock formula was "in the presence and hearing of divers persons." Puterbaugh's Pleading and Practice (3d Ed.) p. 478.

In the Kirby Case, which was a prosecution for feloniously receiving and possessing stolen postage stamps, with intent to convert them to the use of the accused, the objection that the indictment did not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, was held not well taken. After citing authorities to the proposition that the offense is not the receiving of stolen goods from any particular person, but receiving them knowing them to have been stolen, Mr. Justice Harlan said:

"We therefore think that the objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken. If the stamps were in fact stolen from the United States, and if they were received by the accused, no matter from whom, with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged, even if it were not shown by the evidence from whom he received the stamps."

As applied to the instant case, it is not, as matter of law, material in whose presence the alleged offending words were spoken. It is only necessary that they be spoken in the presence and hearing of some person or persons. As said by Mr. Justice Harlan, following what has just been quoted:

"This rule cannot work injustice nor deprive the accused of any substantial right. If it appears at the trial to be essential in the preparation of his defense that he should know the name of the person from whom the government expected to prove that he received the stolen property, it would be in the power of the court to require the prosecution to give a bill of particulars."

That there is in the courts of the United States a well-settled practice of requiring and giving bills of particulars in criminal cases, for the purpose of informing a defendant with respect to time, place, and other details, and thus to enable him to meet the charge, appears by these further citations: Rosen v. United States, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Durland v. United States, 161 U. S. 306, 314, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799; Bartell v. United States, 227 U. S. 427, 432, 33 Sup. Ct. 383, 57 L. Ed. 583; Elgin, etc., Co. v. United States (C. C. A. 7) 253 Fed. at page 910, 166 C. C. A. 7; May v. United States (C. C. A. 8) 199 Fed. 53, 61, 117 C. C. A. 431. And a bill of particulars, once made and served, "concludes the rights of all parties who are to be affected by it; and he, who has furnished a bill of particulars under it, must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration." Commonwealth v. Giles, 1 Gray (Mass.) 466, cited in Dunlop v. United States, supra, 165 U. S. at page 491, 17 Sup. Ct. 375, 41 L. Ed. 799. Of course, a bill of particulars will not cure a fatal defect in an indictment.

In the instant case, the district judge, in his opinion overruling the demurrer, said:

"No doubt defendant is entitled to a bill of particulars setting forth the names of the persons to whom the language was addressed, if he wishes such information. The assistant district attorney, in open court, offers such information."

In the brief for the government it is stated (and without denial or criticism on defendant's part) that in open court, at the time of argument on the demurrer:

"The government, without motion being made by counsel, voluntarily offered to present to defendant forthwith a bill of particulars or specifications, setting forth in detail the exact street or building in Cincinnati where the statements were made, the exact time of the day they were uttered, together with the name or names of the persons to whom they were addressed, and any other information that defendant desired or felt himself entitled to, in order that he might better make his defense to the charges contained in the indictment. Counsel for Dierkes failed to avail themselves of this offer, and as a matter of fact stated that they did not care to accept it."

Under such circumstances, the lack of advice to defendant of the name of the person or persons to whom or in whose presence the offending words were spoken is not the fault of the law, or of the court below, or of the government. Defendant was therefore plainly not prejudiced by the lack of disclosure in question, and the practice prevailing in the courts of the United States forbids the reversal of a judgment for error which does not prejudice. Armour v. United States, supra, 209 U. S. at page 84, 28 Sup. Ct. 428, 52 L. Ed. 681; N. Y. C. R. R. Co. v United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613; Elgin, etc., Ry. Co. v. United States (C. C. A. 7) 253 Fed. at page 910, 166 C. C. A. 7; U. S. Comp. Stat. § 1691; section 269 of the Judicial Code, Act March 3, 1911, c. 231 (36 Stat. 1163), as amended February 26, 1919 (40 Stat. 1181, c. 48 [Comp. St. Ann. Supp. 1919, § 1246]); West v. United States (C. C. A. 6) 258 Fed. 413, 415, 169 C. C. A. 429; Bain v. United States (C. C. A. 6) 262 Fed. 664, 669.

We see no merit in defendant's contention that the record is not such as to protect him against further prosecution for the same offense, for if in another prosecution the court should hold (contrary to what we understand to be the law) that the charge as contained in the indictment before us is too indefinite to permit the pleading of the conviction thereunder in bar of such further prosecution, defendant could readily protect himself by parol proof of the actual identity of the charge. Dunbar v. United States, 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. Ed. 390, where in a prosecution for smuggling opium it was said that—

"Some parol testimony might be required to show the absolute identity of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy. It is no valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one specific article."

The same proposition is declared in Durland v. United States, supra, at pages 314, 315, against an objection that full information was not given of the contents or import of certain letters asserted to have been mailed in pursuance of a scheme to defraud; the court there saying:

"If defendant had desired further specification and declaration, he could have secured it by demanding a bill of particulars."

In Bartell v. United States, supra, 227 U. S. at page 433, 33 Sup. Ct. at page 384, 57 L. Ed. 583, the court said:

"In Durland v. United States, 161 U. S. 306, 315, it was held that a general description of a letter identified by the time and place of mailing, when it was mailed in pursuance of a scheme to defraud, was sufficient, in the absence of a demand for a bill of particulars. As to the objection that the charge was so indefinite that the accused could not plead the record and conviction in bar of another prosecution, it is sufficient to say that in such cases it is the right of the accused to resort to parol testimony to show the subject-matter of the former conviction, and such practice is not infrequently necessary"—citing authorities.

And these considerations effectually repel any danger of prejudice from the fact that defendant was shown (by testimony later stricken out) to have made to another person the same statements, and at about the same time, as those alleged to have been made to the witness Mohr, and which are made the basis of the charge here. It should go without saying that a bill of particulars, while not a part of the record (Dunlop v. United States, supra, at page 491, 17 Sup. Ct. 375, 41 L. Ed. 799), would itself furnish clear and indisputable evidence of the identity of the charge on which the conviction was had. In our opinion there is no escape from the conclusion that the judgment of conviction is not subject to reversal for insufficiency of the indictment.

[7] 2. The government was allowed to introduce considerable evidence of statements by defendant tending to show sympathy with the cause of Germany and hostility against participation by the United States in the war. These statements include the following:

"It is a great mistake to carry on this war; those s. o. b.'s at Washington will be sorry they have got into this war;" that the war was a "moneyed war." The statement, "I voted the Socialist ticket because I wanted Germany to win the war." Again, "Well, don't buy any Liberty bonds; what do you want them for; you might as well throw that money away; buy anything else," coupled with the statement that it was a Wilson war. Another statement, made by way of question to a young man about to enter the army, "What did Germany do to you, that you have got to wear Uncle Sam's uniform?" In another case, "The Allies had no chance whatever to win the war against Germany," and a statement that the President was allied with and favored the English. At another time, "This is a hell of a government, or we would not be drafting men into the army; we are no longer a free country; we are vassals of the British." In another case, that "President Wilson had been brought into the war through British influence," and that "we had no more right to declare war against Germany than we had against England." In another case, the statement that it was a big financial war profit for Wilson and a bunch of Eastern grafters, and that he had paid two young men's way to Honduras to escape the draft. In another case, saying to a young man wearing the uniform of a national rifle association, and who as he said was "trying to serve my country, trying to help the boys to learn to shoot, training them for future service": "Well, you will regret this some day anyway, when you see Wilson and that crowd at Washington with their heads lopped off at Jackson Park." In another instance, when asked whether he had bought any Liberty bonds, replying, "Liberty bonds—hell, to fight my own people with?"

A majority of these statements were alleged to have been made before the passage of the 1918 amendment to the Espionage Act, and all, with one exception, after the original passage of the act; but even this exceptional case is said to have occurred after the United States had entered the war. This testimony was all taken against defendant's objection, on the grounds, so far as seem important, that the

testimony was incompetent to prove intent, that it added nothing to the intent normally attending the words used in the indictment, that it raised new issues not presented by the indictment, and, further, as to the statements alleged to have been made previous to the amendment of 1918, that declarations lawful when made were used to show criminal intent under a later statute.

In our opinion the evidence was properly admitted. It tended to show an attitude of hostility toward the war and the participation of the United States therein, and a spirit of disloyalty toward the United States and a desire to bring its armies into disrepute. It thus bore directly upon the likelihood of defendant's using the language which forms the subject-matter of the two counts of the indictment with which we are concerned. That the court admitted the testimony for the purpose of showing intent, so far as that may be thought distinguishable from attitude of mind, could not work legal prejudice.[3] It was, in our opinion, clearly admissible as showing mental attitude, even if, as defendant insists, intent (strictly speaking) was not involved. So far as intent was involved, it was competently addressed to the subject. Schoborg v. United States (C. C. A. 6) 264 Fed. 1, 7–8, and cases there cited; Kirchner v. United States (C. C. A. 4) 255 Fed. 301, 304, 305, 166 C. C. A. 471; Wimmer v. United States, supra (C. C. A. 6) 264 Fed. at page 13. We see no support in principle for the contention that statements made previous to the passage of the amendment are for that reason inadmissible. Such a proposition was rejected by this court in Schoborg v. United States, supra (C. C. A.) 264 Fed. at page 9. Similar holdings have been made by others of the Circuit Courts of Appeals: Kirchner v. United States (4th Circuit) 255 Fed. 301, 304, 305, 166 C. C. A. 471; Deason v. United States (5th Circuit) 254 Fed. 259, 260, 165 C. C. A. 547; Bold v. United States (9th Circuit) 265 Fed. 581, 584.

[8] 3. It was the government's claim that Mohr was the person in whose presence and hearing the language charged in the indictment was uttered. In fact, Mohr did not testify that defendant used the last sentence of the language alleged in the indictment, viz.: "Mohr would look like hell toting a gun in Wilson's Wall Street war." Defendant's language, as given by the witness Keefe, however, included that statement. Keefe's testimony was, on defendant's motion, subsequently stricken out in the jury's presence. In the charge the court mistakenly treated the sentence in question as included in Mohr's testimony, saying: "Mohr testified that the defendant used these words to him. The defendant denies it." Defendant now contends that the judgment should be reversed for this mistake.

There are several reasons which lead us to conclude that the judgment should not be reversed on this account. Admittedly the court was

[3] The actual instruction was this: "Such other statements are not evidence of the fact that he made the statements charged. They are permitted, if you find they were made, to go to you as tending to reflect upon his state of mind when he used the words he is charged with having used; that is to say, as reflecting upon his intention when he used them, if he used them, and they are only to be considered by you in that connection, as reflecting upon his intention, purpose, and state of mind."

not alone in his misapprehension in the respect stated. Defendant's counsel, upon his direct examination of defendant as a witness in his own behalf, called his attention to the statement in question, apparently on the theory that it had been testified to by Mohr, and defendant replied, "Probably I used something like that," saying in explanation that Mohr was "a puny, delicate kid, and the idea of his packing a gun, and with a great big bundle on his back, a soldier's kit—why, I didn't think of that—I couldn't think that possible." Accordingly the attention of the court was never called, during the trial or charge, or after the charge was concluded, to the fact that Mohr's testimony did not relate to the sentence now in question, although the matter was later made the subject of motion in arrest of judgment, which, however, lies only for material error on the face of the record, and does not include the testimony and the charge, and so could not avail defendant. Clark's Criminal Procedure, § 186; Towe v. United States (C. C. A. 4) 238 Fed. 557, 558, 151 C. C. A. 493; United States v. Erie R. R. Co. (Judge Haight; D. C.) 222 Fed. 444, 447–8. Indeed, defendant had the benefit of instruction to the jury, apparently based upon his own testimony, to the effect that if the expression "poor slob" referred to Mohr, if it was a mere jocular expression, applicable to his person and peculiarities, and if the statement that Mohr would look like hell toting a gun in Wilson's Wall Street war "was applicable to the figure Mohr would cut as a soldier, you would not be justified in finding these words disloyal, scurrilous, and abusive, and your verdict would be not guilty under the second count." This instruction (omitting the last clause) was expressly asked by defendant.

Moreover, even should the sentence we are considering be entirely eliminated, there still remained the statement, "I would rather serve a term in the penitentiary than wear a uniform in Wilson's Wall Street war," which is slightly, if at all, less significant than the later statement about Mohr's appearance in toting a gun. Under these circumstances we would not be justified in exercising the extraordinary authority to reverse the judgment, in the absence of exception directing the attention of the court to the misapprehension shared by both court and counsel, even if reversal would be called for had such exception been made. The force of defendant's practical admission that he made to Mohr the statement in question is not necessarily overcome either by the fact that he did not positively admit the language used (for it was open to the jury to conclude from his examination that he did make that statement in substance, especially as it was made when testifying as a witness in his own behalf and under examination by his own counsel), or by the fact that defendant insisted that his conversation with Mohr was in December, 1917, and not in June, 1918, and thus previous to the adoption of the amendment to the Espionage Act. Nor did the failure of the court to expressly instruct the jury not to consider Keefe's testimony (which had been stricken out as stated above) constitute reversible error, in the absence of request for such instruction.

[9] 4. Several of the witnesses whose testimony is referred to in the second pargaraph of this opinion (including Rogers and Hellwig) testi-

fied that defendant had referred to the war as "Wilson's Wall Street war." On defendant's motion the trial court struck out the evidence of those witnesses as to that point, suggesting the possibility that the ruling might later be changed. Defendant complains that the government's counsel cross-examined him with reference to the testimony of Rogers and Hellwig upon that point. The record shows that defendant, on his direct examination, had already testified that in his conversation with Mohr, which was made the subject of the indictment, he may have used the expression "Wilson's Wall Street war," stating, however, that he did not recall saying to Mohr or anybody anything like the words, "I would rather serve a term in the penitentiary than carry a gun in Wilson's Wall Street war." In the course of his direct examination he referred at considerable length to the attitude of several prominent newspapers, which had frequently used the expression "Wilson's Wall Street war," apparently in justification of an incidental use of that term by him.

Moreover, on his further direct examination he expressly denied making to the Government's witness Elzemann the statement testified to by that witness that the war was "nothing but a Wall Street war," which testimony had likewise been stricken out by the court on defendant's motion. On cross-examination, after saying generally that he had not stated "that this was Wilson's war," he qualified it by saying that he "did not habitually make that statement; I am telling you that that was current; I think a man gets into the habit of saying things." On further cross-examination he was asked whether he wished his general statement on cross-examination, that he had never said to any one, in terms, in speaking of the war, that it was "Wilson's Wall Street war," to cover also his conversation with Rogers. After replying that he wished it clear that any reference thereto "was a current reference, in current form, which was used before we were in the war, before we went into the war, the beginning of the war," he was asked whether he had ever made the statement, "leaving out repetitions or repeated statements or reports, or anything," to which he replied, "I won't answer, except with the reservation that it was not made with any intention to injure the war or to hurt any one." He was later asked whether he wished his general denial that he ever made such a statement to any one (referring to the term "Wilson's Wall Street war") to cover also the conversation with Miss Hellwig, to which he replied in the affirmative.

All the cross-examination in question, including the reference to the testimony of the witnesses Rogers and Hellwig, was given without objection on the part of defendant or his counsel, and presumably because counsel thought either that the cross-examination was justified or that defendant was not injured thereby. Defendant was represented by intelligent and able counsel. Plainly the trial court committed no error in not intervening on its own motion to prevent a cross-examination to which defendant apparently did not object. It is equally clear that the trial court did not commit reversible error in not instructing the jury, in connection with striking out the testimony of the several witnesses referred to, that they should not consider it. As defendant's

counsel say: "It is undoubtedly true that if it had been called to his [the court's] attention he would so have instructed the jury."

[10] 5. With the exception about to be noted, we have now considered all the arguments presented on defendant's behalf, by brief and orally, and we have discussed them so far as they seem to call for discussion. The exception is this: It is urged that the language set forth in the indictment cannot be construed as abusive or disloyal as related to the military or naval forces of the United States, or as intended to bring those forces into contumely and disrepute, and that no crime is either charged or proven. We are unable to agree with this contention.

The occasion for speaking the language charged in the indictment, according to Mohr's testimony, was this: On his telling defendant, in the latter part of May or early art of June, 1918, that he (Mohr) was likely to be called into service soon because he was in the draft, defendant talked about "Wilson's Wall Street war, and about [how?] he would hate to be in it," and upon being told by Mohr that he did not "relish hearing any abuse of the President, because I had a brother that was a member of the 148th infantry, and I expected him to be sailing for France in a few days," defendant said:

"The poor slob [inferably meaning Mohr's brother]. I would rather serve a term in the penitentiary than wear a uniform in Wilson's Wall Street war."

There was substantial evidence (we have not attempted to set it all out, even in substance) tending to support a conclusion that at the time the words in question were spoken defendant, who was of German parentage, entertained strong pro-German sympathies, not merely as between Germany and Great Britain, but as between the United States and Germany; that he was hostile to the entry of the United States into the war, and that he still hoped and expected that Germany would win. The weight and sufficiency of this evidence (including the extent to which it might be thought to be explained or otherwise by defendant's testimony) is not within our province to consider. That subject was addressed to the jury alone. Matthews v. United States (C. C. A. 8) 192 Fed. 490, 113 C. C. A. 96; Kelly v. United States (C. C. A. 6) 258 Fed. 392, 406, 169 C. C. A. 408, and citations in note. If the jury believed that defendant entertained the sentiments which, as we have said, there was competent and substantial evidence tending to show, it was reasonably open to it to conclude that the language in question was uttered in a spirit of disloyalty as respects the fighting forces of the United States, and with the intent to bring those forces into disrepute.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

BILLINGSLEY v. UNITED STATES (two cases).

CLIFT v. SAME.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1921.)

Nos. 3518–3520.

1. **Criminal law ⊂=37—Instruction held correctly to state law as to entrapment by officers.**
In a prosecution for transporting whisky from one state into another contrary to the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c), an instruction that if the authorities have reasonable grounds to suspect defendants were causing whisky to be unlawfully transmitted, and one of them joined with defendants for the purpose of detecting their crime, the officer's acts would not prevent conviction, but that if defendants had no intention of committing a crime, and were induced to do so by the officer, they could not be convicted, correctly states the law in relation to entrapment.

2. **Criminal law ⊂=678(1)—Prosecution not required to elect between counts charging different offenses committed on same day.**
Where the indictment contained numerous counts charging similar offenses, the prosecution need not elect between two of those offenses alleged to have been committed on the same date, where the allegations and the evidence supporting them clearly showed that they referred to different transactions.

3. **Indictment and information ⊂=176—Prosecution not limited to date alleged in indictment.**
The date in an indictment does not necessarily limit the prosecution to proof of the commission of the offense on that particular date, provided the date proven is prior to the date of filing the indictment, and is in such reasonable proximity to the actual date that defendants could not have been misled or prejudiced thereby.

4. **Criminal law ⊂=1167(1)—Departure from alleged date held not to have prejudiced defendants.**
In a prosecution for unlawfully transporting whisky from one state into another, where defendants did not deny any of the acts charged against them in the indictment and testified to by the witnesses for the prosecution, but defended only on the ground that they were entrapped by officers into committing the offense, they were not prejudiced by a departure of the proof from the date of one of the transactions alleged in the indictment.

5. **Indictment and information ⊂=159(3)—Amendment of indictment unnecessary for proof that offense was committed on different date.**
It is not necessary to amend an indictment to render admissible testimony by a witness that the offense was committed on a different date than that alleged in the indictment.

6. **Criminal law ⊂=444—Account books held admissible, without testimony verifying each entry.**
Account books kept by the seller of the whisky unlawfully transported, which were identified by a witness as those kept in the regular course of business by a person employed for that purpose, are admissible against defendants, though the witness did not make all or any of the entries therein, and though he did not have any recollection with reference to the particular transactions.

7. **Intoxicating liquors ⊂=233(1)—Account in fictitious name held admissible against accused.**
In a prosecution for unlawfully transporting whisky from one state into another, an account kept by the seller of the whisky in a fictitious name is admissible against defendants, after evidence was introduced identifying

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

the defendants as those who purchased some of the goods under that account, since the jury could find therefrom, in the absence of evidence to the contrary, that the defendants had opened the account in that name, and continued to purchase the whisky shown thereon from the date of the first transaction.

8. **Criminal law ⇐365(2)—Evidence of purchase in another state admissible, as incident of unlawful transportation.**
In a prosecution for violation of the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c), evidence of the purchase by defendants of whisky in another state is competent, as showing an incident of its unlawful transportation into the state.

9. **Criminal law ⇐369(6)—Evidence as to prior transactions held admissible to rebut defense of entrapment.**
In a prosecution for unlawfully transporting intoxicating liquors into the state, where the defense was that accused was entrapped into the offense by officers, evidence tending to show similar transactions by defendants before the earliest date mentioned in the indictment is admissible to establish the good faith of the officers in co-operating with defendants in the unlawful transactions for the purpose of detecting the crime.

10. **Criminal law ⇐374—Facts relating to similar transactions creating suspicion only, admissible to rebut defense of entrapment.**
Where the defense of accused was that they were entrapped into the unlawful transportation of liquor by officers, evidence tending to show similar transactions by them before the officers began co-operating with them is admissible to show good faith of the officers, though it was insufficient to establish the guilt of defendants, and merely created suspicion against them.

11. **Criminal law ⇐369(6)—Declarations that defendants' grocery business was ostensible only held admissible although involving other transactions.**
In a prosecution for unlawfully transporting whisky into a state, where the accused claimed that they had been engaged in the grocery business, and were entrapped by the officers into committing the offenses charged, declarations by defendants that their grocery business was ostensible only, and that for years they had been engaged in unlawful transactions of the character charged, are admissible against them, though they related to other transactions than those charged in the indictment.

12. **Criminal law ⇐722(3), 1171(6)—Reference to accused as a gang held not reversible under evidence.**
Where there was evidence that defendants were organized for the particular unlawful purpose of transporting whisky into the state, a reference by the prosecuting attorney to defendants as a gang, while a harsh one, that should not be used, was not such as to make it prejudicial error for the court to refuse to caution the district attorney or to instruct the jury to disregard the remark.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Sherman Billingsley, Ora Billingsley, and Charles Clift were convicted of causing whisky to be transported from the state of Ohio into the state of Michigan, in violation of the Reed Amendment, and they separately bring error. Affirmed.

George Vandeveer and Wm. F. Connolly, both of Detroit, Mich. (Thomas F. Chawke and George F. Vandeveer, both of Detroit, Mich., on the briefs), for plaintiffs in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich. (Frank Murphy, Asst. U. S. Atty., of Detroit, Mich., on the briefs), for the United States.

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

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. These cases were heard and submitted together. The plaintiffs in error were jointly indicted for causing whisky to be transported from the state of Ohio into the state of Michigan, in violation of the Reed Amendment. The indictment contained 23 separate counts, each count charging a like offense upon different days. The jury found the defendants not guilty on the first 18 counts, and guilty on the nineteenth, twentieth, twenty-first, twenty-second and twenty-third counts. By the express terms of the statute of Michigan prohibiting the manufacture and sale of liquor as a beverage, that law took effect May 1, 1918. All these offenses are charged to have been committed after that date.

The undisputed evidence offered on the part of the United States clearly established that these plaintiffs in error transported intoxicating liquors on or about the dates named in these five counts of the indictment, from the state of Ohio into the state of Michigan as a joint enterprise, in violation of the provisions of section 5 of the act of Congress approved March 3, 1917, known as the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c). At the close of this evidence a motion was made on behalf of the defendants for a directed verdict, upon the theory that whatever the defendants had done in the way of actual transportation of this liquor was directly incited, procured, and brought about by the officers whose duty it was to prohibit such violation of the law. This motion was overruled by the court, and thereupon counsel for defendants made a statement to the jury on behalf of the defendants, a part of which is as follows:

"Supplementing what already appears on that subject, we shall show these defendants were engaged in running a grocery store—one of them with another of the defendants as a copartner; the other, in his own individual right, Sherman Billingsley; that they had nothing to do with the liquor business, and that Chase came to them and invited them to go into this enterprise and they were merely the agents, and the court will instruct you when the proper time comes that if he caused this to be done, they are not guilty, if it was he who framed this plan as a means of getting them to engage in this business for the purpose of entrapment, then they are not guilty. This is our defense."

Thereupon several witnesses were called and testified, on behalf of the defendants Sherman and Ora Billingsley, that Sherman Billingsley operated a grocery store on Brooklyn avenue in Detroit, and that Sherman and Ora Billingsley operated another grocery store on Porter street in that city; that they started in business about the 1st of July, and operated the same three or four months, and were frequently seen about these stores during July and August of that year.

Melvin Robinson, a witness introduced on behalf of the defendants, testified among other things that, during the time he was employed as a clerk in one of the stores operated by the Billingsleys, Sherman asked him to take a car to Toledo, and that he did drive a car to Toledo on Saturday night; that while he (Robinson) was in Toledo, Chase, who, while pretending to co-operate with the defendants was

in fact an inspector of the Michigan state food and drug department, asked him to drive a Paige car full of whisky from Toledo back to Detroit, but that Ora Billingsley would not let him do this. Thereupon the government called in rebuttal a number of witnesses, who testified as to statements made by these defendants in reference to their connection with the unlawful transportation of liquor prior to any of the dates named in either count of this indictment. At the close of all the evidence the motion for a directed verdict was renewed by the defendants and overruled by the court.

The court charged the jury very fully in reference to entrapment, and in a summary of the charge on this subject said:

"If the state authorities and Mr. Chase had reasonable grounds to suspect defendants of causing whisky to be transported into the state of Michigan, and their action and that of Mr. Chase was taken in an effort to detect crime, and not to induce its commission, then such action was lawful, and if the defendants caused the whisky in question to be transported into Michigan, as charged in the indictment, they are guilty. On the other hand, if you find that the action of the state authorities and Mr. Chase, or either of them, was taken in bad faith and for the purpose of inducing and enticing the defendants to commit the offense charged, and that they in fact induced the original intent on the part of the defendants to cause whisky to be transported into this state, then you will find the defendants not guilty."

"If, however, an intent and purpose to cause whisky to be transported into Michigan had been formed by the defendants before meeting and making arrangements with Mr. Chase, and defendants were already engaged in causing such transportation, then the action of Mr. Chase in apparently co-operating with them and aiding in such transportation, does not in any way relieve defendants of guilt, but such plan and work by Mr. Chase was proper and lawful as a means of obtaining evidence of the crime that was in fact being committed."

The court prior to this had charged that—

"Public policy forbids that officers sworn to enforce laws should seek to have them violated, and that those whose duty it is to detect criminals should create them. So that, when an officer induces a person, who has had no intention of committing a crime, to violate the law, courts will not lend their aid in punishing the person thus lured into crime."

[1] This charge clearly states the law in relation to entrapment. U. S. v. Wight (D. C.) 38 Fed. 109; Woo Wai v. U. S., 223 Fed. 412, 137 C. C. A. 604; Sam Yick et al. v. U. S., 240 Fed. 60, 153 C. C. A. 96; Grimm v. U. S., 156 U. S. 604–610, 15 Sup. Ct. 470, 39 L. Ed. 550; People v. Liphardt, 105 Mich. 84, 62 N. W. 1022; Goode v. U. S., 159 U. S. 663–669, 16 Sup. Ct. 136, 40 L. Ed. 297; Goldman v. U. S. (C. C. A. 6) 220 Fed. 57–62, 135 C. C. A. 625. The evidence offered on the part of the United States tends to prove that the public officials of Michigan were acting in good faith; that they did suspect, and had reasonable ground to suspect, that these defendants were engaged in the unlawful transportation of liquor into the state of Michigan; and that these officials made no mistake in arriving at that conclusion.

[2] The court did not err in refusing to compel the government to elect between the fifth and twenty-third counts of this indictment, because each of these counts charged an offense to have been committed on the same date. It is clear from the indictment itself that

these counts charge separate offenses. The fifth count charges the unlawful transportation of three automobile loads of whisky in bottles, aggregating approximately 750 quarts of whisky. The twenty-third count charges the unlawful transportation into Michigan of five automobile loads of whisky in bottles, aggregating 1,389 quarts of whisky. Both of these offenses might have been committed on the same date, so that these counts do not on their face, and clearly not upon the evidence, relate to the same transaction.

[3] Nor does the date in an indictment necessarily limit the prosecution to proof of the commission of the offense upon that identical date, provided the date proven is prior to the date of the filing of the indictment, and is in such reasonable proximity to the actual date named in the indictment that the defendants could not have been prejudiced or misled thereby. Section 1025, R. S. (Comp. St. § 1691); U. S. v. Molloy (C. C.) 31 Fed. 19; Dierkes v. U. S. (No. 3362, decided by this court June 7, 1921) 274 Fed. 75.

[4] In this particular case it is clear that this departure from the exact date in the indictment in no way affected the substantial rights of the defendants, or misled or prejudiced them in the preparation of their defense. Defendants offered no direct evidence tending to prove that the acts had not been committed by them as charged in the indictment. On the contrary, their sole defense was that whatever they did was directly incited and procured and caused to be accomplished by the officers whose duty it was to prevent such violation of the law. Upon that defense, upon clear, full, explicit, and correct instructions by the trial judge, the jury found against the defendants upon these five counts. Therefore, there being no conflict in the evidence as to the commission of the unlawful acts, there is no theory whatever upon which the defendants could possibly have been prejudiced by proving these acts to have been committed upon a different date than the one named in the indictment, where, as in this case, it clearly appears that notwithstanding the difference in the date proven from the date named in the indictment, the conviction is for the identical offense charged in the indictment.

[5] An amendment of this count of the indictment was not necessary. As the indictment read, the evidence of the witness Mehrtense that the offense charged in the twenty-third count of the indictment was in fact committed on the 28th of September was properly admitted.

[6] It is also insisted upon the part of the plaintiffs in error that the court erred in admitting in evidence the books of O'Neill, Weill & Co., wholesale liquor dealers in Toledo, in connection with the evidence of Julius Levy. Mr. Levy testified in part as follows:

"I am a salesman for O'Neill, Weill & Co., wholesale liquor dealers in Toledo. Last summer I also helped keep the books. I know Charley Clift, Sherman and Orrie Billingsley. I first met them about the latter part of last summer. I don't remember just when. They bought some goods from O'N. & W. last summer. I kept a record of that in my books. They bought under the name of John F. Smith. I identify Exhibit 15 as the sales book of the O'Neill-Weill Company. These pages are copies of the report furnished by the O'Neill & Weill Company to the internal revenue office."

Later he testifies that these books were kept in the regular course of the company's business, upon official forms furnished by the internal revenue collector's office, for the purpose of making report to that office of goods sold, but that they do not show payments; that payment was made at the time the goods were ordered; that Clift, Sherman Billingsley, and Ora Billingsley at different times ordered and paid for goods shown on this account in the name of John F. Smith. He also identifies Exhibit 16 "as one of our sale books known as 52–B"; that part of this account was in his own handwriting and part in the handwriting of another person formerly employed by O'Neill, Weill & Co. as bookkeeper.

[7, 8] These books were properly received in evidence. They were kept by O'Neill, Weill & Co. in the regular course of business by a person employed for that purpose. It was wholly unimportant whether the witness Levy made any or all the entries therein or not, and equally immaterial whether or not he had any recollection in reference to particular sales. The connection of plaintiffs in error with this account of John F. Smith is fully shown by the evidence of this witness. It is of no importance whether that connection is shown at the beginning of the account or in the later transaction. If they purchased whisky on this account on August 21st, and after that date, the jury had the right to find, in the absence of evidence to the contrary, that they had opened this account and continued to purchase whisky in this name from this wholesale house from the date of the first transaction. The evidence offered by the government was sufficient to require the defendants to explain their real connection with this account, if it was other and different than appears upon the face thereof and their proven connection therewith. This evidence was also competent to show the purchase of this whisky in Ohio as incident to its unlawful transportation.

[9] It is claimed upon the part of the plaintiff in error that the court erred in permitting the witness Chase to testify to certain acts previous to the 10th of August; that defendant's counsel asked that the acts in question should be brought home to some of the defendants, but that this was not done by the government's counsel, who was permitted to draw from the witness Chase the most vague and nebulous testimony as to what certain automobiles were doing. This evidence of Chase was entirely competent to establish the good faith of the government officials in arranging to secure evidence against these defendants, by pretending to join in their enterprise. Evidence had already been introduced tending to show that Chase had sought out Sherman Billingsley and had made certain propositions to him, by which Chase was to use his influence and make arrangements to bribe the state constabulary, so that the business might be conducted without interruption from these officers. It therefore became necessary as a part of the government's case to show the good faith of the state officials in entering into this arrangement, and that it was not a scheme to entrap or entice these defendants into the commission of a crime which they had no purpose or intention of committing prior thereto.

[10] To do this it became necessary to show that these officers sus-

pected, and had reasonable grounds to suspect, that the defendants were then engaged in this unlawful business. Necessarily the proofs upon which they reached this conclusion would be of vague and uncertain character. If they were in possession of proofs as definite and certain as counsel for plaintiffs in error now insist should have been offered, then there would have been no purpose in making these arrangements to secure further evidence. The testimony of Chase in reference to these automobiles and their movements, the shape and character of the packages that they were carrying, the places from which and to which they were traveling, were some of the facts upon which the state officials based their conclusion that these defendants were engaged in the unlawful transportation of whisky from Ohio into the state of Michigan, and it was the duty of the government to place these facts fairly before the jury, so that it might determine whether its officers were acting in good faith, for the purpose of detecting and punishing criminals, or in bad faith, for the purpose of inducing others to commit a crime that prior thereto they had no intention or purpose to commit, in order that they might be arrested and punished therefor.

In view of the sole defense made in this case, this evidence became of vital importance, and, no matter how vague or indefinite it may have been, nevertheless it was the evidence upon which the government asked the jury to find that this arrangement was made for the purpose of punishing criminals, and not for the purpose of creating them.

[11] The evidence of Porter, Cook, Olsen, Williams, and Chase, called by the government in rebuttal, was properly admitted. The defendants had introduced evidence tending to show that the defendants Sherman and Ora Billingsley were conducting two grocery stores in Detroit for a short time prior to and after August 10th, when they were first approached by Chase in reference to these transactions. The legitimate business may have been merely for the purpose of misleading the officers charged with the enforcement of this law, or it may have been conducted in good faith for legitimate profits. Therefore it was entirely proper for these witnesses to testify as to statements made to them by these various defendants tending to show that the retail grocery business was ostensible only, and that for years they had been engaged in this character of unlawful transactions. The fact that these admissions and statements related to other offenses than those for which the defendants were then upon trial is wholly unimportant. The government was not seeking to introduce a collateral issue as to the guilt or innocence of these defendants of other offenses. It sought simply to introduce their own statements made to these witnesses as to their connection with other offenses of a similar character. It also further appears that these statements of defendants to these witnesses tend to disprove the only defense offered upon the trial of this case.

[12] Exceptions were also taken to the argument of counsel for the government in that he referred to these defendants as "the Billingsley gang." While the term is rather a harsh one, and ought not to be used by counsel for the government, yet in this particular case it appears from the evidence, and especially from the statements made

by these defendants to various witnesses in the case, that they were organized for this particular unlawful purpose, and in view of this evidence it was not prejudicial error for the court to refuse to instruct the jury to disregard such remarks and caution the district attorney against making them. Objections are also urged to other parts of the argument, but it does not appear that the court was asked to rule thereon, or that any exceptions were taken thereto.

A great many other errors are urged upon the attention of this court, but they are merely technical in their nature, and in no way affect the disposition of the real issue in this case. It is sufficient to say that the court did not err either in the admission or rejection of evidence, or in its charge to the jury, and that the verdict of the jury is sustained by substantial evidence.

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

JEWELERS' SAFETY FUND SOC. v. LOWE, Collector of Internal Revenue.

SAME v. ANDERSON, Collector of Internal Revenue.

(Circuit Court of Appeals, Second Circuit. May 18, 1921.)

Nos. 197, 198.

Internal revenue ⟸7, 9—Computation of "net income" of mutual insurance society; "insurance company."

Jewelers' Safety Fund Society, incorporated by special act, without capital stock, for mutual protection of its members against loss from fire, burglary, etc., with power only to levy assessments after a loss occurs, but whose members for convenience deposit with the society a sum estimated as sufficient to cover expenses and losses during the year, which deposits, however, belong to the depositors until used to pay losses, *held* an "insurance company," subject to tax under Excise Tax Act Aug. 5, 1909, § 38, and Income Tax Act Oct. 3, 1913, § 2G (a), (b), on its "net income," which is the excess, if any, of the sum drawn by it from the deposit fund over losses and expenses of operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Net Income; Insurance Company.]

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

Actions by the Jewelers' Safety Fund Society against John Z. Lowe, Jr., Collector of Internal Revenue, and against Charles W. Anderson, Collector, etc. Judgments for defendants, and plaintiff brings error. Reversed.

Putney, Twombly & Putney, of New York City (Lemuel Skidmore, Jr., of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Richard S. Holmes, Sp. Asst. U. S. Atty., of New York City, and Newton K. Fox, Sp. Atty. Bureau of Internal Revenue, of Washington, D. C., of counsel), for defendants in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

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

WARD, Circuit Judge. These are actions by the Jewelers' Society to recover taxes upon income for the years 1912, 1913, 1914, and 1915, paid to the Collector of Internal Revenue under protest, under section 38 of the Act of August 5, 1909, 36 Stat. 11, imposing an excise tax on the privilege of doing business, and under section 2G (b) of the Act of October 3, 1913, 38 Stat. 114, enacted in pursuance of the Sixteenth Amendment of the Constitution adopted in that year.

The defendant demurred in each case on the ground that the complaint did not state facts sufficient to constitute a cause of action. The District Judge treated the cases as if they both arose under the act of 1913, and dismissed the complaints on the merits, with costs to the defendant, from which judgments the plaintiff appeals.

The court rightly held that the plaintiff is an insurance company not falling within the classes exempted in each act, and therefore subject to taxation on its net income under both acts; but he further held the plaintiff to be a fire insurance company, and therefore taxable upon its net income, under section 2G (a), which reads:

"That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships. * * *"

The plaintiff has no capital stock, maintains no office, and makes no profits, being a mutual company of the purest kind. The obligation of its members in respect to payments is fixed by section 8 of its charter, which reads:

"The said corporation shall have power to levy assessments for the payment of losses arising under its policies of insurance, such assessments in every case to be made upon all holders of policies of said corporation at the time when the loss for which the assessment is levied occurred, including the holder of the policy under which the loss occurs, and upon no others. Each policy holder liable to assessment as aforesaid shall be assessed in a sum bearing the same proportion to the total amount assessed as the amount of insurance held by such policy holder at the time the loss occurred bears to the total amount of insurance by said corporation in force at that time. In case of the death or dissolution of any policy holder after a loss shall have occurred, such assessment shall be levied upon the personal or legal representatives or successors of such policy holder, to be paid out of the estate or assets of such policy holder in due course of administration or liquidation. The mode of levying such assessment, and notifying the policy holders thereof, shall be prescribed by the by-laws, and the sum assessed upon each policy holder shall become due and payable to said corporation at the expiration of 60 days from the service of such notice."

It is noticeable that this provision speaks only of an assessment for payment of losses, but it must be understood as including a loading to meet the operating expenses of the company; otherwise, the business could not be carried on. The question which both parties wish to be determined is as to the proper method of ascertaining the net income of the plaintiff under both of these statutes, whose provisions in respect to such a corporation are the same.

That the plaintiff is not an insurance company under the laws of the state of New York is perfectly plain. It was incorporated by a special statute (Chapter 171, Laws 1884), at which time and for a long time previous the state of New York had enacted general statutes to cover various corporations. Chapter 308, Laws 1849, provides for the incorporation among others of companies insuring against fire. Thereafter by chapter 463 and chapter 466, Laws 1853, and chapter 175, Laws 1883, general laws were passed for the incorporation of companies for various other objects. If, as the defendant contends, the character of the plaintiff corporation is not to be determined by the laws of the state of New York, but under the federal statutes, then this plaintiff is as much a corporation for insurance against burglary as it is a fire insurance company. We think it is plainly a corporation for the protection of a certain specific class of the community, to wit, manufacturers of, importers of, and dealers in jewelry, etc. Section 2 of the charter provides:

"The corporation hereby created shall have power to insure manufacturers or importers of, and wholesale or retail dealers in watches, watch movements, jewelry, diamonds, precious stones, plate, ornaments and similar goods, against loss or damage to any such merchandise, goods, or articles owned by such manufacturers, importers or dealers, or held by them in trust or on commission, or sold but not delivered, or in which they have any interest or for which they are in any respect liable, by any and all risks of fire, theft, barratry and embezzlement, and any and all risks of transportation by land or water, during all or any period or periods of time whilst such merchandise, goods or articles are outside of the stores, offices and manufacturies of the assured, whether the same are in custody of the assured, their clerks, salesmen, agents or servants, or of any express or transportation line, or in letters or packages in the mail, or in the custody of any other persons or corporations, to whom they may have been intrusted or delivered by or on behalf of the assured, their clerks, salesmen, agents or servants."

Therefore the question is: How is the plaintiff taxable under those two laws? The members are not liable to assessment until after each loss has occurred, and are not liable to pay until after 60 days' notice of the assessment. For their own convenience, however, they deposit with the company an amount estimated by it to cover expenses and losses incurred during the year, which deposits it invests or carries in bank, and so earns interest. This interest belongs, not to the company, but to the depositors. The company has no right in the fund at all until a loss is ascertained, and the amount of its gross income must be the sum which it collects from these deposits of the members for the purpose of paying operating expenses and losses. Under each statute the net income is to be ascertained by deducting from the gross income the expenses of operation and the losses, which, generally speaking, leaves no net income at all.

The defendants rely upon Penn Mutual Life Insurance Co. v. Lederer, 252 U. S. 523, 40 Sup. Ct. 397, 64 L. Ed. 698, as controlling the present case, but we do not think it does. It arose under the act of 1913, which provides that life insurance companies—

"shall not include as income in any year such portion of any actual premium received from any individual policy holder as shall have been paid back or

credited to such individual policy holder, or treated as an abatement of premium of such individual policy holder within such year." Section 2G (b).

The premiums in question were level premiums; i. e., for a fixed amount. When the court spoke of "premium receipts," it referred to the fixed premiums received by the company, and not to deposits for estimated premiums for each year, as is the case with the plaintiff. The court distinguished between life insurance policies and fire policies, by pointing out that the former were both for protection and investment, whereas the latter were for protection only. So much of the return upon life policies as represented earnings in previous years—e. g., because of forfeited policies, or because the expenses of operation or the extent of mortality had been overestimated in fixing the amount of the premium—was to be included in the gross income; whereas any portion of the premium paid back within the year was not to be so included.

Without going into the details of the assessments, the foregoing will be sufficient to indicate to the parties how the net income of the plaintiff for the years 1912, 1913, 1914, and 1915 is to be ascertained. The plaintiff having by stipulation filed in this court waived certain objections, the consideration of which might delay the final disposition of the cause, the judgment is reversed, and the court below directed to enter a judgment in accordance with this opinion and the stipulation filed.

WHITESIDE v. W. T. BAILEY LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1921.)

No. 5708.

Appeal and error ⇐882(12)—Instruction conforming to issue tendered by party complaining not reviewable.

A party cannot maintain error on an instruction which fairly presents an issue tendered by his pleading.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action at law by R. B. Whiteside against the W. T. Bailey Lumber Company. From the judgment, plaintiff brings error. Affirmed.

John Jenswold, of Duluth, Minn. (John D. Jenswold, of Duluth, Minn., on the brief), for plaintiff in error.

Victor L. Power, of Hibbing, Minn., for defendant in error.

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

LEWIS, District Judge. Whiteside brought this action against the Lumber Company to recover the purchase price of White pine, Norway pine, Spruce, Balsam, Jack pine, and Tamarack saw logs which he had sold and delivered to defendant at agreed prices per thousand feet for the different kinds. The complaint set up the number of feet

in the different classes of logs and the different prices to be paid. The answer admitted the agreement to purchase the logs at the prices per thousand feet named in the complaint, that delivery had been made, and alleged that it was agreed between the parties that all of the logs should be scaled by the surveyor general of Minnesota and that his scale and measure would be the basis of settlement between plaintiff and defendant. It set up the number of feet in the different kinds of logs, as shown by the scale and measurement made by the surveyor general, which was less than the amount stated in the complaint, admitted its indebtedness to plaintiff for the amount of lumber so shown at the respective prices named in the complaint, alleged tender thereof ($9,381.55 with interest) to plaintiff, his refusal to accept same, and brought the money into court. Plaintiff filed replication in which he admitted that the contract of sale and purchase contained the provision that the surveyor general was to scale the logs and that such scale would be the basis of the settlement between the parties. It then charged that the scale made by Payfer (surveyor general's deputy) "was grossly erroneous and defective and in the amounts listed as hereinbefore alleged and that the same constitutes a fraud upon this plaintiff and was in fact not binding upon either the plaintiff or the defendant"; which was coupled with specific allegations of Payfer's failure to make correct scale of the different kind of logs and alleged: "That said Payfer in many instances and in reference to at least one-half of the logs so scaled reported and returned a less amount for each log he so scaled than was actually contained in the log, and plaintiff verily believes and alleges the fact to be that said Payfer omitted to scale, return and report in each of said cases at least one-third of the amount that was actually in the log." The pleadings are verified. Verdict and judgment for the amount tendered.

The logs were delivered at the railway station and were scaled by Payfer at the time of loading. He measured each log. They went immediately to defendant's mill and were turned into the pond and mingled with other logs, so that they could not be rescaled. The plaintiff sent two men, Berg and Sanders, into the timber where the logs had been cut and they made a stump and top scale. That is, they estimated the number of feet in a log by measuring the stump from which it had been cut, the butt of the top, and found the length by the distance the two were apart. They could not, of course, obtain the necessary and definite data for deductions on account of defective logs from rot or other causes, which is permissible and recognized as the uniform practice and custom. The plaintiff also got the surveyor general to send two men, Snider and Flaherty, into the timber and they made a stump and top scale. When the scales were compared it was found that the Berg and Sanders scale contained about 200,000 feet more of White and Norway pine than the Payfer scale, but the Snider and Flaherty scale was substantially the same as the Payfer scale, the slight difference being easily accounted for by defective logs,

and the less exactness of that method as compared to log measurement made by Payfer.

The only error assigned that merits attention is the instruction of the court wherein it advised the jury that the parties were bound by the Payfer scale, unless that scale was so grossly incorrect that it evidenced either actual or constructive fraud on the part of the scaler, and that the burden was on the plaintiff to show that that scale was grossly incorrect. But that was the very issue that the pleadings presented for trial. The complaint alleged a contract of sale and purchase; the answer admitted the terms of the contract stated in the complaint, but added the additional element that the logs were to be scaled by the surveyor general, and that the scale and measure thus made would be the basis of settlement between the parties. The replication admitted this additional element of the contract and then, by way of confession and avoidance, charged that that scale was so grossly erroneous and defective that it constituted fraudulent conduct on the part of the scaler, and for that reason the parties were not bound by it. It hardly lies with a litigant to make complaint that the court submitted to the jury the very issue which he tendered to his adversary and the only one made by the pleadings.

Furthermore, the court in substance told the jury that if they found that the Berg and Sanders scale, which showed 200,000 feet more than the Payfer scale, was substantially correct, they would be entitled to find that the Payfer scale was so grossly erroneous as to render it fraudulent, and that if they found the Berg and Sanders scale correct, the plaintiff was entitled to a verdict for the amount he claimed, that if they found that the Payfer scale was grossly erroneous, and yet that the Berg and Sanders scale was too large, they could find for a lesser amount than claimed by plaintiff, but that it must be a substantial amount over and above what the court told the jury their verdict should be if they adopted the surveyor general's scale. The only two guides for the jury as to the amount of lumber were the Payfer scale (supported by the Snider and Flaherty stump and top scale) and the Berg and Sanders scale. They necessarily, as thus instructed, had to adopt one or the other, and the court directed the jury to decide between them. In this it came very near to relieving the plaintiff from all obligation on the admitted provision of the contract, and to giving him a free hand in disregard to the issue. The court said to the jury:

"So that, does not this controversy boil itself down, after all, to a question of whether or not this Berg and Sanders scale was correct, more correct, than the Payfer scale and so much more correct than the Payfer scale that you, gentlemen of the jury, would adopt it and say from all this testimony that the Payfer scale must have been grossly erroneous. Now, if you can say that under this testimony, if you think that the plaintiff, by a fair preponderance of the testimony here, has shown that, that the Payfer scale was grossly erroneous and that the Berg and Sanders scale was more nearly correct, then you should set aside the Payfer scale and award to the plaintiff the amount that you think from this testimony was actually in those logs."

This left the jury free to accept the Berg and Sanders scale if they found it more nearly correct than the Payfer scale. Hence, for two

reasons we think the contention without merit: First, the plaintiff cannot complain that the court submitted to the jury the very issue he made; and, secondly, the jury had before it the two scales, the testimony of those who made them, and the court left with the jury the determination as to which was correct. We are not convinced that there was error prejudicial to plaintiff.

Affirmed.

ONE TRUCK LOAD OF WHISKY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1921.)

No. 3472.

Intoxicating liquors ⇐247—Carriage of liquor from one state into another by owner not "shipment" in interstate commerce.

Criminal Code, § 240 (Comp. St. § 10410), making it a criminal offense to "knowingly ship" any package containing liquor from one state into another, unless the package is so labeled as to clearly show the name of the consignee and the nature and quantity of the contents, and subjecting liquor shipped in violation thereof to forfeiture, *held* not to apply to a carriage of liquor from one state into another by the owner in a truck hired with a driver for the purpose, from a concern which was not a common carrier nor engaged in the business of transportation, but in the business of letting trucks, with drivers, by the day or trip.

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

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

Proceeding by the United States against one truck load of whisky. Judgment of forfeiture and condemnation, and Joseph Tomon, claimant, brings error. Reversed.

Wilson Kern, of Cleveland, Ohio, for plaintiff in error.

H. L. Eastman, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., and Jos. C. Breitenstein, Asst. U. S. Atty., both of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. In June, 1919, Joseph Tomon was in possession of 100 cases of whisky, located at Erie, Pa. Desiring to have this whisky at Cleveland, Ohio, Toman found a company at Erie, which owned a number of automobile trucks and conducted the business of letting for hire the trucks, with drivers, for transporting merchandise, and he hired from this company a truck and driver to carry the whisky to Cleveland. The owner of the truck was under no duty or obligation to carry, and it could accept or refuse any offer of hiring made to it. The whisky was loaded on the truck at Erie and was thus carried across the line into Ohio. Nothing else was carried on the truck. The cases were not labeled in any manner with the name of the consignee or the nature of the contents or the quantity contained. After crossing the

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

state line into Ohio, the whisky was seized by state and federal officials, and a libel and information was filed by the United States in the court below for the condemnation of the truck load of whisky, on the theory that it had become forfeited because of a violation of section 240 of the Penal Code (U. S. C. S. § 10410). The facts were stipulated, and the sole question is whether this whisky was in the course of shipment, within the meaning of the word "ship" in section 240. See Ahlberg v. U. S. (C. C. A. 6, March 18, 1921) 271 Fed. 661.[1]

It is the contention of Tomon, as claimant of the seized property, that no shipment is prohibited by this section, unless it is one made by a common carrier, and that the provision requiring the package to be labeled with the name of the consignee does not apply to the facts here stated. This theory is said to be supported by several decisions which have given to the word this restricted meaning (Noble v. People, 67 Colo. 429, 180 Pac. 562, and cases cited), including the express statement by Mr. Justice Van Devanter in U. S. v. Freeman, 239 U. S. 117, 120, 36 Sup. Ct. 32, 60 L. Ed. 172, that this section of this statute refers to a shipment by a common carrier, though this statement was as to a matter not involved in the case, excepting argumentatively.

Additional support for the claimant's contention is claimed from the history of the act. Sections 238 and 239 of the Penal Code (Comp. St. §§ 10408, 10409) were originally sections 1 and 2 of what was known as the Knox Bill. In the progress of this bill through Congress, a new section was added, known as section 3, being the same which is now section 240 of the Penal Code. Since the Penal Code was, at this time, in process of revision, the Knox Bill was incorporated in it, and its three sections numbered as above stated. U. S. v. First Nat. Bank (D. C.) 190 Fed. 336. Doubtless, the three must be considered as parts of one act, and each one interpreted with a due regard for the other, and to promote the general purpose of the act common to all these sections.

If we do not accept as controlling the definition given by Mr. Justice Van Devanter, as above stated, we at once find an ambiguity. Undoubtedly a shipment, in the more common sense of the word, contemplates transportation by a common carrier; and yet it is now very common to ship goods even from one state to another by private carrier, like a line of private trucks regularly engaged in the transportation business, but under no public obligation, and at liberty to accept or refuse any business offered, and to charge a reasonable or an unreason-

[1] Sec. 240. Whoever shall knowingly ship or cause to be shipped, from one state, territory, or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labelled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

able price at its option. We do not see that the necessity of construing the three sections together is decisive of the meaning. While section 238 has reference only to shipments by common carrier, section 239 refers to transportation by any person as well as by a common carrier. Danciger v. Cooley, 248 U. S. 319, 326, 39 Sup. Ct. 119, 63 L. Ed. 266. On the other hand, it may be said that section 240 must be considered as in aid of, and supplemental to, sections 238 and 239, and that such transportation as occurred in this case is not within the scope of either one of those two sections, for there was no question of delivery to a fictitious person or to some one other than the consignee, and there was no receipt of the C. O. D. price.

We think the case should be disposed of on its peculiar facts without any attempt to give an exclusive definition. There is nothing to indicate that Tomon had parted with the custody, or the right to the custody, to the extent characteristic of anything that can reasonably be considered a shipment. Indeed, counsel for Tomon state, and the statement is not challenged, that Tomon was accompanying the truck, and in direct charge and control of it, at the time the goods were seized, and that he was arrested at this time; but we can consider this only as a situation very likely to exist under the facts stipulated. It is not shown that the truckmen were in the business of transportation themselves; on the other hand, it is most carefully stated that they were in the business of letting their trucks for hire. When the owner of goods does not give up their custody at all, but hires a truck and driver by the day or by the trip, and nothing more appears, we are not satisfied that there is any shipment within the sense of this statute. People v. Bola, 197 Mich. 370, 372, 163 N. W. 893; Gracie v. Palmer, 8 Wheat. 605, 632, 633, 5 L. Ed. 696. The case is one for the application of the rule that a statute of this character, creating a new offense, should not be extended to include acts which may or may not have been within the legislative intent. U. S. v. Bathgate, 246 U. S. 220, 225, 38 Sup. Ct. 269, 62 L. Ed. 676; U. S. v. Weitzel, 246 U. S. 533, 543, 38 Sup. Ct. 381, 62 L. Ed. 872.

The judgment of the court below, condemning the property, must be reversed, and the record remanded for further proceedings accordingly.

WEITZEL v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3412.

Banks and banking ⇐256(½)—Embezzlemen ⇐21—United States ⇐52—Receiver of national bank is "officer of United States" as respects liability for embezzlement and false reports.

A receiver of an insolvent national bank is an "officer of the United States," within the meaning of Criminal Code, § 97, and Act March 4, 1911 (Comp. St. §§ 10265, 10270), and subject thereunder to prosecution for embezzlement of the funds of the bank, or for making a false report of its condition with intent to deceive.

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

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Criminal prosecution by the United States against Fred W. Weitzel. Judgment of conviction, and defendant brings error. Affirmed.

A. E. Stricklett, of Covington, Ky., for plaintiff in error.

Thomas D. Slattery, U. S. Atty., of Covington, Ky. (Edward M. Gatliff, Asst. U. S. Atty., of Covington, Ky., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted upon two indictments—the one (under section 97 of the Criminal Code [Comp. St. § 10265]) charging the embezzling and converting to his own use of moneys which came into his possession and custody, and under his control, as an officer of and in the employment of the United States, to wit, as receiver of an insolvent national banking association, whose affairs were in the course of winding-up by the Comptroller of the Currency; the other indictment (under the Act of March 4, 1911, c. 270, U. S. Comp. Stat. § 10270) charging the making, as such officer of the United States and in its employment, as such receiver of the same banking association, of a false report to the Comptroller of the condition of that association, with intent to deceive. The questions presented relate solely to the sufficiency of the indictments.

1. Each indictment is criticized as fatally defective because, as asserted, the receiver of an insolvent national bank, appointed by the Comptroller of the Currency, is not an officer of the United States and in its employment. We think this objection foreclosed by the decision of the Supreme Court in United States v. Weitzel, 246 U. S. 533, 38 Sup. Ct. 381, 62 L. Ed. 872, where, on review of an order dismissing a demurrer to an indictment charging this plaintiff in error, under section 5209 of the Revised Statutes (U. S. Comp. Stat. § 9772), with embezzlement and making false entries as an agent of the bank here in question, it was held (affirming the judgment of the District Court) that "the receiver, unlike a president, director, cashier or teller, is an officer, not of the corporation, but of the United States." True, it was not necessary to an affirmance of the judgment below that the Supreme Court should affirmatively define the actual legal status of the receiver. It is enough that it unequivocally did so. That this was a considered conclusion is evidenced by the citation of several prior decisions of that court, holding the receiver of a national bank to be an officer of the United States.

While these prior decisions might be differentiated from the case under consideration, in that they did not deal with the identical relation involved here, the Supreme Court in fact applied them to that identical relation. It is thus not important to consider whether plaintiff in error was such an officer as is defined in article 2, § 2, of the federal Constitution. Lamar v. United States, 240 U. S. 60, 65, 36 Sup. Ct. 255, 60 L. Ed. 526. It is also unnecessary to consider the argument that section 97 of the Criminal Code is shown to be inapplicable by its noninclusion in the National Banking Act (Act June 3, 1864, c. 106, 13

Stat. 99), especially in view of what is said in the Weitzel Case, 246 U. S. 542, 543, 38 Sup. Ct. 381, 62 L. Ed. 872, regarding the Act of Feb. 3, 1879 (20 Stat. 280), which is substantially section 97 of the Criminal Code. Nor are we impressed by the fact that Congress, subsequent to the decision of the Supreme Court in the Weitzel Case, so amended section 5209 of the Revised Statutes (U. S. C. S. § 9772) as to make the receiver of a national banking association liable under the banking act for embezzlement or misapplication of any of the assets of his trust. Such amendment does not, in our opinion, indicate more than a congressional intent to supply a defect in the National Banking Act itself.

2. We see no force in the contention that section 97 of the Criminal Code relates only to embezzlement by internal revenue officers. While the first clause of the section is so limited, this clause is followed by the express and unequivocal provision for the punishment of "any officer of the United States * * * who shall embezzle or wrongfully convert to his own use any money" the custody of "which may have come into his possession or under his control" by virtue of his official employment or authority. The fact that the headline to the section as contained in the Criminal Code reads "Embezzlement by internal revenue officer; punishment for," cannot change the positive provision of the statute, which, indeed, before its incorporation into the Criminal Code, had no such headline. The question, however, is in our opinion set at rest by United States v. Davis, 243 U. S. 570, 37 Sup. Ct. 442, 61 L. Ed. 906, where a deputy clerk of a District Court of Hawaii was held punishable under section 97 of the Penal Code for embezzlement of fees deposited by litigants to secure payment of costs; and see the Weitzel Case at page 543, of 246 U. S. (38 Sup. Ct. 381, 62 L. Ed. 872).

3. We see no merit in the contention (addressed to the indictment under the Act of March 4, 1911) that a receiver of a national banking association, appointed by the Comptroller of the Currency, is not required to report the condition of the banking association in his charge, as such receiver, to the Comptroller of the Currency. Section 5234 of the Revised Statutes (U. S. C. S. § 9821), which is part of the National Banking Act, considered in connection with the Act of June 30, 1876, c. 156, § 1 (U. S. C. S. § 9826), in our opinion works that result. But, if we are mistaken in this, the judgment should not be disturbed for that reason. There was a single verdict of conviction on both indictments, and a single sentence thereon, inflicting a less punishment than was imposable under either indictment. Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173; Claassen v. United States, 142 U. S. 140, 147, 12 Sup. Ct. 169, 35 L. Ed. 966.

The judgment of the District Court is affirmed.

HODGMAN et al. v. ATLANTIC REFINING CO. et al.

(District Court, D. Delaware. May 20, 1921.)

No. 423.

1. **Courts ⇐317—Defendant taking antagonistic position cannot be realigned for jurisdictional purposes.**
   In an action in the federal District Court, brought under Judicial Code, § 24 (Comp. St. § 991), on the ground of diversity of citizenship, a defendant taking of record a position antagonistic to that of plaintiff may not for jurisdictional purposes be realigned or regarded otherwise than as a defendant.

2. **Courts ⇐308—For federal court to have jurisdiction on diversity of citizenship, each plaintiff must be competent to sue, and each defendant liable to be sued.**
   To maintain an action in the federal District Court, under Judicial Code, § 24 (Comp. St. § 991), on the ground of diversity of citizenship, each plaintiff must be competent to sue, and each defendant liable to be sued.

3. **Courts ⇐270—Action between citizens of different states must be brought only in the district of the residence of either plaintiff or defendant.**
   Under Judicial Code, § 51 (Comp. St. § 1033), where jurisdiction is founded only on the fact that the action is between citizens of different states, suit can be brought only in the district of residence of either the plaintiff or the defendant.

4. **Courts ⇐273—Shares of stock held "personal property" within district, so as to support jurisdiction.**
   Under Judicial Code, § 57 (Comp. St. § 1039), providing that when, in any suit commenced in any District Court to enforce any lien or remove any incumbrance, etc., on the title to real or personal property, one or more of the defendants shall not be an inhabitant or found within the district, service may be had upon such nonresident without regard to the residence of plaintiffs, nonresidents of Delaware may maintain an action against a Delaware corporation and a Pennsylvania corporation not found within the district to compel the Pennsylvania corporation to restore to the Delaware company shares of stock fraudulently issued to it; the bill showing diversity of citizenship required by Judicial Code, § 24 (Comp. St. § 991), for shares of stock are by Rev. Code Del. 1915, §§ 1930, 1986, expressly declared to be "personal property."
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

5. **Courts ⇐263—Where federal court has jurisdiction of suit to compel restoration of shares of stock, demand for other relief will not divest jurisdiction.**
   Where the federal District Court for Delaware had jurisdiction of a suit against a Delaware and Pennsylvania corporation to compel the Pennsylvania company to restore shares of stock claimed to have been fraudulently issued to it, the fact that the bill by nonresidents of Delaware sought other separable relief will not deprive the court of jurisdiction.

6. **Courts ⇐347—Bill violating the rules requiring conciseness will be dismissed, unless amended.**
   A bill not complying with the rules as to conciseness, accuracy, and clearness (Equity Rule 25 [33 S. Ct. xxv]) will be dismissed, unless amended.

In Equity. Bill by Marshall Hodgman and others against the Atlantic Refining Company and the Superior Oil Corporation. Bill dismissed for prolixity, unless it be amended.

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

Herbert H. Ward, of Wilmington, Del., Arthur Berenson, of Boston, Mass., and Lawrence Berenson, of New York City, for plaintiffs.

Robert H. Richards, of Wilmington, Del., and Ira Jewell Williams, of Philadelphia, Pa., for defendant Atlantic Refining Co.

Richard S. Rodney, of Wilmington, Del., for defendant Superior Oil Corporation.

MORRIS, District Judge. This is a suit in equity instituted by shareholders of Superior Oil Corporation, organized under the laws of Delaware, and Atlantic Refining Company, a Pennsylvania corporation. The plaintiffs are residents of states other than Pennsylvania and Delaware. The bill of complaint alleges, in part, that 325,000 shares of the capital stock of the Delaware corporation were fraudulently and unlawfully issued by it to the Pennsylvania corporation, and that a certain contract entered into by and between the defendant corporations in June, 1920, was made in like manner. The relief sought is that the transactions by which the Pennsylvania company acquired the shares of stock in question be set aside; that the Pennsylvania company be required to restore the status quo of the Delaware company as of the time prior to the happening of those transactions; that an account of damages be taken; that the Pennsylvania corporation be required to repay to the Delaware corporation such damages together with all dividends collected by it upon the capital stock of the latter company; that the contract of June, 1920, be canceled, and an account be taken of the damages sustained by the Delaware company by reason of that contract; and that the Pennsylvania company be decreed to pay the same. Service was had upon the Delaware corporation and upon the person designated by the Pennsylvania corporation as its authorized Delaware agent for service of process. The latter company appeared specially and moved for an order setting aside the service, and for a decree dismissing the bill as to it, upon the ground that this court is without jurisdiction to entertain the suit, in that this district is not the district of the residence of either the plaintiffs or the Atlantic Refining Company. The Delaware corporation also filed a motion to dismiss the bill of complaint as to it, assigning 30 reasons therefor. The motion of the Pennsylvania company will be first considered.

[1, 2] The jurisdiction of this court is founded only on the fact that the suit is between citizens of different states. Judicial Code, § 24 (Comp. St. § 991). As both defendants are alleged to have engaged in the challenged transaction, and the Delaware corporation takes of record a position antagonistic to that of the plaintiffs, the latter company may not, for jurisdictional purposes, be realigned, or regarded otherwise than as a defendant. Venner v. Great Northern Railway, 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666. In any event, a realignment of the Delaware corporation would be of no avail, as the present plaintiffs do not reside in this district, and the act requires that each plaintiff must be competent to sue, and each defendant must be liable to be sued, or the jurisdiction cannot be entertained. Smith v. Lyon, 133 U. S. 315, 319, 10 Sup. Ct. 303, 33 L. Ed. 635.

[3] The Pennsylvania company having made timely objection, consequently, this court may not take cognizance of the suit, if it is affected by that portion of section 51 of the Judicial Code (Comp. St. § 1033), relied upon by the Pennsylvania company, providing that—

"Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." McNeely v. E. I. Du Pont de Nemours Powder Co. (D. C.) 263 Fed. 252.

[4] The plaintiffs, however, contend that the object of the suit is such as to leave it unaffected by the limitation of that clause, and to bring it within section 57 of the Judicial Code (Comp. St. § 1039). That section provides that—

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto," service may be had upon such nonresident or absent defendant without regard to the residence of the plaintiff.

The latter section necessarily implies that, even though jurisdiction be founded only on the fact that the suit is between citizens of different states, yet if the object of the suit brings it within the class described in this section the court of the district in which the suit is brought may entertain it, notwithstanding none of the parties thereto reside in such district. Kentucky Coal Lands Co. v. Mineral Development Co., 219 Fed. 45, 133 C. C. A. 151; Louis. & Nash. R. R. v. West Un. Tel. Co., 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356. It is difficult to perceive any lack of applicability of section 57 to the present suit. The bill of complaint sets up the diversity of citizenship of the parties required by section 24 of the Judicial Code. That the shares of stock in issue are personal property, and are, for the purposes of this suit, within this district would seem to have been put beyond dispute by the Revised Code of Delaware of 1915. Section 1930 thereof provides:

"The shares of stock in every corporation shall be deemed personal property. * * *"

Section 1986 of that Code says:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this state, but not for the purposes of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this state, whether organized under this chapter or otherwise, shall be regarded as in this state."

[5] The Pennsylvania company contends, however, that the objects of the suit are not restricted to those specified in section 57 of the Judicial Code, and that consequently that section will not justify retention of jurisdiction. Whether any decree entered in this cause would necessarily be restricted to adjudging the validity or invalidity of the issue of the stock in question, or whether it might also settle incidental matters connected therewith or flowing therefrom, need not now be determined; for, as I understand the bill of complaint, one of the

objects of the suit is to enforce a claim of the Delaware corporation (made by certain of its shareholders) to the shares of its stock now held by the Pennsylvania corporation, or to remove a cloud upon the former's title thereto. The fact that additional relief was sought by the complainant did not prevent the court in Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, from determining the rights of the parties in and to the shares of stock there in question. The additional relief sought in that case did not differ materially from the further relief prayed by the complainants in this case. In Kentucky Coal Lands Co. v. Mineral Development Co., 219 Fed. 45, 133 C. C. A. 151, it was held that the additional separable relief sought was not a bar to the court's entertaining a suit one of the objects of which came within the statute now known as section 57 of the Judicial Code. It follows, I think, that the motion of the Pennsylvania company must be denied.

[6] The reasons assigned by the Superior Oil Corporation in support of its motion to dismiss need not be considered seriatim for, in my opinion, the bill of complaint violates the rules of pleading requiring conciseness, accuracy, and clearness. Story's Eq. Pl. §§ 241, 454; Equity Rule 25, 33 Sup. Ct. xxv; Pittsburgh Water Heater Co. v. Beler Water H. Co. (D. C.) 222 Fed. 950; East India Company v. Henchman, 1 Ves. Jr. 287.

The bill will be dismissed for prolixity and uncertainty, unless within 20 days from the filing of this opinion it be amended.

SPACKMAN v. SWAN CREEK ORCHARD CO.

(District Court, D. Delaware. March 16, 1921.)

No. 412.

Receivers ⟹128—Certificates will not be given priority to creditors' claims, where issuance not beneficial.

Where, on application of receivers for orchard company for authority to issue receivers' certificates to pay for pruning, spraying, and otherwise preserving the property, it appeared that the assets then had a salable value sufficient to pay all existing claims, and that the creditors would derive no benefit by the issuance of the certificates, but their claims might be jeopardized if the certificates were given priority over them, the application would be granted as to authority to issue the certificates, but denied as respects giving the certificates priority over any existing claims.

In Equity. Suit by Horace B. Spackman against the Swan Creek Orchard Company, in which receivers were appointed for defendant. The receivers petition to issue receivers' certificates having priority over all creditors except mortgage creditors. Petition granted as to authority to issue, but denied as to giving them priority.

Herbert H. Ward, of Wilmington, Del., for receivers.

Daniel J. Layton, Jr., of Georgetown, Del., for opposing creditors.

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

MORRIS, District Judge. Recently, on application of a stockholder, receivers were appointed for the Swan Creek Orchard Company; it being alleged by the complainant, and admitted by the corporation, that the latter was unable to pay its debts as they matured in the usual course of trade and business. The defendant is an orchard company having several hundred acres of fruit trees of bearing age. The receivers are without available funds for pruning, spraying, and otherwise preserving the corporate property. They have presented a petition praying for authority to issue receivers' certificates to the amount of $8,000, such certificates to be given priority over all creditors of the company other than mortgage creditors. Certain creditors have appeared, answered the petition, and objected, not to the issuance of the certificates, but to their being given priority over existing claims.

Counsel for the receivers and counsel for the creditors agree that the assets now have a salable value sufficient to pay all existing claims in full. Counsel for creditors takes the position that the expenditure upon the property of the proceeds of the receivers' certificates would not enhance its salable value, and that its salable value is probably not sufficient to pay both the receivers' certificates and the existing indebtedness in full. While the soundness of this contention cannot now be determined, yet it does appear from undisputed facts that the creditors will derive no benefit by the issuance of the certificates. On the other hand, it appears that their claims may be placed in jeopardy if the certificates be given priority as prayed for. I think claims of creditors may not be so jeopardized for the benefit of stockholders. The prayer of the petition will be granted in so far as it seeks authority to issue receivers' certificates, but denied in so far as it seeks to have the certificates given priority over any existing claims.

An order in accordance herewith may be submitted.

KELLY v. LEWELLYN, Collector of Internal Revenue.

(District Court, W. D. Pennsylvania. May Term, 1921.)

No. 418.

Internal revenue ⇐45—Collection of double tax, imposed under Prohibition Act, cannot be enjoined.

The provision of National Prohibition Act, tit. 2, § 35, for the assessment of a double tax against any person responsible for the illegal manufacture or sale of liquor, is within the taxing power of Congress, and the imposition made thereunder is a tax, the collection of which, under Rev. St. § 3224 (Comp. St. § 5947), cannot be enjoined.

In Equity. Suit by Joseph A. Kelly against C. G. Lewellyn, Collector of Internal Revenue. On motion to dismiss bill. Motion granted. See, also, 274 Fed. 112.

Van A. Barrickman, of Pittsburgh, Pa., for plaintiff.

The United States Attorney, for defendant.

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

THOMSON, District Judge. This bill seeks to restrain the collector of internal revenue from collecting a certain tax and penalty assessed against the plaintiff, under the provisions of section 35 of title 2 of the Volstead Act (41 Stat. 317), passed to enforce the Eighteenth Amendment to the Constitution. The bill denies the sale of any intoxicating liquors, and alleges that the defendant had no notice of the levy or assessment of the tax and penalty; that he filed with the collector an affidavit to that effect, and asked abatement of the tax and penalty, which request was refused, and payment in full demanded, and that otherwise his property would be seized and sold; that said assessment and levy is without warrant of law; and that he is entitled to injunctive relief. The government moves to dismiss the bill, on the ground that the bill is without equity, that the plaintiff has an adequate legal remedy, and that the court is without jurisdiction.

If the amount assessed is a tax, within the taxing power of Congress, its collection cannot be enjoined, by reason of section 3224 of the Revised Statutes (Comp. St. § 5947), which provides that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This act has been given the broadest application by the Supreme Court. In State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, the Supreme Court says:

"The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid."

To the same effect is Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901, wherein Justice Blatchford, delivering the opinion of the court, said:

"The inhibition of section 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."

In Dodge v. Osborn, Commissioner of Internal Revenue, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557, a bill was filed to enjoin the assessment and collection of certain surtaxes, on the ground that the statute was void, as repugnant to the Constitution of the United States. Chief Justice White, in sustaining the motion to dismiss, said:

"This doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it" —citing Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Pittsburgh Railway v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Pacific Whaling Co. v. U. S., 187 U. S. 447, 23 Sup. Ct. 154, 47 L. Ed. 253.

The ultimate question in the construction of section 35 is whether the double tax or penalty, or either of them, imposed therein, is in fact a tax such as Congress, acting within its constitutional authority to levy excise taxes, has power to impose. This is an important question, involving in its solution certain fundamental propositions. These may be summarized as follows:

First. The taxing powers granted to the federal government in the Constitution are:

"To lay and collect taxes, dues, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States."

Second. The power of Congress to tax, as given in the Constitution, has only one exception and two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity.

"Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." License Tax Cases, 5 Wall. 462, 18 L. Ed. 497.

"Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government." Pacific Mutual Ins. Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95.

Third. Where the right of taxation exists, if its exercise is within the lawful power of Congress, it is absolutely unlimited in its nature, carrying with it the power to embarrass and even destroy. Courts cannot inquire into the wisdom or justice of such exercise of constitutional power. Courts can put no limitations upon such exercise of power. The right to tax, being a constitutional grant, is limited by that instrument alone, and it is within the authority of Congress to select the objects upon which an excise tax shall be laid." Pacific Ins. Co. v. Soule, supra; Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. In this last case Chief Justice White, in an elaborate opinion, discusses the subject and collects the authorities. He there said:

"No instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust."

Fourth. The power conferred by the Constitution to levy taxes uniform throughout the United States must necessarily be exercised at the discretion of Congress, and, as was said in United States v. Doremus, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493:

"Where the provisions of the law enacted have some reasonable relation to this power, the fact that they may have been impelled by a motive, or may accomplish a purpose, other than the raising of revenue, cannot invalidate them; nor can the fact that they affect the conduct of a business which is subject to regulation by the state police power."

Long before the passage of the Eighteenth Amendment, where a business such as the manufacture and the sale of intoxicating liquors, which was within the exclusive powers of the state to regulate, was absolutely prohibited by a state, an indictment was sustained against a person for carrying on the business in the prohibited territory without paying the special tax imposed by the internal revenue. The Supreme Court, in License Tax Cases, supra, held that, whether it was named as a license or a tax, the holder obtained no authority thereunder to carry on such business; the requirement of paying for licenses being merely a form of special taxation. It was argued with great force that it must necessarily be inferred that revenue was intended to be raised only when and where the business taxed is a lawful occupation; that Congress cannot constitutionally punish for a refusal to pay for a license to commit a crime, or constitutionally levy a tax for the privilege of committing it. But the Supreme Court held that there is nothing hostile or contradictory in the acts of Congress to the state authorities; that the license or tax demanded gave no authority to exercise trade or carry on business within the state. If the business lawfully existed there, this was a convenient mode of imposing taxes on such business, and the license could only be regarded as a receipt for such taxes, and that what the state prohibits, Congress, if the business exists notwithstanding the prohibition, discourages by taxation. It thus resulted that, in those states where prohibition existed, unlawful sales of liquor became the basis for the collection of revenue taxes.

If Congress can thus impose taxes for the carrying on of a business prohibited by the laws of the state, on the ground that the unlawful business is thereby discouraged, may not Congress, on the same ground and for the same reason, impose taxes on the unlawful carrying on of a business prohibited by the national Constitution, and the act of Congress passed for its enforcement? Turning attention particularly to the provisions of the Volstead Act, it will be observed that under section 2 certain powers and duties are vested in the Commissioner of Internal Revenue and his assistants, to investigate and report violations of the act to the United States attorney, swear out warrants before certain officers for the arrest of offenders, and aid in the committing trial to have them held for the grand jury. Under section 28 the Commissioner and other officers of the United States are vested with power and protection in the enforcement of the provisions of the act. Under section 35 of the act, which is here directly involved, the existing laws in harmony with the Volstead Act remain unimpaired. Under the Eighteenth Amendment and the act in question, intoxicating liquors may still be manufactured, sold, transported, delivered, and possessed for nonbeverage purposes. The prohibition is directed only against their production and sale as a beverage. In the section in question, Congress has specifically declared that—

"This act shall not relieve any one from paying any taxes and other charges imposed upon the manufacture or traffic in such liquor."

Lest a so-called license or tax should be misconstrued as a veiled permission by Congress to violate the law, it was then provided:

"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 the additional penalty therein provided. It is further provided:

"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 relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

I cannot doubt, under the authorities, that such imposition of a tax is within the lawful power of Congress to impose, and, if so, the courts may not inquire either as to the wisdom or justice of the imposition. The fact that, for a violation of the act, both a civil and criminal liability results, in no way affects the validity of the act. It is true that such assessment cannot be made, except upon "evidence" of such illegal manufacture or sale. But this must be assumed to be such evidence as satisfies the assessing power, and not evidence received in the course of legal procedure. In no case under the revenue laws, are the courts resorted to, to establish in the first instance the amount of revenue tax assessable. This is determined by the taxing power, and is so far conclusive against the taxpayer that his only remedy is an action to recover it back after payment has been made, if the assessment was illegal.

I find nothing in the act that makes the tax imposed here an exception to this rule. Judge Faris, in the Eastern District of Missouri, in the case of Kausch v. Moore, Collector (D. C.) 268 Fed. 668, has held that the penalty imposed by section 35 is not in fact a tax, as distinguished from the double tax eo nomine therein imposed. This position has much force and may be true. But here, as in that case, the duty of the plaintiff at least was to pay all such sums as are in section 35 specifically denominated "taxes." If these were illegally assessed, he could have paid them under protest and recovered them back.

As payment or tender of all taxes demandable is a condition precedent to an application for injunctive relief, the bill must be dismissed.

KELLY v. LEWELLYN, Collector of Internal Revenue.

(District Court, W. D. Pennsylvania. May Term, 1921.)

No. 452.

Internal revenue ⇐45—Penalties for illegal sales must be enforced by suit.

National Prohibition Act, tit. 2, § 35, providing that a tax in double the amount provided by existing law shall be assessed against and collected from any person responsible for illegal manufacture or sale of liquor, "with an additional penalty of $500 on retail dealers and $1,000 on manufacturers," does not vest a collector of internal revenue with au-

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thority to collect the penalty by distress and sale, but under Judicial Code, § 24 (9), being Comp. St. § 991 (9), such penalty can be enforced only by suit in the District Court.

In Equity. Suit by Joseph P. Kelly against C. G. Lewellyn, Collector of Internal Revenue. On motion to dismiss bill. Motion overruled.

See, also, 274 Fed. 108.

Van A. Barrickman, of Pittsburgh, Pa., for plaintiff.

The United States Attorney, for defendant.

ORR, District Judge. This bill was filed to restrain the defendant from seizing property of the plaintiff and subjecting it to the payment of the penalty provided in title 2, § 35, of the National Prohibition Act (41 Stat. 317). The material portion of that section is as follows:

"Sec. 35. * * * This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"The Commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

The plaintiff sets forth in his bill, at considerable length, averments which, if true, would relieve him from all liability under said section. In addition thereto, he sets forth that, after a previous bill had been filed by him to enjoin the collection of both the taxes and the penalty mentioned in said section, this court refused the prayer of said bill because the plaintiff had not averred that he had paid the taxes required to be assessed by said section. In the present bill he further sets forth that he has paid the taxes assessed against him in double the amount as required by the act, but that, notwithstanding the payment of the taxes, the defendant is proceeding to collect the penalty imposed by said section to an amount of $549.38 and costs. The plaintiff insists that the defendant, as collector, is without power and authority to enforce the payment of the penalty, for the reason that such duty was not imposed upon him by any act of Congress; but, on the contrary, the law is that the liability of the plaintiff, if such liability exists, to pay such penalty, must be determined by proper proceedings in this court.

The motion to dismiss having been filed by the United States attorney on behalf of the defendant, the matter came on to be heard, and a preliminary order was made in the nature of a rule upon the collector to show cause why the plaintiff should not have relief, and requiring the status of the case to remain until the disposition of the rule. The

matter has now been argued, and is before this court for a decision upon the motion to dismiss.

It is clear, from the language of the section of the act, that a distinction is drawn between taxes and penalty. It is plain, from the reading of the act, that there is wanting any provision imposing the duty upon a collector of revenue, or his subordinate, to determine the liability for the penalty or to proceed of his own motion for the collection of the same without resort to a proper court. The provisions of the second paragraph of said section with respect to the compromise of any civil cause arising under this title before bringing action in court, and as well of any such cause after action has been brought, is rather significant. The question immediately arises in one's mind: What can be compromised before or after action brought in court, unless it be that which is intended by the act to be the subject-matter of legal proceedings, and not the subject-matter of administrative action?

It is hard to conceive of anything more prominently fixed by law as within the jurisdiction of the District Court than the recovery of penalties. The first Judiciary Act, passed by Congress on September 24, 1789, gave the District Courts of the United States jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States. That provision has remained the same, and is now found in the ninth paragraph of section 24, chapter 2, of the Judicial Code, which went into force January 1, 1912, in the following language:

"Sec. 24. The District Court shall have original jurisdiction as follows:
* * * * * * * * * *

"Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."
Comp. St. § 991.

The provisions of the act before us are not like those which authorize an executive officer to impose or collect exactions, for example, Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013. Nor is this a case where the plaintiff seeks to have the courts interfere with the performance of the ordinary duties of executive departments, such as the collection of taxes, etc. Plaintiff's first bill, above mentioned, could not be sustained, because he sought a restraint upon the collector of revenue, not only with respect to the collection of penalties, but with respect to the double taxes mentioned in the section. See Opinion of Thomson, J., 274 Fed. 108, filed March 17, 1921, at No. 418, May Term, 1921.

I am satisfied that Congress has not placed in the hands of the collector of revenue the power to collect, by distress and sale, the penalties provided for in the said section of the National Prohibition Act. This same question has been before courts in other jurisdictions, and decided in favor of the plaintiff, where similar bills have been filed. See Accardo v. Fontenot, Collector of Internal Revenue, 269 Fed. 447, in the District Court for the Eastern District of Louisiana, where Judge Foster has given the subject grave consideration.

The motion to dismiss the bill must be overruled.

UNITED STATES v. YAKIMA COUNTY et al.

(District Court, E. D. Washington, S. D. · June 18, 1921.)

Nos. 824–826.

Taxation ⇐181—Substitute trust lands of Indians not taxable.

Where an Indian allottee of the Yakima tribe in Washington died before the expiration of the trust period, and his land was sold by the Secretary of the Interior under Act May 29, 1908, § 1 (Comp. St. § 4224), which authorizes such sale and the use of the proceeds during the trust period for the benefit of the heirs, and the proceeds were invested in other lands, the conveyances reciting that they could not be disposed of or incumbered without the consent of the Commissioner of Indian Affairs, such substitute lands during the trust period *held* exempt from state taxation.

In Equity. Suit by the United States against Yakima County and others. Decree for complainant.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash.
H. J. Snively, of Yakima, Wash., for defendants.

RUDKIN, District Judge. The General Allotment Act of February 8, 1887 (24 Stat. 388, 389, § 5 [Comp. St. § 4201]), provides as follows:

"Patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust for the sole use and benefit of the Indian to whom said allotment shall have been made or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period, and if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 1 of the Act of May 29, 1908 (35 Stat. 444 [Comp. St. § 4224]), provides:

"That when any Indian who has heretofore received or who may hereafter receive an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: Provided, that the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: And provided further, that upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold. * * *"

In the case now before the court the allottees died before the expiration of the trust period; the legal heirs of the deceased allottees were ascertained as provided by law; the lands were sold, presumably because it was found that the heirs were incapable of managing their own

affairs, and parts of the proceeds of the sales were invested in other lands under the direction and supervision of the Secretary of the Interior, the conveyances reciting that the lands so acquired could not be disposed of or incumbered without the consent of the Commissioner of Indian Affairs. The sole question presented for decision is: Are the lands acquired with the proceeds of the sales of the allotted lands exempt from taxation during the trust period by the state and its municipal subdivisions?

In United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, it was held:

"That neither the lands allotted nor the permanent improvements thereon nor the personal property obtained from the United States and used by the Indians on the allotted lands, are subject to state or local taxation during the period of the trust provided by the above act of 1887."

In the oft-cited case of United States v. Thurston County, Neb., 143 Fed. 287, 74 C. C. A. 425, it was held that the allotted lands were exempt from taxation by the state or county during the trust period; that the proceeds of the sales of such allotted lands by the Indian heirs of allottees were held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by the state or county for the same reason; that no change of form of property divests it of the trust; that the substitute takes the nature of the original and stands charged with the same trust, and that the authorized sale of trust property by a trustee discharges the property sold and charges the proceeds of sale in the hands and under the control of the trustee with the trust.

In National Bank of Commerce v. Anderson, 147 Fed. 87, 77 C. C. A. 259, a similar ruling was made by the Circuit Court of Appeals for this Circuit.

In United States v. Pearson (D. C.) 231 Fed. 270, 281, after citing United States v. Rickert, supra, the court said:

"Under this decision the changed forms of the property held in trust, as time brings such changes about in live stock and other personal property of the Indians, even to exchanges between themselves of trust property, are impressed with the trust. Even the substitute takes the nature of the original and is charged with the trust. The authorized sale of trust property by a trustee discharges the property sold from, and charges the proceeds of the sale, in the hands of and under the control of the trustee, with the trust."

In United States v. Law, 250 Fed. 218, 162 C. C. A. 354, it was held that property purchased with trust funds, as in these cases, was subject to the trust, and that a mortgage by the Indian grantee was null and void.

In United States v. Nez Perce County, Idaho (D. C.) 267 Fed. 495, it was held that land acquired in the same manner was not subject to state taxation. The only distinction between the Nez Perce County case and the cases now before the court lies in the fact that the land was there held in trust for the Indians by the Superintendent of Indian Schools, a distinction, of course, without a difference.

These decisions afford ample authority for the position taken by the government in these cases. Whether they have been limited or overruled by the decision in McCurdy v. United States, 246 U. S. 263, 38

Sup. Ct. 289, 62 L. Ed. 706, may admit of question. In that case, by section 5 of the Act of April 18, 1912 (37 Stat. 87), the Secretary of the Interior in his discretion was authorized to pay to Osage allottees all or part of the funds in the treasury of the United States to their individual credit. There, as here, a part of the funds were invested in other lands and a conveyance taken to the Indian similar in form to the conveyances now before the court. The Supreme Court held that the authority of the Secretary was limited to releasing or withholding the funds, and that he was given no authority to exercise control over any property in which the funds released might thereafter be invested, or otherwise to create with the released funds a governmental instrumentality for the protection of the Osages.

The Act of May 29, 1908, supra, however, is broader in its terms. That act provides that the proceeds arising from the sale shall be used during the trust period for the benefit of the allottee or heir so disposing of his interest under the supervision of the Commissioner of Indian Affairs. Authority to use is much broader than a mere authority to release, and had these funds been used in the purchase of personal property for the use of the Indians on their allotments I have no doubt that the property so acquired would be exempt from state taxation under the authorities heretofore cited. I am not prepared to say, therefore, that the acquisition of these lands was not a legitimate exercise of the authority vested in the Secretary of the Interior.

However, there is another reason why the property is exempt from taxation by the state and county. Section 4 of the Enabling Act (Act Feb. 22, 1889, c. 180, 25 Stat. 677) declares:

"And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said states: * * *

"Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe."

The compact with the United States embodied in article 26 of the state Constitution contains similar language. Here is an express declaration that the property of Indians who have not severed their tribal relations remains under the absolute jurisdiction and control of the United States, and a plain implication that such property is not taxable by the state until the Indians have severed their tribal relations. See United States v. Higgins (C. C.) 103 Fed. 348; United States v. Heyfron (C. C.) 138 Fed. 964; United States v. Pearson, supra.

Some question was raised during the trial as to whether these Indians have severed their tribal relations, but the government of the United States through all its departments has repeatedly and consistently recognized the Yakima Indians as a tribe, and I feel satisfied that the Indians in question were members of that tribe, although in the process of civilization tribal relations have become somewhat loose and difficult of definite proof.

For these reasons, I am of opinion that the taxes in question were imposed without warrant or authority of law, and decrees will be entered in the several cases in accordance with the prayers of the complaints.

PATTON et al. v. CLEGG et al.

(District Court, E. D. Pennsylvania. June 28, 1921.)

No. 1971.

1. **Patents ⊂=287, 302—Agent, who sold infringing article, chargeable as infringer.**
   One who sold an infringing article is chargeable with infringement, and may be enjoined, though he made the sale, not for himself, but as agent for another.
2. **Patents ⊂=328—1,301,596, for paper lining for finger bowls, held valid and infringed.**
   The Patton patent, No. 1,301,596, for a paper lining for finger bowls, *held* valid on the presumption arising from the grant, and also infringed.

In Equity. Suit by John G. Patton and Harry P. Sayford, trading as the Sayford Paper Specialty Company, against E. T. Clegg and the Vendig Hotel Company. Decree for complainants.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for plaintiffs.

Synnestvedt & Lechner, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. [1] This cause concerns itself with letters patent No. 1,301,596, issued April 22, 1919, to John G. Patton, for a paper lining for finger bowls. The title is in the plaintiffs by ownership of the patent in one and an exclusive license in the other. At the close of the plaintiffs' case in chief there was a motion to dismiss as against the defendant Clegg on the ground of the absence of any evidence that he had made, used, or vended the patented utensil. If this motion prevails, the Hotel Vendig is left as the sole defendant. This calls for a word of explanation.

The bill was originally filed against the Milwaukee Lace Paper Company, which was averred to have infringed the patent by manufacturing and selling these paper linings. The defendant could not be found in the district. The bill was served upon Clegg, on the theory that he was the agent and occupied the office of the Milwaukee Company. The marshal, however, declined to return these latter facts. This was because Clegg, although he had been the agent of the company,

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

was at the time of service no longer its agent, nor did the company then maintain an office within this district. The return of service was in consequence a service upon Clegg as an individual, and it was held that there had been no valid service upon the company. The bill was then amended by adding Clegg and the Hotel Vendig Company as defendants; both being charged with infringement—Clegg with vending, and the Hotel Company with using, the patented linings. The proofs warrant the finding that Clegg had in fact sold the patented linings. He solicited an order for linings from the Hotel Company, and the Milwaukee Company completed the sale by filling the order. Clegg had also made other sales the same way. This was at the time he was agent for the Milwaukee Company.

The motion is based upon the proposition that this proved a sale by the Milwaukee Company, but not by Clegg. A large number of cases have been cited to us in support and denial of the defense raised on behalf of Clegg. None of these cases are in point. They go to the question of venue, or to whether the patentee had placed his invention on sale before his patent issued. There is another line of cases more nearly in point, affecting the officers and managers of a corporation, of which one is Mergenthaler v. Ridder (C. C.) 65 Fed. 853. Even this line of cases is not in point, unless the officer of the corporation himself made the sale or secured the order.

The question is a much narrower one than that discussed. It is simply whether a court of equity should afford relief against the individual who effects a sale, even when he makes the sale, not for himself, but for another. There is no ground upon which an accounting can be decreed, but there may, in a proper case, be good reason to award an injunction. The act of these defendants is one of trespass. The one defendant bought and subsequently used the patented article. Admittedly it may be enjoined against further use. The other defendant sold, and the fact that he sold for another is no very convincing reason that he should be left free to make further sales.

The point made that the sale was not complete within this district may be conceded, but none the less Clegg was at least a contributor to the infringement, and may be enjoined. Clegg offers no other defense, and the Hotel Company has contented itself with merely offering in evidence the prior patents relied upon in the answer. They were all cited for reference and passed upon when the patent issued.

[2] The first branch of the defense with which we have to deal, however, is that of the invalidity of the patent based upon the denial of invention. The question is the oft-presented one of the distinction between invention and the skill displayed in construction. The nearness of this patentee to the danger line is disclosed by his experiences in the Patent Office. The Examiner ruled against him. The Board found in his favor. The finding was made on the authority of Fonseca v. Suarez, 232 Fed. 155, 146 C. C. A. 347. This latter case was before two courts. One found one way; the other, the other. The final ruling was influenced, if not induced, by adherence to the doctrine that commercial success in doubtful cases is evidence, and often controlling evidence, of invention.

We feel called upon to say that, if the case were one of the first impression, we would unhesitatingly refuse to make the finding of invention. The dividing line indicated is one difficult to define in words. The difference between what the line separates partakes somewhat of the difference between science and art, in that invention involves the conception of what physicians call the philosophy of a given treatment or remedy, as distinguished from mere skill in applying it. There may be a stronger claim to merit in the mechanical skill displayed than in the inventive features, yet the latter is rewarded by a monopoly, and the other is not.

To make use of the instant case as an illustration of our meaning, if this patentee had been the first to conceive of the thought of a paper lining for finger bowls, he might well have been said to have come upon an idea which, when given embodiment in a concrete thing, involved invention. Given this inventive idea, the making of the thing might well involve mere skill in construction. Many finger bowls are constructed in a form in which the sides flare outward as we approach the upper edge, so that the diameter of the opening is greater than that of the bottom of the bowl. It is a convenience, if not a necessity, to have the lining take a like form. It is an advantage to have given a snugness of fit by giving to the lining an expanding capability. This is done by the patentee by fluting the paper lining, so that it may have a fan-like spread. This may indicate skill, but does it evidence invention?

We find, as did Ulysses of old, "many men of many minds." Some happily have minds which readily grasp what are commonly called "mechanical principles," or the principles on which anything is constructed. They are fertile in such ideas, and are quick to see and appreciate them in any work of construction. Others can see nothing in what has been done, except evidence of skill in manipulation or construction. There is, of course, the difference between construction which calls for the display of only ordinary commonplace mechanical skill and that which calls for something more. The distinction, however, goes deeper than what is a mere difference in the degree of skill employed. Resourcefulness, or even the display of mechanical ingenuity, does not always involve invention in the patent law sense. The patent laws deal with things which are the product of ideas, not with ideas alone. In a very real sense a person may invent a way of doing something, without having invented anything in a patentable sense. An illustration is the old story of the blacksmith, who restored the broken iron bars in a window opening of a stone wall. One way of doing it was to tear out a part of the wall, insert new bars, and then rebuild the part of the wall which had been taken down. The story is that the blacksmith did the work by heating new bars, bending them so they could be inserted in the wall of the opening, and while still hot straightening them. He had displayed ingenuity in the finding of a way to do the job, but had he invented anything for which he could have taken out a patent?

The distinction, of course, is that, although given the idea of a paper lining to a finger bowl, the man who makes it not only displays skill in

completing the job, but he has made something and, if none before him has made that thing, he has not only invented the idea of making it, but he has invented the thing, because before he made it there was no such thing. The question, however, every time recurs, in making it, did he merely supply skill, or did he invent the thing he made? The question admits of no general answer, but the answer depends upon the special conditions of each case, although there are general guides to aid in arriving at the answer. One of these guides is that, if the thing made is something which, given the mere general idea of making it, any one possessed of the ordinary skill of an artisan could easily make, then there is no invention. When there is doubt, the utility of the thing made, indicated by its general recognition, and this in turn evidenced by the commercial success attending its being placed upon the market, is said to resolve the doubt in favor of a finding of invention.

As has, however, been often said, we can never be sure how much mere commercial success is due to the arts of the salesman, and how much to the merits of the thing sold. Mere numbers, moreover, often lack the impressiveness which they seem to have. When anything sold is inexpensive, and a single customer, as in the instant case, buys, in a single purchase, 10,000 of them, millions in sales has little significance. Without using the word in any opprobrious sense, the use of anything sometimes becomes a mere fad. So-called sanitary precautions often partake of this. Indeed, one of the arguments addressed to us in this case indicates the danger of allowing a monopoly. An argument used to enforce the utility of this claimed invention was based upon the anticipation that the health authorities would make the use of these linings compulsory. To grant first a monopoly, and then compel the use of the thing monopolized, is to confer a power to tax. Nothing could be more suggestive of the necessity for the exercise of caution.

Notwithstanding the views which we have expressed, we feel constrained to make a finding of validity. The finding is based wholly on the following considerations: We recognize that the case is of that character in which one may see invention where another cannot. We are bound to recognize that the experts of the Patent Office, although differing in opinion among themselves, finally made a finding of patentability, and that this finding was made with everything before them which is before us. This finding is, in consequence, one which ought to have its full weight.

We cannot shut our eyes to the cases in which validity has been given to patents in instances as near the line of no invention as is this. Because of these considerations we do not feel disposed to find that the prima facie right which the patentee has should be taken from him, particularly in view of the fact that none of the defendants before us are really disputing the plaintiff's claim. We say this because one defendant contents himself with a denial of infringement, and the other merely submits the prior patents upon which the Patent Office has passed, and submits them without the support of either expert opinion or argument of counsel. If those who have been in the business of making and selling these linings do not think enough of the defense of

the invalidity of plaintiff's patent to present the defense, we may well decline to interfere with the findings of the Patent Office.

The finding of validity is made, notwithstanding the view to which we are inclined, that the plaintiff really has a special make of lining rather than a patent right, and the difficulty we have experienced in being convinced that the fluting of these linings, which was not done until 1914, was then a new thing in this art. This fluting idea is really the keystone in the arch of the combination in each of the claims. With validity found, there is no controversy over infringement by the Hotel Company. This defendant admittedly has used. Without going into the reasons for the limitation, we limit the decree made to one of injunction, and deny the prayer for an accounting. No very broad meaning can be given to the claims, and the writ of injunction must be correspondingly restricted.

A decree, in accordance with this opinion, for an injunction and for the allowance of costs to the plaintiff, may be submitted.

INTERNATIONAL BANKING CORPORATION v. IRVING NAT. BANK.

(District Court, S. D. New York. May 10, 1921.)

1. **Banks and banking ⇐191—Only reason assigned for refusal to pay draft against letter of credit can be considered.**
   In an action against a bank, which refused to pay a draft drawn against a letter of credit issued by it, only the reason given by the bank for its refusal to pay can be considered.

2. **Banks and banking ⇐191—Omission from draft of specification required by letter of credit held to justify refusal of draft.**
   Where the letter of credit issued by a bank required the draft to be accompanied by commercial documents showing that the silk was to conform to their design and the stripe was not to exceed 50 per cent. of the width of the material, the omission from the documents presented of the required statement concerning the width of the stripe justifies the bank's refusal to pay the draft, since it cannot be required to determine whether such omission has any commercial significance, nor to construe the documents nor decide arguable questions.

At Law. Two actions by the International Banking Corporation against the Irving National Bank, tried together to the court after a jury was waived. Judgment rendered for defendant.

Shearman & Sterling, of New York City (Clifton P. Williamson and James A. Stevenson, Jr., both of New York City, of counsel), for plaintiff.

Dennis & Buhler, of New York City (Joseph S. Buhler and Arthur B. King, both of New York City, of counsel), for defendant.

MAYER, District Judge. These are two actions, which were tried together and which involve the same question. While there is some difference in detail as to amount involved, there is no difference in the controverted question. A discussion of the first action will suffice for both.

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

The first action is to recover $22,751.30, with interest from May 18, 1920, upon a draft drawn by one K. Kobayashi, of Yokohama, Japan, upon the Irving Trust Company of New York, under a letter of credit for $32,500 issued by Irving Trust Company under date of November 7, 1919. After this letter of credit was issued, the Irving Trust Company became a national bank and was then merged with defendant, which assumed the liabilities of Irving Trust Company.

The letter of credit was issued and delivered to one Philip Liberman on November 7, 1919, and was in the following form:

"Irving Trust Company.

"New York, Nov. 7, 1919.

"Letter of Credit No. 2110 for $32,500, U. S. C'y.

"We hereby authorize K. Kobayashi, Yokohama, Japan, to draw on Irving Trust Company, New York, for account of Philip Liberman, New York, at four months after sight for any sum or sums not exceeding in the aggregate thirty-two thousand five hundred dollars U. S. currency, against complete negotiable set of shipping documents covering 500 pcs. Fuji silk as per sample 400 weight about 16 mm. each piece 33"x50 yds. to be made as per our designs and total width of stripes not more than 50% of the material width. Price $65.00 U. S. gold per piece c. i. f. New York for shipment to New York. Marine insurance and also war risk insurance to be effected by shippers. Drafts under this credit are to be drawn in duplicate and negotiated on or before May 20, 1920, and to be enfaced, 'against I. T. Co.'s L/c 2110, dated New York, November 7, 1919' and the amounts thereof to be written off on the back of this credit. The negotiating banker must send duplicate advice of such drawings promptly to Irving Trust Company, New York, accompanied by negotiable bills of lading (all except one of the set issued), insurance certificates if the shipper insures, consular invoice, and commercial invoice. Bills of lading are to be issued to the order of 'Irving Trust Company, New York, notify Philip Liberman, New York.' All remaining documents, completing the sets originally issued, must be sent by negotiating bankers to Irving Trust Company, N. Y., bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly accepted upon presentation and paid at maturity. Irving Trust Company."

On April 15, 1920, Kobayashi drew the draft in question "under and pursuant to said letter of credit against a complete set of shipping documents." The draft is in the following form:

"Drawn under L/credit No. 2110 dated 7 November, 1919. No. 5881 U. S. $22,750.

"Yokohama, 15th April, 1920.

"At four months after sight of this first of exchange (second of the same tenor and date unpaid) pay to the order of the International Banking Corporation U. S. dollars twenty-two thousand seven hundred and fifty, for value received, and place the same to account against shipment of silk goods per S. S. Asia, to New York, N. Y.

"To Messrs. Irving Trust Co. New York, N. Y., U. S. A. K. Yobayashi.

"For a/c of Mr. Philip Liberman, New York."

On April 15, the day of the date of the draft, it was delivered to plaintiff, together with the complete set of shipping documents referred to above, the draft bearing upon its face the words and figures "Drawn under L/credit No. 2110, dated 7 November, 1919," and the documents, consisting of commercial invoice, consular invoice, bills of lading, marine and war risk insurance policy. The bills of lading were issued

to the order of "Irving Trust Co., New York, N. Y., notify Mr. Philip Liberman, New York, N. Y." Thereafter plaintiff promptly sent to the Irving Trust Company a duplicate advice of the drawing of said draft accompanied by the negotiable bills of lading, insurance certificate, consular invoice, and commercial invoice.

On May 18, 1920, the draft was presented to the defendant for acceptance, but the defendant declined to accept the draft; the sole reason given therefor being:

"Invoice does not state that stripes not more than 50 per cent. of material width is called for in credit."

Thereupon the draft was duly protested for nonacceptance, due notice being given to defendant.

The sole question to be determined is as to whether the draft and shipping documents complied with the terms of the letter of credit. The defendant claims, inter alia, that they did not, because there is no specific statement in words and figures upon the face of the documents, "Total width of stripes not more than 50 per cent. of the material width." The plaintiff claims (1) that this is an immaterial omission; and (2) that the documents do in fact cover this representation.

[1] As the only reason for declining to pay the draft is that set forth supra, that reason alone will be considered. Grimwood v. Munson, 273 Fed. 166 (Circuit Court of Appeals for the Second Circuit, decided May 4, 1921).

[2] It will be noted that the letter of credit provided, inter alia, the silk is "to be made as per our designs and total width of stripes not more than 50 per cent. of the material width." It is agreed that "our" must have meant Liberman's, and not the Irving Trust Company's, designs. This, it may be observed in passing, is one of those obvious accidents of language which renders a mere verbal change unimportant, and hence immaterial, and does not require exact and literal verbal compliance.

The contention of plaintiff is that the control of the designs was with the buyer—i. e., Liberman—but that this was not an absolute control, because, by the addition of the words "and total width of stripes not more than 50 per cent. of the material width" the manufacturer, if such Kobayashi (or somebody else) was, could not be compelled to produce silk 33 inches wide, with stripes which occupied more than 50 per cent. of that width. In other words, Kobayashi undertook to manufacture according to Liberman's designs, provided these designs were not of such a character that the stripes would occupy more than 50 per cent. of the material width. Then follows an argument to sustain this contention, and the argument necessarily involves inference, construction of the meaning of the words concerning the 50 per cent. as applying to the manufacturer and the buyer in their relations with each other and what may be concluded therefrom.

It is argued by defendant that Liberman may well have required the letter of credit to contain the words in question because, no matter what his designs were, he wished to make certain that not more than 50 per cent. of the material should be in color, and that this may well have

been a trade necessity for his purposes. The court is then asked by plaintiff to decide that designs would include the disposition of stripes, while defendant argues much about the difference between patterns and designs. There is nothing in the words used to enlighten a reader of the letter of credit as to whether designs would or would not include the per cent. of material used for stripes.

The simplest words of art in commercial transactions often have a trade meaning. A yard may mean a yard and an eighth in one business and a yard exactly in another. Design may mean one thing in silk and another in cotton. Therefore, when the letter of credit used the phrase conjunctively, it was as if to say:

"This silk must be made as per my [Liberman's] designs, *and* the total width of stripes must be not more than 50 per cent. of the material width."

The mere statement of the arguments pro and con destroys plaintiff's case. When the bank issued this letter of credit it did not purchase goods. It agreed to purchase documents, in the sense that it would pay on receipt of certain documents, which should conform in every respect with the requirements of the letter of credit. It was, of course, not concerned with the goods, but with the documents. It would gravely impair the business of issuing letters of credit, if banks were required to construe the documents involved and determine arguable questions.

Of course, there are cases where simple and obvious verbal errors are made, such as "our" above illustrated, of which advantage cannot be taken; but here is a real difference of opinion, which is not a matter of mere words. The only safe rule for a bank is to refuse to pay, if, by omitting, as here, a distinct and clearly expressed provision, the documents do not conform with the letter of credit. Bank of Montreal v. Recknagel, 109 N. Y. 482, 17 N. E. 217.

Defendant, therefore, may have judgment on the merits in both cases.

KEMPER MILITARY SCHOOL v. CRUTCHLEY.

(District Court, W. D. Missouri, W. D. March, 1921.)

1. Internal revenue ⇐7—Corporation conducting military school subject to income tax.

That a corporation organized under the general incorporation laws of the state as one for pecuniary profit is exclusively engaged in conducting a military school, or that its officers and teachers are its sole stockholders, *held* not to exempt it from taxation under Income Tax Act 1916, § 11 (Comp. St. § 6336k), where all the property employed is owned by the corporation, an annual charge is exacted from pupils for tuition, board, etc., and dividends are paid to the stockholders from its net income.

2. Internal revenue ⇐7—Corporation not entitled to deduction for cost of new buildings.

Under Income Tax Act 1916, § 12 (Comp. St. § 6336*l*), a corporation for pecuniary profit is not entitled to a deduction from gross income for expenditures made for new buildings or betterments to its property.

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

At Law. Action by the Kemper Military School against George F. Crutchley. Judgment for defendant.

John Cosgrove, of Boonville, Mo., for plaintiff.

Leonard M. Haydon, Asst. U. S. Atty., of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. [1] The plaintiff in this action seeks to recover the sum of $52,166.81 income taxes, with interest and penalty, alleged to have been illegally exacted from the plaintiff by the defendant for the year 1918. The basis of plaintiff's alleged right to recover the above sum is that it is exempt from tax as an educational institution, which was organized and operated exclusively for educational purposes, and that no part of its net earnings inures to the benefit of any private stockholder or individual. This defense is asserted under the following exemptions specifically provided by the Congress:

"Corporations * * * organized and operated exclusively for religious, charitable, scientific, or educational purposes," or for the prevention of cruelty to children or animals, "no part of the net income of which inures to the benefit of any private stockholder or individual." Comp. St. § 6336k.

The plaintiff was incorporated June 15, 1909, under the provisions of chapter 12, article 9, of the Revised Statutes of Missouri of 1899, governing the formation of private corporations for manufacturing and business purposes. This statute appears as article 7 of chapter 33 of the Revised Statutes of 1909, concerning private corporations, and deals with corporations organized for pecuniary profit and gain. Plaintiff was not organized under the article of the same chapter, which deals with benevolent, religious, scientific, educational, and miscellaneous associations not intended for pecuniary gain or profit.

The school was originally of individual ownership. For many years prior to its incorporation it was owned by Col. T. A. Johnston, now its president and principal stockholder. He purchased it originally for approximately $12,000, since which time large additions and betterments have been made, until its present total assets are shown to be $348,796.01, its liabilities $96,522.88, and its net resources $252,273.13. Its present attendance totals about 435 pupils. In 1918 and 1919, during war activities, it had a few over 500. In 1918 the charge was $600 per pupil for tuition, board, and lights. The charge now has been raised to $700. In addition thereto, it sells to the pupils uniforms and books, upon which it makes a profit. It receives minor items of income from other sources, which do not require detailed consideration. For the calendar year 1918 its gross income amounted to $205,153.26, of which the sum of $5,083.11 was received from sources other than tuition. After making statutory deductions, the net income remaining amounted to $79,788.01. The figures involved are not in dispute, except as to some claims for deduction, to which reference will be hereafter made.

When the school was incorporated, Col. Johnston transferred the property to the corporation, receiving stock therefor. The remaining

shares of stock were subscribed for by teachers, and the officers and board of directors are made up of such. These teachers paid for their stock out of their earnings. A dividend of 6 per cent. has been paid upon all stock since the date of the incorporation.

That the corporation is operated exclusively for educational purposes may be conceded. If the law had stopped there, and had evidenced the purpose of exempting all such, the contention of the government would be without merit; but the law further provides that not only must the corporation be organized and operated exclusively for educational purposes, but that no part of its net earnings should inure to the benefit of any private stockholder or individual.

The case of State ex rel. J. L. Spillers v. Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. (N. S.) 171, in which this same school was under discussion, is not in point. There the school was exempt under a provision of the state Constitution and statute, which exempts from taxation real estate "used exclusively for schools." The element of private pecuniary gain was not involved, and, furthermore, the construction of a state court upon a state Constitution or law could not affect a federal statute of different intendment and uncontrolled by state laws.

This corporation, while devoted to educational purposes, was confessedly organized for private pecuniary profit and gain. Its teachers all receive salaries. In addition thereto, they have all, including Col. Johnston, received an annual dividend of 6 per cent. upon their stock since the date the corporation was organized. While under the terms of the statute we are concerned chiefly with net earnings, nevertheless it may appropriately be remarked that the increase in value of the school property inures to the stockholders of this business corporation. It might at any time be sold, and the purchase price divided proportionately to such holdings. Upon ultimate dissolution the holders of these shares of stock would receive the proceeds of the property, including accumulated income.

The chief insistence is that, because all the shareholders are officers, directors, and teachers in the institution, they are not "private stockholders or individuals." This involves a narrowness of definition that cannot be entertained, in view of the obvious purpose and spirit of the act. The distinction is not between private and official, whether the latter be used in a military or an institutional sense. The word "private," as here used, is the antonym of "public"; a private stockholder, as distinguished from the general public, the supposed beneficiary of the benevolent activities of an institution devoted exclusively to public betterment. Private pecuniary profit and gain is the test to be applied. This corporation was, and is, undeniably organized and operated for that purpose. It does not detract, even in small degree, from the merit and worthy service of the plaintiff, as a valuable institution of learning, to hold, as we must, that it is not exempt from the tax imposed.

[2] Plaintiff further contends that:

"Even if it were liable to pay said taxes, they should not be collected for the year 1918, because it expended in the necessary furniture and fixtures the

sum of $13,086.68, and for buildings and other necessary improvement $80,188.35, amounting in the aggregate to $94,275.03, which amount was expended for the upkeep and expansion of the plaintiff's plant and for the comforts and necessities of said school."

To this claim the defendant answers that plaintiff, in its appeal to the Commissioner of Internal Revenue, in its claim for the abatement of said taxes and for refund, never at any time asserted or claimed that it had failed to take credit for any deduction in its said return of income for the year 1918, which it was entitled to take, in computing its net income for that year, under the act of Congress, and that said claim was never at any time presented by the plaintiff to the Commissioner of Internal Revenue for his consideration and decision thereon; further, that in computing its net income for the year 1918 plaintiff deducted, in its said return of income for said year, a reasonable allowance for the exhaustion, wear, and tear of the property used in its trade or business, including a reasonable allowance for obsolescence.

These allegations of the answer are sustained by the testimony. The law provides for a reasonable allowance for exhaustion, wear and tear, etc., as conceded by defendant, and as claimed by plaintiff in its return and allowed by the collector and Commissioner. It further provides that in computing net income no deduction shall in any case be allowed in respect of any amount paid out for new buildings, or for permanent improvements or betterments made to increase the value of any property or estate. It follows that this claim for deduction, in the sum of $94,275.03, or any part thereof, cannot be indulged.

It appearing that the grounds upon which plaintiff relies for recovery are untenable, and there being no dispute that the amount of the tax levied was correct, if plaintiff's contentions are not sustained, it follows that judgment must be entered for the defendant; and it is so ordered.

UNITED STATES v. MITCHELL et al.

(District Court, N. D. California, First Division. July 1, 1921.)

No. 9276.

1. **Intoxicating liquors ⇐249—Warrant for search of apartment building held invalid.**

   A search warrant issued by a commissioner for search of an apartment building occupied by a large number of families, and without any showing or claim that the premises or any part thereof were being used for the unlawful sale of liquor, *held* invalid to authorize the search of any apartment therein, or the seizure of anything there found.

2. **Searches and seizures ⇐3—Search warrant cannot be amended by telephone.**

   A search warrant cannot be amended by a telephone communication from the commissioner who issued it, nor without evidence to support the amendment.

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

3. Searches and seizures ⇐3—Unlawful seizure cannot be legalized by second warrant.

Where property was seized under a search warrant unlawfully issued, the seizure cannot be legalized by the issuance of a second warrant based on information secured through the first search and seizure.

Criminal prosecution by the United States against Charles Mitchell and Joe O'Donnell. On motion by defendant Mitchell for return of property seized. Motion granted.

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

Chauncey Tramutolo, of San Francisco, Cal., for defendants.

DOOLING, District Judge. [1] The defendant Mitchell was apparently violating the Prohibition Law (41 Stat. 305) by selling intoxicating liquor at his place of business, 211 Kearny street, San Francisco. The enforcement officers searched these premises by virtue of a search warrant and found there certain liquor. They also purchased liquor there. Thereupon they applied for a search warrant to search the residence of defendant at 880 Bush street. This is an apartment house, in which defendant occupies with his family apartment No. 4. It does not seem that the officers would have had any difficulty in ascertaining the number of the apartment occupied by defendant before they applied for a search warrant. The search warrant applied for and issued was one authorizing a search of 880 Bush street—entire premises, outhouses, sheds, lockers, safes, closets, attic, basement, etc. It may be said, in passing, that no information was laid before the commissioner to show that the premises were being used for the unlawful sale of intoxicating liquor and it is not claimed that they were directly; the theory being that the liquor was transported from 880 Bush street to 211 Kearny street and there sold, though no evidence was offered to show even this. Armed with the all-covering warrant above described, the offiecrs went to the premises, and, finding that it was an apartment house in which a number of families resided, had the grace to hesitate in its execution. They telephoned to the commissioner, and received permission over the phone to insert in the warrant the words, "By order of Com. Krull, this to specify Apt. 4, especially." With warrant bearing this long-range amendment they then proceeded, over the protests of defendant's attorney, to search apartment 4, and, finding therein a quantity of liquor, seized it all, sealed some of it, and took one barrel, containing three or four gallons, away. Subsequently another warrant was issued, upon which they assumed again to seize the same liquor. The defendant now moves for a return of the liquor so seized.

Much confusion seems to exist among the enforcement officers concerning the necessity for search warrants and their use. The confusion arises generally, in my opinion, because they are not willing to be bound by the limitations of the Constitution or the law. In pursuing liquor, recently made an outlaw by the Eighteenth Amendment to the Constitution, they are, in their zeal, inclined to disregard other provisions of the same document equally sacred and far more important to the rights

of the people. The language of the Fourth Amendment to the Constitution is as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The protection thus afforded to the people can only be insured by the courts. It is far more important that the right to be secure in their persons, houses, and effects be zealously guarded than that a few individuals be convicted of violating the prohibition or any other law. It is one of the most sacred rights that the Constitution guarantees, and officers sworn to defend the Constitution should be the first to recognize and defend it. There is nothing obscure about it; the language is plain, and means what it says.

Following the Constitution, Congress has provided for the issuance of search warrants (Act June 15, 1917, title 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼a–10496¼v):

(1) "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." Section 10496¼c.

(2) "The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them." Section 10496¼d.

(3) "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." Section 10496¼e.

(4) The judge or commissioner must thereupon be "satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence," before he can issue a search warrant which must, if issued, command the officer "forthwith to search the person or place named for the property specified, and to bring it before the judge or commissioner." Section 10496¼f.

The National Prohibition Act further provides that no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the prohibition law a search warrant is applied for, the first inquiry of the judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling, then the inquiry should be:

"What evidence have you that this place is being used for the unlawful sale of intoxicating liquor?"

If the officer has no such evidence, he should not apply for the warrant; or if the judge or commissioner is not satisfied with the evidence offered, he should not issue it. If the officer is acting upon information, he should lay all the facts before the judge or commissioner, with the names of the persons from whom his information is received.

[2, 3] It is not merely a pro forma matter, but one of utmost importance, that search warrants should be properly issued in the first instance. They should not be lightly applied for, nor lightly issued, as

they trespass upon the most important rights of the people. When issued, they should be promptly served and promptly returned. It should go without saying that they are of such grave importance that they may be amended, if at all, only by the officer issuing them, and then only in conformity wtih the affidavits or depositions upon which they are based. In the present instance we have an all-devouring warrant issued against an apartment house where many families reside. This of itself is sufficient to condemn it, as it was never claimed that the whole premises should be searched. "Particularly describing the place to be searched" is the language of the Constitution, and "particularly describing the property and the place to be searched" is the language of the act. The warrant could not be amended by the officers upon a telephone communication from the commissioner, nor could he himself amend it unless the affidavit itself were so amended as to specify the particular apartment to be searched. Nor should the warrant have been issued without proof satisfactory to the commissioner that the place, being a private dwelling, was being used for the unlawful sale of intoxicating liquor. The original entry into the defendant's home was therefore unlawful, and could not be cured by another warrant issued upon information thereby secured.

The motion is granted, and the property taken will be restored to defendant.

UNITED STATES v. POWERS.

(District Court, W. D. Michigan, S. D. July 5, 1921.)

1. **War ⟸4—Fact that contract by government was made under stress of war does not avoid it.**
   Though a contract by a wool dealer, whereby he agreed to the limitation of profits fixed by regulations of the War Industries Board, was entered into under stress of war conditions, such conditions do not avoid the contract, or excuse failure to perform it where it is not shown that there was either coercion or duress.

2. **Evidence ⟸83(1)—War Industries Board presumed to have acted in good faith, in absence of contrary showing.**
   In the absence of a showing to the contrary, it will be presumed that the War Industries Board in fixing the profit of wool dealers acted in good faith, believing it was authorized so to do.

3. **War ⟸4—Congress can ratify good faith acts of War Industries Board.**
   Acts by the War Industries Board, in good faith believing they were authorized, can be approved or disapproved by Congress, and where contracts made by the board are affirmed by Congress, the other party thereto cannot challenge their validity, if they were such as Congress could in the first instance have authorized.

4. **War ⟸4—Rights of parties under government contract controlled by legislation existing before suit was brought.**
   Where the contract in controversy between the War Industries Board and a wool dealer, whereby he was permitted to act as approved wool dealer at a stipulated profit, was confirmed by Congress long before the

commencement of the suit to recover excess profits resulting from its breach, the rights of the parties must be determined in view of such legislation.

At Law. Action by the United States against Serol E. Powers to recover profits on the sale of wool in 1918 in excess of those allowed under the regulations of the War Industries Board of the Council of National Defense. On motion to dismiss the declaration. Motion denied.

The declaration alleged that, pursuant to the provisions and under the authority of the act of Congress approved June 3, 1916, commonly known as the National Defense Act, and of the act of August 29, 1916, known as the Army Appropriation Act, and the act of Congress of August 10, 1917, commonly known as the Food Control Act, there was created a War Industries Board by appointment of the President; that the actions of the War Industries Board were subsequently ratified and confirmed by Act July 24, 1919, and Act May 31, 1920, making appropriations for the Department of Agriculture for the fiscal years 1920 and 1921, respectively, and also by the executive order of December 31, 1918; that the War Industries Board acting on behalf of the government, fixed the prices of the wool clip of 1918, and issued regulations for handling that clip, which provided, among other things, that it should be distributed through approved dealers, who should not be entitled to more than 1½ cents gross profit on the wool handled by them; that defendant applied for a permit to operate as an approved wool dealer, and agreed to be subject to the rules of the board, but that it made a gross profit on the total season's business in excess of the agreed 1½ cents a pound, whereby it became justly indebted to the United States for the full amount of the excess profits, and in consideration thereof promised to pay said sum to the United States.

To the declaration the defendant interposed a demurrer, or motion to dismiss, for the reasons that the acts of Congress referred to did not, in terms or by legal implication, empower the War Industries Board to make, issue, or enforce the regulations for handling the wool clip as set forth in the declaration, or to limit the dealer's profits; that the rules and regulations of the War Industries Board set forth in the declaration were made without authority of law, and were illegal and void; that the license issued to defendant and the agreement exacted of it was void; that the matters set forth in the declaration were insufficient as a matter of law to establish any legal liability.

L. S. Hulbert, Asst. Sol. of Department of Agriculture, of Washington, D. C., and Myron H. Walker, U. S. Atty, of Grand Rapids, Mich.

Thomas Sullivan, of Hastings, Mich., for defendant.

SESSIONS, District Judge. The decision of this case rests upon well-established rules of law and little discussion is required. This is not a prosecution for a criminal offense arising out of a violation by the defendant of the regulations promulgated by a departmental agency of the government.

[1] In this instance the defendant entered into a contract, and so far as appears from the face of the pleadings there was neither coercion nor duress. It is true that it may be said the contract was entered into under stress of war conditions; but such conditions do not avoid contracts, and furnish no excuse for failure to perform them. In time of war broad powers are conferred upon the President of the

United States both by Constitution and by standing statutory enactments of Congress. The question of the power of the President, or of the War Industries Board organized under the President, is not necessarily involved.

[2] It is fair to assume that the board acted within what it believed to be its authority and power. Whether such authority and power were conferred by the act of Congress, or whether it was derived from the general powers conferred upon the executive branch of the government in times of war, is quite immaterial. It must be assumed that the board or bureau acted in good faith, and there is nothing to indicate a want of good faith. The power of Congress to authorize the action of the board in the first instance cannot be doubted.

[3] That being true, it was entirely competent for Congress thereafter to approve or disapprove, affirm or disaffirm, its acts. Acting pursuant to what it believed to be the power conferred upon it, this governmental agency entered into a contract with this defendant, and the defendant is not in a position to challenge the right of the congressional branch of the government to approve and affirm the contract so made; and Congress in no uncertain terms has approved and affirmed contracts of this kind and character made by the board through its officers.

[4] Here the congressional action was not taken subsequent to the bringing of this suit to enforce the provisions of the contract, but was taken long prior to the commencement of this suit, so that the rights of the parties must be determined in view of legislation as it now exists, and in view of the ratification and approval of the acts of the board. It follows as a matter of course that, if the contract is valid and made in behalf of the government, the government has a right to bring suit in its own courts to enforce its terms.

For these reasons, the motion to dismiss will be denied. The plaintiff will have the usual time in which to plead to the declaration.

THE FLUSH.

ROBINS DRY DOCK & REPAIR CO. v. BULK OIL TRANSPORTS.

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

Admiralty ⇐50—Stipulator not entitled to intervene.

A stipulator for value in a suit in rem *held* not entitled to intervene, where not shown to have any claim against the res or its proceeds.

In Admiralty. Suit by the Robins Dry Dock & Repair Company against the Steamship Flush; the Bulk Oil Transports, claimant. On motion of the National Surety Company for leave to intervene. Denied.

Crowell & Rouse, of New York City, for libelant.

T. Langland Thompson, of New York City, for claimant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for petitioner.

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

GARVIN, District Judge. The National Surety Company has applied for an order permitting it to intervene as a party respondent in this cause and to take such measures as it may be advised are desirable or necessary to protect its interests herein.

On or about August 19, 1918, the applicant executed a stipulation for value in the sum of $185,000, conditioned to pay the amount awarded by final decree of the court herein. This stipulation for value was given on the undertaking or indemnity of Christoffer Hannewig at a time when it was supposed that he was entirely solvent. It now appears that he is insolvent, and that his undertaking or indemnity is worthless. The claimant, also, appears to be insolvent, and has no assets, except what may be represented by the value, if any, of a claim for which it has a cross-libel herein.

The claimant has been represented by T. Langland Thompson, as proctor, who, opposing the entry of the petitioner on the ground that he has not been paid for services performed herein, and that if the application is granted the applicant will receive the benefit of all services heretofore rendered by him, urges that the court has no power to permit the intervention sought. If it were merely a question of counsel fees the court would have no hesitation in granting the application, perhaps upon terms, but the real difficulty is found in the fact that the National Surety Company has only, at best, a contingent interest in this action, at the present time.

The right of a third party to intervene can be based only upon his having a claim against the res or the proceeds thereof. The petitioner was a stranger to the parties and to the cause of action when the libel was filed, and has never had any interest in, claims to, or connection with the res. Reliance is placed upon The Bylands, 231 Fed. 101, 145 C. C. A. 289, and Briggs v. Taylor, 84 Fed. 681, 28 C. C. A. 518. I cannot agree with counsel for the petitioner that either of these cases is any authority for granting the relief sought.

Motion denied.

TRYSON et al. v. SOUTHERN REALTY CORPORATION.

(Court of Appeals of District of Columbia. Submitted March 9, 1921. Decided June 6, 1921.)

No. 3472.

1. **Corporations ⊂=439—Sale by insolvent corporation of building owned by it held not ultra vires.**
   A sale by a solvent insurance company, with the approval of its stockholders, of a building which was its principal asset, but which was burdensome to it because of its nonliquid character, to a realty corporation, for whose stock the insurance company's stockholders were invited to exchange their stock, at a price and on terms causing no substantial loss to the stockholders who exchanged, or those who did not exchange, their stock *held* not ultra vires, illegal, or void, under Code of Law, §§ 607, 608, relative to the powers of corporations and the management of their affairs by trustees.
2. **Corporations ⊂=388(4)—Stockholders, participating in sale of building by exchanging stock for stock in purchasing corporation, not entitled to attack sale.**
   Where, on a sale of property by an insurance company to a realty company, stockholders were invited to exchange their stock for stock in the realty company, stockholders who participated in the exchange could not attach the sale as ultra vires, illegal, and void.
3. **Corporations ⊂=370(1)—Doctrine of ultra vires to be applied within narrow bounds as respects private corporations.**
   The doctrine of ultra vires should be confined within narrow bounds, as applied to private corporations.

Appeal from the Supreme Court of the District of Columbia.

Suit by William Frank Tryson and others, receivers, against the Southern Realty Corporation. From a decree in favor of defendant, plaintiffs appeal. Affirmed.

Charles A. Douglas, Howard A. Boyd, Michal J. Keane, and Jo. V. Morgan, all of Washington, D. C., for appellants.

John Lewis Smith, L. A. Dent, and H. P. Gatley, all of Washington, D. C., for appellee.

HITZ, Acting Associate Justice. This is an appeal from a decree of the Supreme Court of the District of Columbia, passed July 20, 1920, denying the prayer of a bill to set aside the sale of the building hereinafter referred to, and a subsequent decree of August 12, 1920, which dissolved an injunction incorporated in the first-mentioned decree against any conveyance or incumbrance of said building by the appellee, or the declaring of any dividend on its stock until the liabilities of the First National Insurance Company (of which appellants are receivers), both absolute and contingent, had been fully satisfied, secured, or discharged. The latter decree permitted the giving of a bond by the appellee in the sum of $300,000, indemnifying the receivers against any claims of creditors of the Insurance Company on account of any indebtedness which might be properly adjudicated as subsisting and bona fide debts of said company, to the extent that they might be in excess of the assets of said company.

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

Prior to December 15, 1914, the Insurance Company was the owner of an undivided moiety in the property known as the Southern Building, in the city of Washington, and on that date became by proper conveyance the sole owner. At that time the building was subject to three deeds of trust, securing $800,000, $450,000, and $325,000, respectively. To carry out the terms of the purchase of the moiety acquired December 15, 1914, and to finance the transaction, a corporation, the appellee, was created February 10, 1915, under the laws of Delaware, the corporators being seven members of the executive committee of the Insurance Company and one citizen of Delaware, all expenses of the organization of the new corporation being paid by the Insurance Company.

By deed of February 24, 1915, the Insurance Company conveyed the Southern Building to the appellee, and thereupon the second and third trusts above mentioned were released, and, on March 18, 1916, the appellee reconveyed the property to the Insurance Company subject to the original first trust of $800,000 and to a new second trust of $600,000. The by-laws of the Insurance Company provide, in part, as follows:

"The management of the affairs of the company shall be vested in the board of trustees, consisting of fifteen stockholders, to be elected by ballot at the annual meeting of stockholders to be held on the Thursday following the second Wednesday in June of each year."

The incumbrances nearing maturity, the trustees of the Insurance Company called a special meeting of its stockholders to be held February 7, 1917, for the purpose of considering a plan to refinance the building, at which meeting such a plan was proposed by the trustees and adopted by the stockholders. Pursuant thereto this property was on February 14, 1917, again deeded to the appellee, and by it, on the 28th of the same month, again reconveyed to the Insurance Company, subject only to the lien of a first trust of $900,000.

At the stockholders' meeting of February 7, 1917, a committee had been appointed to investigate the condition of the Insurance Company and to devise plans for the betterment thereof, the report of said committee to be made first to the trustees and by them submitted to a special meeting of the stockholders. Such report was made to the trustees March 7, 1917, in substance suggesting that such of the stockholders of the Insurance Company as might so desire should enter into a corporation, to be called the Southern Realty Corporation, which would take over the building at a price affording such stockholders an allowance of their proportionate part of the then existing surplus of the Insurance Company, those so entering to exchange their Insurance Company stock for stock in the Realty Corporation, par for par, or one share of insurance stock for one share in the Realty Corporation. This report was approved by the trustees, and a circular letter, under date of March 10, 1917, inclosing a copy of the plan, was sent to the stockholders of the Insurance Company.

On May 18, 1917, the trustees received an offer from the appellee to purchase the building for $1,800,000, payment to be made by the assumption of the first trust of $900,000; by approximately 39,000

shares of the stock of the Insurance Company, with its proportionate part of the surplus of that company as of April 30, 1917; and by second trust bonds payable five years after date with interest at 4 per cent. for the balance of the purchase price of the equity of $900,000. This offer was accepted by the trustees at this meeting, conveyance of the property was directed, and the deed therefor was subsequently executed and delivered, and there is no contention made that this price was inadequate or below the value of the property.

The capital stock outstanding of the Insurance Company was represented by 182,101 shares, of the face value of $5, making a total of $910,505. There were 39,707 sent in, pursuant to the plan for exchange, amounting to $198,535. The settlement made between the trustees of the Insurance Company and the Realty Corporation with respect to this sale was as follows:

Purchase price		$1,800,000.00
Less first mortgage		900,000.00
Balance to be accounted for		$ 900,000.00
First National capital April 30, 1917	$910,505.00	
Exchanged for Realty Company stock, 39,707 shares, or	198,535.00	
Ratio	.21804	
First National surplus April 30, 1917	126,219.76	
Less net rent due April 30, 1917	15,070.40	
Surplus to be apportioned	$111,149.36	
Southern Realty Company's proportion		$24,235.00
Add amount of stock exchanged		198,535.00
Second Mortgage Bonds to be given the First National by the Realty Company		677,230.00
Total		$ 900,000.00

In accordance with the by-laws, notices to the stockholders of the annual meeting to be held on June 14, 1917, were sent out, and these were accompanied by a call for a special meeting, to be held immediately after the annual meeting, for the purpose of voting upon a resolution for the reduction of the capital stock of the Insurance Company to $711,000. At the annual meeting 528½ shares were voted in person, and 147,512 shares by proxies, some of which were given in 1914, others in 1915, and some early in 1916.

These proxies were of two classes. One form, designated as the "stock association proxy," ran for three years from 1916, and empowered the persons named to vote the stock "at any and every annual or special meeting of the stockholders * * * on any and all matters and questions which may be considered and presented at any such annual or special meetings occurring within said period." The other form, called "old proxy," unlimited as to time, give the power to vote the stock "at any annual or special meeting of the stockholders" in voting for trustees of the company, "and in the transaction of any other business as may properly come before the meeting"; these proxies reciting that they are to remain in full force until revoked in writing. It is not claimed that there was any revocation of either form of proxy.

At the annual meeting a resolution was passed ratifying all the acts

of the board of trustees and the officers of the company during the past year. The special meeting was held immediately after the annual meeting; the memorandum of settlement of the sale, above set forth, was presented, and the transaction ratified. A resolution diminishing the capital stock to the sum of $711,000 was passed; the vote being taken by ballot through tellers, and the 148,040½ shares, represented as above stated, being cast in favor of the adoption of the resolution.

In August, 1917, a majority of the trustees of the Insurance Company filed a petition in the Supreme Court of the District of Columbia, Equity No. 35358, stating that at a meeting of the trustees held on August 8, 1917, a resolution was passed reciting that, because of unwarranted attacks and malicious rumors made and circulated about the company, the trustees believe it impracticable to succeed in the fire insurance business, and deem it beneficial to the interests of the stockholders that the company be dissolved, although entirely solvent, and directing the trustees to apply for the voluntary liquidation and dissolution of the company; the petition praying such dissolution under section 769 of the Code, together with the appointment of receivers and reference to the auditor as provided by law.

Temporary receivers were named, and later the appellants herein were appointed permanent receivers. On March 3, 1919, the appellants filed a report in the cause in which they were appointed receivers, stating that a majority of them recommended that they be authorized to take such action as might be necessary to set aside the sale to the appellee, and on the same day an order was passed authorizing such a proceeding, and the present bill was filed April 3, 1919.

In the court below there was practically no conflict regarding the facts, the question being as to the validity of the sale upon the case as briefly stated above. There are seven assignments of error, which, taken together, present the contention that the sale and conveyance of the building to the appellee was ultra vires, illegal, and void.

[1] The Insurance Company was incorporated under the general law of this District. Section 607 of the Code provides that the persons who have acknowledged and filed the certificate required by the preceding section shall be a body corporate, with certain enumerated powers, and—

"by their corporate name be capable in law of purchasing, holding, and conveying any real or personal estate whatever which may be necessary to enable the company to carry on its operations named in such certificates, but shall not mortgage such estate or give any lien thereon, except in pursuance of a vote of the stockholders of the company."

Section 608 of the Code provides that "the stock, property, and concerns of such company shall be managed by not less than three nor more than fifteen trustees," whose qualifications are specified.

While not bearing directly upon the validity of the sale, it is proper to ascertain what injury, if any, was inflicted thereby, first on the creditors; and, secondly, on the stockholders of the Insurance Company who did not enter into the exchange. From creditors there is no complaint; and it does not in any way appear that they can or will suffer loss, for it is conceded that the Insurance Company is solvent. No

stockholder, as far as the record shows, personally unites with the receivers in their attack upon the sale.

In the testimony of one of the attorneys for the appellants there is a statement to the effect that at a hearing before the auditor in the course of the dissolution proceeding a holder of 10 shares was represented by counsel, and that a number of attorneys raised objections, but details as to the extent of the interests of their clients are not given, nor does it appear that any further action was taken by them, so that the stockholders are not before the court, except through the appellants, under section 774 of the Code, which is as follows:

"Upon his giving surety as aforesaid the receiver shall be vested with all the estate, real or personal, of the corporation, for the benefit of its creditors and stockholders."

But, assuming that the stockholders of the Insurance Company are now before the court through the bill of the receivers, for the present purpose such stockholders consist of two groups, namely, those who participated in the exchange and those who did not. Those who participated receive for their shares of stock in the Insurance Company a bookkeeping credit for their portion of the surplus of that company and stock in the Realty Corporation, share for share, at 100 cents on the dollar; while those who did not participate in the exchange receive their portion of the surplus of the Insurance Company in cash, and second mortgage bonds of the Realty Corporation at 100 cents on the dollar, which represents an obligation of that company prior to its capital stock, and which must be paid or satisfied before that stock has any value.

[2] Those stockholders who participated in the exchange, of course, cannot be heard now to attack it; while those who did not participate will receive the full face value of their stock, together with their portion of the surplus of their company. But it is said by the appellants that these second mortgage bonds of the Realty Corporation carry interest at only 4 per cent., while its stock paid an annual dividend of 5 per cent. in 1918.

Laying aside the fact that the record shows no dividend since that time and gives no light on the subsequent financial condition of the company, we view the difference in value between a 5 per cent. stock and a 4 per cent. prior bond as de minimis in the present controversy. While the financial result of the transaction complained of is not conclusive of its legality, it is of much significance in considering the question here presented, which involves no allegation of fraud or inadequacy of price, but rests upon the alleged ultra vires character of the transaction.

While the Southern Building was not the only asset of the Insurance Company, it was its main asset, and it was clearly nonliquid in character and not essential to the conduct of its business. One of the difficulties confronting the Insurance Company prior to the sale was an objection from the insurance authorities of the District of Columbia to the nonliquid character of its equity in the Southern Building.

[3] In this situation the managers of the company sought, obtained, and accepted an offer to buy the building at a fair price. The In-

surance Company was a private corporation, and the doctrine of ultra vires, as applied to such corporations, should be confined within narrow bounds.

In the case of Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, the court quotes with approval a statement by Mr. Freeman to the effect that the doctrine of ultra vires, as applied to contracts of private corporations, has almost lost its meaning, and in First National Bank v. Guardian Trust Co., 187 Mo. 494, 86 South. 109, 70 L. R. A. 79, the opinion embodies a statement by Lord St. Leonards, that "the safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds." This case presents a situation where the trustees of a corporation of this class, under the Code provision and its own by-laws, had the power of "management of the affairs of the company," and receiving an offer of purchase for a building, the continued ownership of which they believed was a burden upon the company, made sale of it for a fair price. Their action was reported to and ratified by the stockholders at an annual, and at a special meeting immediately following, where 148,000 shares out of a total of 182,000 were cast in favor of the ratification.

Very little help could be gained by a review and discussion of the numerous cases cited by counsel for the respective parties. Many of the decisions could, perhaps, be reconciled or distinguished, but none cover the exact situation here, so that this case must be determined upon its own facts. Under all the circumstances we cannot say that the transaction here challenged was ultra vires or illegal, or that any good purpose would be accomplished by setting aside the sale, producing a condition of confusion, and opening the way for further expensive litigation.

The result is that the decrees appealed from must be affirmed, with costs; and it is so ordered.

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.

KILLGORE v. ZINKHAN.

(Court of Appeals of the District of Columbia. Submitted February 7, 1921. Decided June 6, 1921.)

No. 3414.

Constitutional law ⇐318—Landlord and tenant ⇐278½, New, vol. 11A Key-No. Series—Statute making rent commission's findings final, except on appeal, is constitutional.

The provision of Ball Act, §§ 106, 108, making the findings of the rent commission, from which no appeal was taken, final and conclusive, is constitutional since the act provides for a hearing after notice, and for an appeal from the commission's decision, which satisfies the guaranty of Const. Amend. 5, against deprivation of property without due process of law.

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

Appeal from the Supreme Court of the District of Columbia.

Proceeding by M. Alice Zinkhan, as landlord, against Emma Killgore, as tenant. Judgment for the landlord, and the tenant appeals. Affirmed.

R. B. Dickey and Robt. T. Lang, both of Washington, D. C., for appellant.

Andrew Wilson, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is a landlord and tenant case. Zinkhan brought action in the municipal court against Killgore to recover possession of certain real estate. Objection having been made to the court's proceeding until the rent commission, provided for under the Act of October 22, 1919 (41 Stat. 298), known as the "Ball Act," had passed upon the question as to whether Zinkhan was entitled to possession, the case was continued to await the commission's determination. The commission ruled in favor of Zinkhan, and from its action no appeal was taken. Afterwards the case was called for trial before the municipal court, and the decision of the commission offered and received in evidence. Basing its action on the decision of the commission, the court rendered judgment for Zinkhan. From this judgment Killgore appealed to the Supreme Court of the District, where Zinkhan, in accordance with rule 19 of that court, filed an affidavit of merit setting forth, as we have given them, the proceedings before the municipal court, and asking for judgment. To this Killgore interposed her affidavit of defense, in which she averred that the notice to quit served on her was defective, that the provision of the Ball Act making the findings of the commission obligatory upon the court was unconstitutional and void, and that there was no trial before the municipal court because it refused to consider any of the questions raised by her and based its judgment wholly and exclusively on the determination of the commission. The court held the affidavit insufficient and gave judgment for the landlord, Zinkhan, from which Killgore appeals.

According to the Ball Act the determination of the commission is made "final and conclusive" unless an appeal to this court is taken within 10 days after the filing of the determination. Section 108. We have seen that Killgore did not appeal from the commission's determination. Section 106 says:

"In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto."

This was obeyed by the trial court.

In Hirsh v. Block, 255 U. S. ——, 41 Sup. Ct. 458, 65 L. Ed. ——, decided by the Supreme Court of the United States April 18, 1921, the Ball Act was held constitutional in all its parts. It was there urged, as Killgore urges here, that the act was invalid in so far as it deprived the parties of a trial by jury on the right to possession of the land, but the court was not persuaded. The act provides for a hearing after notice,

before the commission, and, as we have just seen, an appeal from the commission's decision. This satisfies the constitutional guaranty (Fifth Amendment) against deprivation of property without due process. San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229.

The place for Killgore to present her contention that the notice to quit was insufficient was before the commission. We do not know what course she took there in that regard. But that is immaterial. If she raised the point, it was overruled; if she did not, she lost her opportunity. In either case she is bound by the commission's action.

The judgment of the Supreme Court is affirmed, at the cost of the appellant.

Affirmed.

Mr. Justice STAFFORD, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

SMITH v. PYNE et al.

(Court of Appeals of District of Columbia. Submitted February 10, 1921. Decided June 6, 1921.)

No. 3446.

1. **Landlord and tenant ⇐278½, New, vol. 11A Key-No. Series—Municipal court cannot proceed over objection of pending proceedings before rent commission.**

   The provisions of the Code giving municipal courts jurisdiction to determine controversies between landlord and tenants respecting possession of real estate must be construed in connection with the provisions of the Ball Act, and, though the municipal court may determine such controversies on the evidence before it, in the absence of objection, it cannot proceed to determination when objection is made that proceedings were pending before the rent commission under the Ball Act.

2. **Landlord and tenant ⇐278½, New, vol. 11A Key-No. Series—Determination of rent commission is conclusive in municipal court proceedings against tenant.**

   The determination by the rent commission under the Ball Act is conclusive in a suit in the municipal court between a landlord and tenant, and no other evidence is permissible.

Appeal from the Supreme Court of the District of Columbia.

Suit by Norvell C. Pyne and another against Claude R. Smith to recover possession of premises. From a judgment for plaintiffs on appeal from the municipal court, defendant appeals. Reversed and remanded.

Raymond M. Hudson, of Washington, D. C., for appellant.

Andrew Wilson, of Washington, D. C., for appellees.

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

SMYTH, Chief Justice. The Pynes sued in the municipal court to recover possession from Smith of premises which they claimed the latter held without right, and recovered a judgment for what they desired. Smith appealed to the Supreme Court. Within the time allowed by law the Pynes filed an affidavit of merit and asked for judgment under the nineteenth rule. Smith, by plea and his affidavit of defense, set forth that the Pynes had instituted a proceeding before the rent commission for the same cause of action as that pleaded in this case, and that the proceeding was still pending and undetermined, and for that reason he challenged the jurisdiction of the court to advance until the commission had disposed of it. His challenge was overruled, and the motion for judgment sustained. He appeals.

[1, 2] We think the court could not rightly enter judgment, except upon the determination of the rent commission (Killgore v. Zinkhan, — App. D. C. —, 274 Fed. 140, this day decided), and that Smith sufficiently raised the point. The provisions of the Code giving the municipal court jurisdiction to hear and determine controversies between landlords and tenants respecting the possession of real estate must be construed in connection with the pertinent provisions of the Ball Act (41 Stat. 298). They are in pari materia. The municipal court has jurisdiction over the subject-matter, and with the proper parties before it may hear and determine all controversies relating to the subject on such evidence as may be adduced, when no objection is made; but when objection is made to the effect that the court cannot proceed, except upon the determination of the rent commission under the Ball Act, it must suspend proceedings until that determination is presented in evidence. When it is presented, the court must accept it as conclusive and pronounce judgment according to it. No other evidence is permissible. Killgore v. Zinkhan, ante.

For the error pointed out, the judgment is reversed, at the cost of the appellee, and the case remanded for further proceedings.

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.

DAVIS v. COOKSEY et al.

(Court of Appeals of District of Columbia. Submitted February 10, 1921. Decided June 6, 1921.)

No. 3429.

Landlord and tenant ⊂=278½, New, vol. 11A Key-No. Series—Finding of rent commission, not appealed from, is conclusive in the courts.

The finding of the rent commission in a controversy between landlord and tenant, from which no appeal was taken as provided by the terms of the Ball Act, is final and conclusive in the courts.

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

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding by Rena Cooksey and another against Charles S. Davis. From a judgment for plaintiffs on the insufficiency of the affidavit of defense, defendant appeals. Affirmed.

Raymond M. Hudson, of Washington, D. C., for appellant.

Chapin B. Bauman, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This is a landlord and tenant proceeding, in which the landlords, Rena Cooksey and Blanche E. Cooksey, hereafter referred to as plaintiffs, brought an action before the rent commission against the tenant, Davis, to recover possession of the property in question. An order for possession was made by the commission. Plaintiffs then brought an action in the municipal court, offering in support thereof the finding of the rent commission. From a judgment in their favor the case was taken to the Supreme Court of the District for trial de novo.

In the affidavit of merit, plaintiffs averred that they were the owners of the property in fee simple; that they had purchased it for their own bona fide use and occupancy as a home; that Davis occupied the premises at the time as a tenant by sufferance; that a 30-day notice to quit had been given, as required by law, and that the proceedings in the municipal court had been suspended to await the order of the rent commission before final action was taken.

In the affidavit of defense, defendant Davis contended that the order of the rent commission was only prima facie evidence of plaintiffs' right to possession, which might be refuted before a jury. The notice was served on November 28, 1919, and expired on December 28; but plaintiffs admitted in their affidavit of merit that they accepted rent up to December 31, 1919.

Plaintiffs, under rule 19 of the Rules of Practice of the Supreme Court of the District, moved for judgment upon the insufficiency of the affidavit of defense. The court sustained the motion, and from the judgment the case is here on appeal.

The failure to appeal from the finding of the rent commission, as provided by the terms of the Ball Act (41 Stats. 298), rendered the finding final and conclusive in the courts. This is sufficient to support the judgment, and the other defenses, including the effect of the receipt of rent for a period extending beyond the expiration of the notice, are not available. The case is ruled by Killgore v. Zinkhan, —— App. D. C. ——, 274 Fed. 140, this day decided.

The judgment is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

GREENE et al. v. UNITED STATES.

LOUCKS et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. July 8, 1921.)

Nos. 3523, 3525.

1. **Public lands ⟸114(3)—Reference to survey makes it part of description in patent.**
A patent conveying lands mentioned therein according to the official plat of survey makes the plat a part of the conveyance which controls the limits of the grant as fully as if the descriptive features therein were written out on the face of the grant itself.

2. **Waters and water courses ⟸111—Meander line not boundary.**
As a general rule a meander line run by a surveyor is not a boundary if the lands conveyed by the patent are described as bordering upon a lake or other body of water but the waters themselves constitute the boundary, the meander line being intended to ascertain the approximate acreage.

3. **Waters and water courses ⟸111—Purpose to make meander line boundary must be manifest.**
Where a patent conveyed public lands in accordance with the official survey thereof, and the plat showed one of the boundaries to be a meander line, supposedly the shore of a lake, the meander line as described is not the boundary, where it deviates from the lake shore, unless a purpose to make such line, and not the shore line, the boundary is manifest because of the absence of the body of water shown in the plat or the presence of a misnamed body of water which satisfies the natural object shown, or a notation of intervening land.

4. **Public lands ⟸26—Resurvey correcting error cannot deprive former patentee of title already acquired.**
The unquestioned right of the government to make new surveys of public lands and correct errors in former ones does not make the new survey conclusive against a prior purchaser so as to prevent his assertion of whatever title he had acquired as against one claiming under the new survey.

5. **Waters and water courses ⟸111—Lake shore, and not meander line, held boundary.**
Where the patent referred to the official survey which showed a meander line as the shore of the lake, but it appeared that the lake shore varied from the calls for the line so that the fractional subdivisions conveyed by the patent, if extended to the lake shore, exceeded by 50 per cent. and 20 per cent. respectively, the acreage stated, and the intervening land was intersected with ravines sometimes filled with water, and was of little value until oil was discovered thereon, the shore of the lake, and not the meander line, was the boundary of the tract conveyed by the patent.

Appeals and Cross-Appeals from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Separate suits by the United States of America against Charles J. Greene, Jr., and others and against A. C. Loucks and others to quiet title to certain lands and to recover the value of oil removed therefrom by defendants. From a decree in each case quieting the title to the land and giving decree for the value of the oil removed less the cost of extracting it, defendants appeal, and the plaintiff files cross-appeal from the portion of the decree deducting cost of extracting the oil. Revers-

ed on appeal, with directions to dismiss the bill of complaint, and cross-appeals dismissed.

F. M. Cook, S. M. Cook, N. C. Blanchard, H. C. Walker, Jr., and Elias Goldstein, all of Shreveport, La., for appellants and cross-appellees in No. 3523.

J. D. Wilkinson, S. L. Herold, and J. A. Thigpen, all of Shreveport, La., D. Edward Greer, of Houston, Tex., and R. L. Batts, of Pittsburgh, Pa., for appellants and cross-appellees in No. 3525.

Robert A. Hunter, Sp. Asst. Atty. Gen., of Shreveport, La., for the United States.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On July 19, 1917, the United States filed in the United States District Court, for the Western District of Louisiana a bill in equity against Charles J. Greene, Jr., and others, seeking a decree setting up its title, and granting relief in regard to certain lands described as lots 2 and 3 of section 27, township 20 north, range 16 west, Louisiana meridian, containing 65.77 acres according to a plat of survey approved March 28, 1917, by Clay Tallman, Commissioner of the General Land Office of the United States.

On August 2, 1917, the United States filed a similar bill in said court against A. C. Loucks and others seeking a like decree as to the land described therein as lot No. 4 of said section 27 according to the same plat of survey.

Each bill prayed a decree declaring the lands to be mineral in character, and to be the property of the United States, declaring all adverse claims or titles of the defendants to be null and void, canceling the same as a cloud on complainant's title, and enjoining the defendants from creating any cloud on complainant's title to the lands, or any oil, gas, or mineral therein, or from extracting the same therefrom. It prayed for the appointment of a receiver to take charge of said lands pendente lite and for an accounting for the value of the oil and gas theretofore extracted therefrom by the defendants.

The defendants in each case denied the title of the United States and asserted that the land was held by them by mesne conveyances under patents theretofore granted by the United States conveying the same.

Greene and his codefendants asserted title under a patent including the fractional N. W. ¼ of said section 27.

Loucks and his codefendants asserted title under a patent including the fractional N. E. ¼ of said section 27. Each answer averred that at the dates of said patents said fractional N. E. ¼ and N. W. ¼ of said section 27 were conveyed according to the plat of survey then on file in said land office, and bordered on and adjoined Ferry Lake, and there was no land indicated as between the meander line and the waters of said lake (which is a navigable body of water); that said patents embraced and conveyed the lands now claimed by the United States.

The entire township 20 was originally surveyed by one Warren in 1839. His plat of township 20 showed Ferry Lake as the northerly

boundary of fractional lot 27. No land is indicated on said plat as lying between the meander line of said lake and the waters thereof. In 1908 the presence of oil in adjacent territory caused the President to withdraw all lands of the United States in this and other townships from any manner of appropriation, and a resurvey of this township was directed where it bordered on Ferry Lake and its arms. This survey determined that the mean high-water level of Ferry Lake at the time of said Warren survey in 1839, as well as in 1812, when Louisiana became a state, was 173.09 feet above the Gulf level; that Warren so recognized it and that his section lines terminated at the lake at this elevation, but that in meandering the shore of said lake in front of said section 27 Warren's courses and distances do not follow the shore of the lake, but run over high ground which at its farthest point is about 1,200 feet from the true shore line. The omitted land is intersected with several ravines running to Ferry Lake. It contains 97.64 acres divided into lots 2, 3, and 4 of section 27 and fractional section 23, as per said plat of survey of March 28, 1917, the lots 2 and 3 contain 65.77 acres. No. 4 contains 14.13 acres, and section 23, 17.44 acres. The acreage of section 27 as surveyed by Warren in 1839 was 468.67 acres. The acreage claimed by the defendants in case No. 3523 to be included in the Warren survey and the patent thereunder under which they claim is that in lots 2 and 3 and about one-half of the 16.61 acres described as the fractional section 23 in the Kidder survey, or 74.08 acres. That claimed by the defendants in No. 3525 is lot No. 4 of section 27 and the rest of said fractional section 23, or 23.56 acres. While these suits involve no part of the land described as section 23, the title to the acreage is necessarily disposed of by the decision of these cases.

The cases were referred to a master, who took testimony and made a report finding that the land in controversy had been omitted from the Warren survey by manifest error, and that the government was the owner thereof. He also found that the government was entitled to recover the value of the oil received therefrom less all costs of extracting the same. The defendants excepted to the report, and the government to so much thereof as allowed to defendants the cost of raising said oil.

The court overruled all exceptions and rendered a decree in favor of the government in accord with the master's report.

The defendants appealed, assigning error in the finding that the government was the owner of the land, and the government has taken a cross-appeal from the finding that defendants were to be credited with the cost of raising said oil.

There was no dispute as to the facts. The only evidence on which the master predicated his finding that the patents including the northwest and northeast fractional quarters of said section 27 did not cover the land sued for by the government was that the resurvey of township 20 by Kidder and a reproduction of the meander line of the Warren survey, according to the calls in Warren's field notes, did not follow the ordinary high-water elevation of 173.09 feet above Gulf level, but ran over high ground at distances varying from a few feet to about one-fourth of a mile from said 173.09-foot contour. Warren's plat does not

show any meander line, but gives the waters of Ferry Lake as the boundary of the fractional sections bordering thereon. The section lines of these sections are conceded to reach the ordinary high-water level as determined by Kidder and the scientific experts to have existed at the time of Warren's survey.

Kidder's survey was made for the purpose of marking the ordinary high-water level of Ferry Lake in 1839 at the time of Warren's survey. This elevation was determined by careful examination and by ecological and geological experts, and a meander line carefully run at 173.09 feet above Gulf level, that having been fixed as the ordinary high-water level existing in 1839. The plat of this survey also traces the meander line as given by the calls of Warren's field notes.

Both meander lines, thus marked, beginning on the west side of section 27, were generally in a northeast direction to the most northerly point of the land on the south shore of Ferry Lake as marked on the Kidder and Warren plats respectively, and then run in a southerly and southeasterly direction to section 26 on the east.

The additional land shown on Kidder's plat is a strip bounded on the north by a broken line, forming roughly an arc with the courses of Warren's meander line as its chord. Its greatest width is about one-quarter of a mile; its length is about one mile.

The evidence shows that the land in controversy was regarded as conveyed by said patents; that parts of it were cultivated and a dwelling house was erected on the part sued for in the Greene Case, near the lake. The Warren plat referred to in said patents indicated Ferry Lake as the northern boundary of the land conveyed by each patent.

The only apparent reason for the departure of the traverse line from the shore of the lake is that the land was broken with ravines running down to the lake; that these ravines in times of very high water were partially flooded, and the convenience of the surveyor may have occasioned a failure to follow the water level, the land left out being at the time of little value. In other parts of this survey the Warren meander line, as reproduced by Kidder, in places runs into the lake and includes within its calls, as land, small portions of the lake.

There is no suggestion of any purpose on the part of Warren not to include all the land up to the water of the lake in this section as surveyed; and if the land described in the Kidder survey as outside of Warren's traverse line in section 27 is included, it still leaves section 27 a fractional section.

The evidence of the government to the effect that the traverse line was a manifest error is only the expression of an opinion, based solely on the fact that it runs from the margin of the lake on high ground in the meander heretofore described. This opinion is based on an absence of explanation given for the discrepancy, and not on any evidence of an intention to make the line one of boundary, and to depart from the general rule. It is conceded that the survey as a whole (except in the case where a large tract was clearly omitted where Jeems Bayou and Ferry Lake unite) follows generally the contour of the lake and makes the lake the boundary. It is also not disputed that as to the land sold by the government in section 27 the survey referred to in the patent

represented the lake as its boundary. The question therefore is: Did the evidence in this case show that there was such a mistake in the Warren survey that the government can now have the same corrected against the present owners of the land conveyed by its patents.

[1] These patents respectively conveyed the land mentioned therein "according to the official plat of survey of said lands returned to the General Land Office by the Surveyor General." (This was the Warren survey.) This constituted such plat a part of the deed, "and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 205, 32 L. Ed. 566; McIver's Lessee v. Walker, 9 Cranch, 173, 177, 3 L. Ed. 694; Jefferis v. East Omaha Land Co., 134 U. S. 178, 194, 195, 10 Sup. Ct. 518, 33 L. Ed. 872; Chapman et al. v. St. Francis Levee District, 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564.

[2] The general rule, well established by decisions of the Supreme Court of the United States, is that, where a meander line is run, if lands are described as bordering on a stream or body of water, the meander line is not a boundary, but the waters themselves constitute the boundary, the meander line being intended to ascertain the approximate acreage which is to be paid for. Railroad Co. v. Schurmeier, 7 Wall. 272, 286, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 380, 11 Sup. Ct. 808, 838, 35 L. Ed. 428.

The patent to the fractional part of section 27 held by defendants in the Greene Case called for 147.25 acres. The land claimed by the government as outside of this acreage is 65.77 acres, and the additional land involved in section 23 is about 8.30 acres, so that the land claimed by defendants is about 50 per cent. in excess of the acreage given in said patents. The acreage covered by the patent under which defendants claim in the Loucks Case is 123.49½ acres, and the land claimed by the government as outside of this acreage is 14.13 acres. The additional land involved in section 23 is about 9.44 acres, so that the land claimed by defendants in the Loucks Case is not quite one-fifth of the acreage named in the patent.

[3] The case is well within the rule that a meander line is not to be considered as a line of boundary, where the plat of survey shows a body of water as the boundary, but that there must be some absence of the body of water in the descriptions where shown on the plat, or another body of water which satisfies the natural object shown, although misnamed, or a notation of intervening land, such as a marsh, so that the plat when applied to the ground shows either a clear mistake as to the existence of the natural object or a purpose not to call for it as a boundary.

The case of Mitchell v. Smale, 140 U. S. 406, 412, 11 Sup. Ct. 819, 840, 35 L. Ed. 442, clearly demonstrates the above principle. There a fractional lot calling for 4½ acres was shown on the plat of survey as bounded by a lake. There was a point containing 25 acres outside of the meander lines, projecting into the lake. This 25 acres was subsequently surveyed by the Land Department and patented to another

purchaser. The second patent was held invalid and the land decided to have been conveyed by the first patent. The court said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants to the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusion of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

That acreage is not controlling in limiting the grant is clearly shown by the above case. There are many others of the same purport.

In Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1251, the patent called for a tract of 86.06 acres. The natural object was held to be the boundary and to carry with it 143 acres.

Where the survey mentioned in a patent calling for 80 acres depicted a lake as a boundary, and the meander line did not coincide with the lake shore, the lake was decided to be the boundary, and the patent was held to convey 100 acres lying between the meander line and the lake. Barringer v. Davis, 141 Iowa, 428, 120 N. W. 65. See, also, Lindsey v. Hawes, 2 Black. 554, 560, 17 L. Ed. 265; Brown v. Huger, 21 How. 305, 16 L. Ed. 125; St. Clair v. Lovingston, 23 Wall. 46, 63, 23 L. Ed. 59; Grand Rapids & Indiana R. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85; St. Anthony Falls Water Co. v. Board, etc., 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; Chapman & Dewey v. St. Francis Levee District, 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564.

The decisions holding the meander line to be one of boundary all recognize the general rule to be as above stated and rest on exceptions thereto. In the case of Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, the plat called for the Indian river as a boundary. There was a water course where the plat depicted the river, and the mistake was in calling it Indian river. It was held that this water course (not

a meander line) was the boundary intended, and that the patent did not include a large tract of land, never surveyed, which lay between the bayou and Indian river.

In Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, the survey showed a tract of marsh or swamp lands beyond the meander line. The patent therefore was held to terminate at the meander line, and not to carry the swamp lands lying between it and Lake Erie.

In the present cases the plat of survey shows nothing as the meander line, but the shore line of Ferry Lake.

Where a plat called for a lake, and there was no lake in front of the so-called meander line, but only one located outside of the side lines of the grant, it was held that the so-called meander line must be taken as the boundary instead of shifting the entire grant. French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800.

Upon the same principle, coupled with evidence of the fraudulent character of the survey, there being no lake or body of water at or near the spot indicated on the plat of survey, rests the decision in Security Land & Exploration Co. v. Burns, 193 U. S. 182, 24 Sup. Ct. 425, 48 L. Ed. 662. And also Lee, Wilson & Co. v. United States, 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128.

The decision of the Supreme Court of the United States in Producers' Oil Co. v. Hanzen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330; affirming the decision of the Supreme Court of Louisiana in 132 La. 691, 61 South. 754, lays down the general principle and illustrates the exceptions. There Bristol, a surveyor, made a survey of parts of sections 3, 4, 9, and 10 of this township 20 and referred in his field notes to a spur of marsh extending "out north." It was also admitted that the land in controversy was high land when the Bristol survey was made. This case establishes:

"As a general rule meanders are not to be treated as boundaries, and when the United States conveys a tract of land by patent referring to an official survey which shows the same bordering on a navigable river, the purchaser takes title up to the water line.

"Where the facts and circumstances, however, affirmatively disclose an intention to limit the grant to actual traverse lines, these must be treated as definite boundaries; and a patent to a fractional section does not necessarily confer riparian rights because of the presence of meanders.

"Where, as in this case, the survey of improved lands was made at the express request of the occupant to whom they were subsequently patented, and the grant specified the number of acres, and other circumstances also indicated that only the lands conveyed were those within the traverse lines, the patent of the United States conferred no riparian rights, but simply conveyed the specified number of acres."

[4] That the government has the right to make new surveys and correct errors in former one does not in any way limit the above general rule or create a different rule where such new survey is made.

The right of the government to make such new surveys is clear; but, where the United States has previously parted with the title, a new survey does not conclude a prior purchaser from asserting whatever title he has acquired by his older patent as against one claiming under the new survey. Cragin v. Powell, 128 U. S. 696, 9 Sup. Ct. 203, 32 L.

Ed. 566; Hardin v. Jordan, 140 U. S. 371, 400, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156.

This limitation on the effect of a new survey is recognized in the cases asserting the right of the government to make it. Thus in Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698, while the right to order a new survey is upheld, it is expressly stated that the right of the existing grantee could be thereafter asserted. To the same effect is the decision in Lane v. Darlington, 249 U. S. 331, 39 Sup. Ct. 299, 63 L. Ed. 629.

[5] We think that the present cases are governed by the general rule above laid down, and that the patents to said section 27 convey all of the land to the waters of Ferry Lake. The side lines of said section 27 terminate at the lake. The lake lies in the same relative position to said section as the Warren plat of survey indicates. It lies from a few feet to less than a quarter of a mile distant from Warren's meander line as now laid on the ground on the new survey. The omitted land was at the time of little value and broken by ravines. There is no evidence of any intention to grant only to the traverse line, but the apparent purpose was to include all the land to the lake in the survey; that in each of these cases the meander line, according to its calls, is not to be treated as a boundary, but that, the patents referring to an official plat which shows the land granted as bordering on the lake, the patentee took title to the water line.

The decree in each case is reversed on the appeal therein, with directions that the bill of complaint be dismissed by the District Court. Each cross-appeal is dismissed.

AMERICAN SURETY CO. OF NEW YORK v. FINLETTER.

MASSACHUSETTS BONDING & INS. CO. v. FINLETTER et al.

(Circuit Court of Appeals, Third Circuit. June 6, 1921.)

Nos. 2457, 2624.

1. **Receivers ⇐54—Appointment of receiver fixes status of property and rights of parties.**

The appointment of a receiver for an insolvent contractor for public works, while a number of contracts were uncompleted, fixed the status of the property and the rights and equities of all parties as of that time.

2. **Assignments ⇐52—Liens ⇐7—Receivers ⇐158(1)—Assignment to surety creates equitable lien as against general creditors.**

A provision of a contract between a contractor for public work and the surety on its bond for the payment of subcontractors and materialmen that in case of default by the contractor "deferred payments * * * that may thereafter become due and payable on account of said contract shall be credited for any claim that may be made upon the said surety by reason of its suretyship" *held* an assignment, which created an equitable lien in favor of the surety as against general creditors of the contractor,

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

on so much of such deferred payments as remained above the cost of completing the work after appointment of a receiver for the contractor, whether such completion was by the receiver or by a surety.

3. Liens ⇐7—Surety on contractor's bond entitled to equitable lien on deferred payments due under contract.

The right of a surety on the bond of a contractor for public work, conditioned for payment of claims for labor and material, who paid such claims on insolvency of the contractor, to an equitable lien on deferred payments which became due on completion of the contract, by virtue of an assignment made by the contractor when the bond was given, *held* not affected by the fact that such deferred payments were in part from a city and in part from a railroad company, which shared the cost of the work, and that the bond ran to the city alone.

4. Subrogation ⇐28—Surety paying part of debt held not entitled to subrogation against materialmen.

Where the surety on the bond of a contractor for public work, conditioned for payment of claims for labor and material, on insolvency of the contractor paid into court the amount of the obligation on its bond, but the same was insufficient to pay material claims in full, it is not subrogated to the right to prove the amount so paid as a general claim against the insolvent estate in competition with the claims of the materialmen for the balance due them.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of the receivership of Peoples Brothers, Inc.; Robert W. Finletter receiver. From a decree distributing funds, the American Surety Company of New York and the Massachusetts Bonding & Insurance Company separately appeal. Decree reformed and affirmed.

For opinion below, see 254 Fed. 489.

Joseph J. Tunney, Edward Hopkinson, Jr., and Arthur Dickson, all of Philadelphia, Pa. (Henry C. Willcox, of New York City, of counsel), for appellant American Surety Co. of New York.

Murdoch Kendrick, Joseph J. Tunney, and Edward Hopkinson, Jr., all of Philadelphia, Pa., for appellant Massachusetts Bonding & Ins. Co.

Horace Michener Schell, of Philadelphia, Pa., for appellee Finletter.

James Wilson Bayard, of Philadelphia, Pa., for appellee American Bridge Co.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. These cases, growing out of the same business failure, have as many angles as they have parties and subjects-matter. We shall endeavor to view them separately in so far as that is possible.

The questions concern the distribution of funds arising from a receivership in equity. Peoples Brothers, Inc., a Pennsylvania corporation, hereinafter called the Contractor, was under several contracts with the City of Philadelphia for the construction of public works. These contracts called for partial payments as construction progressed and for deferred payments pending completion.

[1] Before the works had been completed the Contractor defaulted and a receiver was appointed. With the receivership, the rights and

equities of all parties—contractors, claimants, creditors—became fixed, and a status was established from which all matters, past and prospective, are to be gauged. The court receiving the estate must regard this status as the chart to guide and govern its subsequent administration and final distribution. The rights of contract parties, of creditors of different classes, and of the receiver, are to be dealt with as they were found legally to exist when receivership brought the business to an end and at the same time brought into active operation laws applicable to everything that had gone before and to everything that was to follow. Regarding the appointment of a receiver as the fact, and the date of his appointment as the time, on which every phase of the instant controversies turns, we shall address ourselves to the questions brought here for review.

Byberry Farms.

[2] Peoples Brothers, Inc., entered into a contract with the City of Philadelphia for the erection of a power house at Byberry Farms, a municipal property. Failing to complete the work, a receiver was appointed. From the status of the contractor's affairs established by the receivership two things immediately developed: First, the receiver refused—as he had the right to do—to continue the contract and complete the work; second, his refusal brought to light a fact, anterior to the receivership; namely, that when the Contractor entered into this contract, he gave the City two bonds with the American Surety Company of New York as surety; one conditioned upon the completion of the work, and the other conditioned upon the payment of all claims for labor performed and material furnished under the contract. Resort to both bonds was had at once. The Surety Company completed the contract at a cost of $4,725.60 and paid in full all claims against the Contractor for labor and material amounting to $11,188.34.

During the progress of the work the City retained 15 per cent. of the amount due, of which 10 per cent. was to be paid on the completion of the contract and 5 per cent. one year thereafter. After completing the contract the City paid the Surety Company $7,231.60, being the final payment less the 5 per cent. of the contract price to be retained for one year. Of this sum the receiver demanded $3,150.40, representing 10 per cent. of the work claimed to have been completed by the Contractor according to the last certificate by the architect prior to stopping work. Contesting the claim of the receiver the Surety Company turned over this sum to the receiver to await the outcome of this litigation.

The special master and the District Court recognized the surety's right under one bond to be reimbursed in full out of funds retained, and later paid, by the City for its cost of completing the contract, but denied the surety the right under the other bond to apply the balance of the money, so obtained from the City, on account of the amount it had expended in paying claims of laborers and materialmen. By its decree the District Court awarded this disputed balance to the receiver for the benefit of general creditors, thereafter treating the surety as a

general creditor in the amount of its disbursements. From this decretal disposition of the fund the Surety Company took this appeal, presenting as the question involved the following:

Where a surety gives bond to a City for the payment of sub-contractors upon municipal work and pays their claims in full, is the surety not entitled to be reimbursed therefor out of retained percentages under the contract as against the receiver of the defaulting contractor?

This question was argued on two theories, that of equitable subrogation and of assignment. The theory of equitable subrogation constituted the main contention and was argued by both parties with great vigor; and on that theory the case was decided. This issue had its rise in the written application made by the contractor to the Surety Company for the bond in question, which contained a paragraph of which the following is a part:

"VII. * * * And the Indemnitor (Contractor) further agrees in the event of any breach or default on his part in any of the provisions of the contract covered by said suretyship that the said surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contract. * * *"

The receiver, the special master, and the District Court took the perfectly sound position that neither the subrogation contemplated by the quoted provision nor subrogation on any other theory is applicable to this case, because:

"As under the Pennsylvania decisions the laborers and materialmen did not have any right against the percentages retained by the City, but are merely in a position of general creditors of Peoples Brothers, Inc., the right of subrogation which the Surety Company has cannot arise any higher than that of the creditors whom it has paid."

In this state of the law—laborers and materialmen having no rights to reserved percentages—there were, as to them, no rights to which the Surety Company could be subrogated. Likewise, Peoples Brothers, Inc., had no rights in the fund to which the Surety Company could be subrogated. Obviously, there was no right of subrogation anywhere.

The Surety Company recognized this, for it conceded throughout that sub-contractors had no lien on the fund reserved by the City and that this fund could not have been reached by the subcontractors through any process against the City. Indeed, both sides viewed in the same light the controlling decisions of the Pennsylvania courts in this regard. Lesley v. Kite, 192 Pa. 268, 43 Atl. 959; Philadelphia v. McLinden, 205 Pa. 172, 54 Atl. 719; Sax v. School District, 237 Pa. 68, 85 Atl. 91.

But the Surety Company did not confine its argument to the question of subrogation, whether within or without the terms of the quoted provision in the Contractor's application for bond, but maintained on authority of Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412 and Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, that, as a surety—which had paid all laborers and materialmen and had thus released the contractor from his obligations to them and had also satis-

fied the purpose of the City in requiring an obligation to see that laborers and supplymen were paid—it has an equity in reserved percentages superior to that of general creditors. In the Henningsen case the Supreme Court recognized in the surety a superior equity to that of a creditor, who, in that case, had loaned money to the contractor with which to prosecute his work. It is this "superior equity" thus recognized by the Supreme Court that the Surety Company here asserts. Yet, in order to prevail in this case we do not believe the Surety Company is forced to invoke the doctrine of the Henningsen case, and of the Prairie State Bank Case, because as we read the record, it appears very clear that the Contractor and the surety themselves wrote the doctrine of those cases into their contract when arranging for the bond to be given the City. After agreeing that the Surety Company should be subrogated to all rights and properties of the Contractor in the event of his default—a provision which in the light of the Pennsylvania law was without force or effect—the Contractor did something more. It agreed that—

"Deferred payments and any and all moneys and securities that may be due and payable at the time of such default, or on account of extra work or material supplied in connection therewith, or that may thereafter become due and payable on account of said contract, shall be credited for any claim that may be made upon the said Surety by reason of its suretyship as aforesaid."

This purports to be an assignment of deferred payments by the Contractor to the Surety Company. If this was a valid assignment, it settles the case. But the special master and the court did not, on authority of Christmas v. Russell, 81 U. S. (14 Wall.) 69, 20 L. Ed. 762, regard it as a valid assignment, and, accordingly, held that upon the appointment of the receiver title to the percentages reserved by the City passed to the receiver for general creditors. The case of Christmas v. Russell turned mainly, if not entirely, upon a question of jurisdiction. Without discussing the views there expressed with reference to a valid equitable assignment, we are inclined rather to the views of the same court expressed in Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208, accepting the rule stated in Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865, to the effect that an express executory contract in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property or fund therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated. Barnes v. Alexander, 232 U. S. 117, 120, 121, 34 Sup. Ct. 276, 58 L. Ed. 530; Hurley v. Ashbridge, 55 Pa. Super. Ct. 523, 526, 527; Stehle v. United Surety Co., 107 Md. 470, 68 Atl. 600.

Applying this rule to cases where a contractor, seeking surety, pledges deferred payments—moneys certain to be due and clearly indicated—as an inducement for the bond, the courts have very generally recognized such a pledge as a valid consideration moving to the surety, first, to induce it to enter into the bond, and second, at a reduced premium because of the reduced risk.

The obligation of the Contractor, having assigned to the surety deferred payments on default, became fixed as a part of the status of

the case established by the receivership. Such an obligation has been recognized by some courts as a valid assignment to be asserted in favor of the surety against the receiver as an equitable lien on reserved percentages. We find no courts that have held the contrary. The cases which we think rule this case, not in principle alone but on the facts as well, as in one case (Cox v. New England Equitable Insurance Co., infra) where the contract between the contractor and surety with reference to a bond was identical in substance and almost identical in terms, preserving the fund to the surety against the claims of general creditors, are: In re Scofield Co., 215 Fed. 45, 131 C. C. A. 353 (C. C. A. 2d); Cox v. New England Equitable Insurance Co., 247 Fed. 955, 160 C. C. A. 655 (C. C. A. 8th); Montgomery v. City of Philadelphia, 253 Fed. 473 (D. C. E. D. Pa.).

We see no reason why parties, if so disposed, can not make such an assignment a valid consideration of a contract. As this is what the parties in this case did, we are of opinion that the fund in dispute should be awarded the Surety Company.

Stewart Street.

The Contractor entered into a contract with the City of Philadelphia for grading Stewart Street. Two similarly conditioned bonds were given by the Contractor with the American Surety Company of New York as surety. In this instance the receiver completed the contract and collected from the City a reserved percentage in the amount of $1,037.-63. The cost of completion to the receiver was $501.91. The surety demands the balance of $535.72 on account of claims it paid under its bond for labor and material in the sum of $664.08. This fund the District Court awarded the receiver for general creditors, allowing the Surety Company to prove its claim as a general creditor for the amount of its disbursements. The only difference between the claims made by the Surety Company for reserved percentages growing out of the Byberry Farms contract and out of the Stewart Street contract is that in the former the Surety Company, upon the receiver's election not to complete the contract, finished it and received payment therefor out of the reserved percentages; in the latter, the receiver elected to finish the contract himself and, similarly, received payment out of the reserved percentages.

While in the Byberry Farms contract the surety by completing the contract did the work that released the reserved percentages and made them available, the receiver under the Stewart Street contract did the work with that result. Yet we do not see that this affects in any way the assignments by the contractor to the surety of reserved percentages in the event of default. The assignment in each case was absolute, and, we think, was valid. We are of opinion, therefore, that this fund should be awarded the Surety Company.

Fifty-Fourth Street Bridge.

The City of Philadelphia and the Pennsylvania Railroad Company entered into a contract with the Contractor for the construction of a bridge over the Railroad Company's tracks at Fifty-Fourth Street for

the sum of $37,000, of which it was agreed the City was to pay $22,000 and the Railroad Company $15,000. In pursuance of Ordinances of Councils, the Contractor as principal, and the Massachusetts Bonding & Insurance Company as surety, executed and delivered to the City a bond in the sum of $11,100, conditioned upon payment by the Contractor of all claims for labor performed and material furnished in the execution of the contract. The Contractor defaulted and receivership followed. The receiver completed the bridge at a cost of $1,479.94. Claims for materials supplied toward construction were proved in the sum of $15,956.28. The surety paid into court $11,100, the full amount of its bond, which later was distributed among creditors in the form of a dividend of approximately 65 per cent. Upon the completion of the contract by the receiver there was due by the City $5,184 and by the Railroad Company $4,632. These sums, less the sum expended by the receiver in the completion of the contract, are held by him awaiting the outcome of this litigation, begun by the Bonding Company on its petition praying that the same be paid to it on the theory of equitable subrogation or of assignment.

One provision of the contract of the Contractor with the Bonding Company for the bond required by the City was similar in terms and identical in substance with that contained in the contract between the Contractor and the American Surety Company previously considered. It reads:

"In consideration of the company becoming surety, the said company shall as of the date hereof be subrogated to all of its rights, privileges, and properties as principal, or otherwise, in or under said contract, and the applicant further assigns, transfers, sets over and conveys to the said company, all of the deferred payments and retained percentages, and any and all moneys and properties that may be or hereafter becomes due and payable to the applicant (the Contractor) at the time of any breach or default in the contract," etc.

[3] In this case, as in the others, the argument revolved around the question of equitable subrogation; but in this case, as in the others, there appears in the light of the Pennsylvania decisions no ground, and because of the presence of a valid assignment of deferred payments, no occasion to discuss or decide any question of subrogation. The master however awarded the receiver the sum paid by the Railroad Company and the surety the sum paid by the City. The court, on exceptions, awarded both funds to the receiver on the ground that the principle of subrogation could not in this instance be invoked. We are constrained to reverse the court's action on our finding of a valid assignment to the Bonding Company of deferred payments due the Contractor. Nor are we disturbed in this conclusion by the fact that the bond in question runs only to the City. The Bonding Company's obligation to the City was for the performance of a given work and the payment of all labor and material claims incurred therein. The Bonding Company was induced to enter into this obligation upon the Contractor's assignment of "all of the deferred payments and retained percentages," among which were those of the Railroad Company quite as well as those of the City. This was

the consideration moving to the Bonding Company. The Bonding Company is seeking recovery on its contract. The City is not suing on the bond. We are of opinion that both amounts should be awarded the Bonding Company, as we see no distinction in principle between this case and the two cases previously decided, except in the next aspect which arises from a claim of

American Bridge Company.

[4] American Bridge Company supplied the Contractor with material for the Fifty-Fourth Street Bridge and therefore came within the protection of the bond of Massachusetts Bonding & Insurance Company. When the Bonding Company paid the receiver the amount of its obligation, $11,100, the receiver therewith declared a dividend of about 65 per cent. As 35 per cent. of its claim remains unpaid, the Bridge Company, very naturally, stands with the receiver in this litigation in opposition to the claims of both surety companies for reserved percentages under the several contracts. As we have held against the receiver, we likewise hold against the Bridge Company—with this difference: In the cases of the American Surety Company, its obligation on each of its bonds was greater than the total of unpaid labor and material claims. Therefore the master and the court, while denying to the American Surety Company a right to the reserved percentages, permitted that company, after paying *in full* all labor and material claims against the Contractor, to stand as a general creditor and prove the amount of its disbursements as general claims. That provision of the decree will be no longer applicable—at least in its entirety—as the American Surety Company may, after these decisions, be made whole, or almost whole, by receiving the reserved percentages. But in the case of Massachusetts Bonding & Insurance Company, while it met its obligation in the full amount of the penal sum, that amount was not sufficient to pay in full all claims of materialmen. Just here, we think, the principle of subrogation enters into the case for the first time. As the Bonding Company did not discharge the claims of materialmen in full, it can not stand in their stead as a general creditor and prove claims for the partial payments it made; but before it can claim reimbursement for such payments it must wait until the general creditors have had their claims paid in full. Anything else would defeat the purpose for which the bond was required and would bring the Bonding Company into competition with the materialmen in their claims upon receivership funds and would proportionately decrease their recoveries.

The decrees of the court below, when reformed in harmony with this opinion, are in all other respects affirmed, with costs to the appellants.

Ex parte LAMAR.

(Circuit Judge, Second Circuit. April 2, 1921.)

1. **Habeas corpus ⇐47(1)—Circuit judge has authority to grant writ.**
A circuit judge of the United States, sitting as a judge and not as a court, *held* to have authority to grant a writ of habeas corpus, and under Rev. St. § 755 (Comp. St. § 1283), to be required to do so on presentation of a sufficient petition.

2. **Habeas corpus ⇐29—Judgment not invalidated by illegal bringing of defendant into jurisdiction.**
Petitioner, while serving a sentence for a criminal offense in the United States penitentiary at Atlanta, Ga., was taken by the warden on a telegram from the Attorney General, and without the institution of proceedings for his removal under Rev. St. § 1014 (Comp. St. § 1674), into the Southern district of New York, and on his arrival there was brought into court on a writ of habeas corpus ad prosequendum, and was tried and convicted for another offense. *Held* that, while he was brought into the district of trial illegally and without due process of law, such fact did not affect the jurisdiction of the court to try him, nor invalidate its judgment, so as to afford ground for his discharge from imprisonment thereunder on habeas corpus.

3. **Criminal law ⇐100(3)—Defendant, serving term of imprisonment, may be tried for another offense.**
That a defendant is serving a term of imprisonment under sentence for a criminal offense *held* not a bar to his trial for another offense.

4. **Criminal law ⇐15—Pending prosecution not affected by repeal of statute.**
Under Rev. St. § 13 (Comp. St. § 14), a pending prosecution for violation of a statute is not affected by a repeal of the statute, though without a saving clause.

5. **Criminal law ⇐995(1)—What constitutes judgment.**
In the absence of a federal statute on the subject, where under the practice no judgment roll is made up, the commitment paper on which a convicted defendant is committed for imprisonment must be treated as the judgment, and a certified copy of the clerk's criminal minutes indorsed thereon is to be considered as a part of the sentence imposed by the judge.

6. **Criminal law ⇐1210—Sentence held valid.**
Where a defendant was tried and convicted while serving a term of imprisonment under a prior conviction for a different offense, a judgment imposing a term of imprisonment in a different institution from the one where he was then confined, to commence on the expiration of his prior term, *held* within the power of the court, and not void for indefiniteness.

At Law. On petition of David Lamar for writ of habeas corpus. Writ dismissed.

Stephen C. Baldwin, of Brooklyn, N. Y., and Elijah N. Zoline, of New York City, for petitioner.

Francis G. Caffey, U. S. Atty., of New York City (George W. Taylor, Asst. U. S. Atty., of New York City, of counsel), opposed.

Before MANTON, Circuit Judge.

MANTON, Circuit Judge. The petitioner sues out this writ of habeas corpus, declaring that he is illegally restrained of his liberty. Heretofore, and on the 3d of December, 1914, he was tried and convicted of the charge of impersonating a federal officer, an offense under the

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

Criminal Code of the United States (Comp. St. § 10165 et seq.), before Hon. C. W. Sessions, District Judge, and sentenced to two years' imprisonment at the United States penitentiary at Atlanta, Ga. He appealed to the Circuit Court of Appeals, and later to the Supreme Court. Ultimately this conviction was affirmed (240 U. S. 60, 36 Sup. Ct. 255, 60 L. Ed. 526), and the petitioner began the service of the sentence so imposed on December 3, 1914, at the United States penitentiary at Atlanta. While released on bail, and pending his appeal from this conviction, he committed another breach of a section of the United States Criminal Code (Act July 2, 1890 [Comp. St. § 8820 et seq.]), to wit, conspiracy in restraint of foreign commerce. He was tried on this charge and convicted, together with two others, Franz Von Rintelen and Henry B. Martin, and on the 21st of May, 1917, he was sentenced to one year on this charge. He appealed from this conviction to the Circuit Court of Appeals of the Second Circuit, where his conviction was affirmed. 260 Fed. 561, 171 C. C. A. 345. Later he applied for a writ of certiorari to the Supreme Court, and this was denied. 250 U. S. 673, 40 Sup. Ct. 16, 63 L. Ed. 1200. When his trial upon the conspiracy charge was noticed, he was actually serving the prison term for his first offense, that is, the conviction for impersonating a federal officer. The claim now is:

First. That his constitutional rights have been violated in (a) that he was taken from the penitentiary at Atlanta, Ga., without removal proceedings and against his protest, and placed on trial in New York in violation of his constitutional rights to due process of law; that he could not in any event be placed on trial while undergoing sentence on a previous conviction; (b) that the Circuit Court of Appeals denied the right of assistance of counsel as guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Second. That the provision of the Sherman Act as to foreign commerce, which applied to the facts which were proven against the petitioner and which has been held to amount to a crime, was repealed, and that, although indicted by the grand jury for this offense before the repeal of this provision of the Sherman Act, the right to prosecute was impliedly ended.

Third. That the sentence which was imposed on this conviction of conspiracy ran concurrently with the sentence which the petitioner served for the crime of impersonating a federal officer, and that therefore the petitioner has satisfied the requirements of this later sentence by serving his time when he returned to the Atlanta prison after the trial on the conspiracy charge, when he served approximately one and a half years, the balance of his two-year term.

Fourth. That the commitment issued by the clerk is void.

[1] The power of a circuit judge to issue a writ of habeas corpus, sitting as a judge and not as a court, is involved, and I shall preliminarily dispose of that question before considering the other points. The statute (Act Aug. 29, 1842, c. 257, 5 Stat. 539 [Comp. St. § 1279 et seq.]) provides that the Supreme, Circuit, and District Courts have power to issue writs of habeas corpus. The several justices and judges of the said courts, within their respective jurisdictions, shall have pow-

er to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. By Act March 3, 1911 (36 Stat. 1167, c. 231, § 289 [Comp. St. § 1266]), the Circuit Courts were abolished and their functions were transferred to the District Courts.

In Whitney v. Dick, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963, it was held that the Circuit Court of Appeals is a court created by statute, and is not endowed with original jurisdiction, and since there is no language in the statute which can be construed into a grant of power to issue a writ of habeas corpus, unless it is one in aid of the jurisdiction already existing, the court is not authorized to issue original or independent writs of habeas corpus. The court said:

"The writ of habeas corpus is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in the trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error. It is doubtless true that if the language of the Court of Appeals Act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of habeas corpus, the great importance of the writ might justify a construction upholding the grant. * * * But in the Court of Appeals Act there is no mention of habeas corpus, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing."

But the application for the writ is made here to a Circuit Judge of the Circuit Court of Appeals, and not to the court. The petition upon which the same is based advances the claim that the petitioner is restrained of his liberty, and that his constitutional rights have been violated. The power is given to the justices and judges of the courts, within their respective jurisdictions, to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. And the application for a writ of habeas corpus under Act Feb. 5, 1867, c. 28, § 1; Revised Stat. § 754 [Comp. St. § 1282]), "shall be made to the court or justice or judge authorized to issue the same by complaint in writing," etc. And by the same act (Rev. Stat. § 755 [Comp. St. § 1283]) it is provided that a judge to whom such application is made shall forthwith award a writ of habeas corpus unless it appears from the petition itself that the party is not entitled thereto. While the Circuit Courts have been abolished, there is still the office of circuit judge as created by the statute. While a circuit judge may not issue a writ of habeas corpus as one of the members constituting the Circuit Court of Appeals, there is still the authority vested in him as a circuit judge to do so, and there is a mandatory provision of the statute requiring him to issue a writ of habeas corpus if the petition be sufficient.

It will be observed that section 716 of the Revised Statutes of the United States (Comp. St. § 1239) provides that they (the courts) shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and "agreeable to the usages and principles of law." This statute authorizing writs of habeas corpus was passed by the first Congress of the United States, sitting under a constitution which had declared that—

"The privilege of the writ of habeas corpus should not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." Const. art. 1, § 9, cl. 2.

The inference of this injunction of the Constitution has, with peculiar force, impressed upon me the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence the privilege itself will be lost. For this obligation the Congress gave and has continued to give since, in each subsequent enactment, the courts the power of awarding writs of habeas corpus.

The right to grant this important writ is given to every judge of the District Court. It has been held that the power vests in a Justice of the Supreme Court. Ex parte Bollman, 8 U. S. (4 Cranch) 95, 2 L. Ed. 554. When the Circuit Courts were abolished, the statute providing for the right of a judge to grant the writ of habeas corpus was not repealed or amended, thus taking away the power from a circuit judge. Circuit judges have become appellate judges, and while they have no original jurisdiction as a court, they have reserved to them the right thus vested by the statute and by the ancient law. I therefore conclude that I have the power to grant the writ of habeas corpus.

[2] The proof shows that Lamar was removed, while a prisoner serving a term under the first sentence, from the United States penitentiary at Atlanta to the Southern District of New York by the medium of a telegram which was sent by the Attorney General, directing the warden of the prison to produce him in New York City. It is by stipulation proved that on the 25th of March, 1917, a printed notice of trial, entitled United States v. Rintelen, Lamar and Martin and others, was served upon the petitioner; that Lamar at once consulted his attorneys at Atlanta and conferred with them about his case. On their advice, an application was prepared for the purpose of obtaining a continuance of Lamar's trial until his term of imprisonment had expired, and the affidavit in support of this application was prepared and signed by the petitioner. The petitioner was informed that his application and the affidavit in support thereof were duly presented to Judge Cushman, who presided at the conspiracy trial on the 10th of April, 1917, and the application for a postponement was denied. This result was communicated to Lamar about the 15th of April, 1917, whereupon he again conferred with his counsel at Atlanta, and was advised by them that because he was a prisoner serving a term for another offense in the same court, he could not be tried until he had served out this term of imprisonment, and that if any attempt was made to remove him to New York for trial on the date specified, the prisoner ought to resist such effort. He was advised further that the only lawful way in which he might be removed over his objection or protest for trial in New York was by virtue of removal proceedings instituted under section 1014 of the Revised Statutes (Comp. St. § 1674), and that he would receive notice of such proceedings and could resist the same. He says that he learned from officials at the prison of the intention of the government to remove him for trial at New York forcibly, and without beginning any legal proceedings in the District Court of Geor-

gia. He again consulted counsel to protect his rights, and was advised by the warden of the prison that he would not be removed in the way suggested. He was advised that the United States attorney for the District of Georgia gave assurance that no attempt at kidnapping by the officers of the executive department would be tolerated by him. He says that like assurances were given to him by the warden of the prison, and that if an effort was made to remove him in the manner threatened he would have sufficient notice to advise with his counsel and prevent such removal by legal steps.

On the evening of April 25, 1917, at about 6:45 o'clock, the petitioner says he was informed by the night warden that he should prepare to leave Atlanta for New York on a train leaving at 7:30. The petitioner says he protested against being removed from prison, and stated that he "stood upon his legal right to serve out his term of imprisonment without interruption," and he says that he was then forcibly removed from the prison and taken to New York. He was refused permission to telephone or communicate with his counsel at the depot, and it was stated by the officers in charge of him that he would not be permitted to confer by telephone, telegram, or other writing with any one. While in Washington there was an interval of several hours, where he was detained at the station, awaiting the train to proceed to New York, and there petitioner asked that he might confer with his counsel residing in Washington. This opportunity was also denied him. On arriving in the Southern district of New York the petitioner again made a similar request. He says he was denied by those in charge of his person an opportunity to communicate with any one until he was produced in the courtroom, where he says his trial was at once begun, and then a colloquy between the court and petitioner followed, and the judge presiding gave him 15 minutes in which to obtain a lawyer and prepare to participate in the proceedings then already in progress. The officer in charge of the petitioner, when he arrived in New York, was served with a writ of habeas corpus requiring the production of the prisoner for trial in the District Court, and the trial proceeded. It resulted in his conviction. This proof is not controverted by the government.

A writ of habeas corpus may be issued "when it is necessary to remove a prisoner in order to prosecute or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the act was committed." Ex parte Bollman, 8 U. S. (4 Cranch) 75, 2 L. Ed. 554. And a writ of habeas corpus ad prosequendum requiring the production of a prisoner for trial is a power granted by section 262 of the Judicial Code (Comp. St. § 1239). Section 1014 of the Revised Statutes (Comp. St. § 1674) provides how offenders against the United States may be arrested and removed for trial. It provides:

"And where an offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

If the petitioner was not removed to the Southern District of New York as provided by this section of the statute, he was not on the day of his trial in the Southern District of New York to answer the charge against him by due process of law. He may question whether he is unlawfully restrained of his liberty and called upon to do service for the sentence imposed on this conviction through the medium of a writ of habeas corpus. Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203.

In Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, the prisoner was charged with the crime in the Circuit Court of the United States for the Eastern District of New York. A warrant for his arrest was issued in that district and returned "Not found." Thereupon a complaint, supported by an affidavit, was filed in the District Court for the Southern District of New York, alleging the filing of the indictment, the issuance of the warrant, the return "Not found," and that the defendant named was within the Southern District of New York. He was arrested upon this warrant and brought before a commissioner. A hearing was had before the officer, and upon his report the District Court for the Southern District of New York signed an order of removal to the Eastern District of New York. Before this order could be executed the defendant named sued out a writ of habeas corpus. The court held that a commissioner in proceedings under section 1014 does not hold a court, and is not, in a constitutional sense, a judge. He is a mere ministerial officer, upon whom, while acting as a committing magistrate in such proceedings, is imposed the exercise of duties which are not judicial in character. The court said, by Justice Brewer (194 U. S. 83, 24 Sup. Ct. 606, 48 L. Ed. 882):

"It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial rather than a mere ministerial act."

The present case illustrates the importance of the requirement that removal proceedings under section 1014 be instituted. The petitioner claimed, as the testimony shows, that he intended to contest the right to removal and put him on trial in the Southern District of New York on a charge of conspiracy when, in point of fact, at the time he was serving a prison term on a conviction of the crime of impersonating a federal officer.

In Tinsley v. Treat, 205 U. S. 20, at page 29, 27 Sup. Ct. 430, 432 (51 L. Ed. 689), Chief Justice Fuller, speaking of section 1014, said:

"Obviously the first part of this section provides for the arrest of any offender against the United States wherever found and without reference to whether he has been indicted, but when he has been indicted in a district

in another state than the district of arrest, then, after the offender has been committed, it becomes the duty of the district judge, on inquiry, to issue a warrant of removal. And it has been repeatedly held that in such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same."

Justice Jackson, then a circuit judge, in Re Greene (C. C.) 52 Fed. 104, 106, said:

"The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions."

When it appears from the evidence that the petitioner was removed by the authority of a telegram sent by the Attorney General to the keeper in charge of the United States penitentiary at Atlanta, Ga., and this against the protest of the prisoner, and after he had been denied the right to consult with his counsel, who might take steps to prevent his removal, it is clear that he was denied the protection of the law which is guaranteed him by the Constitution, unless, having thus been removed to the Southern district of New York, the court had jurisdiction to try the defendant. The government contends that it did, and argues that, even if the production of the petitioner was irregular, that defect would not invalidate the conviction or be ground for release upon habeas corpus and in support of this position. Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103, are cited.

In the Ker v. Illinois Case, a prisoner was kidnapped in a foreign country (Peru) and brought by force against his will within the jurisdiction of the state (Illinois) whose laws he had violated, with no reference to an extradition treaty. An extradition treaty existed between Peru and the United States and no proceeding or attempt to proceed under the treaty was undertaken. The Supreme Court held, on these facts, that the treaties of extradition, to which the United States was a party, did not guarantee a fugitive from justice of one of the countries an asylum in the other, and they do not give such person any greater or more sacred right of asylum than he had before. It is pointed out that treaties make provision that for certain crimes he shall be deprived of that asylum and surrendered to justice and the treaties prescribe the mode in which this shall be done. But the court held that a trespass of a kidnapper, unauthorized by either of the governments and not professing an act under the authority of either, is not a case provided for in the treaty, and the removal is by a proceeding against him by the government whose law he violated, or by the party injured. It was further held that the question of how far such forcible transfer of the defendant so as to bring him within the jurisdiction of Illinois, where the offense was committed, could not be set up against the right to try him, and that it is within the province of the state court to decide such a defense and presented no question for the Supreme Court's review. The court said:

"The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the state court, for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court" (citing authorities).

"What is the due process of law?" was pertinently inquired in Den, etc., v. Hoboken, etc., 59 U. S. (18 How.) at 276, 15 L. Ed. 372, where it was said:

"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a retraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

With the statute (R. S. § 1014) which indicates the mode of removal and which has been constantly employed, and which concededly was not employed in removing the petitioner to the Southern district of New York, can it be said that he has been afforded due process of law? This protection is offered to a defendant. In Re Hans Nielsen, 131 U. S. 176, at page 182, 9 Sup. Ct. 672, 674 (33 L. Ed. 118), the court said:

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, and Ex parte Siebold. 100 U. S. 371, and in several other cases referred to therein. * * * The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in Ex parte Siebold, 100 U. S. 371, 375, and is illustrated by the case of Ex parte Parks, as compared with the Cases of Lange and Snow. In the Case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the Cases of Lange and Snow, there was a denial or invasion of a constitutional right."

In Mahon v. Justice, 127 U. S. 700, 714–715, 8 Sup. Ct. 1204, 1212 (32 L. Ed. 283), the defendant was indicted in Kentucky for a felony and escaped to West Virginia. While the Governor of West Virginia was considering an application from the Governor of Kentucky for his surrender as a fugitive from justice, he was forcibly abducted to Kentucky, and when there was seized by the Kentucky authorities, under legal process, and put in jail, and held to answer the indictment. In

holding that he was not entitled to his discharge from custody on a writ of habeas corpus from the Circuit Court of the United States the court said:

"So in this case it is contended that, because under the Constitution and laws of the United States a fugitive from justice from one state to another can be surrendered to the state where the crime was committed, upon proper proceedings taken, he has the right of asylum in the state to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is, that the laws of the United States do not recognize any such right of asylum, as is here claimed, on the part of a fugitive from justice in any state to which he has fled; nor have they, as already stated, made any provision for the return of parties * * * abducted from a state."

These cases, however, but decided that the prisoner, who has been kidnapped or forcibly removed to the jurisdiction where he is to be tried, cannot set up the mode of his capture by way of defense if the state from which he was abducted makes no complaint. Where a prisoner is extradited from a country where an extradition treaty does exist, and is delivered up for trial, he cannot, without violating the treaty, be tried for any other crime than that for which he was delivered up. United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

The petitioner here was in the custody of the United States, making his amends to society and serving his term for impersonating an officer. It was improper practice for the government to forcibly remove the prisoner to New York and put him on trial without affording him the opportunity which the law provides—of contesting the right to removal under the removal statute.

In Ex parte Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103, a warrant was issued by a commissioner from the Southern district of the Indian Territory to arrest the defendant (petitioner) upon a charge alleged to have been committed on July 24, 1896. On October 9, 1896, he was indicted, and on October 17 was arraigned, tried, and convicted, and sentenced to death. On July 25, following the commission of the offense, a warrant issued by a commissioner for the Eastern district of Texas, charging him with the same crime, was placed in the hands of the marshal for that district. He demanded of the marshal of the Southern district of the Indian Territory the surrender of the defendant in obedience to the writ, and this was refused. At the time of the commission of the offense there was no term of the United States Court for the Eastern District of Texas until the following November, and this was after the trial, conviction, and sentence of death. The court held that, if the defendant was actually in the custody of the marshal on September 1, the subsequent indictment and trial was valid, although he might have been illegally arrested in the first instance. It was held that a court having possession of a person or property cannot be deprived of the right to deal with such property or person until its jurisdiction is exhausted, and that no other court has a right to interfere with such custody and possession. The court said:

"Although it has been frequently held that if a defendant in a civil case be brought within the process of the court by a trick or device, the service will

be set aside and he will be discharged from custody. Union Sugar Refinery v. Mathiesseu, 2 Cliff. 304; Wells v. Gurney, 8 B. & C. 769; Snelling v. Watrous, 2 Paige, 314; Williams v. Bacon, 10 Wend. 636; Metcalf v. Clark, 41 Barb. 45; Stein v. Valgenburg, 3 B. & E. 65; Williams v. Reed, 5 Dutcher, 385; Carpenter v. Spooner, 2 Sand. 917; Pfiffner v. Krapfell, 28 Iowa, 27; Moynahan v. Wilson, 2 Flippen, 130; Small v. Montgomery, 17 Fed. 865; Kauffman v. Kennedy, 25 Fed. 785. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest."

In Pettibone v. Nichols, 203 U. S. 192, 213, 27 Sup. Ct. 111, 118 (51 L. Ed. 148), the Supreme Court, in stating what the decision of the court was in Ker v. Illinois and Mahon v. Justice, said:

"'(1) That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one state to that of another, where they are held under process legally issued from the courts of the latter state. (2) That the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States.' In Lascelles v. Georgia, 148 U. S. 537, 543, that it was settled in the Ker and Mahon Cases that 'except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process.' And in Adams v. New York, 192 U. S. 585, 596 (the same cases being referred to), that 'if a person is brought within the jurisdiction of one state from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the state wherein he had committed an offense.' See, also, In re Johnson, 167 U. S. 120, 127, in which the court recognized the principle that when a party in a civil suit has, by some trick or device, been brought within the jurisdiction of a court, he may have the process served upon him set aside, but that a different rule prevails in criminal cases involving the public interests."

It is urged by the United States attorney that it has been adjudicated by affirmance by the Circuit Court of Appeals that the court had jurisdiction of the person of the petitioner and of the crime. But on a writ of habeas corpus the inquiry is addressed, not to errors, but to the question of whether the proceedings and judgment rendered therein are for any reason void, and, unless it is affirmatively shown that the conviction under which the petitioner is found is void, he is not entitled to his discharge. United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

Even though the government failed to institute removal proceedings, but did bring the petitioner to New York for trial by mere direction of the attorney general to the warden, still, he having come within the jurisdiction of the court under the rule in the above authoritative decisions of the Supreme Court, the government could, as it did, serve the officer in charge of the person of the prisoner with a writ of habeas corpus ad prosequendum to prosecute and place him on trial. This ancient writ has long been known to the English for removing prisoners from one court to another for the more easy administration of justice. 3 Blackstone, 129. 139.

[3] The petitioner contends that he could not be placed on trial on the charge of conspiracy during the period that he was undergoing sentence for the crime of impersonating an officer. The right to try a prisoner under such circumstances is controlled in many of the state jurisdictions by statute. Sections 298-a, 298-b, N. Y. Code Cr. Proc.

In the absence of statutes, the highest courts of some states have ruled that the trial for the second offense may not be had during the period of servitude for the first offense. State v. Buck, 120 Mo. 479, 25 S. W. 573; State v. Connell, 49 Mo. 282; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; Ex parte Morton, 132 Cal. 346, 64 Pac. 469. The Missouri cases were cited with approval by Circuit Judge Thayer (In re Jennings [C. C.] 118 Fed. 479), where he said:

"The law contemplates that after a prisoner has been tried and sentenced, he will be committed at once to the custody of the prison officials where the sentence is to be executed. He passes by virtue of the sentence into a custody different from that of the court before which he was convicted. This doctrine is enforced so rigidly in some jurisdictions, and possibly in all, that, after a sentence for a crime has been pronounced, the prisoner cannot be arraigned and tried for another offense, even in the same court by which he was sentenced, until the sentence is reversed by a higher tribunal, or he has served out his term of imprisonment."

By common law cumulative fines and terms of imprisonment, if definite and certain, are valid, where the accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment. Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; Hyde v. United States, 198 Fed. 610, 119 C. C. A. 493. And where a convict in serving a term of imprisonment under a prior sentence at the time of a second conviction, sentence may be announced to begin at the expiration of the term he is serving. United States v. Farrell, 25 Fed. Cas. 1051, No. 15,074; Rigor v. State, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719. To hold otherwise would excuse a defendant who is serving a life term of imprisonment from trial and execution if guilty of the crime of murder in the first degree. For authorities holding that a prisoner who commits a crime during the unexpired term of imprisonment may be tried and punished therefor and sentenced to a term of imprisonment at the expiration of his present term, see Thomas v. People, 67 N. Y. 218; State v. Finch, 75 Kan. 582, 89 Pac. 922, 20 L. R. A. (N. S.) 273; People v. Huntley, 112 Mich. 569, 71 N. W. 178; Harrington v. Bader, 32 Ohio Cir. Ct. R. 493; Kennedy v. Howard, 74 Ind. 87; Perry v. State, 110 Ga. 234, 36 S. E. 781; Singleton v. State, 71 Miss. 782, 16 South. 295, 42 Am. St. Rep. 488; State v. Johnson, 93 Mo. 73, 5 S. W. 699; Ex parte Ryan, 10 Nev. 261.

Whatever may be the merits of this contention, it has been, inferentially at least, adjudicated adverse to the petitioner on the appeal to the Circuit Court of Appeals. Upon examination of the brief as submitted to that court, I find that the question was argued, and by its decision the Circuit Court of Appeals has decided adverse to the petitioner's contention. The question of the right to try the petitioner while he was serving his present sentence under the first conviction

was raised by his motion for a continuance of the case until after the expiration of his term, when he was brought to the bar of justice on the charge of conspiracy. If it was wrong to require him to go to trial, or if it was error to refuse his request for a continuance, such error is one that must be presented to an appellate court by a writ of error. Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463. There is no federal statute or case for guidance, nor does either counsel call my attention to any other controlling authority. I do not find that the question has heretofore been presented to the Supreme Court or any of the Circuit Courts of Appeals.

There is no logical reason why a criminal, deprived of his liberty, should not be placed on trial a second time. His opportunity of offering defense to the second charge while serving a term for the first offense is as good as if he were committed without bail to imprisonment. The fact that he is serving his term on a conviction is no greater handicap to his defense than the opportunity which is offered in many, if not all, jurisdictions of proving his former conviction. He may have counsel and opportunity to secure his witnesses to offer proof as to his defense, although perhaps handicapped by his incarceration. To hold otherwise would invoke a rule of law which would frustrate the administration of justice, as, for example, where a prisoner while in jail, commits a homicide or breaks jail. If, upon apprehension in either case, he may not be tried for the offense thus committed until he has served possibly a long term for the first offense, witnesses may die and the administration of justice would be defeated. I think that the court could try the petitioner and that it had jurisdiction so to do.

[4] The petitioner contends that the prosecution was ended by the implied repeal of so much of the Sherman Act as applied to foreign commerce during the pendency of the writ of error. On April 10, 1918, Congress passed the Webb Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8836¼a–8836¼e); sections 2 and 3 (sections 8836¼b, 8836¼c) whereof provided as follows:

"Sec. 2. That nothing contained in the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety [Sherman Act], shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association: Provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: And provided further, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding or conspiracy or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

"Sec. 3. That nothing contained in section seven of the act entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October fifteenth, nineteen hundred and fourteen [Clayton Act], shall be construed to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade, and actually engaged solely in such export trade, unless the effect of

such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States."

It is contended that in the absence of a saving clause, pending prosecutions for violations of so much of the Sherman Act as made it unlawful to restrain or monopolize foreign commerce were ended by reason of this act. But the prosecution under the Sherman Act was not brought to an end by the repeal contained in the Webb Act. By section 13 of the Revised Statutes (Comp. St. § 14), even in the absence of a special saving clause in the repealing act, all penalties previously incurred under the act repealed are saved. It provides the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred. Under the statute (R. S. § 13), unless the repealing act shall so expressly provide, the particular law shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty and forfeiture or liability. Therefore this statute saved this prosecution, even though by the Webb Act the Sherman Law has been repealed, in so far as it applies to foreign commerce. Great No. Ry. v. United States, 208 U. S. 452, 28 Sup. Ct. 313, 52 L. Ed. 567.

[5] After conviction on the conspiracy charge, the petitioner was returned to the Atlanta penitentiary, where he served out the balance of his term under the conviction for impersonating a federal officer. It is contended by him that, while so doing, he served the term which was imposed upon him on the conviction of the conspiracy charge. The argument is that the term of one year as his sentence on the conspiracy charge ran concurrently with the term imposed on the charge of the crime for impersonating a federal officer. There are two records which disclose what took place at the time sentence was imposed: First, the criminal minutes kept by the clerk in his minute book and the commitment paper which issued and upon which the prisoner was incarcerated. The criminal minutes kept by the clerk provide a memorial for the future record for the court of what took place at the time of sentence. The commitment serves another purpose. The purpose and object of this record is, first, to record accurately the judge's terms of the sentence; second, to advise the prisoner what penalty is imposed so that he might make amends to society accordingly; and, third, to advise the jailor so that he might keep the prisoner and require the fulfillment of the sentence so imposed. The minutes produced read as follows:

"On motion of United States attorney ordered sentenced. The court thereupon proceeds to pass judgment and sentence the defendant. Franz Rintelen sentenced to be imprisoned for one year. Mercer county jail or such other place as the Attorney General of the United States sees fit to designate. Bail fixed in sum of $25,000 pending appeal. David Lamar to be imprisoned in the Mercer county jail for a period of one year. That the commencement of this term of service begin at the expiration of your present sentence at the federal prison at Atlanta, Georgia. You are now remanded to the custody of the warden of the penitentiary at Atlanta, Georgia, until your term of imprisonment there has expired and that at the end of that term of imprisonment and service you be surrendered to the United States marshal for the Southern district of New York and he will then under this judgment transport you to the Mercer county jail and you will there be imprisoned for the period of one

year. Henry B. Martin sentenced to be imprisoned for one year, sentence to be executed in Mercer county jail, Trenton, N. J. Ordered that the term of court be and hereby is extended for a term of two years."

The commitment reads as follows:

"On motion of the United States attorney, ordered sentence. The court thereupon proceeds to pass judgment and sentence the prisoner David Lamar to be imprisoned for a term of one year. Sentence to be executed at the Mercer county jail, Trenton, N. J. An extract from the minutes. [Seal] Alex. Gilchrist, Jr., Clerk."

Beneath the signature of the clerk there is found the following:

"Bail fixed in the sum of $10,000 pending appeal. Execution of sentence under this indictment to commence at expiration of sentence of two years imposed by Judge C. W. Sessions on December 3, 1914, and to be executed at the U. S. Penitentiary, Atlanta, Ga. A true copy: Alex. Gilchrist, Jr., Clerk."

Mr. Leary, the clerk who made this entry upon the commitment paper, testified that he made such entry after the sentence was imposed. He could not testify to a positive recollection that, when Judge Cushman imposed sentence, he stated that the execution of the sentence was to commence at the expiration of the sentence of two years imposed by Judge Sessions on December 3, 1914. It is clear, however, that Judge Cushman intended that the execution of the sentence here be at the Mercer county jail in Trenton, N. J., and not at the United States penitentiary at Atlanta. It is argued that it was within the power of the Attorney General to change the prisoner from one United States penitentiary to another and thus lawfully permit him to carry out his sentence. It will be remembered that the crime was committed while he was released on bail pending the hearing on the writ of error from the conviction of the charge of impersonating a federal officer. The criminal minutes kept by the clerk are not part of the judgment. The judgment consists of an extract from the minutes made out by the clerk, which is called the commitment paper, and which has the effect of a judgment. This is conceded by the government. The record called "criminal minutes" kept by the clerk would be of aid for reference if an application were made to amend the judgment. The minutes of the clerk cannot in any sense be considered as a judgment or sentence. There is no federal statute that I have been able to find controlling the procedure as to the method or form of judgment required to be entered in a criminal case, and the rule of common-law procedure accordingly must prevail.

In Tucker v. United States, 196 Fed. 260, 116 C. C. A. 62, in considering the plea of nolo contendere, it was said:

"Both propositions rest on the common-law definitions of this plea of 'nolo contendere,' and it is unquestionable that the common-law rule must govern, in the absence of any federal statute providing therefor; and the questions thus raised, by way of challenging the judgment, are plainly involved for decision in the case at bar. * * * So the answer to either of the contentions must be derived from definitions of the plea in the common-law authorities."

The deputy clerk of the District Court testified at the hearing that no judgment roll has ever been made up in the case at bar against the petitioner, and that it was not the practice of the clerk so to do. He

did testify that the commitment above referred to constituted the sentence and the authority of the jailer to imprison the petitioner.

In Crain v. United States, 162 U. S. 625 (p. 643), 16 Sup. Ct. 952, 958 (40 L. Ed. 1097) the court said:

"The record should be a permanent memorial of what was the issue tried, and show whether the judgment, whereby it was proposed to take the life of the accused or to deprive him of his liberty, was in accordance with the law of the land. In Hopt v. Utah, 110 U. S. 574, 579, this court, observing that the public has an interest in the life and liberty of an accused person, said: 'Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.' * * * Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared."

It has been held that a bill of exceptions will not take the place of a judgment and is not a part of a record of a judgment to which a court may look in a proceeding where the judgment is collaterally attacked. Corrections of the ruling of a reviewing court can never be considered in habeas corpus to test the validity of a judgment. In re Haskell (C. C.) 52 Fed. 795. The commitment paper must be treated as a judgment, and from it must be obtained the intention of the judge as to what he intended to impose as the sentence upon the petitioner. The "criminal minutes" of the clerk record all that is written below the clerk's name, "Alex. Gilchrist, Jr.," and after the record made by the deputy clerk, Mr. Leary, is found "a true copy." This must be considered a part of the sentence as imposed by the trial judge. Therefore I conclude the sentence on the conspiracy charge did not run concurrently with the impersonation charge.

[6] It is urged that Judge Cushman had no power to impose a cumulative sentence. That this is what was imposed, if the sentence under the conspiracy charge was not to commence at once, but was suspended until the petitioner had served his term under the charge of impersonating a federal officer. The case at bar, however, is not one where several crimes are charged in one indictment, or where several indictments have been consolidated for the purpose of the trial. In such cases the rule is that there can be but one judgment, and when that judgment is imposed it must in terms specify the order in which the terms of imprisonment are to commence and terminate. In such a case the judgment must be certain and definite. It required the identification of the various convictions. United States v. Patterson (C. C.) 29 Fed. 775 (Justice Bradley). Thus it is held that it is not necessary to enter separate judgments for several offenses charged regarding several separate convictions upon distinct indictments. Freeman v. United States, 227 Fed. 732, 142 C. C A. 256.

"Under the present statute three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a

single sentence for all." In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174.

It has been held that a prisoner may not be sentenced for more than one offense, unless the different convictions were had at the same term, and both were obtained previous to the sentence. In other words, that there is no authority for convicting a prisoner of felony at one term of the court and regularly passing sentence upon him and then remanding him to jail until the next succeeding term and again convicting and sentencing him for another felony. Ex parte Meyers, 44 Mo. 279. This rule prevails in California. Ex parte Morton, 132 Cal. 346, 64 Pac. 469.

In the absence of some clear expression by the court the day on which the prisoner is sentenced is presumed to be the day that he commences his term of imprisonment, unless he be released on bail. In United States v. Patterson (C. C.) 29 Fed. 775, 776, Supreme Court Justice Bradley, sitting in chambers, issued a writ of habeas corpus, and there was presented the question as to whether the petitioner under the following sentence had served his term after having been imprisoned for five years. The judgment read:

"The court do order and adjudge that the prisoner, Oscar L. Baldwin, be confined at hard labor in the state's prison of the state of New Jersey for the term of five (5) years upon each of the three indictments above named, said terms not to run concurrently, and from and after the expiration of said terms until the costs of this prosecution shall have been paid."

In holding that the terms did run concurrently the court said:

"If this were a mere error, it could not be considered on habeas corpus. The judgments of the District and Circuit Courts in criminal cases are final, and cannot be reviewed by writ of error, and a mere error of law, if in fact committed, is irremediable; as much so as are the decisions of the Supreme Court. But if a judgment or any part thereof is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless and without meaning, and cannot be corrected, or for any other cause, then a party imprisoned by virtue of such void judgment may be discharged on habeas corpus. I do not say that the judgment in this case is void. It is a good judgment for the term of five years' imprisonment on each indictment. Perhaps these terms might have been lawfully made to take effect successively, if the order of their succession had been specified, although there is no United States statute authorizing it to be done. But this was not done. No distinction was made between them in this respect, and, as neither of them was made to take effect after the one or the others, they all took effect alike; that is, from the time of the rendering of judgment. The additional words as to nonconcurrence are void, because they are incapable of application. It is as if a man should be sentenced to successive terms of imprisonment on each of several indictments, and to hard labor, or to be kept on bread and water, during one of the terms, without specifying which. The latter part of such a sentence would clearly be void, for it could not be allowed to the jailer to exercise his discretion as to the application of the aggravated penalties. If there were any way in which the District Court could amend its judgment, the case might perhaps be different. But I see no way in which it could do so without passing a new sentence, and that it could not do now, after the term has passed, and after one term of imprisonment has been suffered. What right would the court have now to determine that the expired term was due to any particular indictment more than to either of the others?"

To like effect, holding that where the defendant is already in execution of a former sentence and where the second sentence does not state that the term is to begin at the expiration of the former, the second will run concurrently with the first in the absence of a statute providing a different rule: Ex parte Gafford, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568; Dickerson v. Perkins, 182 Iowa, 871, 166 N. W. 293, 5 A. L. R. 374; Ex parte Green, 86 Cal. 427, 25 Pac. 21; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; In re Black, 162 N. C. 457, 78 S. E. 273; Kirkman v. McClaughry (C. C.) 152 Fed. 255.

The importance of accuracy in the statement of the terms of the sentence is a right which is accorded every defendant. It is of importance to the prisoner that the sentence should be definite and certain, so as to advise him and the officer charged with its execution of the time of its commencement and termination, without being required to inspect the records of the court or records of another case. If it is vague and indefinite, the terms will run concurrently. A sentence to confinement to take effect in the future cannot be sustained, unless it is certain and definite, and not subject to undefined or uncertain contingencies. Indefiniteness and uncertainty leaves the defendant in a position where he can claim that he has served his sentence. It places him in the position where, if it is held that the sentences run concurrently, he may be held to have served but one of the two sentences imposed. A prisoner, while suffering the penalty of the law, should always have preserved to him whatever remains of his rights and condition. A sentence should be so complete as to need no construction of a court to ascertain its import. It should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or ministerial officer. He must find what the sentencing judge intended from the language which he used. The rascality of the petitioner, or the merits or demerits of his case, or the appropriate punishment which has been inflicted, cannot enter into this determination. The punishment which the worst criminal has inflicted upon him must be legal, and when this is not so, however unintentional, an offense is being committed in the name of the law against the person. Society does not wish to have it imposed; for, if this may be done against a man guilty of one crime, it can be done against another, and no one can say whose turn will come next.

Is the sentence which was imposed by Judge Cushman definite and certain? Is it such as a defendant may readily understand and be capable of performing? I think all that is found in the commitment paper must be read and applied. Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer county jail in New Jersey. The petitioner could not serve the term fixed for Mercer county jail until after he finished his term at Atlanta, Ga. The criminal minutes bear out the indorsement at the bottom of the commitment paper. It is there clearly expressed that the judge fixed the commencement of service after the expiration of Lamar's term at Atlanta. No authority supports the claim that Judge Cushman was prohibited from fixing the date of the commencement of

this term to such future date. To hold otherwise would be making a mockery of the law, and to stultify the course of justice.

The claim that the petitioner was not given opportunity to be represented fully by counsel in the Circuit Court of Appeals is not borne out by the facts. He submitted a brief of 81 pages, urging many points, all of which was duly considered by that court. It is true he argued the case in person, but he was accorded at least two continuances of his argument to employ counsel, and the time allotted was ample for counsel to prepare for the argument of the appeal. Under the circumstances, I cannot sustain the writ.

Writ dismissed; prisoner remanded.

Ex parte CRAIG.

(Circuit Judge, Second Circuit. April 29, 1921.)

1. **Habeas corpus ⊜47(1)—Circuit judge has authority to grant writ.**
A United States circuit judge *held* to have authority to grant a writ of habeas corpus.

2. **Habeas corpus ⊜4—Writ cannot be used as writ of error.**
A writ of habeas corpus cannot be invoked to review an erroneous judgment of a court of competent jurisdiction, but challenges the jurisdiction of the court.

3. **Habeas corpus ⊜25(1)—Writ may discharge from imprisonment in violation of constitutional right.**
Where by a sentence to imprisonment there is a denial or invasion of a constitutional right, the prisoner may be discharged on habeas corpus.

4. **Habeas corpus ⊜28—Lies where court transcended its powers.**
A prisoner may be discharged on habeas corpus, if on inquiry raised by the writ it is found that the court in imposing the sentence transcended its powers.

5. **Contempt ⊜9—Letter held not to constitute criminal contempt.**
A letter written by petitioner, as an officer of New York City, criticizing the action of a federal judge in denying an application by the city for the appointment of petitioner as coreceiver of a street railroad company, on the ground that it prevented petitioner from access, as matter of right, to the books and records of the company in the interests of the city, where the application had been finally disposed of before the letter was written, *held* not misbehavior in or so near the presence of the court as to obstruct the administration of justice, and a judgment imposing a sentence of imprisonment on petitioner for criminal contempt under Judicial Code, § 268 (Comp. St. § 1245), *held* in excess of the powers of the court, and void.

6. **Action ⊜66—"Pending cause" defined.**
A cause is "pending," when it is still open to modification, appeal, or rehearing, and until the final judgment is rendered.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pending.]

Petition of Charles L. Craig for writ of habeas corpus. Writ granted.

See, also, 266 Fed. 230.

At the time referred to herein the petitioner was the comptroller of the city of New York, duly qualified and serving as such. He was also a member

of its board of estimate. Heretofore the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, the New York Consolidated Railway Company and the New York City Railway Company, all operating street railways in the city of New York, found themselves in financial difficulties, and receivers in equity were appointed by District Judge Mayer. The Interborough Consolidated Corporation, also a railway corporation, was declared a bankrupt. and a receiver of its assets was appointed. On January 15, 1919, the city of New York, pursuant to a resolution of the board of estimate and apportionment, through its corporation counsel, applied to the District Court for the appointment of a coreceiver in the Brooklyn Rapid Transit Company suit. It was sought to have the comptroller appointed receiver. The intention was that he would serve without compensation, and thus look after the interests of the city of New York. The claim was that the city was interested in representing its citizens as well as protecting its rights under the various franchises granted to the railway corporations. The court denied the application for the appointment of a coreceiver. This denial was upon the merits, but the opinion stated that it was "without prejudice to its renewal at such time as counsel may be advised." No further application for the appointment of a cereceiver was made before the petitioner wrote and sent the letter which is the subject of the charge for contempt herein. The controversy between the officials of the city and those who had charge of the affairs of the railway companies was very spirited. An application was made before the board of estimate and apportionment for an increase in fare, and this gave rise to hostility in the controversy.

Between the time of the appointment of receivers and the 1st of October, 1919, expert accountants appointed by the court, made an examination of the books, and made a report as to the financial condition of the company and suggestions were made as to the requirements of the company. Undoubtedly this resulted in the application for an increase in fare. Mr. Lewis Nixon was the public service commissioner for the First district of the state of New York. As representative of this commission, and under the terms of the New York statute, he was an interested party in the litigation. On October 1, 1919, Mr. Nixon called for a conference to be held in the city of New York on October 6 following, for the purpose of discussing the financial and physical condition of the traction lines of the city of New York, including the Brooklyn Rapid Transit Company.' He invited the officials of the city of New York, including the petitioner, to this conference. On October 6, 1919, the petitioner wrote and caused to be sent, the following letter:

"October 6, 1919.

"Hon. Lewis Nixon, Public Service Commissioner—Dear Sir: Replying to your letter of October 1: Apparently without inquiry and without information, you have fixed the time for the proposed conference upon a date, which, if observed, would require the members of the finance and budget committee of the board of estimate and apportionment (comprising the entire board) to drop the preparation of the largest budget in the history of New York City, in which work, as you could easily have ascertained, they have been for some time and must continue to be engaged in daily sessions from early to late. In your letter you say: 'It may be necessary to review figures and examine leases and agreements that will consume time.' Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy, for which Judge Mayer is responsible, of denying to myself and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York. When the applications were made to Judge Mayer in the 'friendly' proceedings instituted by those interested in these corporations for the appointment of a receiver of their own liking, if not of their own selection, the corporation counsel of the city of New York, acting under instructions from the board of estimate and apportionment given at my instance, urged upon Judge Mayer that he appoint an additional or coreceiver acceptable to the board of estimate and

apportionment, to see that the facts and conditions of the corporations involved were fairly and fully presented to the United States District Court in the course of the receivership, so that any orders or decrees that might be made by the court would be fair and just to the city of New York, and the members of the board of estimate and apportionment might be accurately informed with respect thereto, in order that any action deemed necessary by the city might be taken.

"As you must be aware, it is a very common thing in large receiverships to appoint additional receivers, particularly where there are varied and conflicting interests, and I have never been able t understand why, in a matter of great public concern such as this, Judge Moyer set himself against it. It was clearly understood that conditions were certain to develop in these receiverships where the responsible authorities would be urged to take action which no honest or intelligent man could be expected to consider without the most exact and complete information upon the entire subject. Judge Mayer refused to grant any of the relief sought by the city. He not only denied the relief, but he made orders which preclude any application being made by the municipal authorities to any other court or judge for any right of examination into the affairs or conditions of these corporations seeking municipal aid and favor. Truth is the mightiest weapon in every controversy. The orders of Judge Mayer deny to the municipal authorities the opportunity to ascertain the truth. The franchises and rights enjoyed by these corporations were mostly all procured many years ago, when corrupt political rings were in control of public affairs in the darkest scandals of municipal history, both in the old city of New York and in the city of Brooklyn prior to consolidation, are those in relation to such grants. The affairs of the franchise-holding corporations have been in the hands of the boldest and most unscrupulous manipulators engaged in the exploitation of the rights obtained from corrupt political rings. Up to the present moment they have defied every power that has sought to open up the books and original records for search and examination in the public interest. They will open and open wide, without any reservations or restrictions, before there will be any conference so far as I am concerned.

"It seems to me a monstrous thing that an order of a federal judge in a court of equity should stand between the public and the truth under such circumstances. Such an order is hostile to every interest of the city of New York in these controversies. Its operation and effect is to disarm the municipal authorities, to deny them the most effective instrument of redress. and to force them into a contest with corporate powers entrenched in darkness and concealment. The responsibility for the turmoil, delay, and dissatisfaction that has followed upon the orders of Judge Mayer, denying to the city of New York any representation in these receiverships, rests upon those who procure and are protected by such orders. As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications should procure the entry of orders by Judge Mayer putting the city of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy; and it will not in the end procure any advantage whatever to the traction interests.

"Yours very truly, Charles L. Craig, Comptroller."

The sending of this letter resulted in an information being filed, charging the petitioner, as a defendant, with criminal contempt under section 268 of the Judicial Code (Comp. St. § 1245). In the information it was charged that he caused the publication of the letter, not only by sending it to the Public Service Commission, but also by sending it to various newspapers published within the district. The information charges that the following statements in the letter are false:

First. The statement that the court was responsible for a policy of denying to the defendant and other members of the board of estimate and apportionment of the city of New York any access to original sources of information concerning the property and affairs of the various public utility corporations in the hands of the receivers appointed by the court.

Second. That it is stated in the letter that the court made orders which

precluded any application being made by the authorities of the city of New York to any other court or judge for any right of examination into the affairs or conditions of the said public utilities corporation, whereas in truth and in fact the court never made any such order, and, on the contrary, expressly ordered and directed that there should be given to the authorities of the city of New York every opportunity and facility for making such examination.

Third. That it is stated in the letter that orders of the court denied to the authorities of the city of New York the opportunity to ascertain the truth, whereas in truth and in fact the court never made any such orders, and has never made any orders that had such an effect.

Fourth. That the letter stated that an order of the court stands between the public and the truth, whereas in truth and in fact no such order was made. That in point of fact the court directed every facility be afforded to the public officials and citizens' associations to satisfy themselves in respect to the financial and other conditions relative to the corporations in charge of the receivers.

The charge is that the petitioner willfully, knowingly, unlawfully, and contemptuously made these statements. It is alleged that the publication was calculated and intended by the petitioner to influence the court in the exercise of its lawful functions, and to force and compel it to decide applications and questions in issue in accordance with the views and wishes of the petitioner; that it was written for the purpose of inciting public ridicule, scorn and condemnation, if its decisions were contrary to or at variance with the views and wishes of the defendant; that it tended to obstruct and impede the administration of justice in said suits and proceedings.

A demurrer was interposed to this information, alleging various grounds why it was insufficient. This was overruled. The petitioner was then held to answer in contempt before Judge Mayer. A trial was commenced May 10, 1920, and concluded on June 10, 1920, with decision reserved.

The petitioner was a witness in his own behalf. He gave testimony as to his intention and purposes in writing the letter referred to. He said the letter from Commissioner Nixon came to him on the morning of October 6. The letter was one of the many things he had to attend to on that morning. It was written in considerable haste, and the writer's purpose was to "get into the mind of Nixon the necessity for that kind of co-operation resulting in the public authorities being on an equal footing with those representing the traction interests." He said it was physically impossible for him to have attended the conference on October 6. He did not expect the commissioner to read the letter at the conference, and the letter was not intended for any one else but the public service commissioner. It was explained by him that the letter reached the public press through a usual routine of giving out letters for publication which prevailed in the comptroller's office. This was done through his secretary, who is an appointee of and paid by the city. He further testified as to what he intended by the language employed in his letter. He said that what he meant by "original sources" was that letters and documents of the railway companies were kept in their archives, and he meant, by "denying" original sources, inability to have "full and unrestricted access, with power to compel any subordinate to produce or dig up whatever it might be, or be suspected of being, all of the facts that relate to these companies," that anything that "cut us short of that was a denial of access to the original sources, and that the very purpose of the application that had been made to the United States District Court for the appointment of a coreceiver was to have some one who was in a position to bring about these disclosures, and the necessary effect of the order denying that application was to deny to the municipal authorities in question that kind of access to the original sources." He stated how it was important to the financial interest of the city of New York and to its citizens to have its officials well informed of the matters pertaining to the railroad company's affairs; that the most feasible and practicable way to this end was that a coreceiver be appointed who in some way would be representative of the city.

The petitioner is a lawyer, and his testimony indicates that he had at the time considerable information concerning the railroad company's affairs and its relations to the city in connection with the franchise obligations. He

denied that he gave publicity to the letter, other than sending it to the commissioner. He also denied that at any time he intended to convey the meaning that the District Judge had in point of fact denied access to original papers, except in so far as such denial might flow from his refusal to appoint him coreceiver.

On February 24, 1921, the court adjudged the petitioner guilty and sentenced him to serve a term of 60 days in the Essex County Prison in the state of New Jersey. The petitioner in the meantime continued to perform his official duties as comptroller. His term will not expire until December 31, 1921.

John P. O'Brien, Corp. Counsel, of New York City (Edmund L. Mooney, Charles T. B. Rowe, Alfred B. Cruikshank, Russell Lord Tarbox, and Frank I. Tierney, all of New York City, of counsel), for petitioner.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews and David V. Cahill, both of New York City, of counsel), for respondent.

Before MANTON, Circuit Judge.

MANTON, Circuit Judge (after stating the facts as above). [1] The power of a circuit judge to issue a writ of habeas corpus is questioned by a motion to dismiss. I have held heretofore that a circuit judge has such power. In re David Lamar (C. C. A.) 274 Fed. 160. Nothing has been submitted in this proceeding which causes me to change the views there expressed. Further, at the time of the issuance of this writ, the circuit judge writing was by assignment empowered to consider matters of original jurisdiction. The application to dismiss the writ for want of authority to issue the same is denied.

[2] A writ of habeas corpus cannot be made to perform the office of a writ of error. Nor can it be invoked to review an erroneous judgment of a court of competent jurisdiction. It challenges the jurisdiction of the court. In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Watkins, 28 U. S. (3 Pet.) 193, 7 L. Ed. 650.

In a contempt proceeding it may be available to relieve a prisoner from the restraint imposed if the judgment is void on the ground that the court was without the power to make it. But the usual objection to the remedy sought by the medium of habeas corpus is that there is a regular judgment of conviction which cannot be questioned collaterally. There are exceptions to this rule which have been recognized. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

If the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally. The defendant, who is imprisoned under and by virtue of such a judgment, may be discharged from custody on habeas corpus. In re Hans Nielsen, 131 U. S. 176, 183, 9 Sup. Ct. 672, 674 (33 L. Ed. 118). There the court said:

"In the present case, it is true, the ground for the habeas corpus was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to

see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant."

In Ex parte Lange, supra, the court had authority to hear and determine the case. But the Supreme Court held it had no authority to give the judgment it did. As was said in the Nielsen Case, supra:

"He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right."

[3] So where there is a denial or invasion of a constitutional right, the prisoner may be discharged on a habeas corpus. Therefore the determining inquiries are: (a) Had the district judge jurisdiction of the person and subject-matter? (b) Was the sentence imposed within its power?

Judicial Code, § 268, 36 Stat. 1163 (Comp. St. § 1245), provides:

"The said courts [United States courts] shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice. * * *"

In Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203, it is pointed out that there were five exceptions to the rule that there can be no review on a habeas corpus of a sentence which can be reviewed on appeal or by a writ of error. One of the five exceptions is where the judgment or order entered under which he is held is a nullity because in excess of the power of the court.

An example of this exception was recently before the Supreme Court in Ex parte Hudgings, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656, 11 A. L. R. 333. There, on a rule to show cause, a petition of habeas corpus seeking the discharge of the petitioner from custody under a commitment for contempt was filed. The grounds for discharge were that the court had exceeded its jurisdiction by punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt, the action of the court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the Fifth Amendment. The court said:

"The duty to consider the case arises from the permission to file, and therefore prima facie implies that it is of such a character as to be an exception to the rule of procedure, that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court. Ex parte Royal, 117 U. S. 254; Riggins v. United States, 199 U. S. 547; Glasgow v. Moyer, 225 U. S. 420, 428; Johnson v. Hoy, 227 U. S. 245; Jones v. Perkins, 245 U. S. 390; In re Mirzen, 119 U. S. 584; In re Huntington, 137 U. S. 63. Whether, however, definitely the case is of such exceptional character, must depend upon an analysis of the merits, which we now proceed to make upon the petition, the return, argument for the petitioner, suggestions by the United States, a statement by the judge, and

a transcript of the stenographer's notes showing what transpired in the court below, made a part of the argument of the petitioner, and in substance conceded by all parties to be the record."

In the case at bar there is submitted the petition, alleging, among other things, that the judgment under which the petitioner is held is a nullity, because in excess of the power of the court, and because of the arbitrary action of the court beyond the limits of any discretion possessed. The proceedings are sought to be justified by the return which is filed and the testimony taken on the hearing before Judge Mayer is made a part thereof. It is argued on behalf of the petitioner (a) that there is no contempt either in substance or in the language of the letter of October 6; and (b) that at the time the letter was written the subject-matter of the criticism was not pending sub judice.

In the Hudgings Case, supra, a witness testified who was declared by the district judge to be committing perjury. The judge considered him in contempt of court because of his continuous refusal to recognize writings shown to him, the signature of which he said he could not identify because he had no recollection of having seen the signatory sign. The district judge, because of the peculiar circumstances of the case, thought the contrary, and held that the witness was testifying falsely, and that his refusal was obstructing the course of justice in the presence of the court. The Supreme Court discharged the prisoner and said:

"Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. Toledo Newspaper Co. v. United States, 247 U. S. 402; Marshall v. Gordon, 243 U. S. 521. An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. * * * But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. * * * Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone, without reference to any circumstance or condition giving to it an obstructive effect."

The argument of the petitioner is that there was an excess of power exercised by the district judge; that the conviction for contempt is therefore a nullity. He contends among other things (1) that the writing and sending of the letter does not tend to obstruct the admin-

istration of justice; (2) that at the time the letter was sent the application for the appointment of a coreceiver had been disposed of, and therefore there was not pending before the court a proceeding which the letter could affect by obstructing the administration of justice.

[4] If either of these contentions be sound, there was an excess of power exercised in the action of the district judge and the petitioner is entitled to his discharge on this writ. Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; Ex parte Lange, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872; New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80; In re Loney, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717. He may be discharged, if on inquiry raised by the writ it is found that the court "has transcended its powers." Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787. In Ex parte Lange, 85 U. S. (18 Wall.) 163, 166, 178 (21 L. Ed. 872), Justice Miller said:

"Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of habeas corpus or otherwise, we proceed to examine the case as disclosed by the record of the Circuit Court and the return of the marshal, in whose custody the prisoner is found, to ascertain whether it shows that the court below had any power to render the judgment by which the prisoner is held. * * * There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged."

In Bacon's Abridgement, Habeas Corpus, B 10, the rule states:

"If the commitment be against law, as being made by one who had no jurisdiction of the cause or for a matter for which by law no man ought to be punished, the courts are to discharge."

In Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, the Supreme Court approved the foregoing quotation and said:

"The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void."

The court must act judicially in all things and cannot transcend the power conferred by the law, and when the court does so in imposing the sentence not merely is an error committed, but the judgment is absolutely void. Bailey on Habeas Corpus, § 50. In Ex parte Parks, 93 U. S. at page 22, 23 L. Ed. 787, Justice Bradley said:

"From this review of the law it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offense, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers it will grant the writ and discharge the prisoner, even after judgment."

[5] From this record it is evident that if any contempt was committed it was a constructive contempt as distinguished from direct contempt. The district judge in his opinion fixes responsibility of guilt upon that portion of the letter written which contains a false charge that the "judge was responsible for a policy of denying to the writer and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of the company." He held this to be a contempt of court, within section 268 of the Judicial Code, as misbehavior so near the court as to obstruct the administration of justice.

The findings of fact having any evidence to support them are binding upon an application such as this. The objectionable language of the letter is referred to in the court's opinion (United States v. Craig [D. C.] 266 Fed. 230):

"Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of United States District Judge Mayer, there must be a reversal of the policy for which Judge Mayer is responsible of denying to myself and other members of the board of estimate and apportionment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York."

It will be observed that the entire letter refers to the denial of the application to appoint a coreceiver. The purport of the letter, taken as a whole, is a criticism of the district judge who denied the application. If the comptroller were appointed coreceiver, he would have the access he sought as a matter of right. The finding of the district judge is that he had it as a matter of favor. Therefore it is concluded that the statement of the denial of access is false. The district judge says in his opinion (266 Fed. 231):

"The right to criticise the correctness of the decisions of courts and judges has always existed under our form of government, and must continue to exist, not merely as a right possessed by the individual, but as a safeguard to our institutions. Such criticism often invites valuable discussion and deliberation, and not infrequently results in correcting error. But such right must not be confused with 'the misbehavior * * * so near' the presence of the court 'as to obstruct the administration of justice.'"

This quotation well expresses the rule for guidance in the determination of a charge of contempt under the statute. A criminal contempt is conduct that is directed against the dignity and authority of the court. It is an offense against organized society. Although it may arise in the course of private litigation, it is not a part of the litigation but creates an issue between the public and accused. In determining whether the language used was or was not a contempt, regard must be had not merely to the very words used, but to the surrounding circumstances in connection with which they were used. The tone and the emphasis must be considered. The determination as to whether a contempt has been committed does not depend upon the intention of the offending party, but on the act done. Such is the rule in cases of direct contempt. But in constructive contempt, such as is charged here, where the language used is not per se libelous, but is fully capable of innocent meaning, the intention of the offending party is a factor and

may control. The rule is now well settled that it is a contempt to issue a publication which is calculated to prejudice or prevent fair and impartial action in a cause of judicial investigation then pending. It is as much a contempt as if one sought to influence judicial action by threats or other form of intimidation which reflect on the court or which stands to corrupt or embarrass the due administration of justice. Toledo Newspaper Case, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186.

But publications made in good faith and couched in respectful language are not contemptuous. So, where the publication complained of can have no tendency to prejudice the cause, the publisher may not be found guilty of contempt. To vindicate the dignity of the court in compelling respect and obedience, a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers. To visit punishment unjustly upon another official, who acts within the limits of what he conceives to be his duty, and who attempts, whether inadvisedly or otherwise, to secure some means of keeping his employer (a municipality) advised by right of access, rather than the favor of access, to papers and information concerning the railroad properties, is clearly an excess of the power possessed.

There is no divinity about the office or duties of a judge which makes him free from criticism. The statute requires a misbehavior which causes an obstruction of the administration of justice. The federal Constitution (Amendment 1) guarantees the right to every person to freely speak, write, and publish on all subjects. The writer is responsible for the abuse of that right. Therefore the liberty thus accorded the writer must not be confounded with mere license. The liberty of the writer stops where a further exercise would invade the rights of others. The guarantee of the Constitution does not authorize usurpation of the functions of the courts. A writer with his liberty has no right to assault a judge during the progress of a trial. When his thought and pen are used so as to constitute misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, he invades the rights of others. There is little doubt that a sentiment expressed in writing favorable or unfavorable to one of the parties in a case may be made to so pervade the community as to reach the courtroom and interfere with the fair and impartial consideration of a judge in the performance of his duty. But the essence of the offense is conduct reasonably calculated to produce such an atmosphere and such a result. It is well settled that where his contempt is committed without the presence of the court every reasonable doubt will be resolved in favor of the accused. The charge is quasi criminal.

The language of the letter, particularly the portion which has been deemed offensive, could not in any degree be considered misbehavior of a person "so near the presence of the court as to obstruct the administration of justice." There was but one letter. There seems to be but one paragraph which constitutes the charged misbehavior. By no interpretation can the letter be said to have any tendency to embarrass or influence the court so as to prevent a fair trial or a just conclusion in regard to any matter which was then pending before the court.

Every case must be measured by its own facts. To have adjudged this misbehavior "so near the presence of the court as to obstruct the administration of justice" was to exercise a power beyond the jurisdiction of the district judge.

The rule throughout, relied upon by the accuser, is the Toledo Newspaper Case, supra. There the court imposed punishment for newspaper publications, but this was done on the ground that the publications obstructed justice. It was a very extreme case. It consisted of continuous and protracted attacks upon the judge. The Circuit Court of Appeals stated (237 Fed. 986, 150 C. C. A. 636) by Judge Denison:

"Upon this record, the publications had reference to pending judicial action, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, if one should be made, and there is a finding that they constituted an attempt to intimidate—at least unduly to influence—the district judge with reference to his decision in the matter pending before him."

And the Supreme Court (Chief Justice White; 247 U. S. 402, 415, 38 Sup. Ct. 560, 563 [62 L. Ed. 1186]) in its opinion quoted and approved this finding:

"That each of these findings is supported by competent evidence and for that reason binding upon this court is too clear for dispute; but we may rightly go further and say that it is difficult to see how any other findings could have been made."

In that case Justice White said further:

"The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty—a conclusion which necessarily sustains the view of the statute taken by the courts below. * * *" 247 U. S. 419, 38 Sup. Ct. 564, 62 L. Ed. 1186.

The misbehavior must present an interruption which comes between the court and the consideration of the subject-matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court. No such conclusion can be reached in the case at bar. When a case or application is finished, the courts are subject to the same criticism as other people. In the case of Patterson v. Colorado ex rel. the Attorney General, etc., 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689, Justice Holmes said:

"When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied."

[6] Was there a cause pending within the rule of contempt concerning libelous publications? A cause is pending when it is still open to modifications, appeal or rehearing and until the final judgment is rendered. Did the letter concern a cause pending? If it did not, it could not obstruct the administration of justice. The application before the court, which is the subject-matter of the letter, was the matter of a coreceiver. As to this the court had definitely decided adverse to the comptroller. The court's action was complete in respect to this matter. It is true there is added to his opinion opportunity for another

application, but this may well have been left unwritten. If a new application was made, even under suggestion of the opinion or the order, it would be necessary to do so as an entirely new application on new papers and facts. The leave granted was not one of reargument. At any time, upon a new showing, irrespective of the suggestion of the court, another application could have been made for the appointment of a coreceiver. Therefore the court's action was complete in every respect, and its order was entered when the letter was published.

This appears by the return of the writ. The district judge pointed out, as did the information, that the whole railroad situation was before the court, since it was an equity proceeding; but it is not of this that the defendant wrote. This is fully corroborated by the testimony of the defendant. He also testified that he had no intention of obstructing the delivery of justice or misbehaving himself so as to obstruct the administration of justice. He stands convicted upon his letter alone, and such inferences as may be drawn thereform. His conviction rests upon an issue between the court and the defendant, and it is one of terminology or interpretation.

There is no criminal intent discoverable from this record to support the interpretation placed upon it by the court, nor was there pending sub judice a proceeding before the court at the time the letter was written. The conclusion is irresistible that the court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty.

The petition for discharge is granted.

PHILLIPS SHEET & TIN PLATE CO. v. STEPHENS-ADAMSON MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. May 11, 1921.)

No. 1829.

1. **Sales ⇐88—Contract with ambiguous terms for construction by jury.**
A contract for the furnishing of steel by defendant to plaintiff for a specified use, made by an accepted order and preceding correspondence, showing that the thing sold was to be "commercial hot rolled steel," "to be absolutely straight with true edges," the order also containing a sketch showing how it was to be used, in view of the necessity of determining the meaning of such specifications in the trade, and where the requirements must have been understood by defendant, *held* properly submitted to the jury for construction in the light of the correspondence and negotiations between the parties.

2. **Principal and agent ⇐124(3)—Sales ⇐182(4)—Acceptance under contract and agent's authority held for jury.**
Whether payment for and attempted use by plaintiff of steel delivered by defendant on a contract constituted an acceptance under the contract or was pursuant to an agreement which bound defendant to replace the steel if found unfit for the purpose intended, and whether the agent representing defendant had authority to make such agreement, *held* questions for the jury.

3. **Sales ⇐179(6)—Effect of conditional acceptance stated.**
Where steel shipped by defendant to plaintiff under a contract was accepted on condition that it should be reconditioned or replaced in case it

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

proved unfit for the use intended, a failure of the condition operated to remit the parties to their previous status and reinvest plaintiff with the right to reject the steel and recover the money paid for it.

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 the Stephens-Adamson Manufacturing Company against the Phillips Sheet & Tin Plate Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Stewart, of Pittsburgh, Pa. (Charles McCamic, and McCamic & Clarke, all of Wheeling, W. Va., and Weil & Thorp, of Pittsburgh, Pa., on the brief), for plaintiff in error.

Nelson C. Hubbard, of Wheeling, W. Va., and J. Sidney Condit, of Chicago, Ill. (Walter H. Jacobs and Winston, Strawn & Shaw, all of Chicago, Ill., and Hubbard & Hubbard, of Wheeling, W. Va., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. Phillips Sheet & Tin Plate Company (now Weirton Steel Company), plaintiff in error, herein called defendant, was a manufacturer of strip steel at Weirton, W. Va. Stephens-Adamson Manufacturing Company, herein called plaintiff, manufactures conveyers and transmission machinery at Aurora, Ill. La Salle Steel Company of Chicago was defendant's exclusive sales agent in that city and adjacent territory, including Aurora. About the 1st of May, 1917, one Grange, a salesman of the La Salle Company, called upon plaintiff in the course of soliciting business and had an interview with Pierce, then its purchasing agent, and Phillips, the foreman of its steel shop. He was informed of the articles made by plaintiff, and particularly of the conveyer known as the "Lehr pan," which appears to have been quite fully explained; learned that plaintiff was using blue annealed steel for making this article; said that hot rolled strip steel would do the same work as blue annealed sheets and was just the steel for that kind of a pan; was told that the pans had to be absolutely flat, so as to carry bottles standing upright without falling over through a Lehr oven under intense heat; but repeated that hot rolled strip steel would do the work and was "a better product." No order was given at the time, but on June 1st Pierce wrote the La Salle Company that "we are in the market for about 75 tons of strip steel," stating dimensions and other requirements, and asking for "best price and delivery by return mail." Reply stated that the matter had been taken up with "our mill," with request to advise "what delivery they could effect." This was followed three days later by an offer to furnish the steel at a price and on terms named, delivery to be made within the next four to six weeks.

Thereupon, on June 7th, plaintiff sent the La Salle Company an order for—

"2000 strips #12 (.109) gauge hot rolled strip steel (10) 10½ inches wide 30x20x10 feet long. No pcs. Must be soft enough for bend below, which is

very sharp bend. Above to be absolutely straight and with true edges. See sketch. Cannot use curved sheets or curved edges, as we have not allowed anything for shearing."

On the order was a pen and ink sketch showing a straight bend at each side of the strip, making two flanges. The line of the bend is drawn straight. In the letter transmitting the order plaintiff says:

"Please note our specifications carefully and make sure that these come in straight. They cannot be curved on the edges."

The second order, on June 8th, was for—

"1,000 strips #12 (.109) gauge hot rolled strip steel (10) 10½ inches wide 7' 0" long. No pc's. Must be straight edgewise. Watch carefully. Same as our order #68713 for same purpose."

Upon receipt of the first order the La Salle Company wrote that their quotation "was based on furnishing commercial hot rolled steel with a natural hot rolled round edge," and that they were sending the specifications on to their works. Replying to this on June 9th plaintiff wrote that—

"We cannot have this steel come to us in anything like a curved condition. Please note sketch on this letter and you will see to what we refer."

On June 11th, as Pierce testified, he had a conversation with Leeds, president of the La Salle Company, in which he told the latter that the material would be used in Lehr ovens, and they wanted the steel to be of exceptionally good grade, and that Leeds said "he would guarantee that the steel we got would be satisfactory to our purpose." In that conversation Leeds advised that the strips be made a little wider, so that they could be cut along the edges, and thus get the edges straight, and Pierce assented. Confirming this by letter of same date, he directed that the steel be made 10¼ inches wide, instead of 10 inches, and referring to the bend shown on the sketch said:

"This bend is rather sharp, and although we do not care to get this material too soft, as it is to be used in a Lehr oven, still we want it at least just as soft as blue annealed sheets."

Under date of June 15th defendant sent plaintiff acknowledgments of the two orders. On the 18th Pierce wrote the La Salle Company that the acknowledgments had been received and that defendant seemed—

"to have these orders very well in hand, with the exception of the quality specifications; in other words, we would imagine from their acknowledgments that you did not call their attention to the operation which we are going to perform on these sheets. Of course, this matter is up to you, but we should think it would be well to advise them on this point also."

Thereupon, on the 20th, Leeds wrote defendant:

"Confirming the writer's conversation, when at the mill, the Stephens-Adamson Mfg. Co. wish to call our attention to the sketch drawn on their original order showing the purpose for which this material is intended. In the acceptance of this order, you are agreeing to furnish material to meet their requirements in accordance with this sketch."

From this correspondence it will be seen that defendant agreed in substance to furnish commercial hot rolled strip steel, to be abso-

lutely straight and with true edges, and of a quality capable of fabrication in the manner shown by the sketch. The trade terms "absolutely straight" and "with true edges" were stated by experts to mean "straight in all directions," "flat on the surface," "not wavy or buckled." The steel actually furnished arrived at plaintiff's plant about the 25th of August, and a part of it was then unloaded. According to plaintiff's testimony, it was badly bent, corrugated along the edges, wavy and buckled; the buckles in some instances being as high as an inch and a half or more from the floor and several inches in width. The La Salle Company was promptly notified. Grange, the salesman above mentioned, came the next day, and, after examining the steel said, as Phillips swore, that it was "in terribly bad condition." On August 27th Pierce wrote the La Salle Company that the steel—

"has come in badly bent, twisted and some of the sheets are corrugated along the edges. We believe that your representative"—referring to Grange—"fully realizes that this steel cannot be used for material which we are manufacturing unless it is thoroughly straightened."

On the 28th the La Salle Company wrote defendant the substance of Pierce's letter and said:

"You will see from the above this complaint calls for your immediate attention. We therefore want you to advise us without delay what action we shall take."

On the last-named date Pierce wrote again to the La Salle Company that they had gone over the matter carefully and could see no way of straightening the strips, and added:

"We wish, therefore that you would arrange to take them off our hands and advise us of disposition of this car. The strips are certainly not as we ordered them, and cannot be used unless they are straight."

This was followed on the 30th with another letter, in which Pierce says:

"We understand you have taken this matter up with the Phillips Sheet & Tin Plate Company and that you expect advices from them shortly. It will be necessary for us to have immediate information, as we are holding this car on our track and must know what is to be done with it."

On the 31st the La Salle Company wired defendant that they had told plaintiff to continue unloading the car to save demurrage, and asked to be advised of defendant's wishes "as to straightening or returning stock," and "if we shall adjust best way possible." Defendant wired back to—

"make earnest endeavor to have them keep steel; if necessary make concession. * * * If you find they will not use steel, have it returned. Will replace in three weeks."

In the meantime Vice President Kelly of the La Salle Company had gone to plaintiff's plant to examine the steel, and had said, according to Phillips, that it was "bad stuff." While he was there it was proposed to run the steel through plaintiff's "bending roller," and a strip was treated in that way, with the result that "it looked fairly good," and this seemed to promise a solution of the difficulty.

On the 5th of September Leeds went to Aurora, as defendant had requested a few days before, and on examining the steel said, as was testified by Kendall, plaintiff's general superintendent:

"Well, that stuff is certainly in rotten shape, but I would like to see those rolls Kelly was talking about."

The outcome of his visit was in brief an arrangement by which plaintiff undertook to run the steel through its roller, in the hope, and seemingly with the expectation on both sides, that it would thereby be put in the required condition, and plaintiff was to be allowed $300 for doing the work. Asked what would happen if the strips did not come out straight, Leeds repeated the assurance in various forms, as stated by plaintiff's witnesses, that "his company would take care of them"; "that they stood back of every pound of steel they sold"; that "we are a reputable house and, if there is anything wrong, we will make it right; quit worrying about that"; that "if this steel does not work, we will see that the steel is reconditioned or replaced"; and plaintiff claims to have relied upon that assurance. It was also testified that Leeds authorized plaintiff to cut the strips into 10-foot lengths, with some 7-foot, as would be needful for their intended use. And when it was explained to him that this would involve punching certain holes in the strips, as their dies were "fitted for punching the holes and countersinking them all in the same operation," and after talking "this whole matter over thoroughly," Leeds said, according to Pierce, "You go ahead and cut up that material and roll it, and there is no doubt but what it will be satisfactory," with more to the same purport.

In this interview Leeds was told that plaintiff would like to discount the bill for the steel, but hesitated to do so because of fear that it could not be straightened and made fit for use, and Leeds replied to the effect that plaintiff wouldn't be taking any chances, as "we are standing back of the shipment." Thereupon a check was given him, to the order of defendant, and which the latter soon afterwards collected, for $8,791.82, the purchase price of the steel less the $300. In his letter of the same date, transmitting the check to defendant, Leeds said:

"The writer called at their plant to-day and inspected the material, and found the same in rather bad condition, due to improper handling before the material cooled."

A shorter summary will suffice for the subsequent happenings. Plaintiff cut up and put through the roller about two-thirds of the shipment, punching holes in the ends of the strips, and clipping them at the same time. Some of the material was taken to another concern, the Richard Wilcox Company, to be formed into Lehr pans, but it did not answer the purpose; the pans were all bowed. The La Salle Company was notified, and Kelly came to Aurora. He went to the Wilcox plant examined the pans that had previously been made, and had several more made in his presence, all of which bowed. At his request some of the strips were taken back to plaintiff's plant, and pans there made in different ways, but all of them bowed; the ends

being about half an inch higher than the center. Samples of the steel were sent to defendant's plant and there reconditioned. When returned to plaintiff they appeared to be straight, but pans could not be made of them that did not bow. A few strips were annealed, but with no better result. In short, as plaintiff claims, the steel, when worked, was not straight, and would not make a straight pan. There was much correspondence between the parties, and some talk of replacement; but nothing led to an adjustment of their differences. The upshot at last was a demand by plaintiff for a return of the money paid for the steel. This the defendant refused, and plaintiff sued. The jury gave a verdict in its favor, and defendant brings the case here.

We have thus set forth in considerable detail the proofs relating to the contract, and to the quality of the steel delivered, and shall further refer to the testimony on these and other issues, because, as seems to us, the recital shows convincingly that the substantial questions raised by defendant were questions of fact for the jury to determine.

[1] First, as to the contract itself. Defendant insists that it is so clear and unambiguous that its construction was for the court, and therefore it was error to submit its meaning to the jury. But to this we cannot assent. What was meant by "commercial hot rolled strip steel"? True, the word "commercial" does not appear in either of the two orders, but the La Salle Company's letter of June 8th says:

"Our quotation was based on furnishing commercial hot rolled steel with a natural hot rolled edge."

And, apart from this, would it not be understood that plaintiff was to get steel of commercial quality? And what was meant by "absolutely straight"? Have those words a technical meaning, known to the trade, which gives certainty to what defendant undertook to furnish? And what of the sketch drawn on the first order, and the notation on the second that it was "same as our order # 68713, for same purpose," and of the sketches shown on plaintiff's letter of June 9th? What is their significance, and what obligation did defendant assume when it accepted orders which these sketches, to say the least, more exactly defined? Was it thereby bound to know the particular use for which the steel was ordered, and did it impliedly promise to supply an article suited to that use?

These and other questions which might be asked demonstrate to our minds that the orders and acceptances, which defendant says constitute the entire contract, are by no means free from ambiguity. It was therefore proper, under a familiar rule of law, to show the preceding negotiations and the knowledge thus acquired by defendant of the specific purpose for which the steel was wanted, in order that the jury might determine what it actually undertook to furnish. The La Salle Company was defendant's agent, with full authority to bind it in effecting a sale, and the information obtained by that company, through its salesman or otherwise, must be deemed information which defendant possessed, and on which it acted, when it accepted plaintiff's orders. It follows that the correspondence between plaintiff and the

La Salle Company, the interviews with its representatives, and all the other incidents of the transaction, were admissible in evidence and rightfully taken into account.

Whether the steel received by plaintiff on the 25th of August was of the kind and quality which defendant had agreed to deliver, even according to its own theory of the contract, was clearly a question of fact for the jury. On this issue it is enough to note, in addition to what is stated above, that two experts, apparently disinterested, testified positively to the effect that the steel was not only wavy and buckled, but that it had not been manufactured in accordance with standard practices; that it appeared to have been finished at a very low temperature; that it was not commercial hot rolled steel, did not comply with the specifications in the orders, and was of little more value than so much scrap. In view of this testimony, the point may be passed without further comment.

[2] It is insisted that plaintiff accepted the steel, and therefore its only remedy, if entitled to any relief, was an action for damages for breach of warranty. But acceptance cannot well be predicated on what occurred when the steel reached Aurora, for unloading had scarcely begun before plaintiff discovered its condition, and at once notified the La Salle Company that it was not as ordered and could not be used, and asked to have it taken "off our hands and advise us of disposition of the car." This was a clear rejection of the steel, which was plaintiff's right, if it did not conform to contract requirements. The claim must therefore rest on the arrangement made with Leeds on the 5th of September. At that time Leeds expressed the utmost confidence, and Pierce appears to have believed, as he had written on the 31st of August, that the steel could be straightened and made usable by running it through their roller. What the arrangement was which they then made is the subject of sharp dispute. Leeds says that plaintiff undertook to put the steel in proper order for its use, was allowed $300 for doing the work, and paid the balance of the purchase price, and thus the matter was settled and ended. On the contrary, Pierce and other witnesses say that this was on the express and distinct condition that, if the defects were not corrected by the rolling operation, defendant would recondition the steel or replace it. It was plainly a question for the jury, and their verdict is conclusive.

But defendant contends that Leeds had no authority to make such an agreement, and therefore it is not binding. This, also, in our opinion, was a question of fact. All the circumstances indicate that the La Salle Company held important relations with defendant and was something more than an ordinary agent. And since it appears—to mention nothing else—that Leeds wired on August 31st for "your wishes as to straightening or returning stock," and "if we shall adjust best way possible," and that defendant wired back to "make earnest endeavor to have them keep steel, if necessary make concession," and added, "if you find they will not use steel have it returned, will replace in three weeks," we think it was for the jury to say whether he was authorized to make the agreement which plaintiff's witnesses testify was made a few days later.

[3] The applicable principle of law in such case is well settled. If plaintiff's acceptance at that time was only on the condition named, and in reliance upon the promises of Leeds, as the jury must have found, the failure of that condition operated to remit the parties to their previous status and reinvest plaintiff with the right to reject the steel and recover the money paid for it. Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21, 150 C. C. A. 223, L. R. A. 1918A, 602; Benjamin on Sales, vol. 2, 798, 799.

These are the principal questions presented by the record, and it is but repeating to say that in our judgment they are all questions of fact, which were properly submitted to the jury. The instructions state the issues fairly and correctly, and the exceptions thereto require no discussion.

Examination of the minor questions discloses no reversible error, and the judgment will therefore be affirmed.

THE YAYE MARU. THE WAR LARK. SUNA v. STRICK LINE. *

(Circuit Court of Appeals, Fourth Circuit. May 3, 1921.)

No. 1874.

1. **Shipping ⟸49(3)—Charterer held entitled to off-hire under breakdown clause, though not then using vessel.**
Under a charter party requiring the owner to keep the vessel "in a thoroughly efficient state in hull, machinery and equipment for and during the service," and providing that, in the event of loss of time from breakdown or "any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost," where the vessel, after entering on the charter and while lying in port awaiting cargo, was injured in collision, which rendered her unseaworthy as to one hold for loading or carrying cargo, and she was taken by the owner and repaired, the charterer *held* entitled to off-hire until the repairs were completed, though he continued to keep her waiting for cargo for a considerable time thereafter.

2. **Collision ⟸128—Loss of charter hire recoverable as damages.**
A chartered vessel, so injured in collision that the charterer was entitled to, and did, place her off-hire until repaired, *held* entitled to recover for such loss of earnings as an element of damages, measured prima facie by the charter hire lost.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by A. Suna, master of the Japanese steamer Yaye Maru against the Strick Line, owner of the British steamer War Lark. From the decree, libelant appeals. Modified and affirmed.

For opinion below, see 265 Fed. 850.

George Forbes, of Baltimore, Md., George C. Sprague, of New York City, and John Phelps, of Baltimore, Md. (Hunt, Hill & Betts, of New York City, on the brief), for appellant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 256 U. S. —, 42 Sup. Ct. 50, 65 L. Ed. —.

William H. McGrann, of New York City (John M. Woolsey and Kirlin, Woolsey, Campbell, Hickox & Keating, all of New York City, and Janney, Stuart & Ober, of Baltimore, Md., on the brief), for appellee.

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

KNAPP, Circuit Judge. On November 5, 1919, the Japanese steamship Yaye Maru and the British steamship War Lark were at anchor in the harbor of Baltimore at a safe distance apart. About noon of that day, while a high wind was blowing, the War Lark dragged anchor and drifted down upon the Yaye Maru, damaging the latter to a substantial, though not serious, extent. The libel filed on behalf of the owner seeks recovery for this injury to the vessel, and also, as will presently be explained, for loss of time while she was undergoing repairs. The trial court found the War Lark solely at fault for the collision, and awarded appellant the sum of $3,081.40 for the physical damage sustained by the Yaye Maru. The appellee acquiesced in this finding and subsequently paid the amount awarded. The claim for detention was wholly rejected, and the libelant appeals.

[1] At the time of the accident the Yaye Maru was under a time charter containing the following provision, known as the "breakdown clause":

"That in the event of the loss of time from deficiency of men or stores, fire, breakdown, or damages to the hull, machinery, or equipment, grounding, detention by average accident to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost."

It is not seriously disputed that the injury to the Yaye Maru prevented "the full working of the vessel" until she was repaired. The learned District Judge said in the course of the trial:

"I do not think there is any real question that the No. 1 hold of that vessel was not seaworthy for the stowage of cargo under those conditions."

And this finding, as properly it may be regarded, is amply supported by the testimony. It is agreed by the parties that the time consumed in making needed repairs was 6 days and 3 hours. At the charter party rate the off-hire for that length of time would amount to $20,514.63, and bunker coal was consumed meanwhile of the value of $230.70.

On November 10th the charterer notified the owner's agent that the vessel—

"should be placed off-hire from the time of collision until repairs have been completed, and she is again in an efficient state to resume my charter."

This claim was allowed by the agent, and off-hire deducted accordingly (in point of fact for 6 days, 4 hours and 50 minutes) on January 24, 1920, when the charterer paid over the hire which before had been in arrears.

The primary question is whether the charterer was entitled to this allowance for off-hire under the breakdown clause of the contract.

Could he have enforced it as a matter of right? The contention that he could not is based upon these facts: The Yaye Maru came to Baltimore for a cargo of coal, arriving there on the 1st of November. Prior to that date the government had placed an embargo on the export of coal, which was still in force, and in consequence the vessel could not then obtain her intended cargo. She was waiting in the Baltimore harbor when the accident happened, and she continued to wait there after the repairs were completed, until the embargo was lifted about the middle of the following January. From this it is argued that the owner was not obliged to allow the off-hire demanded, because the charterer would have done nothing with the vessel during the time required for repairs, and therefore suffered no delay or loss of service as the result of the collision. Granted, it is said, that the injury was sufficient to prevent "the full working of the vessel," she nevertheless was not rendered unfit for the only use made of her, namely, to await the lifting of the embargo, and this being so, the charterer had no valid claim for an off-hire allowance.

No case is cited which goes to the extent of this contention, and the trend of authority seems clearly opposed to it. We are not here dealing with a claim for demurrage, which ordinarily depends upon loss of earnings occasioned by some delay, but with the rights of the parties under the contract which they have voluntarily made. The owner of the Yaye Maru undertook to keep her "in a thoroughly efficient state in hull, machinery and equipment for and during the service," and agreed that the stipulated hire should cease for the time lost by an injury, such as actually happened, which prevented "the full working of the vessel." The collision put her in an unseaworthy condition, at least as to No. 1 hold, and until the repairs were completed she was not "in a thoroughly efficient state" for receiving or carrying cargo. When the accident occurred the owner met the contract obligation by taking over the vessel and repairing her without unnecessary delay, and at a cost the reasonableness of which is not here questioned. Having done this, can the owner defeat the claim for off-hire by saying that the charterer would not have used the ship, if she had not been injured, and therefore has sustained no loss? Was the charterer bound to pay hire for the time she was not in full working order, because, and solely because, he was holding her idle in Baltimore at the time she was hit, and apparently intended to keep her there, as in fact he did, until the desired loading could be obtained?

But waiting for cargo was not the only use to which the vessel could have been put. She had enough coal in her bunkers to take her to Rotterdam, and the charterer was free within broad limits to employ her in such service as he saw fit. If he preferred to do nothing with her while the embargo lasted, was it any concern of the owner? Surely, the right to off-hire, otherwise existing, was not lost by nonuser. The injury impaired the power to use, by destroying to a degree the "thoroughly efficient state" in which the vessel was agreed to be kept, and when that happened, and for such time as it continued, the charterer became entitled to off-hire, whatever permissible use he was then

making of the vessel, or whether he was using her at all. He could not be held for hire when the power to use was taken away.

The "loss of time" provided for in the charter party means the time during which the vessel was not in "full working" order as the result of an injury, and for that time the charterer was released from the payment of hire, although he would have made no use of her if she had not been disabled. It cannot be that he was bound to pay for a vessel he could not use, merely because he deemed it for his interest to keep her out of use. His right to off-hire did not depend upon loss of profits, but upon the fact that the vessel was not in a "thoroughly efficient" condition. Besides, as already mentioned, on notice of the accident and claim of off-hire, the owner took such possession of the vessel as was needful for making repairs, and that possession necessarily deprived the charterer of any use of her which otherwise he might have made. In that situation, and while it existed, the owner's right to compensation was suspended by the terms of the contract.

To review the many cases of more or less similarity would unduly expand this opinion and serve no useful purpose. None of them is directly in point, but the views above outlined are supported, as we think, by the following, among other, decisions: The Mediana, A. C. 113; La Compania Bilbaina, etc., v. Spanish-American L. & P. Co., 146 U. S. 483, 13 Sup. Ct. 142, 36 L. Ed. 1054; Strong v. United States, 154 U. S. 632, 14 Sup. Ct. 1182, 24 L. Ed. 664; Ronalds v. Leiter, 109 Fed. 905, 48 C. C. A. 708; Lake Steam Shipping Co. v. Bacon (D. C.) 129 Fed. 819; Munson Line v. Miramar S. S. Co. (D. C.) 150 Fed. 437; Gow et al. v. Gans S. S. Line, 174 Fed. 215, 98 C. C. A. 223; Northern S. S. Co. v. Earn Line, 175 Fed. 529, 99 C. C. A. 151; The Canadia, 241 Fed. 233, 154 C. C. A. 153.

The case of Hogarth v. Miller, [1891] A. C. 48, cited by the court below, and apparently much relied upon by the appellee, seems clearly distinguishable. In that case the injury was to the vessel's engines, which affected her navigability, but not her seaworthiness, as respects the carrying of cargo. There, as here, the owner undertook the exclusive operation of the vessel; the charterer having exclusive control of the cargo and of its loading and unloading. The charterer was allowed off-hire for the loss of time caused by the engine trouble, which delayed the voyage, but not for the time the vessel was discharging cargo at destination, because, as was said, whilst lying at the dock for unloading she was efficient "with reference to the particular employment demanded of her at the time"—that is to say, for the only use that the charterer could then make of her—which is plainly a different situation from the one here presented.

Moreover, in that case the breakdown clause suspended hire, if the vessel were injured, "until she be again in an efficient state to resume her service," and it was held that the vessel was in an efficient state for discharging cargo; the charterer having full use of her for that purpose, although her engines were being repaired at the same time. But this decision, holding the charterer liable for hire while unloading, was expressly placed on the language of the breakdown clause, and the Lord Chancellor virtually says that the ruling would have been the other way,

if the contract had provided for off-hire "until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set to rights, or the want of repairs has been supplied, or the damage has been remedied," or "upon the vessel being restored to full efficiency in all respects, as to seaworthiness and otherwise as she was at the time when she was originally handed over."

In the instant case, as above shown, the owner agrees to "keep the steamer in a thoroughly efficient state in hull," as well as machinery and equipment, and to abate hire for the detention by average accidents to ship or cargo, "or by any other cause preventing the full working of the vessel." These provisions, in our opinion, have practically the same meaning as those which, as the Lord Chancellor apparently assumed, would have led to a different conclusion in Hogarth v. Miller, had they been found in the contract there considered, and that case may therefore be regarded as sustaining, rather than opposing, the appellant's contention.

The same may be said of Lake Steam Shipping Co. v. Bacon (D. C.) 129 Fed. 819, affirmed without opinion 145 Fed. 1022,[1] where the contract suspended hire in case of injury to the vessel "until she be again in an efficient state to resume her service," the identical language used in Hogarth v. Miller, supra. Following that case, the court allowed off-hire for the delay caused by stranding, which the owner conceded, but required the charterer to pay for the time consumed in discharging cargo at destination, because the vessel was then fully efficient for that service.

To the like effect is Steamship Knutsford Co. v. Barber & Co. (C. C. A.) 261 Fed. 866. In that case also the charter party provided for suspension of hire "until she shall be again in an efficient state to resume her service," though it did not include "detention by average accidents to ship or cargo." It was held that the time required to examine and restow a portion of the cargo, after an accident, was not "loss of time" within the meaning of the breakdown clause, because "the charterer was using the ship at that time for a purpose which, though it necessarily delayed her, was still his own, and was not due to any 'damage' to the ship."

It will thus be seen that all these cases deal with a breakdown clause materially different from and more favorable to the owner than the one under review, yet none of them goes further than to hold the charterer liable for hire if and when he actually uses the vessel to perform a service for which she is fully efficient, such as unloading, although in other respects she may not be in the condition called for by the contract. In the case at bar, however, not only did the charterer make no use of the vessel during the 6 days and 3 hours in question, but for that period of time she was not available for use by him because of the injury she had received. It is therefore quite incorrect to say that the Yaye Maru, while undergoing repairs, performed the only service that was or could be required of her, namely, waiting for cargo, when she was not fit and able, not in a "thoroughly efficient state," to take it on board. The charterer contracted to pay hire for the time she could be used, as a vessel in "full working" order, for any service

[1] 74 C. C. A. 476.

he might desire, but not for the time she happened to be disabled without fault on his part. In short, we think it not doubtful that the charterer was entitled as a matter of contract right to the off-hire claimed and allowed, and that appellant had no defense thereto.

[2] Little remains to be said. If the owner of the Yaye Maru was bound to allow the off-hire in dispute, it was an element of the damage caused by the wrongful act of the War Lark, and the latter must respond. The injury deprived the owner of earnings which otherwise would have been received, and that loss measures, prima facie at least, the amount which the owner is entitled to recover. The Argentino, 14 A. C. 519; The Bulgaria (D. C.) 83 Fed. 312; The North Star, 151 Fed. 168, 175, 80 C. C. A. 536. As this appears to be the settled rule of law, and is not seriously controverted by the appellee, it need not be made the subject of discussion.

The decree appealed from will be modified by directing a decree in favor of appellant for the additional sum of $20,514.63, the off-hire for 6 days and 3 hours, and for $230.70, for bunker coal consumed during the off-hire period, with interest on the aggregate amount from January 24, 1920, and the costs of this appeal.

Modified.

THORPE et al. v. NATIONAL CITY BANK OF TAMPA.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1921.)

No. 3667.

1. **Appeal and error ⇐1172(2)—Appellate court may reverse severable judgment in part.**
   A Circuit Court of Appeals has power to set aside only a part of a judgment, where it embraces different items, some of which are not in question.

2. **Damages ⇐204—Default does not concede amount of damages, which must be determined on writ of inquiry.**
   Default by a defendant does not concede the amount of the damages, but only that plaintiff is entitled to recover some damages, and defendant may contest the amount of the damages on the writ of inquiry.

3. **Courts ⇐352—Jury ⇐12(3)—On default, question of reasonableness of attorney's fee provided for by note held to be submitted to a jury.**
   In action in federal court sitting in Florida on a promissory note providing for a reasonable attorney's fee, in which action defendant defaulted and judgment of default was entered against him, the court, on affidavits of plaintiff claiming more than 10 per cent. of principal of note, which was more than $20, to be a reasonable fee, was required to submit issue of reasonableness of fee to jury; the Seventh Amendment to federal Constitution requiring a jury trial in suits at common law when amount in controversy is over $20 controlling Florida Statutes (Rev. Gen. St. 1920, § 4854), which made it the duty of the court to determine the reasonableness of the fee in such case.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action at law by the National City Bank of Tampa against E. M. Thorpe and another. Judgment for plaintiff, and defendants bring error. Reversed in part.

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

Hilton S. Hampton, of Tampa, Fla., for plaintiffs in error.

K. I. McKay and R. W. Withers, both of Tampa, Fla., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The National City Bank of Tampa brought suit, by attachment, in the circuit court of Hillsborough county, Fla., against E. M. Thorpe and J. R. Paschall, the defendants, each of whom was a nonresident citizen of another state, to recover on a promissory note the sum of $7,000 principal, 10 per cent. interest from maturity, and a reasonable attorney's fee, as stipulated in said note. The defendants removed said case to the United States District Court for the Southern District of Florida and entered an appearance therein.

On December 6, 1920, a default judgment for failure to answer or plead was entered, and on December 9, 1920, the court reciting the appearance of defendants, their failure to plead or defend, and the entry of the default judgment, and finding that $100 was paid on said note on December 1, 1920, "and the said plaintiff having also submitted to the court affidavits from J. F. Glen and A. G. Turner, practicing attorneys of this court, proving the amount of attorney's fees plaintiff is entitled to recover in said cause, and the court being otherwise fully advised in the premises, doth assess the damages of the plaintiff at the sum of $7,375.82, for principal and interest, together with the further sum of $797.58 attorney's fees," and rendered judgment for $8,173.40, with costs.

The defendants sued out a writ of error, assigning as error: (1) The allowance of attorney's fees, on the ground that the fee allowed exceeded 10 per cent. (2) That the court erred in rendering final judgment on the ground that, the case not having been submitted to a jury and the note providing for reasonable attorney's fees, it was error for the trial court to enter a judgment including attorney's fees for any amount.

It will be perceived that the entire error complained of is to the rendition of a judgment, including attorney's fees. There is no error assigned in the judgment, in so far as the principal and interest is concerned. The judgment finds each amount separately. The only unliquidated amount was what was a reasonable attorney's fee contracted to be paid.

It is quite plain that there was no issue as to the sum due as principal and interest; the note sued on fixing the sum, and the defendants by their default raising no issue thereon. In a suit on a bill of exchange for a fixed amount, where the defendant's plea is stricken on demurrer, a writ of inquiry is not necessary. Renner & Bussard v. Marshall, 1 Wheat. 215, 4 L. Ed. 74.

[1] This court has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require. United States v. Ill. Surety Co., 226 Fed. 653, 664, 141 C. C. A. 409. Whatever may be the rule under the common law, where unmodified by statute, as to the power of a court to grant

a new trial in part, or as to a severable sum involved in the suit, we think there is no doubt as to the power of this court to set aside only a part of a judgment, where embracing different items, some of which are not in question. It is therefore quite clear that we are not required to set aside the judgment, so far as it awards the principal and interest on the note, and that the only question is: Should the judgment as to the $797.58, attorney's fees, be set aside? Farrar v. Wheeler, 145 Fed. 482, 486, 75 C. C. A. 386; Insurance Co. v. Piaggio, 16 Wall. 378, 387, 21 L. Ed. 358; New York & C. Railroad Co. v. Estill, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 292.

The principal attack made thereon is that they were adjudged to be reasonable by the judge without the intervention of a jury. The statutes of Florida regulating contracts for attorney's fees require that they should be adjudged by the court:

"Provided, * * * it shall not be necessary for the court to adjudge an attorney's fee, provided in any note or other instrument of writing, to be reasonable or just, when such fee does not exceed ten per cent. of the principal sum named in said note, or other instrument of writing." Chapter 6870, Laws of Florida 1915; Rev. Gen. Sts. of Fla. of 1920, § 4854.

In this case the contract is only to pay a reasonable attorney's fee, and this is an amount to be ascertained and fixed by the court.

Prior to the act (Laws of Fla. 1915, c. 6870) declaring an attorney's fee not exceeding 10 per cent. of the principal of a note or other contract in writing reasonable, the court was not bound by a fixed sum agreed on in the writing, and is not now, when it exceeds said 10 per cent. Cooper Grocery Co. v. Citizens' Bank & Trust Co., 62 Fla. 142, 56 South. 435. This judgment for attorney's fees being for more than 10 per cent. of the principal of the note sued on, they should have been found to be reasonable, on proper proof, by the tribunal appointed by the law.

It will be noted that, in holding a writ of inquiry of damages not necessary in a suit on an inland bill of exchange, the Supreme Court of the United States held that where the action is brought for a sum certain or which can be rendered certain by computation, judgment for damages may be entered by the court without a writ of inquiry. Renner & Bussard v. Marshall, 1 Wheat. 215, 4 L. Ed. 74. Under the Seventh Amendment to the Constitution of the United States, where an issue of fact exists, the federal courts must in cases at common law submit it to a jury.

[2] A default by a defendant does not concede the amount of the damages: but only that the plaintiff is entitled to recover some damages. Without plea he is entitled to contest the amount of the damages on the writ of inquiry. 8 R. C. L. § 214, p. 672; Watson v. Seat & Crawford, 8 Fla. 448.

[3] As was said by Circuit Court Judge Pardee:

"But it is well to notice that while in the United States courts, in cases at law, we follow as near as practicable the practice, pleadings, and forms and modes of proceeding, of the state courts of record, yet the Constitution and laws of the United States require all issues of facts in common-law cases to be determined by a jury, unless the same is waived in writing by the parties." Lanning v. Locket (C. C.) 11 Fed. 814, 817.

We hold, therefore, that in this case, where more than 10 per cent. of the principal is claimed, the question of what was a reasonable fee raised an issue of fact, which should have been submitted to a jury. Parker v. Dekle, 46 Fla. 452, 35 South. 4; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

The judgment of the District Court, finding the principal and interest due on the note in favor of the plaintiff, is affirmed. The judgment finding the amount of $797.58 as attorney's fees is reversed, with direction that the issue as to attorney's fees be submitted to a jury in accordance with this opinion.

QUARLES v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1921.)

No. 3537.

Criminal law ⟸1044, 1054(3)—Sufficiency of evidence not reviewable, in absence of exception and motion to direct verdict.

Where no motion for directed verdict is made by a defendant, and no exception taken to the charge, the question of the sufficiency of the evidence to sustain conviction, raised for the first time by motion for new trial, is not reviewable by an appellate court, which may consider it only if satisfied that there has been a miscarriage of justice.

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

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

Joe V. Williams, of Chattanooga, Tenn., for plaintiff in error.

W. T. Kennerly, U. S. Atty., of Knoxville, Tenn.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. The plaintiff in error seeks a review of his conviction of violation of section 4 of the Act of June 25, 1910 (U. S. Comp. St. § 8815), known as the White Slave Act. The specific charge of the indictment, upon which, under the evidence, the conviction must have rested, was that he induced the girl named, being under the age of 18, to go and be transported by railroad across the state line for the purpose of debauchery. Upon the trial there was no request by the respondent for any instructions to the jury, nor was there any exception to the charge of the court. The record shows no question raised in any way in the court below, save by motion for new trial.

The substantial complaint now made by the present counsel for Quarles is that the evidence did not justify a conviction. Upon that complaint he has no right to be heard. As this court said in Lockhart v. United States (C. C. A.) 264 Fed. 14, 16:

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

"No motion was made for an instructed verdict, either at the conclusion of the government's evidence or at the conclusion of the case, and no exception whatever was taken to the charge, which carefully instructed. * * * The defendant, therefore, has no right to be heard in this court upon the contention that there was no evidence. His counsel, with the proof fresh in mind, acquiesced in the implied ruling that the questions were for the jury. The point was first raised on motion for new trial, and that was too late."

As pointed out in the case just cited and in Sylvia v. United States (C. C. A.) 264 Fed. 593, 594, an appellate court, under such circumstances, will interfere if it is satisfied, and only if it is satisfied, that there has been a miscarriage of justice. Upon this record we are not led to that conclusion. The age of the girl, her travel by common carrier across the state line to keep appointments with Quarles, the ensuing debauchery, and his constant intent that their meetings should be for that purpose—all are clearly shown by the evidence which the jury believed. His guilt of the offense denounced by this statute depends wholly upon whether he "induced" the making of the trips.

It is his contention that to "induce," in the context here found, means more than merely to request, and involves the idea of overcoming opposition or reluctance. In this setting, we are not inclined to enter into a nice consideration of the definition of this word; accordingly, we pass by, without decision, Quarles' contention that the word is not satisfied by a simple request. It was so defined in the charge that the jury might have acquitted Quarles, if it had thought that, according to the standards prevailing among the parties, he was not seriously to blame, and that the instigation of the prosecution was for blackmail. The verdict of the jury and the sentence imposed by the trial court show that neither accepted Quarles' theory of fact, and we cannot say that both were wrong.

The same view disposes of the contention that, because the girl was an accomplice, the jury should have been warned against placing too much dependence on her testimony. This subject was not brought to the attention of the trial court during or after the charge, and both the premise and the conclusion of the proposition are far from clear. We would not be justified in acting, practically on our own motion, to consider such objections so raised.

The judgment below must be affirmed.

FRUIT GROWERS' EXPRESS INCORPORATED v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Seventh Circuit. June 16, 1921.)

No. 2857.

1. Monopolies ⟸24(2)—Railroads held necessary parties to proceeding to annul exclusive provision in contracts between them and a car company.
Under contracts between railroad companies and a car company, providing that the car company would furnish refrigerator cars for a fruit crop and furnish men, icing stations, and ice to keep the cars iced, etc., and that the railroad companies would take all their refrigerator cars from the car company and pay icing charges and the usual mileage charge, the destruction of the exclusive clause would destroy the mutuality of the contract and render it unenforceable, and the railroad companies were necessary parties to a proceeding to annul it, as in violation of Clayton Act, § 3 (Comp. St. § 8835c).

2. Monopolies ⟸24(1)—Federal Trade Commission without jurisdiction of proceeding to annul exclusive provision of contracts between railroad companies and car company; "where applicable to common carriers."
Clayton Act, § 11 (Comp. St. § 8835j), conferring authority to enforce compliance with certain sections, including section 3 (Comp. St. § 8835c), on the Interstate Commerce Commission "where applicable to common carriers," gives exclusive jurisdiction to the Interstate Commerce Commission where the facts involve common carriers or the business of common carriers, and the Federal Trade Commission is therefore without jurisdiction to require a car company to cease and desist from using or enforcing a provision in contracts with railroad companies requiring them to take all their refrigerator cars for a fruit crop from it.

Petition by the Fruit Growers' Express Incorporated to review an order of the Federal Trade Commission. Order annulled and set aside.

Chas. J. Faulkner, Jr., H. K. Crafts, and R. F. Feagans, all of Chicago, Ill., for petitioner.

E. C. Alvord, of Washington, D. C., for respondent.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is an original petition filed in this court under the provisions of section 11 of the Act of October, 15, 1914, 38 U. S. Stats. at L. p. 730 (Comp. St. § 8835j), commonly known as the Clayton Act, to obtain a review of an order to cease and desist, entered by the Federal Trade Commission (here known as respondent) against Fruit Growers' Express (here known as petitioner).

In 1919 respondent filed its complaint, charging that petitioner had made a contract with certain railroads containing the following clause, alleged to be in violation of section 3 of the Clayton Act (Comp. St. § 8835c):

"The railroad shall use the car line's equipment exclusively in the movement of fruits and vegetables under refrigeration in carloads from points on the lines of railway owned or operated by the railroad during the life of this contract."

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A motion to dismiss was denied, and petitioner answered, admitting the correctness of the above quotation, but saying that the exclusive clause was made in consideration of and depended upon other covenants on the part of petitioner. The answer also denied the alleged violation of the Clayton Act, jurisdiction in respondent, and urged the absence of necessary parties.

By the contract, the car company was to do the following things: Furnish, to be parked and distributed, required number of suitable refrigerator cars to carry all fruit tendered; furnish men, icing stations, and ice, to keep cars iced to destination; keep cars in good repair; load and strip cars and furnish additional refrigeration under stated condition; furnish cars for points on foreign lines; hold itself accountable for failure to furnish cars required, properly iced, and for improper or faulty condition of the cars; keep an inspector at South Rocky Mount.

After a hearing, respondent made findings of fact, from which it reached and expressed the following conclusion with reference to the exclusive clause in the contract:

"The effect of such condition * * * may be to substantially lessen competition and tend to create a monopoly in the transportation of fresh fruits and vegetables under refrigeration in the territory served by the several lines of railroad mentioned, * * * and that the use of such conditions is in violation of section 3 of an act of Congress approved October 15, 1914. * * *"

Thereupon respondent entered the order here complained of, which was, in substance, that petitioner cease and desist from making any new contract containing that exclusive clause and from enforcing it in existing contracts.

Authority to enforce compliance with section 3 of the Clayton Act is vested by section 11 thereof in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce. If respondent had jurisdiction, it was by virtue of this section.

[1] 1. The contract here involved covered the arrangements made by common carriers for moving the Georgia fruit crop during the season, which was to begin 23 days after entry of the order to cease and desist. The previous year the crop amounted to 7,600 cars of peaches, and it had to be, and was, moved within a few weeks. To the action here complained of, and in which the contract was in part held to be illegal, the carriers were not parties. The carrier's consideration for the contract consisted of two promises, viz., first that it would take all its requirements of refrigerator cars from petitioner; and, second, that it would pay icing charges and also three-fourths of one cent per mile run on the lines of the carrier, which was the usual charge. 50 Interst. Com. Com'n R. 666. Inasmuch as the exclusive clause covered the only agreement in the contract to use any cars, the destruction of that clause destroyed the mutuality of the contract, and it could not be enforced. Dorsey v. Packwood, 53 U. S. (12 How.) 126, 13

L. Ed. 921; Tweedie Trading Co. v. Parlin & Orendorff Co., 204 Fed. 50, 112 C. C. A. 364; Dennis v. Slyfield, 117 Fed. 474, 54 C. C. A. 520; American Cotton Oil Co. v. Kirk, 68 Fed. 791, 794, 15 C. C. A. 540. Such being the effect of the finding and order, the carriers were necessary parties. U. S. v. U. S. Shoe Machinery Co., 247 U. S. 32, 60, 38 Sup. Ct. 473, 62 L. Ed. 968.

[2] 2. The words "where applicable to common carriers," in section 11 of the Clayton Act, must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction.

The order to cease and desist is annulled and set aside.

MORGAN'S LOUISIANA & TEXAS R. R. & S. S. CO. et al. v. JOHNSON et al.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1921.)

No. 3501.

Railroads ⊂=5½, New, vol. 6A Key-No. Series—Action not maintainable against company for injury received during federal control.

An action for a personal injury received on a railroad while being operated by the government after promulgation of General Order No. 50, requiring such suits to be brought against the Director General, cannot be maintained against the company owning the line, over its objection.

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

Action at law by Mrs. W. C. Johnson and others against Morgan's Louisiana & Texas Railroad & Steamship Company and others. Judgment for plaintiffs, and defendants bring error. Reversed.

For opinion below, see 257 Fed. 757.

George Denegre, Victor Leovy, Henry H. Chaffe, and Harry McCall, all of New Orleans, La., for plaintiffs in error.

John P. Sullivan and David Sessler, both of New Orleans, La., and C. W. Howth, of Beaumont, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. As originally brought in the District Court for the Eastern District of Louisiana on November 16, 1918, this suit was against the Director General of Railroads for damages for an alleged personal injury sustained by the defendant in error, Mrs. W. C. Johnson (herein referred to as the plaintiff), on May 28, 1918, in consequence of the derailment near Vinton, in the Western district of Louisiana, of the car on which the plaintiff, a resident of Mississippi, was a passenger, having a through ticket, bought at the New Orleans office of the United States Railroad Administration, from New Orleans,

La., to Beaumont, Tex., over the lines of Morgan's Louisiana & Texas Railroad & Steamship Company, and its connecting carriers, the Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company. Subsequently the plaintiffs in error, Morgan's Louisiana & Texas Railroad & Steamship Company and the Louisiana Western Railroad Company (herein called the defendants), were made defendants. After the court had sustained the Director General's exception to the petition, based on General Order No. 18 of the Railroad Administration, requiring such suits to be instituted either in the district where the plaintiff lives or in that where the cause of action arose, the suit was dismissed as to the Director General, and proceeded to judgment against the remaining defendants.

The alleged cause of action arose while the government was operating the lines of railroad of the defendants, and the suit was brought after the promulgation of General Order No. 50 of the United States Railroad Administration, which required such a suit to be brought against the Director General. The question of the right of the plaintiff to maintain the suit against the defendants, or either of them, was duly raised, and the action of the court in allowing the recovery complained of is duly presented for review. The court erred in overruling the objections of the defendants to the maintenance of the suit against them. Missouri Pacific R. R. Co. v. Ault, 255 U. S. ——, 41 Sup. Ct. 593, 65 L. Ed. ——. June 1, 1921.

Because of that error the judgment is reversed.

TISCH v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 29, 1921.)

No. 3523.

Internal revenue ⊜2—National Prohibition Act did not affect prior offenses against revenue laws.

The Volstead Act did not repeal any part of the internal revenue laws, so far as relates to punishment for offenses previously committed.

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

Criminal prosecution by the United States against B. F. Tisch. Judgment of conviction, and defendant brings error. Affirmed.

Francis B. Kavanagh and Hugo E. Varga, both of Cleveland, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., and H. L. Eastman, Asst. U. S. Atty., both of Cleveland, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted under Rev. St. § 3242 (Comp. St. 1916, § 5965), of carrying on the business of manufacturing stills without having paid the special tax as required by law

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

(R. S. § 3244 [C. S. 1916, § 5971]). The only question presented which calls for specific mention arises out of the contention of plaintiff in error that the internal revenue sections in question were repealed by sections 25 and 35 of title 2 of the Volstead Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305; Fed. Stat. Ann. Supp. 1919, p. 202 et seq.), the former of which sections provides punishment for the possession of property designed for manufacturing liquor, and the latter of which "repeals all prior acts to the extent of their inconsistency with the National Prohibition Act," and thus the old penalties for acts specific provision for the punishment of which is made in the Volstead Act. United States v. Yuginovich, 255 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided by the Supreme Court June 1, 1921.

This contention is without merit. The indictment charges, and the evidence tended to show, that the alleged offense was committed October 21, 1918. The sections of the Volstead Act with which we are here concerned did not take effect until January 16, 1920. Volstead Act, tit. 3, § 21; Dillon v. Gloss, 255 U. S. —, 41 Sup. Ct. 510, 65 L. Ed. —, decided by the Supreme Court May 16, 1921. The revenue sections in question were not repealed, so far as relates to punishment for offenses committed previous to the taking effect of national prohibition. Howard v. United States, 271 Fed. 301, decided by this court February 8, 1921.

The judgment of the District Court is affirmed.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. HAMILTON, Collector of Internal Revenue.

(District Court, W. D. Kentucky. June 30, 1921.)

Internal revenue ⇐24—Owner cannot be taxed on whisky stolen from government warehouse.

Where whisky stored in a bonded warehouse, where it remained after the taking effect of the Eighteenth Amendment, in the sole custody and control of the United States, was stolen and removed, the owner cannot be required to pay the internal revenue tax thereon.

In Equity. Suit by the Kentucky Distilleries and Warehouse Company against Elwood Hamilton, lately Collector of Internal Revenue. On demurrer to petition. Overruled.

Wm. Marshall Bullitt, of Louisville, Ky., for plaintiff.

W. V. Gregory, U. S. Dist. Atty., of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. Having, on August 24, 1920, paid to the defendant under protest $4,636.08 internal revenue taxes on certain distilled spirits stored in a bonded warehouse, the plaintiff in due course and form applied to the Commissioner of Internal Revenue for the refunding thereof. That officer for more than six months after the receipt of the claim therefor had neither refunded the same nor refused to do so, and, under the statute, that gave the right to the plaintiff to sue for its recovery now.

We need not go into any lengthy detail, either of the averments of the plaintiff's petition or of the contentions of the respective partes, inasmuch as the only question now to be decided is whether the petition of the plaintiff states a cause of action—a demurrer to that pleading having been filed by the defendant.

Before the ratification of the Eighteenth Amendment all of the distilled spirits on which the taxation complained of was collected had been manufactured and deposited in a bonded warehouse of the plaintiff near the city of Covington, Ky. They had been manufactured in due course under the sanction of the law as it then existed. Being stored in the bonded warehouse, the spirits remained there after the ratification of the Eighteenth Amendment in the exclusively controlled custody and care of the United States through its revenue officials.

This, in a general way, being the situation on the 30th day of January, 1920, the bonded warehouse was broken into through an underground tunnel by several persons, among whom was a deputy collector of internal revenue, and the distilled spirits, the taxation upon which is involved in this action, were stolen and removed by those persons from the bonded warehouse. The persons who had committed this act of thievery were indicted, convicted, and punished therefor. No one of them was in any wise in the employ or under the control of the plaintiff, and no part of such distilled spirits was removed by the plaintiff or in any way by its knowledge, consent, or approval.

These being the facts admitted by the demurrer the question is whether the United States had any right to assess or enforce the collection of any of the taxes on the distilled spirits thus stolen and thus removed from the bonded warehouse. Preliminary to any discussion of that question, it may be said that of course, if the plaintiff or anybody over whom it had any control had removed the spirits by the consent or connivance of the plaintiff, the taxes would have been due from the plaintiff and collectable upon their removal. But that is not the case we are dealing with. Here, we repeat, neither the plaintiff nor anybody under its control had anything to do with removing the spirits which, while in the bonded warehouse, as we have said, were in the exclusive custody and under the exclusive control of the United States, through its officers in whose charge the spirits were placed.

The Eighteenth Amendment was of course a radical change in respect to distilled spirits, which had been previously made lawfully and properly. No compensation was offered by the people for the property, the value of which was thus probably largely destroyed, unless in course of time the spirits could be sold under the law. Meantime, however, as we have seen, the United States altogether controlled the custody thereof.

This situation presents in bald form the question whether the plaintiff shall be held responsible for the acts of the criminals who took the spirits from the custody of the government officials, when the owner could not control the situation, nor prevent the criminal acts, and in fact had no opportunity to do so. To exact taxes under such circumstances would seem to be unjust and oppressive, and until the

question is settled by final authority we are not willing to say that the government can exact taxation under such conditions, especially as the property can never be restored to the owner—a situation in which the plaintiff without fault on its part would lose both property and the taxes paid.

In our opinion the government is not under present conditions, entitled to the taxes on spirits in warehouses until, in some way, they are removed therefrom by the owner. The taxation would then be due whether the owner removed them lawfully or unlawfully. The rights of the owner cannot justly be interfered with by the wrongful acts of others, of which he knew nothing, which he could not control, and which the government ought to have prevented, if it claims taxation.

With the time at its command the court cannot at present go into any very satisfactory discussion of the question involved. We shall therefore content ourselves with the statement that we have the gravest doubts as to whether this great government of ours desires or should be permitted to inflict an act of injustice or oppression upon any citizen, such as would be inflicted here if, under the admitted facts, this taxation should be exacted from the plaintiff. Its property was in the sole custody of the United States. The United States permitted it to be stolen. The plaintiff could control neither situation, for, while the owner of spirits in a bonded warehouse is permitted to have watchmen on the outside of the warehouse to prevent raids from that quarter, those watchmen cannot enter the warehouse without a written permit from the proper revenue officer, whatever may be going on in the inside, and we repeat only the government has control over whatever goes on in the bonded warehouse, from which the spirits in this instance were stolen. This situation is radically different from that existing before January 16, 1920, and this seems to differentiate this case from that of United States v. Witten, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81.

Under these circumstances, the plaintiff would obviously be wronged, if denied the relief sought, and without going into more detail, and moved by the considerations we have set forth, we will overrule the demurrer of the defendant, who, however, is given leave to answer the petition, if so desiring.

NOTE.—**The defendant declined to plead further, and judgment was entered for the plaintiff for the amount claimed.**

AMERICAN DELINTING CO. v. POMERANING.

(District Court, M. D. Pennsylvania. January Term, 1921.)

No. 1235.

Patents ⇐218(5)—Contract construed to require payment of minimum license fee.

A contract by which plaintiff granted to defendant an exclusive license to manufacture and sell under certain patents, for which defendant agreed to pay to plaintiff 25 per cent. of the net profits from the sale of the patented inventions, "which share of said net profits in no event shall be less than $5,000 per annum after the year 1917," *held* to bind defendant to pay a minimum of $5,000 per year for use of the patents, though he made no net profits.

At Law. Action by the American Delinting Company against Joseph W. Pomeraning. On affidavit of defense, raising questions of law. Defense overruled.

George Kunklre and John McI. Smith, of Harrisburg, Pa., for plaintiff.

Olmsted, Snyder & Miller, of Harrisburg, Pa., for defendant.

WITMER, District Judge. Plaintiff seeks to recover the sum of $5,000 under the terms of an agreement, whereby the plaintiff, who was the owner of certain letters patent, assigned to Joseph Pomeraning, the defendant herein, the exclusive use of such patents for the full term thereof. The portion of the agreement material to the question involved is as follows:

"This license is granted upon condition that the said Joseph Pomeraning, his heirs, executors, administrators, or assigns, shall well and truly cause to be paid, to the American Delinting Company, its successors or assigns, during each year for the full term of said respective patent, 25 per cent. of the net profits derived from the manufacture and sale of the several devices and inventions enumerated and described in said United States letters patent No. 672,068 and 1,032,938, less the proportionate share of governmental and profit taxes, and which share of said net profits in no event shall be less than $5,000 per annum after the year 1917, such payment to be made in the manner following. On January 1st of each year a sworn statement shall be exhibited to the American Delinting Company, its successors or assigns, giving the number of machines sold, and giving in detail a profit and loss statement of the business ending the preceding December 31st, and payment of the sum or sums so determined to be due shall be made within 15 days thereafter and in event of the default in such payment for the period of 30 days, this license may forthwith be revoked. * * *"

The defendant rendered a statement for the year 1918, showing a net profit of $22.72, but paid plaintiff for that year $5,000. A statement for 1919 was rendered about Jan. 23, 1920, showing a deficit for that year of $9,497.25. Defendant refused to pay plaintiff $5,000 for the year 1919, contending that, as there were no net profits, plaintiff, under the terms of the agreement, was not entitled to receive any sum, that no minimum was intended, and that plaintiff's only remedy under the assignment, in case the net profits amounted to less than $5,000 per year, was a revocation of the assignment.

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

In contracts of this nature, probably the most usual method of expressing the consideration flowing to the assignor is to provide for a "royalty" of a certain amount per article on each article manufactured or sold, with a provision usually inserted, for the protection of the assignor, that such royalty shall equal at least a certain amount, or that the assignee shall pay royalty on not less than a certain number of such articles, or that the assignee agrees to sell not less than a certain number of such articles, during a stated period. The effect in each case, in the absence of anything specifically to the contrary in the contract, is the same, namely, to provide for a minimum liability on the part of the assignee and to protect the assignor. In such case, the assignee is bound to pay at least the minimum royalty, regardless of the actual number of articles sold. Nor is this affected by the fact that the assignor is given an option to terminate the contract in case such minimum is not attained. Preston v. Smith, 156 Ill. 359, 40 N. E. 949; Hamilton v. Park & McKay Co., 112 Mich. 138, 70 N. W. 436; Meyer v. Brenzinger, 22 Misc. Rep. 712, 49 N. Y. Supp. 1091; Beecher v. Stein, 139 Pa. 570, 21 Atl. 79.

To provide, as in the case before us, that the "share of said net profits in no event shall be less than $5,000 per annum," is to provide the very same thing in intent and effect that is contained in a provision that assignee shall not sell less than a certain number of the articles in a given period. In a case of the latter kind (Meyer v. Brenzinger, supra) the assignee's theory was that—

"Under a proper construction of the contract, his company was bound to pay royalties only on sales actually made; that the only effect of the failure to comply with the agreement to sell 250,000 buttons was the forfeiture of the option to renew the contract or buy the patent."

Judge Beekman said:

"We do not think there is any basis for this claim. The agreement on the part of the company to sell 250,000 buttons within the year is as plain as language can make it, and their failure to keep it entitled the defendants to receive a sum equivalent to a royalty, at the rate specified, on a sale of 250,000 buttons. This construction is both obvious and reasonable. The defendants had surrendered to the company for the period of a year the exclusive possession and use of the patent, and during that time they were precluded from deriving any advantage from it, except through the performance of the agreement under consideration. It was doubtless the expectation of the company that they would be able to sell at least 250,000 buttons within the prescribed period, and it was quite reasonable that the defendants, in consideration of the exclusive rights which they had conferred, should require that, so far as they were concerned, such expectation should be reduced to a certainty. In short, the agreement was that the defendant should receive for what they gave at least the sum of $625 and as much more as might result from sales actually made by the company in excess of 250,000 buttons."

What was said in that case is entirely applicable in this case. The contract is explicit. The exercise of the right of rescission operates neither ab initio, nor in toto, but solely in futuro. Hamilton v. Park & McKay Co., supra. So far as concerns the year 1919, which had already passed, and for which the statement was rendered, showing a deficit, it is evident that the defendant, Pomeraning, was nevertheless under a legal obligation to pay the plaintiff the minimum amount which

he had guaranteed would be plaintiff's share of the net profits. The defendant was no doubt disappointed in the number of machines he was able to sell, but this could not affect the fact that he had contracted to obtain a certain amount of net profits, as plaintiff's minimum share for the privilege of controlling the monopoly secured by the letters patent.

The conclusion here reached was no doubt entertained by the parties to the contract, as evidenced by the payment of the minimum of $5,000 for the year 1918, when the profits netted the nominal amount of $22.-72. The affidavit bases the legal defense on the assumption that, inasmuch as plaintiff's statement showed there were no net profits for the year 1919, plaintiff could not recover. This defense having been found without merit, the plaintiff's statement is held sufficient and defendant is allowed 30 days in which to file a supplemental affidavit, otherwise, the clerk is instructed to enter judgment for the plaintiff for want of a sufficient affidavit of defense.

AMERICAN HAWAIIAN S. S. CO. v. WILLFUEHR et al.

(District Court, D. Maryland. June 29, 1921.)

No. 719.

1. **Contracts ⇐32—Verbal agreement binding, though intended to be reduced to writing.**
   In the absence of statutory provision to the contrary, parties may become bound by a verbal agreement though both intend that it shall be reduced to writing and signed.
2. **Shipping ⇐52—Charter not invalidated by refusal of charterer to perform condition.**
   Where a verbal agreement for a charter provided that the charterer should pay over a certified check when the formal charter party was signed, it cannot relieve itself from the obligation of the contract by refusing to do so.
3. **Admiralty ⇐12—Oral charter maritime contract.**
   An informal charter, made orally, is a maritime contract, over which a court of admiralty has jurisdiction.

In Admiralty. Suit by the American Hawaiian Steamship Company against Herman A. Willfuehr and Herman S. Willfuehr, trading as the American Fuel & Shipping Company. Decree for libelant.

Janney Stuart & Ober, of Baltimore, Md., and Kirlin Woolsey, Campbell, Hickox & Keating, of New York City, for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City, and Lord & Whip, of Baltimore, Md., for respondents.

ROSE, District Judge. The libelant says that the respondents by word of mouth chartered the steamship American to carry coal from New York to Rotterdam, and then repudiated their agreement. After some delay, the ship was rechartered to others at a somewhat lower rate, and the libelant here seeks to recover for the loss caused by the breach.

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

On the morning of August 25, 1920, a shipbroker, learning that respondents wanted a ship, told their manager that he could get one, and, shortly after, that the American could be obtained. Thereupon the manager made in writing a "firm" offer for it. This the broker submitted to libelant's broker. Some of the terms were unsatisfactory, and counter propositions were made. Negotiations between the brokers, each during the time in immediate touch with his respective principal, followed, culminating in an agreement that the respondents would take the ship, on the revised November form of charter party, at $13.50 per ton, if the ship was ready for loading by Friday, August 27th, and, if she was not, at $13.25. The ship was to take 6,000 tons, 10 per cent. more or less, at owner's option. The charterer was to pay over a certified check for $10,000 upon the signing of charter party. The broker then asked the manager where the ship should report, and he was told to send it to the foot of India street, Brooklyn.

It was then about 2 or 2:30 in the afternoon of the 25th. The broker immediately reported the closing of the deal to the libelant's broker, who prepared a formal charter party, and the respondents' broker took it to their office. After he had read it over, the respondents' manager admitted that it was what had been agreed to, but he said he could not give a check until his partner came in, meaning apparently one of the respondents. He also indicated that he was annoyed by the check requirements. He called in a business friend, and had the latter read over the charter, and the latter also commented adversely upon the check proviso. As the so-called partner did not come in, the charter was left with the respondent's manager. The next morning the two brokers together visited the respondents' office, and at that time respondents' manager definitely refused to sign the charter or to go on with the transaction.

The version above stated is that of respondents' broker, or at least the broker who was not acting for the libelant. It was corroborated by the libelant's broker on all points as to which his knowledge could be expected to go. In a number of respects it is contradicted by respondents' manager. If he is accurate, he could have been confirmed in the more vital particulars by the business friend who, at his request, examined the draft charter, but no explanation of the failure to produce that gentleman has been made. After seeing the witness who did testify, I feel myself unable to accept the respondents' account of the transaction.

Even so, they say they are not liable because (1) the parties did not intend the bargain to be obligatory until a formal charter party was signed; (2) because the libelant would not have been bound until respondents' certified check was given, and that therefore there was no mutually binding obligation on either of them; and (3) that at the most it was not a charter, but a mere agreement to make one, over the breach of which admiralty has no jurisdiction.

[1] Of these in their order. In the absence of statutory provision to the contrary, men may become bound by what they say to each other, although they both intend that their agreement shall be reduced to writ-

ing and signed, but the burden of proof that such a bargain was made, although no writing was ever executed, rests somewhat heavily upon him who asserts it. Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545. In the instant case that burden seems to have been sustained. The direction of the respondents' manager to send the ship to the foot of India street, in connection with everything else which took place, shows that he regarded the matter as settled.

[2] 2. Respondents' second contention depends upon a deduction which their learned advocates draw from such cases as Erlen v. The Brewer, 8 Fed. Cas. 768, No. 4519, and The H. W. Edye, 12 Fed. Cas. 1104, No. 6,964, in which it was held that, where an owner had stipulated for a guarantee from the charterer, he is not bound unless or until it is supplied. The argument here made confuses a contingency which must happen before a contract is made with a term of the contract requiring one party to do something before he can insist on performance by the other.

[3] 3. From what has already been said, it would appear that what the parties actually did here was to make an informal charter, and over that the jurisdiction of the admiralty extends. The Tribune, 24 Fed. Cas. 191, No. 14,171. The evidence seems to show that the loss of the libelant, through delay, lower freight rates, extra port charges at Philadelphia, to which they had to go, increased amount of bunker coal they had to consume, etc., amounts to $9,125, and unless some question shall be made of these figures, the libelant will be entitled to a decree for that amount.

PHILADELPHIA STORAGE BATTERY CO. v. AIR REDUCTION SALES CO.

(District Court, E. D. Pennsylvania. July 1, 1921.)

No. 8164.

1. **Negligence ⊂=111(1)—Pleading held not sufficiently definite.**
   The statement of claim in an action for loss by fire alleged to have been caused by negligence of defendant in the designing, construction, and materials used in making an article furnished by defendant for use in plaintiff's factory *held* insufficient in not setting out in what particulars the design, construction, and materials were improper or unsafe.
2. **Damages ⊂=153—Claim for damages to different articles of property must be itemized.**
   In the statement of claim in an action for damage by fire to plaintiff's factory buildings, machinery, appliances, stock, and materials, it is not sufficient to allege generally the amount of the damage, but the claim must be itemized sufficiently to enable the defendant to contest any particular item.

At Law. Action by the Philadelphia Storage Battery Company against the Air Reduction Sales Company. On motion to strike off statement and for more specific statement. Motion granted.

Hepburn, Dechert & Norris, of Philadelphia, Pa., for plaintiff.

Isaac A. Pennypacker, of Philadelphia, Pa., for defendant.

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

THOMPSON, District Judge. The plaintiff sues to recover damages in the sum of $400,000, alleged to have been suffered through—

"a conflagration in which were burnt, consumed, destroyed, or damaged a large part of plaintiff's buildings, with the machinery, tools, fitting, and appliances, and stock, raw material, and material manufactured and in course of manufacture, contained in and about the same."

[1] The conflagration is alleged to have resulted from the fact that a manifold furnished to the plaintiff by the defendant for use as an appliance for connecting cylinders of oxygen gas, furnished by the defendant to the plaintiff, with the system of pipes in the plaintiff's factory for the distribution and conveyance of the gas therein, burst or burned through. The negligence alleged is that the defendant did—

"negligently and carelessly, and with a total disregard of the safety of plaintiff's employees and property, furnish and install a manifold of highly unsafe and dangerous design and construction, and scientifically disapproved, improper and dangerous material, for the purpose for which it was intended," and that "upon or about the 24th day of March, 1920, the said manifold, as a result solely of its said improper and defective material and construction, burst or burned through, creating and releasing flame and sparks of great force and intense heat, which were immediately communicated to plaintiff's adjacent building, resulting in a conflagration," etc.

The plaintiff, in defense of the sufficiency of the statement of claim, relies upon the allegations in the answer to the rule that the facts relative to the design and construction of the manifold lie wholly within the knowledge of the defendant; that the manifold was manufactured for it, under its direction, and in accordance with plans and specifications furnished by it; that the defendant installed it at the plaintiff's factory, and after the fire took possession of it and removed it from the plaintiff's factory.

The fact that the defendant has complete knowledge concerning the design and construction of the manifold is not sufficient to relieve the plaintiff of its duty to set out the particulars in which, it is charged, the manifold was negligently designed and constructed, unless the plaintiff is ignorant of the facts upon which it bases its charge of negligence. The object of all pleading is to advise the adversary party of what is relied upon to sustain or defeat the suit.

The Pennsylvania Practice Act of May 14, 1915 (P. L. 483 [Pa. St. 1920, §§ 17181–17204]) requires every pleading to contain a statement in concise and summary form of the material facts upon which the party pleading relies for his claim, but not the evidence by which they are to be proved. The practice prescribed in section 21 of the act, substitutes a motion to strike from the record a pleading which does not conform to the provisions of the act, for the rule for a more specific statement under the former practice. These methods of practice were apparently intended to supersede a rule for a bill of particulars; but there is no indication in the act of 1915 that the statement of claim is not to contain in specific terms sufficient to inform the defendant upon what facts the plaintiff relies to sustain its suit.

While the defendant is, no doubt, entirely familiar with the design, the construction, and the material embodied in the manifold,

the plaintiff, in order to sustain its suit, must have within its knowledge facts from which it can state in what respect it claims the manifold was of unsafe and dangerous design and construction, in what respect it has been scientifically disapproved, and what material entering into its construction is improper and dangerous for the purpose for which it was intended. Without this information in the pleading, the defendant would be entirely in the dark as to the theory upon which the plaintiff's suit is based, and is entitled to have such particulars set out. The plaintiff is not thereby compelled to disclose its evidence, nor to anticipate matters of defense.

[2] The defendant further complains that the plaintiff has failed to itemize the damages claimed in the sum of $400,000. In an action for personal injuries or for trespass upon real estate in which special damages are claimed, it is usually manifestly impossible to itemize the damages as applied to each particular injury alleged. But the present suit is for loss through destruction by fire of certain things, viz.:

"A large part of plaintiff's buildings with machinery, tools, fittings, and appliances, and stock, raw material, and material manufactured and in course of manufacture, contained in and about the same."

In order that the defendant may meet the demand for damages at the trial, it is entitled to have the details as to the character and extent of the property destroyed by the alleged negligence of the defendant fully set out and itemized. Charnogursky v. Price-Pancoast Coal Co., 249 Pa. 1, 94 Atl. 451; Niden v. Wolfenden, 12 Pa. Co. Ct. R. 398; Childs v. Railroad, 27 Wkly. Notes Cas. 510; Costello v. Bailey, 12 Pa. Co. Ct. R. 422; Anderson v. Haig, 12 Pa. Co. Ct. R. 450; Krauskopf v. Stern, 19 Phila. 328; Carr v. Heacock, 12 Wkly. Notes Cas. 305.

These are matters not only within the knowledge of the plaintiff, but of which the defendant must be assumed to be in entire ignorance. It will not prejudice the plaintiff to require it to furnish a more specific statement, both as to its cause of action and its claim for damages in accordance with this opinion.

Rule absolute.

THE ANGIE B. WATSON.

(District Court, D. Massachusetts. June 15, 1921.)

No. 1954.

Maritime liens ⇐28—Lien for supplies furnished on order of master.

A fishing schooner *held* subject to a lien for food supplies furnished on order of her master in a port where she was not known, though he was operating her on a lay and had no authority to bind her, where it did not appear that it was customary to let vessels on the lay on that part of the coast, and libelant relied on the master's apparent authority.

In Admiralty. Suit by William C. Scott against the schooner Angie B. Watson. Decree for libelant.

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

Miles Wambaugh and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for libelant.

Sylvester M. Whalen, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel for supplies of food delivered on board the schooner Angie B. Watson upon order of her master in the port of Newport, R. I., in March and April, 1919. It is admitted that the supplies were furnished as claimed in the libel and that the prices stated are reasonable. The controversy is as to whether the vessel is liable for them.

The Angie B. Watson is a Gloucester fishing vessel. At the time in question she had been let by her owners to one Trott as master on the one-fifth lay, and was engaged in mackerel fishing. She put into Newport with a fare, and while there Trott made the purchases in question. At the time of making them he was asked by Henry T. Scott (manager for the libelant), "Who would pay for them?" and replied that the agents of the vessel, Wollard & Brewster of Boston, would do so. In fact, the schooner being on the one-fifth lay, the owners were not liable for supplies, as Trott well knew, and his statement appears to have been unauthorized and fraudulent. The testimony is that he absconded with the entire receipts for the trip. Henry T. Scott had never heard that fishing vessels were sailed on lays, and knew nothing about the customary terms of lays.

The parties agree that Trott was not in fact authorized to pledge the credit of the vessel, or to bind her owners for these goods. Under the statute, however (Act June 23, 1910, 36 Stat. 604 [Comp. St. §§ 7783–7787]), he had presumptive authority to do so, and the vessel is liable, unless the person furnishing them—

"knew, or by the exercise of reasonable diligence could have ascertained, that * * * the person ordering the * * * supplies * * * was without authority to bind the vsssel therefor." Section 3 (section 7785).

The question, then, is whether Scott, by the exercise of reasonable diligence, could have ascertained Trott's lack of authority. There was nothing which would put him on inquiry, except the fact that the Watson was a fishing vessel. See The Oceana (D. C.) 233 Fed. 139. In the waters of Massachusetts Bay, and probably on the Maine coast as well, it is so customary to operate such vessels on a lay that I should have no hesitation in holding that anybody furnishing supplies to them was bound to take notice of that fact. The Acushla (D. C.) 260 Fed. 419.

There is, however, no evidence of any such custom in the Rhode Island waters, nor, indeed, on the south coast of New England. In the New Bedford whaling ships it was customary to pay the crew by a lay, but the vessels themselves were operated by the owners. Scott has, for more than 20 years, been furnishing supplies to all sorts of vessels, including fishing vessels; he customarily charged all supplies to the vessels, making no distinction between fishermen and merchantmen. It is possible that he knew of the custom which prevails in Boston and Gloucester as to sailing on a lay; but there is nothing in the evidence

from which that fact can fairly be inferred. See The Yankee, 233 Fed. 919, 147 C. C. A. 593.

Upon all the evidence, I am not satisfied either that Scott knew, or, by such diligence as he was bound to exercise, could have ascertained, that Trott was not authorized to bind the vessel and her owners for these supplies.

The lien was not lost, either by the sale of the vessel or the delay in filing the libel. She was sold in December, 1919. The owner knew of Scott's claim and warranted her free of liens. She did not return to Newport; and Scott endeavored, not very energetically perhaps, to locate her, and did not learn her whereabouts until the early spring of 1921, when he promptly brought this libel. The purchaser will not suffer by the allowance of Scott's lien. See The Tonawanda (D. C.) 27 Fed. 575. In view of the death of the libelant, an amendment bringing in his representative may be necessary.

Let there be a decree for the libelant for the amount of the bill, with interest and costs.

THE DOWNER.

PATTERSON v. DOWNER TOWING CORPORATION.

(District Court, E. D. New York. June 20, 1921.)

Collision ⊂=134—Damages for injury to vessel not necessarily cost of restoration.

A libelant *held* not entitled to an award of $700 damages for injuries to a barge, though that was the amount found by a survey as the cost of restoration, where she was an old boat and was repaired for a much less sum, and used for a long period thereafter.

In Admiralty. Suit by S. J. Patterson against the steam tug Downer; the Downer Towing Corporation, claimant. On exceptions to report of special commissioner. Exceptions sustained.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Alexander & Ash, of New York City, for claimant.

GARVIN, District Judge. This is a hearing on exceptions to the report of a special commissioner, who was appointed to determine the amount to be awarded libelant as damages for injuries sustained by his barge Hudson. The commissioner has allowed $700 the price agreed upon at the survey. The boat was actually repaired later, in another way, for a much less sum. If the work called for by the survey had been done, it would have been worth the amount mentioned. The survey was not necessarily conclusive, nor did the commissioner so find; but he has found that the survey was not controverted nor shown to be incorrect in any particular, and that it does not appear that the repairs made the vessel precisely as strong, staunch, and serviceable as she was before the accident. This must

be done (The Loch Trool [D. C.] 150 Fed. 429); but I do not think that case is authority for finding that the owner of an old boat, such as the Hudson, which has been repaired for $220 and then used for a long period of time, should be allowed damages of $700. I consider the case to be controlled by the principles stated by Judge Brown in The J. T. Easton (D. C.) 24 Fed. 95.

The exceptions are therefore sustained.

PIERCE et al. v. BOUND BROOK ENGINE & MFG. CO. et al.

(District Court, D. New Jersey. June 30, 1921.)

1. Corporations ⟸478—After-acquired property clause in mortgage construed.

A mortgage to secure an issue of bonds, executed by a corporation which had just purchased a manufacturing business as a going concern, and covering its real estate, "also all buildings, plant, works, shops, equipment, tools, appliances, stationary or portable, and all other real and personal property of every name and nature, now owned or which may hereafter be acquired by the company," with privilege of selling and renewing, *held* not limited as to after-acquired personal property to that of the kinds specifically enumerated, but to include raw material, work in process, finished product, and choses in action owned by the mortgagor at the time of foreclosure for default.

2. Receivers ⟸66—Mortgagee entitled to order for surrender of property to receiver.

In a suit to foreclose a mortgage given by a manufacturing corporation, covering its plant and also personal property, complainant *held* entitled to an order requiring a purchaser of the property of the mortgagor to surrender to the receiver choses in action covered by the mortgage, without a preliminary determination of what, if any, such choses in action it may have in its possession.

In Equity. Suit by Hugh C. Pierce and V. Mott Pierce, trustees, against the Bound Brook Engine & Manufacturing Company and others. Decree for complainants.

Lindabury, Depue & Faulks, of Newark, N. J. (Joseph H. Morey, of Buffalo, N. Y., of counsel), for complainants.

Thomas G. Haight, of Jersey City, N. J., for defendant Bound Brook Engine & Mfg. Co.

John J. Foulkrod, Jr., of Philadelphia, Pa., and Joseph Beck Tyler, of Camden, N. J., for ancillary receivers of Badenhausen Company.

BODINE, District Judge. The complainants filed a bill to foreclose a mortgage given by the Bound Brook Engine & Manufacturing Company to them, dated July 11, 1917. The mortgage secured the payment of 200 bonds, of $1,000 each, with interest at 5 per cent. Some of the bonds fell due each year thereafter, and all were to be paid by July 11, 1927. The mortgage covered a factory building and the land on which it stood, in Middlesex county, this state. The mortgage was recorded both as a real estate and chattel mortgage.

The Bound Brook Engine & Manufacturing Company defaulted in the payment of those bonds, which have fallen due. It also defaulted in the payment of all coupons bearing date January 11, 1919, and subsequent thereto. The mortgagor also defaulted in the payment of insurance premiums required under the mortgage, and in the payment of the real estate taxes for the years 1919 and 1920.

[1] The sole question raised before me is with respect to the extent of the personal property covered by the terms of the mortgage, and for the determination of that question the following sections of the mortgage are material. The mortgage, after a description of the real estate by metes and bounds, provides:

"Together with all and singular the tenements, hereditaments, profits, privileges, advantages, and appurtenances to the same belonging or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, and issues thereof, and all the estate, right, title, interest, property, claim and demand whatsoever as well in law as in equity, of the party of the first part of, in, and to the same, and to every part or parcel thereof; also all buildings, plant, works, shops, equipment, tools, appliances, stationary or portable, and all other real and personal property, of every name and nature, now owned, or which may hereafter be acquired, by the company. * * *

"Fifth. Until default shall be made in the payment of the principal or interest of any of the bonds hereby secured, or any part thereof, or in the performance or observance of any condition, covenant, or agreement hereof, on the part of the company, the company shall be permitted and suffered to possess, operate, manage, and enjoy the real and personal property hereinbefore described and hereby mortgaged, with the appurtenances, and to receive and retain to its own use the income, rents, issues, and profits thereof, in the same manner and with the same effect as though these presents had not been made.

"Sixth. The company shall be permitted to alter, remove, sell, and dispose of any buildings, fixtures, machinery, or other appurtenances upon the mortgaged premises, or any personal property on which this indenture is or may become a lien: Provided always that the company shall, and it hereby agrees that in such case it will either use the proceeds of such sales in purchasing other real or personal property for the business of the company, or in improving or developing its real estate or plants, or that it will acquire other real estate or personal property for its business equal in value, at cost to the company, to the property disposed of, or that it will pay to the trustees the fair value of the property disposed of, to be agreed on between the company and the trustees, or fixed by an appraiser."

The complainants contend that the words "and all other * * * personal property, of every name and nature, now owned or which may hereafter be acquired by the company," includes raw materials, work in process, finished product, and choses in action. Their claim, however, does not include any property, or the proceeds thereof, placed at the plant by the Badenhausen Company, which took over the plant of the mortgagor, or by the ancillary receivers of the Badenhausen Company, provided, however, that the property, if any, so placed by the Badenhausen Company, or the ancillary receivers thereof, has not been so mingled with the property claimed to be covered by the mortgage as to have lost its identity, so that a separation will be impossible.

It is not necessary now to consider questions with respect to property, or the proceeds of property, placed in the plant by others than the

mortgagor. Possible resulting legal questions will depend so largely on fact that the whole problem may best be settled after a reference. Addressing the problem as to whether the mortgage, by the terms "and other * * * personal property, of every name and nature, now owned or which may hereafter be acquired by the company," covers raw materials, work in process, finished product, and choses in action, it is essential to discover the intent of the parties, in so far as it has been expressed in the instrument of mortgage itself. This intent would be perfectly clear, but for the fact that the words, which I have above quoted follow certain specific words, and the defendants contend that the words which I have quoted are not words of enlargement, but are limited in their scope to the inclusion within the mortgage of after-acquired property of the precise kind as that specifically described as then covered by the mortgage, and in support of this argument have referred to the fifth and sixth clauses of the mortgage, which I have above referred to.

It seems to me that the refutation of this argument is the statement of it. The fifth clause provides that the mortgagor may operate, manage, and enjoy the mortgaged property until default, and retain for its own use the income and profits thereof. The sixth clause provides that on the sale of any real or personal property covered by the mortgage the proceeds shall be used in purchasing other property of equal value. Clearly these provisions contemplate that what might be termed the capital assets be kept intact and subject to the mortgage, while the income and profits derived from the use thereof shall inure until default to the benefit of the mortgagor. Hence I have no hesitation in saying that the intent appears clear that, when the mortgage provides that it shall cover, in addition to that property specifically described, "all other * * * personal property, of every name and nature, now owned or which may hereafter be acquired by the company," that it was in the contemplation of the parties that the mortgage covered that raw material, that work in process, that finished product, and those choses in action which were then owned and which thereafter might be acquired to replace those which were sold, and it seems to me that to decide otherwise would be to substitute for the security offered at the time the mortgage was given a much less valuable security.

The mortgage is dated the same day that a conveyance was made to the Bound Brook Engine & Manufacturing Company by the American Engine & Electric Company of all of its property. The property acquired by the mortgagor was a going concern. Is it not reasonable to suppose that on the same day that it acquired a going concern that it offered as security for a loan of $200,000 a manufacturing plant stripped of raw materials, stripped of work in process, stripped of finished product, and stripped of things in action, when the mortgage specifically provides that it shall cover "all other personal property, of every name and nature, now owned or which may hereafter be acquired."

Rules of construction must not be invoked to defeat the intent of the parties. General words in a mortgage such as this have been held

by the New Jersey courts to include book accounts. Commercial Trust Co. v. Wertheim Coal Co., 88 N. J. Eq. 143, 102 Atl. 448, affirmed Same v. Drayton, 90 N. J. Eq. 264, 105 Atl. 241. See, also, Buvinger v. Evening Union Printing Co., 72 N. J. Eq. 321, 65 Atl. 482. In that case the mortgage covered certain specific articles of furniture, printing presses, and chattels used by a newspaper printing company, "and all personal property of any kind or character now belonging to the said Evening Union Printing Company, or which may hereafter belong to said * * * company." The opinion of Vice Chancellor Leaming clearly indicates that chattels used in the regular course of business were included within such general language, and that the general language was also broad enough to apply to choses in action. The following from his opinion is pertinent:

"This court has repeatedly held that a mortgagor of chattels may be permitted to transact business and make sale of the mortgaged chattels in the regular course of his business, and that in such cases the lien of the mortgage, if so stipulated, will attach to the chattels from time to time acquired to supply the place of the chattels sold. With these rights of a mortgagor and mortgagee recognized, no reason is apparent why outstanding choses in action may not, in like manner, be included in the lien of the mortgage and the privilege be extended to the mortgagor to collect and apply such choses in action under a stipulation that the lien of the mortgage shall include new accounts arising in the regular course of the business."

The illuminating brief filed by counsel for complainants contains a wealth of authority. A few of the authorities cited illustrate the principle. In the case of Ringer v. Cann & Bernard, 3 Meeson & Welsby's Reports, 243, Lord Chief Baron Abinger, construing a lease in which particular words were used, followed by general words, said:

"I cannot see why the words which are sufficiently comprehensive to include everything he had should not be held to pass the leasehold estate."

—which was not particularly described. And again Lord Esher, Master of the Rolls, in speaking of the doctrine of ejusdem generis, said:

"Nothing can well be plainer than that to show that prima facie general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before."

For other cases in support of the same principle see Thurber v. Minturn, 62 How. Prac. (N. Y.) 27, Goulding v. Swett, 13 Gray (Mass.) 517, and Veazie v. Somerby, 5 Allen (Mass.) 280.

[2] Complainants also seek a present assignment to the receiver in this proceeding by the ancillary receivers of the Badenhausen Company of such choses in action as the Bound Brook Engine & Manufacturing Company may have had, which are covered by the terms of this mortgage. The receivers of the Badenhausen Company deny that there are any such choses in action, and contend that the existence of choses in action must be established by proof before this court can make an order with respect thereto. Proof with respect to the existence or nonexistence of a chose in action appears to me to be not a proper disposition of the matter. If there be choses in action, the property of the

Bound Brook Engine & Manufacturing Company, in existence at the time the receiver in the foreclosure proceeding was appointed, and covered by the terms of the mortgage, clearly that receiver has the right to the legal title thereto. If they be nonexisting, the attempt to enforce these rights will demonstrate their nonexistence far better than could be determined by proof, which would, of course, fail to finally establish their extent. The ancillary receivers of the Badenhausen Company, the owners of the stock of the Bound Brook Engine & Manufacturing Company, can suffer nothing in the loss of the bare legal title to such choses in action as may exist, and the bare traverse of their existence cannot, under the circumstances, be a basis for a court of equity to refuse the transfer.

In conclusion, the mortgage lien of the complainants' mortgage covers, in addition to the real estate, machinery, and fixtures, raw materials, the work in process, finished product, and the choses in action Complainants are entitled to a decree of foreclosure for the amount proved, the assignment of the legal title of the ancillary receivers of the Badenhausen Company to the choses in action, the property of the Bound Brook Engine & Manufacturing Company which that company may have owned and subject to the mortgage, and to a reference to a master to take proof with respect to the precise articles of after-acquired property included within the terms of the mortgage as herein found included. The master shall also take proof with respect to the value, separability from the mass, and the circumstances under which property of the sort covered by the mortgage was placed upon the property, if any, by the Badenhausen Company, or the ancillary receivers thereof.

UNITED STATES v. MATHIE.

(District Court, S. D. California, S. D. June 28, 1921.)

No. 2774.

Intoxicating liquor ⇐131—Intent not element of illegal sale.

In a prosecution under National Prohibition Act, tit. 2, § 29, against a retail dealer for selling as a beverage cider containing one-half of 1 per cent. or more of alcohol, it is not a defense that defendant bought and sold the cider as preserved sweet cider, and was ignorant that it contained more than the lawful percentage of alcohol which resulted from the ineffectiveness of the preservative used by the manufacturer.

Criminal prosecution by the United States against J. F. Mathie. Submitted on stipulated facts. Judgment of guilty.

Robert O'Connor, U. S. Atty., of Los Angeles, Cal., and H. L. Dickson, Asst. U. S. Atty., of Los Angeles, Cal.

Meiklejohn & Gahan, of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. This is an information against the defendant for selling cider, containing more than one-half of 1 per centum of alcohol, as a beverage. The facts have been stipulated, and the de-

termination of whether or not the defendant is guilty depends upon the facts set forth in the stipulation as follows:

"That the cider sold by the defendant as in said information alleged was purchased by W. M. Ryan from the Ukipa Cider Company, 916 Mateo street, in the city of Los Angeles, state of California, for preserved sweet cider, but the preservative used by the manufacturer did not maintain an alcoholic content at less than one-half of 1 per centum, which content was unknown to defendant."

The defendant claims that the government must show that the defendant knew the cider contained alcohol in excess of one-half of 1 per cent. by volume. The government contends that it does not make any difference whether he knew it or not; if he sold it, he is guilty under the law.

The determination of this question depends upon the construction of title 2, §§ 4 and 5, of the Volstead Act (41 Stat. 305), which are as follows:

"Sec. 4. The articles enumerated in this section shall not after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, namely:

"(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

"(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

"(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

"(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

"(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

"(f) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs (b), (c), and (d), of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

"Any person who shall knowingly sell any of the articles mentioned in paragraphs (a), (b), (c), and (d) of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, *or shall sell any beverage containing one-half of one per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall* be subject to the penalties provided in section 29 of this title. If the commissioner shall find, after notice and hearing as provided for in section 5 of this title, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making

an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales.

"Sec. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

"If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article."

And again the contentions of the parties depend upon the construction of the last paragraph of section 4, and particularly the words in said paragraph, as follows: Any person who shall—

"* * * sell any beverage containing one half of one per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this title."

The government contends that the phrase referred to here applies to subdivision (e) of section 4, which is as follows:

"Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes"

—and claims that the phrase under discussion does not refer at all to subdivision (f) in section 4, relating to preserved sweet cider. It is plain to me that the phrase under consideration does not refer to preserved sweet cider. There is no extract, sirup or other article used as an ingredient in sweet cider. The language used here would indicate that the beverage referred to was a compound of some kind in which there was more than one article. Cider is a substance in itself. It is true that preserved sweet cider under the regulations may contain benzoate of soda, but I am of the opinion that when benzoate of soda is used it is not regarded as an ingredient of the sweet cider. This argument is borne out by subdivision (c) of section 94 of the regulations, which refers particularly to flavoring extracts and sirups, etc. The department has evidently construed in these regulations the phrase under discussion to refer to subdivision (e) and not to subdivision (f) of section 4.

Article V of the regulations relates to the manufacture and sale of cider and vinegar. Section 36 thereof is as follows:

"Sweet cider containing less than one-half of 1 per cent. of alcohol by volume may be manufactured and sold without the necessity of obtaining permit, provided such product is put up and marketed in sterile closed containers

or is treated by the addition of benzoate of soda, or other substance which will prevent fermentation, in such proportion as to insure the alcoholic content remaining below one-half of 1 per cent. of alcohol by volume. The responsibility for keeping the alcoholic content below such percentage rests upon the manufacturer, and in any case where cider is found upon the market containing alcohol in excess of the allowed percentage the manufacturer will be presumed to have manufactured and sold an intoxicating liquor."

It will be noticed that this section 36 of article V of the regulations relates to—

"sweet cider containing less than one-half of 1 per cent. of alcohol."

It does not give permission to sell any other kind of cider. It is true that this regulation says that the responsibility for keeping the alcoholic content below such percentage rests upon the manufacturer, and the manufacturer undoubtedly would be responsible, but his responsibility would not excuse the retailer. They would both be guilty of violating the law. Section 36 of the regulations relates wholly to the manufacture and sale of sweet cider, and does not relate to the manufacture and sale of cider containing more than one-half of 1 per cent. of alcohol.

Section 37 of article V of the regulations contains the following:

"Cider containing less than one-half of 1 per cent. of alcohol by volume may be sold by the producer to persons holding permits to manufacture vinegar. If such cider, however, contains one-half of 1 per cent. or more of alcohol by volume when removed for conversion into vinegar, it will be necessary that the persons producing same hold permits to manufacture cider as above provided and furnish same only upon receipt of permits to purchase."

It will be seen that section 37 of article V of the regulations deals only with cider containing less than one-half of 1 per cent. of alcohol, except where the cider is sold by permit to persons holding permits to manufacture vinegar. I cannot see where the regulations in any way assist the defendant in this case.

The phrase in section 4, above quoted, upon which the defendant relies, does not sustain the argument of the defendant. The first phrase of the pargaraph, which relates to subdivisions (a), (b), (c), and (d), reads as follows:

"Any person who shall knowingly sell," etc., "* * * or shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes."

It will be seen that there the act uses the word "knowingly" as to subdivisions (a), (b), (c), and (d), and then has a phrase concerning circumstances which may put one upon inquiry. The phrase under discussion does not use the word "knowingly," or any other language tending to indicate that he must have any information that will lead him to make inquiry. The sentence read by itself shows upon its face that the defendant's contentions are erroneous. The word "knowingly" in the last paragraph of section 4, title 2, of the act, under discussion is limited to subdivisions (a), (b), (c), and (d), and does not in any sense refer to subdivision (e) or (f) of section 4.

Section 3, title 2, of the act provides:

"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."

If the contentions of the defendant were maintained, the effect would be that a man who sold cider containing more than one-half of 1 per cent. of alcohol would not be guilty of violating the law, unless he were notified prior to the sale that the cider contained more than one-half of 1 per cent. of alcohol. The defendant contends that, since he bought this cider from one who was manufacturing cider in accordance with section 36 of article V of the regulations, and bought it for preserved sweet cider, the only remedy the government has is that prescribed by section 5 of the act, namely, notice, hearing, etc., and that the defendant cannot be convicted of a crime under the circumstances.

Let us see how this would work out. On Monday an agent of the government calls upon a retail dealer and gets a sample of his cider, analyzes it, and finds that it contains more than one-half of 1 per cent. of alcohol by volume. The next day he goes and notifies the retail dealer that the sample he took was not sweet cider and for him to cease selling it. The retail dealer would say:

"Why, I sold that barrel, and now have a different barrel; take a sample of that, and see if it has too much alcohol in it."

The third day the officer comes back and notifies him that that barrel is wrong, and the retail dealer says:

"Well, I have sold out that barrel, too, and have another barrel now, which purports to be preserved sweet cider; analyze that."

How could a conviction ever be secured against persons selling cider containing more than one-half of 1 per cent. of alcohol for beverage purposes, if the contentions of the defendant were sustained? Would not the defendant each time come forward and say:

"I bought this for preserved sweet cider. I did not analyze it. I took it for granted that it contained less than one-half of 1 per cent. of alcohol, because I bought it from a manufacturer who makes preserved sweet cider. Upon being notified that I had sold cider in violation of the law, I did not sell any more of that particular lot. I immediately got another barrel from another manufacturer, who makes preserved sweet cider, and have been selling out of that"

—and so on, and so on, ad infinitum? Would this be construing the act in such a manner as to prevent the sale of intoxicating liquor? Would not such a construction of the act be a license to a man to continue to sell cider containing more than the required alcoholic content?

The only remedy, according to the defendant, would be for the government to stop the manufacture of such article. But the answer to that argument is that one day this retail dealer would get a barrel of cider from one manufacturer, the next day from another, and so on. The manufacturer would claim that, when he delivered the barrel of cider to the retail dealer, it contained no more than the requisite amount of alcohol, and that if, when the retail dealer sold it, it contained more, the retail dealer must have done something to it; that is to say, the manufacturer would claim that the retail dealer had put sugar, raisins, or something else in it to cause it to ferment and destroy the preservative. The construction contended for by the defendant would be inconsistent with the rule laid down in the act for its interpretation.

It is therefore my opinion that any person who sells cider as a beverage does so at his peril. He must know that he is not violating the law. He must know that the cider contains less than one-half of 1 per cent. of alcohol by volume. This is the only way the act could be enforced against persons selling cider containing more than one-half of 1 per cent. of alcohol by volume.

Under the stipulated facts, the defendant is guilty.

UNITED STATES v. CORONADO BEACH CO.

(District Court, S. D. California, S. D. December 29, 1919.)

No. E-34.

Public lands ⟸223(1)—Mexican grant in California held to convey fee.

Articles 4 and 5 of the Mexican decree of August 18, 1824, concerning colonization and settlement of national lands, providing that lands within 10 leagues of the sea could not be colonized without the previous approval of the supreme general executive power, and reserving to the federal government the right to take any of such lands for public purposes, apply only to foreign colonization, and not to grants to Mexican citizens, and a grant of an island on the coast of California in May, 1846, to a Mexican citizen, afterward confirmed by the District Court of the United States under Act March 3, 1851, and patented to the successors in interest of the Mexican grantee, *held* to convey title in fee as against the United States, free from any claim to government use.

In Equity. Suit by the United States against the Coronado Beach Company, for condemnation of land. Decree awarding compensation to defendant.

Decree affirmed 255 U. S. ——, 41 Sup. Ct. 378, 65 L. Ed. ——.

A. Mitchell Palmer, Atty. Gen., Geo. J. Denis, Sp. Asst. Atty. Gen., of Los Angeles, Cal., and Robert O'Connor, U. S. Atty., of Los Angeles, Cal.

Morrison, Dunne & Brobeck, of San Francisco, Cal., for defendant.

TRIPPET, District Judge. This suit is being prosecuted in pursuance of an act of Congress of date July 27, 1917 (40 Stat. 247 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1867ddd]). This act provides that the suit shall be prosecuted in accordance with the laws of the state of California relating to the condemnation of property for public use. The suit is for the determination and appraisement of any rights the defendant may have in North Island, in the harbor of San Diego, Cal., and for the condemnation of such rights. The government took possession of this island, and now seeks to condemn the defendant's interest therein, under the above-mentioned act, for use for national defense and in connection therewith as sites for permanent aviation stations for the army and navy and for aviation school purposes.

On August 18, 1824, the sovereign general constituent congress of the United Mexican states issued a decree concerning colonization and settlement of the national lands of said republic. This decree provides:

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

Art. 4. That those territories within ten leagues of the sea coast cannot be colonized "without the previous approval of the supreme general executive power."

Art. 5. "If for the defense or security of the nation the federal government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general congress," etc.

Art. 16. That the government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic.

On November 21, 1828, in pursuance of article 15, the government, through his excellency, issued rules and regulations for the colonization of the territories of the republic. The Mexican government granted the land in controversy to one Pedro Carrillo, a Mexican citizen, on May 15, 1846. This grant was made by Pio Pico, the Governor of California, and recites:

"Whereas, Don Pedro Carrillo has, for his personal benefit and that of his family, petitioned for the land known as the island or peninsula in the port of San Diego, the proper examinations being previously made, using the faculties which are conferred on me in the name of the Mexican nation, I have granted him the aforesaid land in decree of this day, declaring to him the ownership of it by these presents, in conformity with the law of August 18, 1824, and the regulations of November 21, 1828, subject to the approval of the most excellent departmental assembly, and under the following conditions," etc.

This recitation was made in the grant to comply with article 8 of the rules and regulations of November 21, 1828. It does not appear in the record that the grant was made with the approval of the supreme general executive power, as provided by article 4 of the decree of August 18, 1824. By virtue of the treaty of Guadalupe Hidalgo (9 Stat. 922), Congress on March 3, 1851 (9 Stat. 631, c. 41), enacted a law entitled "An act to ascertain and settle the private land claims in the state of California." Pursuant to this act of Congress, Billings and others, assignees of Carrillo, the Mexican grantee, instituted proceedings against the United States before the commissioners created by said act, and subsequently in the District Court of the United States, to have the said title confirmed to them. The board of commissioners rejected the claim of Billings and others, but the District Court confirmed it on the 12th day of January, 1857. The only parties to said suit were Billings and others, as plaintiffs, and the United States, as defendant. However, before a patent was issued by the United States for the land, other parties were substituted for Billings and others. The patent issued to the successors of Carrillo makes the following recitation:

"Now know ye: That the United States of America in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3d March 1851, and the legislation supplemental thereto, have given and granted and by these presents do give and grant unto the said Archibald C. Peachy and William H. Aspinwall, and their heirs, the tract of land embraced and described in the foregoing survey, but with the stipulation that, in virtue of the fifteenth section of the said act, the confirmation of the said claim and this 'patent' shall not affect the interest of third persons."

"To have and to hold the said tract, with the appurtenances, unto the said Archibald C. Peachy and William H. Aspinwall and to their heirs and assigns forever, with the stipulation aforesaid."

The title acquired under this patent passed to the defendant. The plaintiff claims that the grant to Carrillo created a fee in the grantee, subject to the reservation provided in article 5 of the act of August 18, 1824, above quoted, and claims that the patent was simply a confirmation of such title, and that the right reserved to the Mexican government passed to the United States by virtue of the treaty of Guadalupe Hidalgo.

On the contrary, counsel for the defendant contends that the grant to Carrillo passed a fee-simple title, and claims that the first eight articles of the decree of 1824 referred only to foreign colonization, and not to grants made to citizens of Mexico, and is applicable only to estates, and not to the territories of the republic.

In De Arguello v. U. S., 18 How. 539, 15 L. Ed. 478, at the December term, 1855, the Supreme Court, in discussing this question, used the following language:

"It is evident from an inspection of this act of 1824, and consequent regulations of 1828, that they contemplate two distinct species of grants: (1) Grants to impresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers. (2) The distribution of lands to Mexican citizens, 'families or single persons.'

"While these countries were under the dominion of Spain, the governors had authority to make grants of the latter description, while those of the former required the sanction of the king. As examples of such colonization contracts in Louisiana, those of the Marquis of Maison Rouge and the Baron de Bastrop may be referred to. They came under the consideration of this court in the cases of United States v. King and Coxe, 7 How. 833, and United States v. Philadelphia, 11 How. 609. These contracts were executory. They designated a certain tract of country, which was 'appropriated' to be gratuitously distributed among the colonists, but did not confer an absolute or immediate title to the whole tract to be colonized by the contractor. 'As the object of these grants was to obtain a body of foreign agriculturists, who would settle together under one common leader, in whom the government could confide, liberal terms were offered. A body of such colonists, besides opening, cultivating, improving, the wild lands, served as a protection against the Indians, and created inducements to others of their countrymen to join them, and thus promote the early settlement of the province.'

"The same policy was pursued by the Mexican government. Besides the desire of fortifying themselves against apprehended attempts at subjugation by Spain, they had before their eyes the prosperous growth of the United States, consequent on the liberal encouragement of European immigration. But, while anxious to encourage immigration of foreigners, they nevertheless entertained some jealousy, well founded, perhaps, that in case of conflict with a powerful neighbor their sympathies and allegiance might not be safely relied on.

"Hence the caution exhibited in requiring the approval of the supreme government 'to grants made to impresarios' for them to 'colonize with many families.' But while a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and seacoast, we cannot impute to them the weakness, or folly, of confining their native citizens to the interior, and thus leaving their seacoast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners would encourage the settlement of natives within those bounds. The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers; proffering gratuitous grants of land and of agricultural implements, expenses of their voyage, maintenance for a year, and leave to import certain articles free of duty. The military posts in the territory were on the seacoast; and it would be strange policy indeed which

would isolate the posts, intended for the protection of settlers, and compel them to dwell among the savages without protection. Numerous enactments, also, exhibit their cautious jealousy with respect to foreigners, and especially their coterminous neighbors on the north. An act of 1828 directs all Spaniards living on the coast of the Mexican Gulf to retire 20 leagues from it. Another, of 1830, prohibits settlements of foreigners from coterminous nations or any part of their border states.

"A careful examination of this decree of 1824, and regulations of 1828, will show that their letter conforms to this policy, pursued with so much solicitude. The title to the decree shows its subject to be 'colonization.' The term 'colonization' implies immigration in numbers. The first section speaks of the subjects of such colonization as 'foreigners.' It guarantees to them security of person and property. The second and third describe the lands open to such colonists, and require the states to make rules and regulations for colonization within their limits. The fourth (whose construction is now under consideration) forbids the colonization of the territory comprehended within 20 leagues of the boundaries of any foreign state, and within 10 leagues of the seacoast, without the consent of the supreme executive power. The sixth section provides that no duties shall be imposed on the entrance of 'foreigners.' The seventh forbids the immigration of 'foreigners' to be prohibited prior to 1840, except of some particular nation, and under peculiar circumstances. The seventh indicates the possibility that the government may find it necessary to take measures of precaution for the security of the federation with respect to foreigners who come to colonize.

"These are all the sections of the act which refer directly to colonization. The subjects of it are called 'foreigners' throughout. They are the only persons to whom the fourth section has any reference or application. The ninth section first speaks of the 'distribution of lands' to individuals and families, as distinguished from colonists, and provides that Mexican citizens should be preferred, without distinction of classes, except as to those who have rendered special service to their country. Thus we have seen that the first eight sections apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them to the subject introduced for the first time in the 9th section, or to select the fourth section as applicable to native citizens, while the other seven are confined by their terms to 'foreigners.'

"The regulations of 1828, made for the purpose of carrying into execution the law of 1824, evidently give this construction to that act. It makes a clear distinction between empresario contracts for colonization, and grants to Mexican citizens. In conformity with the fourth section of that act, it requires grants to empresarios to have the sanction of the supreme government, while those made to individuals or families need only the approval of the territorial deputation. This may be said to be a legislative construction of the act of 1824, and demonstrates that this restraint of grants within the lateral [sic] leagues had no application except to colonies of foreigners."

Necessarily, the District Court, in confirming this grant, was guided by the decision in the Arguello Case. Article 5 of the act of 1824 was not involved in the Arguello Case, except incidentally; but the reasoning in that case necessarily precludes the idea that article 5 could apply to citizens of Mexico, while all the other articles from 1 to 8, inclusive, apply only to foreigners. It will be seen that the Supreme Court includes article 5 among the eight articles, which it holds apply to foreigners, and not to citizens. We might well use the language of the Supreme Court, above quoted, making the reference to article 4 read article 5, thus:

"We have seen that the first eight sections [or articles] apply wholly to colonists and foreigners. It would be contrary to every canon of construction to apply the provisions made for them to the subject introduced for the first

time in the ninth section, or to select the *fifth* section as applicable to native citizens, while the other seven are confined by their terms to foreigners." (Italics ours.)

It would also seem that the Mexican government could with as much propriety have made a distinction between a Mexican citizen and a foreigner, concerning the right of occupancy as provided in article 5, as to have made the distinction in article 4. It seems to the court that this decision of the Supreme Court of the United States is controlling upon this court.

The court might well stop here, without further comment; but the question of res adjudicata has been carefully investigated, and it is not inappropriate to make the following comment:

Section 15 of the Act of March 3, 1851, provides:

"That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, *shall be conclusive between the United States and the said claimants only*, and shall not affect the interests of third persons."

In construing this section, the Supreme Court, in the case of Botiller v. Dominguez, 130 U. S. 238, 248, 9 Sup. Ct. 525, 527 (32 L. Ed. 926), says:

"The fifteenth section declares that the final decrees rendered in such cases, or any patent issued under the act, 'shall be conclusive between the United States and the said claimants only'; that is to say, *it shall be conclusive on the United States* and on the claimants, but it shall not conclude the rights of anybody else, if in a position to contest the action of the board. * * * When this was done, the aim of the statute was attained. The order of the commissioners or the decree of the court established as between the United States and the private citizen the validity or the invalidity of such claims, and enabled the government of the United States, out of all its vast domain, to say 'this is my property,' and also enabled the claimant under the Mexican government who had a just claim, whether legal or equitable, to say 'this is mine.' This was the purpose of the statute; and it was equally important to the object which the United States had in the passage of it, that claims under perfect grants from the Mexican government should be established as that imperfect claims should be established or rejected. * * * We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which *it held the proprietary interest* from those which belonged, either equitably or by strict legal title, to private persons."

In the Botiller Case the court was deciding a controversy between two claimants in an action wherein the United States was not a party, but what the court said in that case is appropriate to a decision in the case at bar. The statute and said decision is to the effect that the patent shall be conclusive on the United States. Certainly, if it is conclusive on anybody, in view of this statute, it ought to be conclusive on the United States. A patentee under this statute could not assert with very much confidence, concerning the land he got, that "this is my property," if the United States could step in at any time and take possession of it forever.

This court is of the opinion that the claim of the plaintiff is not well made for the foregoing reasons.

FARMERS' & MERCHANTS' BANK OF MONROE, N. C., et al. v. FEDERAL RESERVE BANK OF RICHMOND, VA.

(District Court, W. D. North Carolina, at Charlotte. July 21, 1921.)

1. **Removal of causes ⇐102—Motion to remand granted where jurisdiction is doubtful.**
   Where the amount in controversy presents an issue of fact, and the court is unable clearly to conclude that it exceeds the sum of $3,000, the motion to remand the cause to the state court should be granted.
2. **Courts ⇐280—Case is presumed to be without jurisdiction of United States District Court in absence of contrary showing.**
   The jurisdiction of the District Courts of the United States is limited to that conferred on them by the Constitution and laws of the United States, and the presumption is that the case is without their jurisdiction unless the contrary affirmatively appears.
3. **Courts ⇐326—Pecuniary limitation of jurisdiction of federal courts applies in equity suits.**
   The limitation of the jurisdiction of the United States District Courts to cases involving $3,000 or more applies to suits in equity as well as to actions at law.
4. **Courts ⇐326—Right in dispute must be measurable in terms of money to give jurisdiction.**
   Before the United States District Courts can have jurisdiction over a cause, as dependent on amount in controversy the matter in dispute must be money or some right the value of which is calculated and ascertained in money.
5. **Removal of causes ⇐71—Suit to restrain reserve bank from dishonoring checks does not involve jurisdictional amount.**
   A suit by state banks against the federal reserve bank to enjoin the defendants from dishonoring checks presented by plaintiff, and notifying the drawers thereof that there were not sufficient funds to meet such checks, because complainants offered payment in the exchange permitted by the state law, does not involve a right the value of which can be said to exceed the sum of $3,000, since neither the injury to the complainants nor the benefit to the defendants from the practice complained of can be measured in money, and therefore, though a federal question is involved, the defendant must protect its rights under the federal law, if necessary, by a writ of error after final determination by the state courts.

Suit by the Farmers' & Merchants' Bank of Monroe, N. C., and others, against the Federal Reserve Bank of Richmond, Va., begun in the state court and removed by defendant to the United States District Court. On motion of plaintiffs to remand the cause to the state court. Motion granted.

Stack & Parker, of Monroe, N. C., and Wm. W. Smith, of Atlanta, Ga., for plaintiffs.

H. G. Conner, Jr., of Wilson, N. C., H. W. Anderson and M. G. Wallace, both of Richmond, Va., and C. W. Tillett, Jr., of Charlotte, N. C., for defendant.

WEBB, District Judge. This matter is before the court on motion of the plaintiffs to remand the action to the superior court of Union county, N. C. The specific relief demanded by the plaintiffs in their bill of complaint is the following:

"That the defendant, the Federal Reserve Bank of Richmond, its agents and servants, be permanently restrained and enjoined from carrying out their threat to refuse to accept exchange drawn by the plaintiffs on their reserve

deposits, in payment of checks presented and to return such checks to the drawers thereof as dishonored, because plaintiffs have refused to pay same in cash, and have tendered the exchange allowed by the laws of the state of North Carolina."

The only point to be decided by the court is whether or not, under section 24 of the Judicial Code (Comp. St. §§ 991[1]–991[25]), the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.

The court heard the evidence and the able arguments of counsel during the period of four days at Charlotte, and has given the question very careful consideration since that time. Both sides cited authorities tending to sustain their contention, to wit, that this court has or has not jurisdiction. These authorities the court has read with great interest, and it frankly confesses that it is in doubt about its jurisdiction in the matter.

[1] The real question at issue is largely one of fact, and the court finds itself unable clearly to conclude that the matter involved exceeds the sum of $3,000. Being unable so to do, the court is therefore constrained to remand the case to the superior court of Union county.

[2, 3] It is well known and universally established by the opinions of many courts, including the Supreme Court of the United States, that the jurisdiction of the District Courts of the United States is limited, in the sense that they have no jurisdiction except that conferred by the Constitution and laws of the United States; and the presumption is that a case is without their jurisdiction unless the contrary affirmatively appears. This limited or conferred jurisdiction applies to cases both at law and in equity, and, as was said in the case of Oregon Railroad & Navigation Co. v. Shell (D. C.) 143 Fed. 1005:

"The courts are required to apply the same technical rules in equity cases that are applied in actions at law for the purpose of being assured of jurisdiction."

[4] In one of the early and leading cases on this question, decided by the Supreme Court of the United States, Barry v. Mercein, 5 How. 103, 12 L. Ed. 70, the court held that in order to give the federal court jurisdiction in cases dependent upon the amount in controversy "the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained." Chief Justice Taney in this case further says with reference to jurisdiction being dependent upon the amount involved that jurisdiction in such cases can be had "only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction."

Again, in the case of De Krafft v. Barney, 2 Black. 704, 17 L. Ed. 350, it is held, Chief Justice Taney writing the opinion, that the matter in dispute must be money or some right the value of which could be calculated or ascertained in money.

[5] Now, the plaintiffs in this action ask only and solely that the defendant be restrained from publishing what the plaintiffs contend are false statements about the plaintiffs' method of paying their checks. That is the real issue in this case and the real matter involved, al-

though, collaterally and indirectly, the question of par clearance, exchange charges by the plaintiff banks, and the act of the Legislature of North Carolina authorizing the state banks to make exchange charges may be considered. The continuance of the publication of the alleged false statements may result in some pecuniary loss to the plaintiffs, but what that loss may be, or how it may come about, are purely speculative; and the court knows of no rule by which such damages, if any, could be reckoned in dollars and cents and for the purpose of giving this court jurisdiction of this action.

On the other hand, the court cannot see how any calculable money value can accrue to the defendant by its continuance in the publication of the statements which the plaintiffs allege to be false. Neither can the court ascertain the loss in money, if any, which the defendant will suffer should it be restrained from the publication of the statements referred to. Certainly the money value involved, if any, is too hazy, indefinite, and speculative for the court to base so important a jurisdictional finding upon.

The defendant cannot suffer by trying this case in the state court, because there it can present all of its defenses, and, as a federal question is involved, can carry the case to the Supreme Court of the United States. No injustice, therefore, can be done either party to the suit by trying the case on its merits in the state forum.

The case is therefore remanded.

HALL v. PAYNE, Agent.

(District Court, Montana. July 6, 1921.)

No. 901.

1. Removal of causes ⇐94—Petition for removal amendable.

A petition for removal may be amended whenever consistent with justice.

2. Removal of causes ⇐19(1)—Action against federal agent under Transportation Act removable.

An action based on a cause of action arising out of the operation of a railroad while under federal control, and in which plaintiff and the railroad company were citizens of different states, *held* removable.

At Law. Action by George W. Hall against John Barton Payne, Director General of Railroads. On motion to remand to state court and motion by defendant for leave to amend petition for removal. Motion to amend granted, and motion to remand denied.

Norris, Hurd & Rhoades, of Great Falls, Mont., for plaintiff.

I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, all of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. Plaintiff moves to remand, and at hearing defendant asked leave to amend the petition for removal. The complaint alleges that the Great Northern Railway Company was and

is a Minnesota corporation, with lines in Montana and with connections to Oklahoma; that, while the roads were in federal control, plaintiff delivered to the control in Montana live stock to be transported over the roads and to Oklahoma; that the control's negligence inflicted injury upon the animals and damages to plaintiff, in part in Montana. The petition for removal alleges that the suit "(a) arises under the Constitution or laws of the United States, * * * or (b) is between citizens of different states"; that at material times petitioner was and is a citizen of New York, and plaintiff a citizen of Montana.

[1] The motion to remand is that diversity of citizenship is not material, so far as jurisdiction is concerned, in that the United States is the actual defendant and Payne but its agent. The amendment of the petition for removal is (1) to allege that said railway company is a Minnesota corporation; and (2) to allege that the complaint discloses the suit arises under the laws of the United States relating to interstate commerce and to federal control. Plaintiff objects to allowance of the amendments. Removal proceedings are statutory. The petition for removal is in the nature of process to transfer the case to the federal court upon due notice to plaintiff. Judicial Code, § 29 (Comp. St. § 1011), does not prescribe the contents of the petition, and it will serve if, taken in connection with the complaint in the state court and judicial notice, the allegations and facts of which it need not repeat, it discloses a removable case and prays for removal. Matter of Dunn, 212 U. S. 386, 29 Sup. Ct. 299, 53 L. Ed. 558; Gold, etc., Co. v. Keyes, 96 U. S. 204, 24 L. Ed. 656; Trust Co. v. Railway Co., 282 Ill. 565, 118 N. E. 986.

Like any other process or proceeding, the statutes of amendments sanction its amendment whenever consistent with justice. Kinney v. Association, 191 U. S. 82, 24 Sup. Ct. 30, 48 L. Ed. 103. The rule warrants the amendments proposed, if amendments be necessary. The case is virtually against the United States, which will pay any judgment in favor of plaintiff. For the first time, the United States has consented that suits against it may be brought in other courts than its own, but has not denied itself the right of removal in general, if at all. Stark v. Payne (D. C.) 271 Fed. 477.

[2] The proposed amendments are but to supplement what theretofore appears generally upon the face of the record, so far as may be material. The complaint discloses that the railway is a citizen of another state than Montana and that the suit arises under the laws of the United States and the petition for removal alleges plaintiff is a citizen of Montana and that the suit arises as aforesaid. Citizenship may be material in view of Ault's Case, 255 U. S. ——, 41 Sup. Ct. 593, 65 L. Ed. ——, and the restriction upon removal by section 10 of the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j). The nature of the suit, appearing on the face of the complaint, needed no repetition in the petition, nor even the general claim present in the petition in respect thereto. So introducing no new ground of removal, and which theretofore might be deemed to have been unequivocally waived, and no injustice to plaintiff appearing, the amendments are allowed.

All this is nowise inconsistent with Southern Pac. Co. v. Stewart, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345, cited by plaintiff. That case deals with the course and finality of appeals and error, and the jurisdiction of the Supreme Court and the Circuit Courts of Appeals therein, and determines that whether or not error lies to the former from a judgment of the latter depends upon whether or not the said judgment is made final by the Judicial Code, which in turn depends upon the ground of jurisdiction of the District Court "as originally invoked." Its conclusion is that, although a complaint in the state court discloses the case arises under federal laws, if the petition for removal expressly counts upon only diverse citizenship, that alone is the basis of jurisdiction in the District Court "as originally invoked," and so the judgment of the Circuit Court of Appeals is final, and the Supreme Court has no jurisdiction to review it on error—all to comply with the statute limiting appeal and error. The result is a development from construction wherein, as not unusual, the last case widely differs from the first. Southern Pac. Co. v. Stewart assumes to apply Spencer v. Duplan Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; but, whereas in the former the complaint in the state court discloses the case arises under federal laws, the complaint in the latter is otherwise, and the fact is inducement at least to the decision.

The instant case applies a principle of removal supported by the Supreme Court, unaffected by its latest decision, cited and to some extent sustained by it; for it continues sanction of amendment in removal.

The motion to remand is denied. No costs.

CENTRAL R. CO. OF NEW JERSEY v. MERRITT & CHAPMAN DERRICK & WRECKING CO.

(District Court, E. D. New York. November 8, 1919.)

Shipping ⇐79—Lighter held liable for injuries to barge pulled adrift by line to save lighter.

A lighter, which broke loose during a storm, and which checked her way by passing a line to a barge made fast to a steamer, as a result of which the lighter saved herself, but tore the barge from her berth, *held* liable for the damage thereby occasioned to the barge.

In Admiralty. Libel by the Central Railroad Company of New Jersey against the Merritt & Chapman Derrick & Wrecking Company to recover for injuries to libelant's barge. Decree rendered for libelant.

Decree affirmed 274 Fed. 240.

Macklin, Brown & Purdy, of New York City, for libelant.

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

GARVIN, District Judge. The accident involved in this action occurred during the unusual storm of February 26, 1918, when so much

damage was done in the harbor of New York. The libelant's boat, the barge No. 334, was made fast to the steamer Comeric, which was moored to the south side of Pier 3, Bush Docks. Astern of the No. 334, toward the entrance of the slip, and likewise moored to the Comeric, was another barge to which was made fast, on the outside, a lighter belonging to respondent. While the storm was in progress, the lighter broke loose and was being driven up into the slip, when she checked her way by passing a line to the No. 334, whose captain testified that he protested on the ground that his boat would be torn from her berth.

There is a conflict of testimony as to what followed. Libelant's witnesses testified that the result of passing the line or lines to No. 334 (which were not cast off until the No. 334 went adrift), and the consequent additional strain on the lines fastening No. 334 to the steamer was finally the breaking of the latter lines. The respondent offered proof that the line passed to the No. 334 was only to check the lighter, and that almost immediately steel cables were stretched from the lighter to the steamer, and the line that had been used for checking was loosened. At any rate, the barge No. 334 went adrift and was damaged.

It seems to me that it is more likely that the version given by libelant's witnesses is correct. With the excitement and confusion incident to a storm of this character, where damage was being everywhere inflicted, it was very natural that the lighter should have made fast to save herself. Once made fast to the No. 334, it was natural not to disturb the line, even if additional cables were stretched to the steamer. If I am correct, the case is controlled by the decision of Judge Learned Hand in Hammond v. The Barges Burns Bros. No. 34 and Walter Green (C. C. A.) 266 Fed. 269. The captain of the lighter imperiled the No. 334, and if he saved his boat thereby from injury he must make good the damage sustained by the barge.

Decree for libelant.

CENTRAL R. CO. OF NEW JERSEY v. MERRITT & CHAPMAN DERRICK & WRECKING CO.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 222.

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

Libel by the Central Railroad Company of New Jersey against the Merritt & Chapman Derrick & Wrecking Company. Decree for libelant (274 Fed. 239), and respondent appeals. Affirmed.

Foley & Martin, of New York City (James A. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

STOWE v. AMERICAN REFRACTORIES CO.

(Circuit Court of Appeals, Sixth Circuit. July 22, 1921.)

No. 3499.

1. **Patents ⟸328—792,822, for process of making refractory compound for furnace linings, not infringed.**
   Davison's patent, No. 792,822, for a process or method of making a refractory compound for furnace linings or similar purposes, *held* not infringed.

2. **Patents ⟸175—Using rotary kiln, instead of stationary kiln, held not to be invention.**
   A process or method of making a refractory compound for furnace linings, which used a dry mix and rotary kiln, *held* not to be construed as including such method of mixing, as, in view of state of art, it would not be invention to substitute such method for wet mix and stationary kiln.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit by Charles B. Stowe against the American Refractories Company for infringement of patent. From a decree dismissing the bill, plaintiff appeals. Decree affirmed.

Edward R. Alexander, of Cleveland, Ohio, for appellant.

Frederick W. Winter, of Pittsburgh, Pa. (Winter & Brown, of Pittsburgh, Pa., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Infringement suit brought by Stowe, owner of patent No. 792,822, issued June 20, 1905, to Davison, upon application filed April 18, 1904, for a process or method of making a refractory compound for furnace linings or similar purposes. The claims sued upon are Nos. 3 and 4, which read as follows:

3. The process of making a refractory magnesite compound which consists in comminuting natural magnesite, silica and oxide of iron, mixing the ingredients in a dry state, burning the mixture to clinker and comminuting the clinker.

4. The process of making a refractory magnesite compound which consists in comminuting natural magnesite, silica and oxide of iron, mixing the ingredients in a dry state, burning the mixture to clinker in a rotary kiln and comminuting the clinker.

There were the usual defenses of invalidity and noninfringement. The court below dismissed the bill for lack of infringement.

As early as 1896 it had developed that the most suitable known material for making refractory furnace linings needed in certain steel processes was a magnesite ore found in Austria. This was pulverized, heated to a high temperature, which caused it partially to fuse together in clinker form, and was then ground into a fine granular condition. It might be sold in this shape to the user, to be by him spread upon the floor of the furnace and fused into an unbroken lining, or it might be made up into bricks and used in that form.

It was known that this ore contained, in somewhat variable proportions, magnesia, iron, and silica; and it was commonly, if not universally, supposed that the iron was necessary as a flux for the magnesia, and that the silica was an undesirable element. It was Davison's substantial discovery, as the patent owner now contends, that the silica played a useful part in the combination, in that it considerably reduced the temperature necessary to frit or begin to fuse the material, as compared with a combination from which the silica was absent; and it may be conceded, for the purpose of this discussion, that this discovery, calling for a purposeful, instead of an incidental, presence of silica, would lend patentability to a claim for putting together by known processes the known ingredients of the natural material, if the necessary novelty existed.

Several manufacturers, including the Harbison-Walker Company, had been engaged in making this class of material since long before the date of Davison's invention. Some 10 years after the patent issued, the Harbison-Walker Company altered its process, and the defendant began to use the process of Harbison-Walker embodying this change. Upon this change the charge of infringement rests. We think the simplest way to meet the controlling issues is to consider this change. If it did not involve an inventive step, so that defendant's present process is not patentably distinguishable from that which was used before Davison's invention, it is obvious that Davison can have no patent which can be construed broadly enough to support the charge of infringement and can at the same time escape the defense of invalidity.

As early as 1898 the Harbison-Walker Company, which had been buying and using the Austrian magnesite for this purpose, found difficulty in obtaining this material. The company thereupon proceeded to import and use a Grecian magnesite ore, which was similar to the Austrian save for a deficiency in iron. The company supplied this deficiency by adding iron ore, and then thoroughly pulverized the mixture, moistened it sufficiently to make a thick paste, made this up into small blocks or "dobies," and burned these "dobies" in kilns of the types in common use for burning bricks. By this process the carbonic acid gas was driven off and the material "dead-burned." It was then in fritted or clinker form, and was thereafter ground and used as above described. If the Davison patent extends—as we assume it does—to the mixture of magnesite and silica, by using the raw material which naturally contains both, it is clear that it discloses nothing not previously in use by Harbison-Walker, except that Davison mixed his materials dry and, as specified in claim 4, burned them in a rotary kiln.

Thus we come to the question, as decisive, whether in 1904 it would have been invention to substitute in the Harbison-Walker process a dry mix and a rotary kiln for a wet mix and a stationary kiln. The person skilled in the art to whom this problem was presented would have before him his pulverized magnesite ore, containing silica and needing iron, and also his pulverized iron ore. He would know that these materials should be mixed as intimately and perfectly as possible and then burned to the fritting or clinker stage. He would know that the rotary kiln was an instrumentality in common used for simultaneous mixing

and burning of material which was to be fused into a clinker form. It was then specially familiar in making Portland cement, in which the more important materials to be thus fused were limestone and aluminum. While the finished magnesite refractory and the finished cement are distinctly different products, it is not easy to point out any substantial distinction in the mixing, burning, and fritting steps of the process of making the one or the other.

The art of making one kind of synthetic rock (Portland cement concrete) and the art of making another kind of synthetic rock (magnesite refractory) are not so totally dissimilar as are dyeing cloth and tanning leather (Tannage Co. v. Zahn [3 C. C. A.] 70 Fed. 1003, 17 C. C. A. 552), or polishing wood and pulverizing clay (Potts v. Creager, 155 U. S. 606, 15 Sup. Ct. 194, 39 L. Ed. 275). They are as similar as heating water to get a useful heat medium and heating wines to age them (Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. 390, 31 L. Ed. 352), or lifting paper sheets and lifting pills (Stearns v. Russell [6 C. C. A.] 85 Fed. 226, 29 C. C. A. 121). Concrete, plaster of paris, fire brick, the mortars in which they are set, and furnace linings are all fire-resisting materials in different degrees. Concrete is used for a protective lining, as in paper pulp digesters. Munising Co. v. American Co. (C. C. A. 6) 228 Fed. 700, 143 C. C. A. 222.

The substitution of the rotary kiln for the other method of burning impresses us as being only the step which would have occurred to any one fairly familiar with this kind of work; yet we might hesitate to act upon this impression, were it not fortified by other things appearing in the record; and these other things are important, not so much as direct anticipations, but as evidence confirmatory of the obvious character of the substitution. The patents to Reid of 1874 and to Ransome of 1886 describe rotary kilns for burning pulverized gypsum, or lime, cement, etc., and specify the advantages of that device for accomplishing exactly what Davison wished to accomplish. The Ransome patent especially points out that for this purpose the operator may take his choice between putting the material in blocks and burning in a stationary kiln, or pulverizing it and feeding it into a rotary kiln, and also points out that the ingredients, such as clay and chalk, may be mixed either wet or dry, and evidently contemplates that the stationary and rotary kilns and the wet and dry mixes are known equivalents—not only with reference to clay and chalk, but also as to cements "made with other materials than clay and chalk."

The De Navarro patent of 1896 not only describes the distinct advantages of the rotary kiln for making Portland cement, but points out that it contains the same ingredients which constitute the magnesite refractory, viz. silica, alumina, iron, and magnesia. Though, of course, the proportions are very different, the process of mixing and burning is precisely that contemplated by Davison when he calls for a rotary kiln. Indeed, it should be noted that Davison's specification does not describe any new method of kiln treatment, but merely says:

"I then pass the mixture through an ordinary rotary cement kiln, * * * in a well-understood manner."

The Krottnaurer patent of 1900 and the Lossing patent of 1901 further describe the operation of rotary kilns to accomplish effective mixing and burning, not only of cement, but, in the latter patent, of earths and chemicals. If it should be thought that there are such distinctions between burning magnesite and burning cement that the cement kiln would not be familiar to the magnesite worker—though this is in the face of Davison's references to the rotary cement kiln as a thing well known to the artisans whom he was addressing—we find in the British patent to Kirkpatrick of 1902, where Kirkpatrick was discussing the manufacture of magnesite compositions for use in furnaces, a statement that he uses a rotary or any other suitable furnace or kiln.

The use of a rotary kiln in this very situation was not new in 1904. In May, 1899, the Harbison-Walker Company burned several tons of Grecian magnesite mixed with iron ore in a rotary kiln. Although the product was sold, this was an experimental use; but the company soon thereafter installed a rotary kiln for this express purpose. It was used to some extent, although not largely, in such manner that if the use had persisted it would plainly have been a complete anticipation. It was installed to use with natural gas and this proved to be an unsatisfactory method of heating. Within a short time after this experiment was discontinued, the Harbison-Walker Company obtained the exclusive importation rights to the Austrian magnesite, and thereafter had no use for any synthetic process until importations of the Austrian product were cut off by the war in 1914. It then returned to and continued to use the rotary kiln.

Further confirmation of the obviousness of the substitution is found in the Collom patent application of June, 1899. Collom was an employee of the Harbison-Walker Company, and had conceived the idea that dolomite, an inexpensive native material, could be used in place of the imported magnesite to make the desired refractory composition. His application for a patent describes the dry mixture and the rotary kiln and the complete process of Davison more fully than Davison does—save for the substitution of the dolomite, which he thinks an equivalent of magnesite. This application was abandoned, and hence it is important only as indicating that the use of the rotary kiln was an expedient to which every one naturally turned. See Baker v. Hughes Co. (C. C. A. 2) 270 Fed. 97, 99.

Such counter force as might otherwise be found in the abandonment is not here present, because Collom sought no patent upon the use of the rotary kiln, and therefore did not abandon any such claim. He seems to take for granted that its use in this connection would be nonpatentable. It is often true that an abandoned attempt to use some device is evidence of the fact that one who later succeeds in using it has made an invention, but it is evidence only; and these instances of failure to use the rotary kiln to any considerable extent have little, if any, force as indicating that its use was not obvious when its known results were desired.

[1, 2] Putting these considerations with the fact that the use of the rotary kiln for burning magnesite was established in Europe, and that such European usage was known in this country, and with the testimony

of experts as to the common knowledge of the rotary kiln and what it would do, we are driven to the conclusion that it would not have been invention in 1904 to substitute this process of burning for the kiln burning which Harbison-Walker was using, in its then current method of manufacturing magnesite refractory materials. It follows that the patent cannot receive a construction broad enough to cover a continuation of the old Harbison-Walker method with only this change.

We may add that a reading of Davison's specification convinces us that he thought that his invention was in the addition, during manufacture, of silica and iron to natural magnesite—or at the most, in the addition of one of these elements to natural material containing the other two. The theory that he had discovered a new method of mixing and burning materials that others were then mixing and burning would have surprised him.

Our conclusion directly affects claim 4. Claim 3 can be distinguished from the old Harbison-Walker process only by limiting the mixing and burning to a method substantially like that of the rotary, and then it is governed by the same considerations as claim 4.

The decree is affirmed.

ROSE v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1921.)

No. 3522.

1. **Intoxicating liquors ⊜17—War-Time Prohibition Act constitutional.**
Act Cong. Nov. 21, 1918 (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), the War-Time Prohibition Act, is constitutional.

2. **Intoxicating liquors ⊜236(11)—Evidence sufficient to sustain conviction for sale in violation of War-Time Prohibition Act.**
Evidence *held* sufficient to sustain conviction of an unlawful sale of intoxicating liquor, in violation of Act Cong. Nov. 21, 1918 (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), the War-Time Prohibition Act.

3. **Criminal law ⊜507(4)—Witnesses ⊜102—Conviction can stand on uncorroborated testimony of Dry League employé, who is a competent witness.**
The fact that the purchaser of whisky from defendant, charged with violation of the War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), was employed and paid by the Dry Maintenance League to obtain evidence of the violation of the act, did not disqualify him as a witness or prevent a conviction on his uncorroborated testimony.

4. **Criminal law ⊜1159(2)—Verdict sustained by substantial evidence conclusive on Circuit Court of Appeals.**
Under Rev. St. § 1011 (Comp. St. § 1672), providing there shall be no reversal in the Supreme Court or the Circuit Court of Appeals for any error of fact, if verdict of conviction is sustained by any substantial evidence, it is conclusive on the Circuit Court of Appeals.

5. **Intoxicating liquors ⊜17—National Prohibition Act not unconstitutional.**
Act Cong. Oct. 28, 1919, the National Prohibition Act, is not unconstitutional because title 2, § 3, provides that no person shall possess any intoxicating liquor after the Eighteenth Amendment goes into effect, ex-

cept as authorized and permitted by the act, though such liquor was lawfully acquired before such time.

6. **Statutes ⊂=64(9)—Prohibition Act not invalidated by provision for liberal construction.**

If Act Cong. Oct. 28, 1919, the National Prohibition Act, is in excess of legislative power in its provision, in title 2, § 3, that the act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented, the whole act is not thereby unconstitutional, as such provision can be disregarded.

7. **Intoxicating liquors ⊂=249—Search warrant may issue as provided in National Prohibition Act.**

Under Act Cong. Oct. 28, 1919 (National Prohibition Act) tit. 2, § 25, a search warrant for liquors may issue, in manner and form as provided for by Act June 15, 1917, § 13 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼m), in aid of the enforcement of the Prohibition Act.

8. **Intoxicating liquors ⊂=249—Failure to make return of search warrant does not invalidate seizure.**

The failure of the officer to whom a search warrant for intoxicating liquors is directed to make a return thereof cannot invalidate the search or seizure made by the authority of the warrant; the making of the return being merely a ministerial act, to be performed after the warrant is executed.

9. **Intoxicating liquors ⊂=236(6½)—Evidence held to sustain conviction of unlawful possession.**

Evidence *held* to sustain verdict convicting defendant of the unlawful possession of intoxicating liquor, in violation of Act Cong. Oct. 28, 1919 (National Prohibition Act) tit. 2, § 3.

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

Joseph B. Rose, alias Bookey Rose, alias Joseph B. Rujicka, was convicted of the unlawful sale of intoxicating liquor in violation of the War-Time Prohibition Act, and of the unlawful possession of intoxicating liquors in violation of the National Prohibition Act, and he brings error. Judgment affirmed.

Frank B. Kavanagh, of Cleveland, Ohio (Frank F. Gentsch, of Cleveland, Ohio, on the brief), for plaintiff in error.

H. L. Eastman, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The plaintiff in error was convicted in the United States District Court, Northern District of Ohio, Eastern Division, upon an indictment, the first count of which charged him with the unlawful sale of intoxicating liquor in violation of the Act of November 21, 1918, known as the War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115$^{11}/_{12}$f–3115$^{11}/_{12}$h). The second count charged the unlawful possession of intoxicating liquors in violation of section 3, title 2, of the Act of October 28, 1919, known as the National Prohibition Act (41 Stat. 308). A motion for new trial was overruled, and a separate sentence imposed on each count.

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

[1] The plaintiff in error asks reversal of conviction on the first count for the reason that:

"The court erred in overruling the objection to the sufficiency of the first count because Congress was without power to enact, constitutionally, the War-Time Prohibition Act."

In the disposition of this assignment of error, it is sufficient to say that the Supreme Court of the United States has held that act constitutional. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; Hamilton v. Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194.

[2] Reversal of the conviction on this count is also asked by the plaintiff in error for the further reason that the verdict of guilty is not sustained by sufficient evidence. An examination of this record discloses the fact that one witness, Burton, testified positively and unequivocally that on the date named in the indictment he was in defendant's place of business; that Herman Zanker was with him; that he asked for and obtained from the defendant's bartender two glasses of whisky for which he paid 50 cents for each glass; that the defendant was standing at the cigar counter three or four feet away from him at the time he purchased and drank this whisky; that he drank one glass of this whisky, and that Zanker drank the other glass; that he was familiar with the taste, smell, and appearance of whisky, and that the whisky he obtained from defendant's bartender at this time was rye whisky; that the bartender placed the money that the witness paid for this whisky in the cash register on the back bar. The evidence of this witness, if believed by the jury, fully sustains its verdict.

[3, 4] It is insisted, however, that the evidence further shows that Burton was employed and paid by the Dry Maintenance League for obtaining evidence of the violation of the War-Time Prohibition Act; that he is directly contradicted by the witness Zanker, who, Burton said, was with him at the time and drank one of the two glasses of whisky purchased and paid for by Burton; that he is also contradicted by the defendant and his bartender, Szularcki; and that by reason of this conflict in the evidence the uncorroborated testimony of this one witness is not sufficient to sustain the verdict. The fact that Burton was employed by the Dry Maintenance League to secure this evidence did not disqualify him as a witness, or prevent a conviction upon his uncorroborated testimony. Grimm v. U. S., 156 U. S. 604–611, 15 Sup. Ct. 470, 39 L. Ed. 550; Carey v. State, 70 Ohio St. 121–126, 70 N. E. 955; People v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128. The credibility of the witnesses is a question solely for the jury. This court has no power to determine the weight of the evidence. Section 1011, R. S. (Comp. St. § 1672), provides, among other things, that "there shall be no reversal in the Supreme Court or in a Circuit Court * * * for any error of fact." Therefore, if the verdict is sustained by any substantial evidence, it is conclusive upon this court, regardless of the claim of the plaintiff in error that upon all the evidence the verdict should have been one of acquittal upon this count. U. S. v. Penna. & Lake Erie Dock Co. (C. C. A. 6, No. 3466, decided May 7, 1921) 272 Fed. 839, and cases there cited.

[5] The objection to the second count of the indictment is based upon the theory that the National Prohibition Act of October 28, 1919, is unconstitutional, for the reason that section 3 of title 2 provides that no person shall possess any intoxicating liquor after the Eighteenth Amendment to the Constitution of the United States goes into effect, except as authorized and permitted by that Act, although such intoxicating liquors were lawfully acquired before that time.

Section 25 of the act further provides that it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and section 33 of the act provides that after February 1, 1920, the possession of liquor by any person not legally permitted under this title to possess the same, shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. It is also further provided in this section that it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him.

Section 2 of the Eighteenth Amendment to the Constitution of the United States provides, among other things, that "Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." "Appropriate legislation," as used in this section, necessarily means such legislation as will tend to make this constitutional provision completely operative and effective. National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946.

The power conferred on Congress by section 2 of the Eighteenth Amendment is plenary in its nature, and commits to Congress the discretion to determine the legislation necessary and appropriate to enforce the provisions of section 1 of this constitutional amendment. Unless the enactment has no substantial relation to the enforcement of the constitutional prohibition of 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, a court has no power to determine the wisdom of the enactment or challenge the manner of the exercise by Congress of the authority and discretion confided to it by the second section of this constitutional amendment. Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.

Congress in the exercise of its power has determined that it is essential and appropriate to the enforcement of this constitutional amendment to restrict the possession of intoxicating liquors to those having permits to keep and possess the same and to private homes when intended for the sole use of the owner and his family and their bona fide guests. The possession of intoxicating liquors is the first essential to its barter and sale as a beverage. Intoxicating liquors, stored in the same building in which the owner or occupant of the building is conducting a business with the public generally, not only furnishes op-

portunities for the violation of the provisions of this constitutional amendment, but would also tend to hinder, delay, and prevent the detection of unlawful traffic therein. It would therefore appear that this provision of the National Prohibition Act has a substantial relation to the enforcement of national prohibition, and that Congress has not in this respect transcended its power or abused the discretion conferred upon it by the second section of the Eighteenth Amendment. Tonic Co. v. Lynch, supra; U. S. v. Murphy (D. C.) 264 Fed. 842; National Prohibition Cases, supra.

The facts in this case are wholly different from the facts in the cases of United States ex rel. Soeder v. Crossen (D. C.) 264 Fed. 459, and Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. —, 10 A. L. R. 1548, decided by the Supreme Court November 8, 1920. In the case of Soeder v. Crossen, above cited, Mrs. Soeder and her husband occupied a part of the building in which the intoxicating liquors were kept as their private dwelling only. In another part of the same building, wholly separate and apart from their dwelling, some other person, in occupation of that part, conducted a business. Upon this state of facts the court properly held that the relator came within the exception in section 33 making it lawful "to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only." The correctness of this holding further appears by the provision of section 25 of this act which provides:

"The term 'private dwelling' shall be construed to include the room or rooms used and occupied, not transiently, but solely as a residence in an apartment house, hotel, or boarding house."

Necessarily, therefore, the exception applies to the building or to the part of a building that is used and occupied by the person who is in possession of such intoxicating liquor. If all of the building or the part exclusively occupied by such person is used as a dwelling only, then such possession is not unlawful, although other persons may conduct in some other part of the same building, a store, shop, saloon, restaurant, hotel, or boarding house.

In the case of Street v. Deposit Co., supra, the intoxicating liquors were stored in a warehouse for the private use of the owner. The Supreme Court held that:

"Assuming that the unexplained presence of the liquors in the company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admission) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing, or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful."

In the case at bar the defendant was not using the building as a private dwelling only, but also conducted in the same building, in a room connected with the dwelling part and the basement, a restaurant, soft drink, and cigar business. This room was the same room in which he had theretofore conducted a saloon, and it still contained all the paraphernalia formerly used by him in the saloon business.

The fact that the defendant below had lawfully acquired this intoxi-

cating liquor prior to the time that the Eighteenth Amendment went into effect is of no importance. In the case of Ruppert v. Caffey, supra, the Supreme Court held that "the fact that the above-cited provision of the National Prohibition Act entails peculiar hardship and loss to owners of breweries and manufactured beer by becoming effective immediately upon its passage, does not render it arbitrary and unreasonable," and does "not amount to a taking of non-intoxicating beer previously acquired, for which compensation must be made." In the National Prohibition Cases it was held that—

"That power may be exerted against the disposal for beverage purposes of liquors manufactured before the amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced."

[6] If it were conceded, as contended by counsel for plaintiff in error, that the provision in section 3 that the act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented, is in excess of legislative power, that would by no means require a court to hold that the entire act is unconstitutional. That provision is but an inconsequential part of the entire act. Therefore, if, in the opinion of the court, Congress has no power to direct that an act penal in its nature shall be liberally construed, the advice will be wholly disregarded, and the essential parts of the statute, which clearly would have been enacted by Congress, regardless of whether this part is or is not constitutional, construed and applied in accordance with the established rules for the construction and application of penal laws.

It is further claimed that the court erred in admitting in evidence the intoxicating liquors found in defendant's building and taken possession of by the officer executing the search warrant. No direct attack was made upon the validity of this search warrant or the proceedings had thereunder, but the objection to this evidence was based upon two grounds: (1) That the act providing for search and seizure specifically states that such proceedings may be had only in cases in which a felony is involved. (2) That the officer made no return of the service of the search warrant as required by section 13 of that act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼m).

[7] As to the first objection, it is expressly provided by section 25, title 2, of the National Prohibition Act, that "a search warrant may issue as provided in Title XI of Public Law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof." It is clear, therefore, that by this provision a search warrant may issue in manner and form as provided by the Act of June 15, 1917, in aid of the enforcement of the National Prohibition Act. U. S. v. Friedman (D. C.) 267 Fed. 856–858.

[8] The second objection is equally without merit. The failure of the officer to whom a search warrant is directed to make a return thereof cannot invalidate the search or seizure made by authority of such warrant. If the officer neglects to do this, he can be required to make

return of the writ at any later time, or if the person whose premises were searched or whose property was seized is injured in any way by the failure to make this return, the officer failing to make such return is liable to him in damages. The making of the return is merely a ministerial act, to be performed after the warrant is executed.

It is true that there is some confusion as to the officer to whom this search warrant was directed. This is occasioned by the introduction in evidence of various papers which purport to be copies of this search warrant, but the evidence of the United States commissioner that this search warrant was issued directly to the United States marshal and delivered to him, and the further evidence in the case that the deputy United States marshal served the same and delivered a true copy of that writ to the defendant at the time it was executed, would seem to be conclusive of the question, notwithstanding the purported copy in the district attorney's office, would indicate that the warrant was directed to the federal prohibition agent of the United States. In either event, both the deputy United States marshal and the federal prohibition agent were present in person and assisting in the execution of the commands of this warrant, and in the making of this search and seizure, so that, for the purposes of this case, it is wholly immaterial as to which one of these officers the warrant was in fact directed.

There is also some claim made in this court that the affidavit upon which this search warrant was issued is insufficient in law. That objection, however, was not urged in the court below, nor was the court asked to decide upon the validity of this search and seizure, other than as above stated, and upon which grounds were predicated the objections to the introduction in evidence of the intoxicating liquors taken by virtue of this writ.

[9] The plaintiff in error at no time denied having possession of this intoxicating liquor in the building used by him both as a dwelling and for business purposes. Before the search warrant was issued he admitted that he had intoxicating liquors in his possession. Upon the trial of this case he testified that he had this liquor in his possession; that he thought he had a right to keep it in this building, for the reason that he had lawfully acquired it prior to the taking effect of this amendment to the Constitution; and that shortly before that date he applied for information in reference to the disposition thereof to Mr. Weiss, collector of internal revenue for the Eighteenth district, who was then temporarily the prohibition enforcement officer, and continued as such until the National Prohibition Enforcement Act went into effect. In support of this contention he offered Mr. Weiss as a witness, who testified as follows:

"I advised him the best I knew how under the regulations at that time. I told him that I thought that he ought to be very careful, that he ought to take all that he had out of his place of business entirely, and that he ought to keep a complete record of the goods on hand, and ought to place it some place out of reach, in such a safe way that it wouldn't seem as though he had it for sale. I told him that, of course, if there was any of it gone or missed, it would be presumed that it had been used for sale purposes. He told me then at that time that he did have an upstairs room, I think,

that was used for a kitchen, and that he would put it in there, and nail it up, board it up, and take care of it in that way."

The further testimony in this case tends to prove that the plaintiff in error did not accept the advice given him by Mr. Weiss; that he did not put the liquor in an upstairs kitchen, and "nail it up, board it up," as he told Mr. Weiss he would do; that he put 44 cases of whisky in this upstairs kitchen, which connected with a large room or hall, where meetings could be held, or luncheons or drinks could be served; that he wholly failed to "nail it up, or board it up," so as to prevent access from this large room to the kitchen; that another large quantity was placed in the basement, the only access to which was through the business room in which the restaurant and soft drink business was conducted; that a large portion of this whisky in the basement was locked up in a separate compartment in the front end of the cellar; that outside of this enclosure were stacked a number of cases of beer, containing the amount of alcohol permitted prior to the National Prohibition Act; that a number of quart bottles of whisky were found in an old traveling bag, in an icebox located near the stairway leading to the bar room; that some of the bottles in this traveling bag were full, some were partly filled, and one or two were empty; that outside of the "inclosure and in the basement was a considerable quantity of wine in barrels." From this evidence it would appear that this plaintiff in error was keeping this intoxicating liquor, not in accordance with the instructions given him by Mr. Weiss, nor in accordance with his promise to Mr. Weiss, but in direct and positive violation of the letter and the spirit of the National Prohibition Act. Therefore the argument that, because he had sought and followed the advice of Mr. Weiss, he could have had no guilty intent whatever, even if it tended to rebut the presumption that this liquor was not kept for unlawful sale, wholly fails, because not supported by the evidence in this case.

Section 33 provides:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

It is clear from this evidence that plaintiff in error had no legal permit, issued under the provisions of this act, to possess liquor. It is equally clear that the building in which he kept this liquor was not occupied and used by him as his dwelling only, but that, on the contrary, he conducted a restaurant, and in connection therewith sold cigars and soft drinks, in the same building. Had he accepted the advice of Mr. Weiss, or if he had carried out his declared intention of placing this liquor in an upstairs room in the dwelling part of the building, and securely nailed up that room, so that access could not be had thereto from the room in which he was conducting this business, he would nevertheless be guilty of at least such a technical violation of this statute as would place upon him the burden to prove that this liquor was not so kept for the purpose of being sold, given away, or otherwise disposed of in violation of the National Prohibition Act.

The evidence in this case however, tends to show an open, direct, and flagrant violation of the provisions of this act in relation to the possession of intoxicating liquors. The government has also offered two witnesses to prove unlawful sales of intoxicating liquors by this plaintiff in error after the prohibition amendment had gone into full force and effect, and after he had placed this intoxicating liquor where it was found by the officers making the search. Under this state of the proof, the verdict of guilty upon the second count of the indictment is fully sustained by the evidence.

These are the principal assignments of error upon which the plaintiff in error relies for reversal. There are, however, a great number of other assignments of error that it is impossible and unnecessary to discuss in this opinion. It is sufficient to say in reference thereto that we find in this record no error prejudicial to the rights of the plaintiff in error.

The judgment is affirmed.

CENTRAL POWER CO. v. CITY OF KEARNEY.

(Circuit Court of Appeals, Eighth Circuit. July 13, 1921.)

No. 5827.

1. **Electricity ⇐11—Nebraska city cannot make contract fixing rates, so as to abridge power to increase or reduce.**
   Assuming that under Rev. St. Neb. 1913, § 4954, a city is authorized to contract with an electric light and power company concerning the rates to be charged, it cannot make a contract precluding it from increasing or reducing the rates during the life of the contract, in view of section 4955, authorizing cities to regulate such rates and providing that such power shall not be abridged by ordinance, resolution, or contract.

2. **Contracts ⇐10(2)—Electricity ⇐11—Contract fixing rates unenforceable against company for want of mutuality when beyond city's powers.**
   As a contract between a Nebraska city and an electric light and power company, providing for the construction of an electric light and power system and fixing maximum rates to be charged for 25 years, was beyond the city's powers so far as it prohibited changes of rates during the life of the contract, its provisions were unenforceable against the company for want of mutuality, and did not prevent an increase of rates.

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit by the City of Kearney against the Central Power Company. From an order dismissing defendant's counterclaim, and denying a motion to dissolve a temporary restraining order, defendant appeals. Reversed, with directions.

Thomas F. Hamer, of Kearney, Neb., and George A. Lee, of Omaha, Neb. (Warren Pratt, of Kearney, Neb., on the brief), for appellant.

Tibbets, Morey & Fuller, of Hastings, Neb. (Raymond M. Tibbets, of Hastings, Neb., of counsel), amici curiæ.

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

Hector M. Sinclair, of Kearney, Neb. (Edward P. McDermott, of Kearney, Neb., on the brief), for appellee.

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

TRIEBER, District Judge. This is an appeal pursuant to section 129, Judicial Code (Comp. St. § 1121), from a refusal of the court below to dissolve a temporary restraining order, restraining appellant from putting in effect a schedule of rates to be charged and collected by appellant for furnishing electric lighting and power for the city of Kearney, Neb., and the inhabitants thereof, in excess of the maximum rates fixed by a contract of the city with appellant, made on July 9, 1917, and the refusal of the court to grant appellant, on a counterclaim, a temporary injunction restraining appellee from preventing appellant to put in force the schedule increasing the maximum rates set out in the ordinance of the city granting appellant the franchise by the ordinance of July 9, 1917, and accepted by it. The action was originally instituted by appellee in the district court of Buffalo county, state of Nebraska; that court granting a temporary restraining order on an ex parte hearing. On petition of appellant the cause was removed to the District Court of the United States for the District of Nebraska, where an answer and counterclaim were filed by appellant, and motions for a dissolution of the temporary restraining order granted by the state court, and for a temporary injunction against appellee, which motions were by the court denied.

The complaint alleged that an election was held in and by said city on June 19, 1917, empowering the city to grant to appellant for the term of 25 years, the right and privilege of maintaining, constructing, and operating an electric lighting and power system in the city, and to enter into a contract in writing concerning the use of the streets and alleys in said city and of the maximum price or rates to be charged and collected for the furnishing of electric lighting and power for said city and the inhabitants thereof; that pursuant to this authority the city by its mayor and council entered into a contract with appellant on July 9, 1917, by the passage of Ordinance No. 161 on the part of the city, and on the part of appellant by filing in the office of the clerk of said city a written acceptance of the terms and conditions of said ordinance.

The maximum rates provided in the ordinance are set out in the complaint. It is then charged that, although said contract is still in full force and effect, appellant, in violation thereof, has undertaken to make new and higher rates for the same service, and threatens and intends to put them into force and effect, and charge and collect thereunder for lighting and power furnished; that it refuses to be bound by and furnish lighting and power under and in accordance with the contract rates as provided in the contract. The new schedule of rates proposed to be put into effect is set forth and shows a considerably higher rate of charges than provided in the ordinance. It further charges that appellant's plant is the only electric lighting and

power system in said city, and is in general use by its inhabitants, and they are solely dependent upon said system. Then follows the usual prayer for an injunction.

The answer, so far as the allegations therein are material for the determination of the case on this appeal, denies that under the laws of the state of Nebraska, appellee was authorized to enter into any contract for the period of 25 years under fixed and permanent rates.

The counterclaim, omitting the allegations immaterial at this hearing, charges that the fair and reasonable present value of its property devoted to the public service in the generation and distribution of light and power in the city is the sum of $510,880; that at the time said franchise was granted the laws of the state of Nebraska only permitted appellee and other cities of the same size to grant a conditional and limited right and privilege, and not the right, to contract with appellant or any other public service corporation for a stated number of years as to rates to be charged; that the laws of the state limited the authority of cities of that size, and expressly provided that, while such cities had the right to regulate electric rates, such municipalities had no right to abridge this power of regulation; and that for this reason appellee had no power to make any rate contract with appellant.

It is charged that the prices and rates, tentatively fixed by the ordinance and franchise, have never produced an income adequate or sufficient to meet the legitimate operating expenses, depreciation, and taxes of appellant in the operation of its plant in the city of Kearney, and to yield a fair and reasonable return, or any return upon the fair and reasonable value of its property, but that in fact they were at the time, ever since have been, and now are unfair, unreasonable, noncompensatory, and confiscatory; that under the abnormal, unusual, and unprecedented conditions created by the World War the cost of all materials, labor, and supplies entering into the production of electric current, power, and energy furnished by appellant have so greatly increased as to make the schedule of rates in the ordinance set out a losing and confiscatory schedule, and, unless permitted to charge and collect fair and reasonable rates for the service it is furnishing, its property will be confiscated; that appellant has from time to time sought from appellee city an increase of rates, which has been refused, and, unless permitted to increase its rates, it will become bankrupt; that to meet the necessary demands made on it by the city and its inhabitants for an extension of its lines and system that is now and will be necessary will require an additional investment and expenditure of $250,000, but that, owing to the noncompensatory rates now in force, it is impossible to raise this money from the sale of its securities or otherwise.

It is also alleged that the maintenance and operation of the plant have been economical and efficient, but that it is necessary to expend more large sums of money for repairs and additions to maintain that efficiency, by making necessary replacements and betterments, and unless the rates and charges for the current furnished are increased it will be impossible to make these repairs and additions, and

will result in foreclosure of the mortgage on the property and prevent the necessary efficiency in its public functions, and great loss to its stockholders and bondholders; that the legal rate of interest in the state is 7 per cent., and the usual rate of return upon investments in Kearney and adjoining communities is 8 to 10 per cent. per annum. It then sets out the net income for each year since 1917, which, after deducting 7 per cent. for reasonable depreciation, is only 1.7 per cent. per annum, and in some years less than that; that any lesser rates than those sought to be charged in the proposed schedule would be confiscatory as these proposed rates will return only 8 per cent. on the present value of its property used in the operation of its plant in the city of Kearney. It is then alleged that, unless the relief prayed is granted, and it should refuse to charge the existing inadequate and confiscatory rates, that actions against it would be brought for penalties, fines, and civil recoveries, thereby involving it in a multiplicity of actions and litigations.

The statutes of the state of Nebraska applicable are:

Section 4954, Rev. St. 1913: "The mayor and city council shall have power to make contracts with and authorize any person, company or association to erect a gas works. power plant, electric or other light works, heating plant or water works in said city and give such persons, company or association the privilege of furnishing water, lights, power or heat for the streets, lanes, alleys and public places and property of said city and its inhabitants for any length of time not exceeding twenty-five years: Provided, no such contract shall be made or entered into by the mayor and council until the question of granting the contract or privilege shall have been submitted to the electors of the city at a special election called for that purpose or at a general city election, notice of which shall be given by publication in some newspaper published in the city at least thirty days before the date of such election and a majority of the electors voting upon the proposition shall have voted in favor of making the contract or granting such privilege."

Section 4955, Rev. St. 1913: "The mayor and council shall have power to require every individual or private corporation, operating such works or plants subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires or other conduits, with gas, water, power, light or heat, and to supply said city with water for fire protection, and with gas, water, power, light or heat, for other necessary public or private purposes; to regulate and fix the rental rate for water, power, gas, light or heat; to regulate and fix the rents or rates of water, power, gas, electric light or heat; and to regulate and fix the charges for water meters, power meters, gas meters, electric light or heat meters, or other device or means necessary for determining the consumption of water, power, gas, electric light or heat, and these powers shall not be abridged by ordinance, resolution or contract."

Counsel for appellant earnestly argued that this action should be ruled by the late decision of the Supreme Court of the United States in Southern Iowa Electric Co. v. City of Chariton, 255 U. S. ——, 41 Sup. Ct. 400, 65 L. Ed. ——, filed April 11, 1921, and the decisions of the Supreme Court of Iowa, which hold that the laws of Iowa do not authorize municipalities of that state to contract for rates with public utilities corporations. They contend that—

"Although section 4954, Nebraska Rev. St. 1913, empowers the mayor and city council 'to make contracts with and authorize any person, * * * to erect * * * electric light works, * * *' while the Iowa statutes, section 720 of the Iowa Code, does not use the word 'contract' at all, but only

empowers cities to 'grant to individuals or private corporations the authority to erect and maintain such works or plants,' the statutes in both states are in effect identical."

On the other hand, it is claimed by counsel for appellee, that the Iowa rulings are inapplicable to the instant case, owing to this difference in the language of the Nebraska and Iowa statutes.

[1] We do not deem it necessary to determine that question, for, assuming that under the laws of Nebraska cities are authorized to makes contracts for rates to be charged by such corporations, the question is: What is the effect of the provision of section 4955, Rev. Statutes of Nebraska, on such a contract? That section expressly reserves to the city authorities—

"to regulate and fix the rental rate for water, power, gas, light or heat; to regulate and fix the rents or rates of water, power, gas, electric light or heat; and to regulate and fix the charges for water meters, power meters, gas meters, electric light or heat meters * * * and these powers shall not be abridged by ordinance, resolution or contract."

This provision in express terms probihits cities of that state to make a contract with such a public utility corporation, which precludes them thereafter, and during the life of the contract, to change the rates, either by increasing or reducing them, when in the judgment of the mayor or council of the city the interests of the public require it; decreases subject, of course, to the constitutional prohibitions of depriving the corporation of its property, by making the rates noncompensatory or confiscatory.

[2] If only one of the parties to a contract is vested with such a power, can it be said that a contract made under such a statute doesn't lack mutuality? The law is too well settled to require the citation of numerous authorities that a contract, the provisions of which are unilateral is unenforceable for want of mutuality. Robinson v. Iron Railway Co., 135 U. S. 522, 532, 10 Sup. Ct. 907, 34 L. Ed. 276; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 81, 52 C. C. A. 25, 57 L. R. A. 696; A. Santaella & Co. v. Otto F. Lange & Co., 155 Fed. 719, 84 C. C. A. 145; Taber Lumber Co. v. O'Neal, 160 Fed. 596, 87 C. C. A. 498.

In view of the fact that a municipality of the state of Nebraska cannot, under the laws of that state, enter into a contract with an owner of private property used for the public service not to change rates within a time specified, Ordinance No. 161 is not a valid contract, and no more binding on the public service corporation than on the city. No municipality may, in the absence of power granted by the state of its creation, enter into such contracts, and clearly not when the laws of the state expressly prohibit it, as section 4955, Rev. St. Nebraska 1913, does. Under similar laws of the state of Texas it was contended in behalf of a city that—

"Even if no such contract was permissible under the laws of the state, which would bind the city not to lower the rates, nevertheless there was a unilateral contract or concession resulting from the granting of the franchise which bound the railway company to the franchise rate."

But in City of San Antonio v. San Antonio Public Service Co. (opinion filed April 11, 1921) 255 U. S. ——, 41 Sup. Ct. 428, 65 L. Ed. ——, the Supreme Court held the contention untenable, saying:

"But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists, and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Where, therefore, as in the case supposed in the argument, the regulating power of government being wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power."

That decision rules this cause. The court below erred in sustaining the motion of appellee to dismiss appellant's counterclaim and in denying appellant's motion to dissolve the temporary restraining order granted by the state court.

The cause is reversed, with directions to proceed in conformity with this opinion.

HANOVER FIRE INS. CO. v. DALLAVO.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1921.)

No. 3507.

1. **Insurance ⇐146(2)—In absence of waiver contract must be enforced at law as written.**
   In an action at law on an insurance policy, the terms written therein, unless waived either by the parties themselves or some one authorized to make such waiver, must be enforced as written.
2. **Insurance ⇐372—Any provisions of policy may be waived.**
   An insurance company may waive any provisions in a policy for its protection, including even a provision that a waiver must be indorsed on the contract itself.
3. **Insurance ⇐392(1)—Conditions of policies held waived by retention of premiums.**
   Provisions of fire policies that they should be void if a building insured was on ground not owned in fee simple by the insured, or if he was not the unconditional and sole owner of the property insured, or if the subject insured was personal property and was or became incumbered by chattel mortgage, unless otherwise provided by agreement indorsed on the policies, *held* waived where the company long prior to the loss acquired actual knowledge that the building and stock of lumber insured were on land leased by the insured from a railroad company, but retained the premiums and left the policies outstanding.
4. **Insurance ⇐392(1)—Insurer accepting benefits of contract with full knowledge estopped to avoid its burdens.**
   Where the insurer has full knowledge of all the facts in relation to the subject-matter of the contract, and continues to accept all its benefits, it cannot reject its burdens.

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

5. Insurance ⇐152(3)—Statute becomes a part of contract.
A statute prescribing the scope and effect of contracts of insurance and the duties and obligations of the parties is as much a part of contracts, written while it is in force, as though incorporated into them, and such contracts are not affected by its repeal.

6. Witnesses ⇐405(1)—Cross-examiner cannot contradict answers to impeaching questions, raising collateral issue.
While a witness may be asked questions on cross-examination having no relation to the case for the purpose of affecting his credibility, his answers cannot be contradicted by other parol testimony; thus raising a collateral issue.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by John Dallavo against the Hanover Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert E. Plunkett, of Detroit, Mich. (Frederick J. Ward, of Detroit, Mich., on the brief), for plaintiff in error.

Harris E. Thomas, of Lansing, Mich. (Thomas, Shields & Silsbee, of Lansing, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On February 8, 1918, John Dallavo brought action against the Hanover Insurance Company in the circuit court of Ingham county, Mich., to recover upon four separate fire insurance policies. On application of the insurance company this cause was removed to the District Court of the United States for the Eastern District of Michigan, Southern Division. Upon the trial, and at the close of all the evidence, the defendant moved the court to direct a verdict in its favor, which motion was overruled, and the court thereupon directed the jury to return a verdict for the plaintiff for the aggregate amount of the sums named in these several policies of insurance with interest thereon. Judgment was entered upon this verdict. The plaintiff in error seeks a reversal of this judgment upon substantially two grounds of error:

(1) The overruling of its motion for a directed verdict.

(2) Error of the court in the rejection of competent and relevant evidence offered on behalf of the defendant.

There are other assignments of error, but the brief of counsel for plaintiff in error is devoted to the two assignments above stated, and in reference to the other assignments the following statement is made:

"The other assignments of error, 3, 4, and 5, are fully covered in the argument on the first one, as it naturally follows, if we are right in the request for direction of verdict on the grounds of a breach of contract, then a direction of verdict for the plaintiff was in error."

Each of the policies issued by the plaintiff in error is a standard Michigan fire insurance policy, as required by the statutes of that state. Each contains a clause providing that the entire policy shall be void if the subject of insurance is a building on ground not owned by the in-

sured in fee simple, or if the assured was not the unconditional and sole owner of the property insured, or if the subject of insurance be personal property and be or become incumbered by chattel mortgage, unless otherwise provided by agreement indorsed on the policy or added thereto. Each policy also contained the further provision that the entire policy shall be void if the assured concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the assured be not truly stated in said policy, or in case of fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

At the time this insurance was written, and at the time the loss occurred, John Dallavo was operating a retail lumber business at Webberville, Mich. His lumber yard was located on land leased from the Pere Marquette Railroad Company. On this ground he erected an office building and sheds for the storing of lumber and coal.

Some time prior to the date of the second policy of insurance (No. 149) a chattel mortgage to secure the payment of $1,500 was executed and delivered by Dallavo to the Farmers' State Bank of Webberville, Mich., upon this office building and storage sheds, lumber, and other merchandise in the yard. This chattel mortgage continued in force until the loss occurred, but before the loss did occur it was reduced by payment to $500.

The second policy contained this provision:

"Loss, if any, payable to Farmers' State Bank, Webberville, Mich., as their mortgage interest may appear."

The fourth policy (No. 154) contained a similar provision, but nothing appeared either in the first or third policies in reference to this chattel mortgage, and no waiver thereof was indorsed upon either.

Dallavo had been engaged in this lumber business at this place for about three years prior to the date of this loss, during which time this insurance company through its local agent, John Marshall, had written all the insurance carried upon this property by Dallavo. These four policies now in suit were all renewals of expired policies, or additional insurance to cover increased value of stock then on hand. No written application was made by Dallavo for this insurance. The agent, Marshall, does not remember whether Dallavo applied for this insurance or he solicited him to take the same. At all events the agent testified that he knew that these buildings were on leased ground; that he was also cashier of the Farmers' State Bank of Webberville, Mich., and as such cashier had taken from Dallavo a chattel mortgage covering buildings and lumber to secure the payment of $1,500 due to that bank; but he does not remember whether that mortgage was executed and delivered to the bank before or after the first policy of insurance was issued. Under the terms and provisions written into the policies, Marshall had authority, as agent, to waive these conditions both as to the ownership of the ground and the existence of the chattel mortgage, but he further testified that, while he fully knew and understood that

the ground was leased by Dallavo from the railroad company, and that the bank of which he was cashier had a $1,500 chattel mortgage upon this property, he did not know that it was necessary for him to indorse this waiver upon each of these policies; that his purpose in writing into the second policy for $2,500, "Loss, if any, payable to the Farmers' State Bank of Webberville, Mich., as their mortgage interest may appear," and his purpose in writing a similar provision in the fourth policy for $1,000 was solely and only for the protection of the bank; that he considered these two policies amply sufficient for its protection, and therefore wrote no like provision in or made any indorsement upon the other two.

It is therefore clear from the testimony of Marshall that Dallavo made no false or fraudulent representation; that the agent, Marshall was fully advised of Dallavo's lack of title and the existence of this mortgage, and that, with knowledge thereof, it was his intention and purpose to waive these conditions and issue to Dallavo valid insurance to the amount named in each of these policies; that he believed in good faith he had done so, notwithstanding it now appears that he did not indorse this waiver as to the chattel mortgage upon two of these policies and did not indorse any waiver thereon in reference to the ownership of the ground upon which the buildings were situated. It is equally clear that Dallavo was acting in good faith; that he did not understand the necessity of this indorsement upon these policies; and that he relied upon Mr. Marshall as agent of the insurance company to give him valid insurance, for which he paid the price demanded.

The provision in the contract of insurance with reference to the ownership by the insured of the land upon which the buildings that are the subject of the risk are situated, and with reference to chattel mortgages upon personal property, are substantial in their nature. The method by which an agent is required to evidence a waiver of these conditions is formal, and yet, in the absence of a statute to the contrary, the insurance company is clearly entitled to have this provision enforced.

[1] The presumption obtains that parties to a contract fully understand all its provisions. If the contract is obtained by fraud, duress, or mutual mistake, or if by inadvertence it fails to express the true intent, agreement, and purpose of the parties, a court, in a proper action, may order the contract rescinded or reformed, but in an action on the contract the terms written therein, unless waived either by the parties themselves or some one authorized to make such waiver, must be enforced as written. Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140; Northern Assurance Co. v. Building Association, 183 U. S. 308–321, 22 Sup. Ct. 133, 46 L. Ed. 213.

[2] The insurance company may, however, waive any provisions in a policy for its protection, including even the provision that the waiver must be indorsed upon the contract itself. Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Ins. Co. v. Raddin, 120 U. S. 183–196, 7 Sup. Ct. 500, 30 L. Ed. 644; Assurance Co. v. Building Ass'n, 183 U.

S. 308–352, 22 Sup. Ct. 133, 46 L. Ed. 213. If, therefore, this insurance company during the terms covered by these policies, with full knowledge of the facts, separate and apart from the knowledge of the agent, waived these provisions, or by its acts and conduct after it acquired such knowledge has, in good conscience and fair dealing, estopped itself from asserting the failure to comply therewith as a defense to this suit, then the question of the agent's knowledge or authority to waive conditions or the manner in which such waiver must be evidenced wholly disappears from this case.

In the case of Northern Assurance Co. v. Building Assn., supra, the Supreme Court qualified the declaration that "mere knowledge by the agent * * * will not affect the company" with the statement "unless it is affirmatively shown that such knowledge was communicated to the company."

[3] The contention of plaintiff in error that the court erred in overruling its motion for a directed verdict is based solely upon the ground that the knowledge of the local agent that these buildings were on leased property, and that there was a chattel mortgage upon the property insured, does not affect the company or charge it with knowledge of these facts in the absence of a written waiver by such local agent indorsed upon these policies. These contracts are Michigan contracts, and it would appear that the Supreme Court of Michigan has announced a different doctrine. Richards v. Insurance Co., 60 Mich. 420, 27 N. W. 586; Bryant v. Ins. Co., 174 Mich. 102, 140 N. W. 482; Dahrooge v. Ins. Co., 175 Mich. 248, 141 N. W. 572; Gristock v. Ins. Co., 87 Mich. 428, 49 N. W. 634; Brunswick-Balke-Collender Co. v. Ins. Co., 142 Mich. 29, 105 N. W. 76; Hall v. Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497.

These cases were followed by the case of Gordon v. Ins. Co., 197 Mich. 226, 163 N. W. 956, L. R. A. 1918E, 402, in which it was held that the standard policy act of Michigan of 1905 (Pub. Acts 1905, No. 277) was designed to curb the right of insurance companies to declare forfeitures, and not to make them more favorable. However, the federal rule as announced by the Supreme Court, in the case of Northern Assurance Co. v. Building Ass'n, supra, would seem to support fully the claim of plaintiff in error, although the contract there under consideration was a Nebraska contract, and it does not appear that the Supreme Court of Nebraska had established any different rule in relation to such contracts. However that may be, the argument of counsel for plaintiff in error wholly overlooks the evidence in this case tending to show affirmatively that the Hanover Fire Insurance Company acquired direct and positive knowledge of the existence of this chattel mortgage, and that Dallavo was not the sole and unconditional owner of the property insured, long prior to the date of the loss, and, having such knowledge, not only retained the unearned premium and continued such policies apparently in full force, but also did such affirmative acts in relation to these policies that in good conscience and fair dealing it must now be estopped from asserting the failure to comply with these conditions as a defense to this suit.

The second and fourth policies by the written provision contained therein brought home to the insurance company the knowledge of the existence of this mortgage, and that Dallavo was not the sole and unconditional owner of the property insured. It waived these conditions as to these two policies, and did this with the full knowledge that it then had two outstanding policies covering the same property. There is also further evidence in this record tending to prove the knowledge of the insurance company that these buildings were on leased ground. Mr. Allshouse, the state agent of the company, in the course of his investigation of the different outstanding risks in the state was fully advised that Dallavo was renting this ground from the railroad company for $33 per year. There is no evidence, however, that he communicated this knowledge directly to the company, but, in view of the fact that in the very nature of his employment it was his duty to report to the home office all facts that he may have discovered in relation to its outstanding risks, proof that he had obtained such knowledge would perhaps place the burden upon this company to show that he had not in fact communicated it to his principal.

[4] It is of no importance whether the contract be one of insurance or in relation to some other business transaction. When one of the contracting parties has full knowledge of all the facts in relation to the subject-matter of the contract, and continues to accept all its benefits, he cannot, after having accepted these benefits reject the burden on his part to be performed. In discussing this proposition in the case of Insurance Co. v. Raddin, 120 U. S. 183–196, 7 Sup. Ct. 500, 506 (30 L. Ed. 644), Mr. Justice Gray said:

"To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens"—citing Insurance Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387; Wing v. Harvey, 5 D., M. & G. 265; Frost v. Saratoga Ins. Co., 5 Denio (N. Y.) 154, 49 Am. Dec. 234; Bevin v. Connecticut Ins. Co., 23 Conn. 244; Insurance Co. v. Slockbower, 26 Pa. 199; Viele v. Germania Ins. Co., 26 Iowa, 9, 96 Am. Dec. 83; Hodsdon v. Guardian Ins. Co., 97 Mass. 144, 93 Am. Dec. 73.

This same proposition was declared and applied in the cases of Montano v. Mutual Aid Society, 72 Misc. Rep. 515, 130 N. Y. Supp. 455; Insurance Co. v. Forlines, 94 Ark. 227, 126 S. W. 719; Insurance Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785; Black v. Ins. Co., 171 Iowa, 309, 152 N. W. 7; Allen v. Insurance Co., 14 Idaho, 728, 95 Pac. 829; and Bank v. Ins. Co., 83 Ohio St. 309, 94 N. E. 834.

The underlying principle upon which the statement above quoted from Insurance Co. v. Raddin, supra, is based is fully discussed and clearly expressed by Mr. Justice Miller in the case of Insurance Co. v. Wilkinson, 80 U. S. (13 Wall.) 222, at page 233, 20 L. Ed. 617, at page 622, and it is there declared that this principle has been applied to this precise class of cases.

In the instant case, while the insurance company did not actually accept payment of premium for these policies after the time the evidence tends to show that it acquired knowledge of the existence of the

outstanding mortgage, nevertheless Dallavo had paid to the insurance company a premium covering the entire periods named in these policies. The retention of that unearned premium with full knowledge of the facts was and is equivalent to the acceptance of payment, day by day, during the time it retained such unearned premiums, which premiums it was entitled to retain only upon the theory that the policies were valid.

While it is true that the provision in the second and fourth policy does not specifically state that the mortgage is a chattel mortgage, yet it is clear that sufficient appears therein to charge the company with notice of this particular mortgage and with knowledge of whatever facts in relation to Dallavo's title to this property this mortgage would disclose, at least so far as these two policies are concerned. Therefore as to these two policies neither of these defenses can obtain. It was also notice to the insurance company of an outstanding mortgage on the property it had agreed to insure and for which insurance it had accepted and retained the premiums paid by Dallavo. The conduct of the insurance company in issuing these two additional policies with knowledge that the subject-matter of the risk was under mortgage to the Farmers' State Bank, without objection or cancellation of the other policies or the return of the premium paid therefor, was such an affirmative act on its part that it could have had no other effect than to mislead Dallavo into the belief that the first and third policies were valid in so far as these defenses are concerned.

Of far more importance, however, is the evidence of the affirmative act of the insurance company in the issuing under date of June 9, 1917, of form No. 113, containing a blanket clause covering buildings and personal property, to be attached to and made a part of the first, second, and third policies. The insurance company then had full knowledge as to the existence of a mortgage, and also of the fact that by reason of this mortgage Dallavo was not the sole and unconditional owner of this property. This was not only an affirmative act, reaffirming the validity of these three policies as against these conditions, but it was to all intents and purposes a reissuing of these policies as of June 9, 1917, with knowledge of the breach of these conditions and with knowledge that its agent had not indorsed a waiver of these conditions upon two of them.

The affirmative acts of the insurance company in issuing on June 9, 1917, form No. 113, to be attached to the three policies in existence at that time, has application also to the defense offered by the insurance company that the agent failed to indorse upon these policies a waiver of the condition that the insured must be the owner in fee simple of the ground upon which the buildings were situated.

The first policy (No. 147), for $5,000, and the third policy (No. 151), for $1,000, as they were originally written, did not purport to cover the buildings, but only the stock of dressed and rough lumber, lath, shingles, fence posts, cement, etc. Therefore these policies, when they were written, did not cover these buildings, and it was wholly unnecessary for the agent to indorse any waiver thereon in reference to the ownership of the land. The issuing of these forms including the buildings in

the description of the property insured to be attached to these policies was purely voluntary on the part of the insurance company. It does not appear from the evidence that Dallavo asked for any change in these policies, or that in fact he fully understood the nature of the change that had been made in the description of the property insured. It is certain, however, that the policies at that time were not vulnerable to this defense. To permit the company to assert this defense now, based upon its voluntary action in issuing these forms, would be permitting it to take a wholly unfair and unconscionable advantage of the assured.

If, however, the evidence offered on the part of the plaintiff in error tending to prove actual knowledge of the insurance company itself, should be wholly disregarded, nevertheless the trial court did not err in overruling the motion of the defendant for a directed verdict.

[5] At the time all of these policies of insurance were written Act 128 of the Public Acts of 1911 of the state of Michigan provided, among other things, that—

"No policy of insurance shall be declared void * * * for the breach of any condition of the policy, if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, and by reason of such breach of condition."

This act was repealed May 10, 1917 (Pub. Acts 1917, No. 256), but this repealing act did not go into effect until 90 days after the adjournment of the Legislature May 11, 1917, which would be about August 9th of that year.

It is the claim of the insurance company that, this act having been repealed prior to the loss, it therefore has no application to these policies issued before its repeal. When these contracts of insurance were written, this statute of the state entered into them and formed a part thereof, the same as if it had actually been written into the contract. If these provisions had actually been physically written into the contracts, no claim would be made that they should now be disregarded. That the law and not the pen of the scribe wrote these provisions into these policies of insurance does not affect the construction that must be given them.

In the case of Insurance Co. v. Leslie, 47 Ohio St. 409–417, 24 N. E. 1072, 1074, it was held that a statute in relation to insurance policies "molds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability." In Hermany et al. v. Insurance Co., 151 Pa. 17, 24 Atl. 1064, it was held that the provisions of the state statute relating to insurance policies cannot be waived by the insurer. In Ritchey v. Insurance Co., 104 Mo. App. 146, 78 S. W. 341, the court held that statutes "relating to fire insurance become a part of a policy of insurance by implication, as if embodied therein, and all stipulations of the policy must yield to the statute." In the case of Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715, it was held that—

"A statute which prescribes the scope and effect of contracts of insurance, and determines the duties and obligations of the contracting parties, is

as much a part of such contracts as if incorporated into them. Existing laws enter into and become parts of all contracts made under them, and no waiver of the parties nor stipulations by them can change the law."

See, also, White v. Assurance Society, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398.

It necessarily follows that, if this statute entered into these contracts of insurance when written and became a part of them to the full extent as if written therein, the repeal of the statute did not affect the rights of the plaintiffs under the contract, nor can it now affect its construction.

There is no claim here that the loss occurred by reason of such breach of condition. Therefore, under the express terms and provisions of this statute existing at the time the contract was written, and forming a part of the same, the plaintiff is entitled to recover where the insurer has not been injured by such breach or where a loss has not occurred by reason of such breach of condition. Lagden v. Insurance Co., 206 Mich. 341, 172 N. W. 396.

[6] Counsel for the insurance company cross-examined the plaintiff below as to whether or not he had been convicted of a crime in Germany and if he had not escaped from that country without having fully served his sentence for that offense, all of which the plaintiff denied. The defendant thereupon offered as a witness Henrietta Dallavo, a former wife of the plaintiff, to prove that the defendant had falsely testified in his cross-examination in reference to his claimed conviction of an offense in Germany and his subsequent escape. The court excluded her evidence, and this is assigned as error. The matters to which this part of the cross-examination of the plaintiff was directed were purely collateral to the issue in this case. Counsel had the right to ask the witness these questions upon cross-examination solely and only for the purpose of affecting his credibility, but he could not disprove these answers except by the record of conviction, if there is such record; otherwise the jury would be required to determine the preponderance of the evidence in relation to all collateral matters that might be injected into the trial of a suit in this manner, instead of confining its consideration to the real questions in controversy. Jones on Evidence, §§ 839, 840; 1 Greenleaf, Evidence, §§ 375 and 457; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203; Clemens v. Conrad, 19 Mich. 170; Helwig v. Luscowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378; People v. Cutler, 197 Mich. 13, 163 N. W. 493.

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

BRAMLEY v. DILWORTH.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3506.

1. **Trial** ⟸139(1)—**Evidence requiring submission of case to jury.**
A court has no authority to direct a verdict, where on a consideration of all the evidence, and the inferences reasonably and justifiably to be drawn therefrom, a verdict for the opposing party would be sustained.

2. **Municipal corporations** ⟸705(2)—**Duty of driver of automobile to look effectively before entering crossing street.**
It is the duty of the driver of an automobile, before turning into a crossing street, not only to look for cars approaching thereon, but to look in such an intelligent and careful manner as will enable him to see the things which a person, in the exercise of ordinary care and caution, for his own safety and the safety of others, would have seen under like circumstances.

3. **Municipal corporations** ⟸705(2)—**Construction of ordinance regulating vehicle traffic at crossings.**
Provision of a city ordinance that vehicles on main thoroughfares going in a general east and west direction shall have the right of way, as applied to automobiles, means only that, when two cars are approaching a street intersection, one on the main thoroughfare and the other on a crossing street, the latter shall give way to the other; but if there is no car on the main thoroughfare when one approaches it on an intersecting street, sufficiently near to demand this right of way, such provision has no application. It does not authorize reckless or careless driving on the main thoroughfares, without regard to the safety of crossing cars, and the driver of a car on an intersecting street has a right to assume that cars on the main thoroughfare will be operated in a lawful manner, at lawful speed, and with due care.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action at law by John G. Dilworth, by his next friend, John C. Dilworth, against Matthew F. Bramley. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Boyd, of Cleveland, Ohio (Boyd, Cannon, Brooks & Wickham and Howell, Roberts & Duncan, all of Cleveland, Ohio, on the brief), for plaintiff in error.

S. H. Holding, of Cleveland, Ohio (Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 12th of November, 1919, the defendant in error, John G. Dilworth, a minor, resident of Pennsylvania, by his next friend, John C. Dilworth, commenced an action in the United States District Court Northern District of Ohio, Eastern Division, against the plaintiff in error, Matthew F. Bramley, to recover damages for personal injuries, which injuries he averred in his petition were caused by the negligence of Matthew F. Bramley. The acts of negligence complained of are fully set forth in the petition. Issues were joined by answer and reply, and the cause was tried to a

jury, resulting in a verdict for the plaintiff in the sum of $33,000. Judgment was rendered upon this verdict.

Dilworth, at the time of the accident, was visiting in Cleveland. On the evening of the 15th of April, 1919, with a number of other young men of his acquaintance, he attended a fraternity meeting at the Paisley house, on or near to Edgewater Drive, in the city of Cleveland, Ohio. Edgewater Drive runs east and west and is 28 feet wide from curb to curb. At a point near where the accident occurred there is a street called Harbor View Drive, 24 feet wide, running north from Edgewater Drive, then turning in the shape of a letter "U" and re-entering Edgewater Drive about 500 feet west of the place where the collision occurred. The Paisley house is about one-third of a mile west of the place where the collision occurred.

After the fraternity meeting was over, and about 10:30 p. m., Dilworth, with six other young men, was traveling eastward on Edgewater Drive in a Hudson automobile driven by Leland Ritzman. About the same time Bramley drove a Templar Sedan automobile out of Harbor View Drive at its east point of intersection with Edgewater Drive, crossed Edgewater Drive to the south side, and was proceeding east along that highway. The rear end of his automobile had reached a point about 16 feet east of a point in the south curb of Edgewater Drive directly opposite the east curb line of Harbor View Drive, when the car in which Dilworth was riding, and which was driven by Leland Ritzman, overtook it, and in attempting to pass to the right of it collided either with the spring horn of the frame or the right rear wheel with such force as to break all the glass on the right side and rear of the Bramley car, break the right rear wheel, and force the axle ahead on the right side eight inches, tearing off 4 U-bolts which held the axle to the spring, and also shearing off 8 of the 10 bolts which held the axle housing to the differential housing. It also broke the running board on the right rear side. The left rear wheel of the Hudson car, in which Dilworth was riding, was crushed or crumpled up and completely destroyed, and the rear fender was broken. The force of the collision caused Dilworth to be thrown to the top or the side of the Hudson car, by reason of which he sustained severe injuries.

The petition avers that Bramley was guilty of negligence in attempting to cross Edgewater Drive without giving notice or warning by horn or otherwise, and in driving in a careless manner and at a negligent rate of speed, and without looking to the west along Edgewater Drive to ascertain before turning into that drive whether an automobile was moving easterly thereon; that, on the contrary, he suddenly and quickly attempted to cross Edgewater Drive and proceed in an easterly direction along the same; that at that time Edgewater Drive was paved with asphalt and was wet and slippery; that the condition of the pavement was such that an automobile turning into the drive was liable to skid unless driven slowly and carefully, all of which Bramley then and there well knew. It is further averred in the petition that Bramley, in driving over and across Edgewater Drive, violated paragraphs 1, 6, 12, 13, and 14 of section 1341 and also section 1343a of the Ordinances of the City of Cleveland.

The answer denied these averments of negligence on the part of Bramley, denied that the plaintiff was injured as a direct and proximate result of any negligence or carelessness on the part of the defendant, and averred that defendant was driving properly with due regard to his own safety and the safety of others; that the plaintiff was injured solely as a result of the negligent, terrific, unlawful, and highly dangerous rate of speed at which the Hudson car, in which Dilworth was riding, was being driven by Ritzman, in total disregard of the safety of defendant and all others upon the highway and of the occupants of said car. The reply denied the allegations of the answer which did not admit the averments in the petition.

Section 1343a of the Ordinances of the City of Cleveland prohibits the driving of an automobile or other vehicle recklessly or negligently, or at a rate of speed or in a manner so as to endanger or to be likely to endanger the life or limb or property of any person, and further provides that a rate of speed exceeding 15 miles per hour shall constitute prima facie evidence of a violation of this ordinance, and that a rate of speed exceeding 20 miles per hour shall be conclusive as to its violation.

Paragraph 14 of section 1341 provides, among other things, that no vehicles shall cross any main thoroughfare or make any turn thereon at a greater speed than one-half of the legal speed limit upon such thoroughfare, and that in all other cases vehicles going in a general east and west direction shall have the right of way. The provisions of paragraphs 12 and 13 are substantially the same as to right of way.

The plaintiff in error seeks a reversal of this judgment upon the grounds:

(1) The evidence is insufficient to support the verdict and judgment.

(2) The court erred in its charge to the jury.

(3) Error of the court in permitting the witness Ritzman, the driver of the Hudson car, to testify that he had the right of way, and knew he had the right of way.

(4) The court erred in permitting the witness Scribner to testify that in his opinion the Bramley car skidded.

While under the facts of this case the negligence of the driver of the Hudson car cannot be imputed to the plaintiff in error, nevertheless the manner in which this car was operated, at and immediately prior to the time of the accident, is of vital importance in determining the real cause of this accident.

The witnesses for the defendant placed the speed at which the Hudson car was traveling eastward on Harbor View Drive at 40 or 45 miles an hour. The young men riding in that car testified that it was traveling about 20 or 25 miles an hour, but further stated that it was traveling so fast that because of the condition of the street the driver could not apply the brakes and stop the car within a reasonable distance. There are, however, some other facts in this case that perhaps demonstrate with greater certainty the speed at which this Hudson car was traveling than the opinion of witnesses who saw it or were riding in it. The driver of this car, realizing that there was not suffi-

cient room between the Bramley car and the curb to permit his car to pass, ran the right wheels of the Hudson car over the south curb. These wheels cut into the soft clay on the outside of the curb, cutting a gutter therein 10 to 14 inches wide and from 6 to 12 inches deep in places, and about 35 feet in length to where the car returned to the street. The car, while traveling in this course and under these conditions, came in contact with and completely tore out of the ground a cedar post which was standing just inside the curb, 8 feet long, 6 to 8 inches in diameter, and sunken in the ground from 2 to 2½ feet.

There is some conflict in the evidence as to the distance the Hudson car ran with a crushed left rear wheel and its two right wheels in the soft earth. The evidence offered by the plaintiff tends to prove that it stopped after it had passed the Bramley car a short distance; the defendant's evidence tends to prove that it did not stop until it had run the entire length shown by the ruts in which the wheels traveled until it passed back into the street. While the attending facts and circumstances would indicate that the Hudson car must have been carried by the velocity with which it was moving, in connection with its own power, the entire distance traveled by it until it reentered the paved street, instead of being moved there by its own power only, after it had once stopped, yet whether that be so or not is of little importance. It affirmatively appears from the plaintiff's evidence that this car traveled a substantial distance with two wheels deeply imbedded in the soft earth and its left hind wheel crushed and useless. The force with which it struck the Bramley car has already been described.

The driver of the Hudson car testified he was traveling at about 20 miles an hour, yet under the provisions of section 1343a of the Ordinances of the City of Cleveland, a rate of speed exceeding fifteen miles an hour under any conditions is prima facie evidence, and a rate of speed exceeding 20 miles an hour conclusive evidence of the violation of the provisions of this ordinance, so that if the testimony of Ritzman as to the speed at which he was driving is accepted as true, in view of the wet, slippery, and dangerous condition of this street at this time, 20 miles an hour would certainly constitute a violation of the provisions of this ordinance.

Ritzman also testified that he had his car under control. By this he must have meant that he had it under control so far as guiding its direction was concerned, for he also says that at the rate he was traveling, and the wet and slippery condition of the street, that if he had used his brakes the car would have skidded against the Bramley car. Therefore he had not full control of the speed of his car at the time he first saw the Bramley car, and which he says was then about 45 feet away from him. On the contrary, the important safety appliances of brakes provided upon all cars for the purpose of checking and controlling the speed were wholly useless to him at the rate of speed that he was then traveling, and his testimony discloses that he fully knew that fact. The situation is not different, so far as he is concerned, than if he had voluntarily and with knowledge of the fact driven a car at this rate of speed at this street intersection that was not equipped

with either emergency brakes or any other brakes whatever. There is other evidence on the part of the plaintiff tending to prove that the Hudson car was traveling 20 to 25 miles an hour.

While all physical facts in this case tend strongly to corroborate the defendant's witnesses that the car was traveling at a much higher rate of speed than even 25 miles an hour, nevertheless this court has nothing to do with the weight of the evidence, and for the purpose of this review must accept the evidence most favorable to the plaintiff's contention; but that evidence, taken in connection with the admitted facts in the case, and construed in connection with the Ordinances of the City of Cleveland, clearly establish that the Hudson car, at and immediately prior to the time of the collision, was being operated at a negligent and highly dangerous rate of speed, in violation of the provisions of the ordinances of Cleveland, and this negligence in driving this car at an excessive and dangerous rate of speed is aggravated by the fact that at the rate of speed the car was moving, taken in connection with the wet, slippery, and dangerous condition of the surface of the street, the brakes were useless as a means to control that speed. However, the negligence of the driver of the Hudson car is not imputable to Dilworth. The evidence in relation to Ritzman's negligence is important only in enabling the jury to determine the real cause of the accident. Regardless of the negligent operation of the Hudson car, if Bramley was guilty of negligence in driving upon and across this street and his negligence contributed to the accident and the consequent injury to the plaintiff, the plaintiff is entitled to recover in this action.

From the defendant's evidence it appears that Bramley had driven his car south on Harbor View Road to its east intersection with Edgewater Drive and there came to at least a momentary stop; that he then started directly across Edgewater Drive to the south side, where he turned east. Bramley testified that when he started upon Edgewater Drive he looked to the west, but did not see the Hudson car; that when he got about the middle of the street he saw the lights of this car 500 or 600 feet to the west of him. The witnesses that were riding in the automobile that was following, and but a short distance behind, the Bramley car on Harbor View Drive, saw the lights of the Hudson car when they reached the north line of Edgewater Drive. These witnesses testified that the car was 300 or 400 feet to the west of this street intersection when they first saw it; that Bramley's car was then crossing Edgewater Drive; that the Hudson car was coming east at the rate of 40 or 45 miles an hour. Bramley further testified that he started his car in low gear, and is not certain whether he had thrown it into second gear or not before the collision occurred; that he was traveling not to exceed 5 miles an hour. It also appears from the evidence that the distance from the place where he stopped his car to the point of the collision did not exceed 44 feet, including the width of the street, 28 feet, and the 16 feet that he had driven eastward on Edgewater Drive, from which fact it is insisted that Bramley's car could not have attained any great rate of speed. In this respect he is corroborated by other witnesses, who testified that

his car was not going much faster than a fast walk, from 3 to 5 miles an hour. One witness for the plaintiff, however, who was riding in the Hudson car, and who saw the side of the Bramley car for a moment only through the small "clear space" in the windshield, testified that in his opinion it was traveling at the rate of 10 miles per hour. Practically all of the witnesses for the plaintiff testified that the Bramley car, when they first saw it crossing Edgewater Drive, was not to exceed 45 feet away from the Hudson car. Some of the witnesses estimate the distance at even much less than that.

[1] Upon this state of the proof the court did not err in overruling the motion of the defendant for a directed verdict. A court has no authority to direct a verdict, where upon a consideration of all the evidence, and the inferences reasonably and justifiably to be drawn therefrom, it appears that under the law such facts and inferences will sustain a verdict for the opposing party. Standard Life & Accident Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116. The reverse of this proposition is well stated in the case of Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, in this language:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant"

—citing in support of this proposition Pleasants v. Fant, 89 U. S. 116, 22 L. Ed. 780; Herbert v. Butler, 97 U. S. 319, 24 L. Ed. 958; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840.

[2] It is clear that if the defendant drove upon and across Edgewater Drive, without looking to the east or to the west for the purpose of determining whether a car approaching from either direction was so near that there would be danger of a collision, he would be guilty of actionable negligence. While it is true that Bramley testified that he did look to the west, and that he saw no car approaching when he first entered upon Edgewater Drive, nevertheless, if the Hudson car, equipped with two bright headlights was then so near this street intersection as the plaintiff's witnesses say it was, in the very nature of things he would have seen that car approaching. He was not only required to look, but he must look in such an intelligent and careful manner as will enable him to see the things which a person in the exercise of ordinary care and caution, for his own safety and the safety of others, would have seen under like circumstances. Railway Co. v. Elliott, 28 Ohio St. 340–352; Spencer v. Railroad, 29 Iowa, 55; Railroad Co. v. McKean, 40 Ill. 218.

The claim of the plaintiff in error that the physical facts in this case wholly disprove the evidence offered on behalf of the plaintiff as to the location of this Hudson car when Bramley drove upon Edgewater Drive is not tenable. These facts affect only the question of the weight of the evidence. While they are persuasive they are not conclusive upon that question. Undoubtedly they tend strongly to cor-

roborate the testimony offered on behalf of the defendant as to the location of the Hudson car at that time; nevertheless there is a direct and positive conflict in the oral evidence in this respect, and therefore the question was one for the jury.

[3] It is insisted upon the part of the plaintiff in error that the court erred in its charge to the jury in reference to the right of way. Upon this subject the court charged as follows:

"When you go into the question, to be enlightened by the evidence, whether the defendant was careless, you must take into consideration all the circumstances that attended that particular incident—the weather, the kind of car he was in, the fact that he was coming from a highway that had in some measure a subordinate relation to the other—for, technically, the right of way was with the vehicle on the main drive."

After the charge the counsel for defendant excepted to this portion of it, and thereupon the court further charged the jury in the following language:

"Now, when the court spoke to you about the right of way being technically in the user of the main highway, it simply meant that this was one of the incidents of the situation which Mr. Bramley, coming from a subordinate highway, was to have in mind. By no means does that mean that the party using the main highway had a right to rely upon the road being absolutely clear; nor by no means does it mean that any extraordinary precaution on the part of Mr. Bramley should be observed in coming in there. It is merely one of the incidents of the situation."

Counsel for plaintiff in error insist that this modification of the charge is equally prejudicial and does not cure the error complained of. The charge is based on paragraphs 12, 13, and 14 of section 1341 of the Ordinances of the City of Cleveland, which paragraphs provide in substance that vehicles going on main thoroughfares running in a general east and west direction shall have the right of way over those going on intersecting main thoroughfares. The right of way within the meaning of these paragraphs of this ordinance is a relative right; that is to say, that the application of this ordinance depends entirely upon the facts of each particular case. The ordinance means that when two vehicles are approaching a street intersection, one on the main thoroughfare and the other on the intersecting street, that the one on the intersecting street must give way to the one on the main thoroughfare; but, if there is no car on the main thoroughfare sufficiently near to demand this right of way, then the ordinance has no application whatever, and has nothing to do with the case. In other words, a car driven on an intersecting street, seeing a car approaching at such a distance that it may turn in safety upon the main thoroughfare, is not compelled to stop and wait until the distant car has reached and passed the point of intersection; nor does this ordinance relieve the driver upon the main thoroughfare from the broad requirements of section 1343a, prohibiting the operation of an automobile or vehicle upon any public highway in the city of Cleveland recklessly or negligently, or at a rate of speed or in a manner so as to endanger or to be likely to endanger the life or limb or property of any person. The driver of a car on an intersecting street, when turning his car into a main thoroughfare, has the right to presume that the driver of an

approaching car on the main thoroughfare is operating his car at a lawful speed and with due care and that such car and all its safety appliances and equipments are fully under the control of the driver. If the Hudson car was in fact 300 feet distant from this street intersection at the time Bramley turned into it, his action would not be negligent, and the ordinance as to right of way would have no application whatever.

The court instructed the jury that the street from which Bramley drove his car onto Edgewater Drive "had in some measure a subordinate relation to the other—for, technically, the right of way was with the vehicle on the main drive." In its modification of this instruction the court stated that what he had said in reference to the vehicles on the main drive having technically the right of way "simply meant that this was one of the incidents of the situation which Mr. Bramley, coming from a subordinate highway, was to have in mind." Taking this charge in connection with the fact that Ritzman, the driver of the Hudson car, was permitted to testify over the objection of the defendant that "I knew I had the right of way, through my experience, knowing what is the right of way and what is not," the jury would naturally interpret the charge as meaning that Ritzman had the right of way, technically at least, under any and all circumstances, regardless of the distance his car may have been from the street intersection at the time Bramley turned upon Edgewater Drive.

The jury should have been instructed, in connection with the charge as given and the modification thereof, that if it found from the evidence offered on the part of the defendant that the Hudson car was so far west of this intersection when Bramley drove upon the main highway that there could be no probability of collision if the Hudson car was operated at a lawful rate of speed, in a lawful manner, in conformity to section 1343a of the Ordinances of the City of Cleveland, that then and in that event the Hudson car did not have the right of way technically or otherwise, and that under such a state of facts this provision in the ordinances of Cleveland in reference to right of way would have no application whatever. This charge fails to take into consideration the evidence offered on behalf of the defendant in reference to the distance the Hudson car was west of this street intersection when Bramley drove upon the main thoroughfare. It also fails to take into account that the provisions of the city ordinances in reference to right of way has no application where the car approaching upon the main highway is at such a distance from the street intersection that it cannot delay and obstruct traffic by demanding such right of way.

The charge as given, without this modification and explanation by the court as to the application or nonapplication of these ordinances to the facts as found by the jury, was undoubtedly prejudicial to the plaintiff in error. The conflict in the evidence in relation to the distance of the Hudson car from this street intersection when Bramley drove upon Edgewater Drive was so sharply drawn and so vital to a correct determination of the results in this case that it was essential that the jury should be fully advised of the scope and effect of this

ordinance and the state of facts under which its provisions would apply. The prejudicial effect of this charge is seriously aggravated by the evidence of Ritzman, under the sanction of the court, that he knew he had the right of way, for whether or not he had such right of way was not for him to decide. He might have believed that he had the right of way when he was a mile distant from this street intersection, yet under the terms of this ordinance he had the right of way at street intersections only where the situation was such that one of these cars must give way to the other and both could not use it with safety. Even then, under the terms and provisions of section 1343a of the city ordinances, he would be required, in asserting his right thereto, to exercise reasonable care so as not to endanger the life or limb or property of another.

Upon the question of whether the Bramley car skidded or the Ritzman car skidded, there is also a serious conflict in the evidence. The plaintiff in error insists that the trial court erred in permitting the witness Scribner to testify, on behalf of the defendant, that in his opinion the Bramley car skidded. The jury was fully informed by the evidence as to all the facts and circumstances in relation to this entire transaction. It does not appear from this evidence that Scribner was in any better situation to determine that question than the jury itself, and therefore his evidence in that respect should have been rejected. However, it does not appear that this error was prejudicial, but we refer to it only that it may be avoided upon a retrial of this case.

For the reasons above stated, this judgment is reversed, and the cause is remanded to the District Court, for further proceedings and a new trial in accordance with this opinion.

E. H. TAYLOR, JR., & SONS v. JULIUS LEVIN CO.

JULIUS LEVIN CO. v. E. H. TAYLOR, JR., & SONS.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

Nos. 3487, 3488, 3502.

1. Principal and agent ⇐33—Party held justified in terminating contract as to executory part, but not as to part executed.

Plaintiff, manufacturer of a well-known brand of whisky, entered into a contract with defendant, a dealer in San Francisco, by which defendant was made distributing agent for the Pacific Coast, with the exclusive right, so far as plaintiff could give it, to sell in California and Nevada; also under the contract defendant bought each year so much of that year's crop of whisky as it was estimated its trade would require, giving its notes therefor, which, with the warehouse receipts attached, were discounted by plaintiff in banks and carried, with renewals, until the whisky could be bottled in bond, when it was bottled and shipped to defendant, which then paid the note and tax. Defendant built up a large trade, and the arrangement was profitable to both parties; but after a number of years defendant was charged with many and serious violations of the internal revenue laws, involving fraud, and its business

was seized by the collector and held for more than a month, when a settlement was made. At that time plaintiff held whisky from four crops, for which defendant had given its notes. This whisky plaintiff sold to another concern, which it substituted for defendant as its Pacific representative. *Held*, that the contract, so far as related to the whisky for which defendant had given notes, was one of executed sale; that the title to such whisky was vested in defendant, and its sale by plaintiff was a conversion; that the executory part of the contract was one of joint adventure in the nature of an agency; and that the bad repute of defendant, resulting from the widely known charges against it, and also fraud practiced against plaintiff, justified its cancellation by plaintiff.

2. **Principal and agent ⟸33—Fraud of agent, though not known to principal at the time, justifies discharge of agent.**
That a principal, at the time of his discharge of an agent, was ignorant of fraud practiced against him by the agent, and did not base the discharge on that ground, does not deprive him of the right to rely on that ground, when the right to discharge is later called in question.

3. **Equity ⟸65(1)—Rule of "clean hands" applicable to counterclaim.**
The rule of "clean hands" is applicable to an independent counterclaim, not related to complainant's cause of action, pleaded by defendant in an equity suit under equity rule 30.

4. **Principal and agent ⟸41—Measure of damages for conversion considered.**
Where plaintiff, manufacturer of a particular brand of whisky, on cancellation of a contract giving defendant exclusive agency for sale of that whisky in certain territory, converted a quantity of the whisky in its possession, which it had previously sold to defendant under the contract, and sold the same to another, which it substituted as its agent in the same territory, the profit which defendant could have made if the whisky had been delivered from its sale in competition with the new agent, *held* too uncertain and speculative to be adopted as the measure of damages for the conversion, and, it not appearing that defendant could have bought the same quantity of the same whisky in the market, the difference between the price to defendant and that received by plaintiff *held* the best available measure of damage.

5. **Damages ⟸40(1)—Not measured by speculative profits.**
If profits are inherently too speculative to furnish a measure of damages, the fact that they happen to have materialized before the trial does not change the rule.

Appeals from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in Equity by E. H. Taylor, Jr., & Sons, a corporation, against the Julius Levin Company. From the decree, both parties appeal. Modified and affirmed.

In 1911, E. H. Taylor, Jr., & Sons, a Kentucky corporation, was a distiller of the brand of whisky known as "Old Taylor." The Julius Levin Company, a California corporation, was a wholesaler of whiskies in the Pacific Coast territory. The parties are hereinafter spoken of respectively as Taylor and Levin, and as if individuals. In January, 1911, the two entered into a contract, largely expressed in letters, but in parts to be inferred from the circumstances and their course of business thereunder. It was to the effect that Levin would undertake the wholesale sale and distribution of Old Taylor in the Pacific Coast territory; that Levin should have the exclusive so-called agency and right of purchase of that whisky in California and Nevada; that the expenses of advertising and promotion of the business should be, to some extent, on joint account; that, with the production of each annual crop of whisky by the distiller, Levin would estimate his future needs. and would

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

buy from Taylor, at the current agreed price, the estimated amount, paying for the same with his six months notes bearing 6 per. cent. interest; that Taylor should carry this whisky in his bonded warehouse until it became of bottling age—i. e., for four years—and would issue a warehouse receipt to be attached to the note as collateral; that during this period Levin should renew his notes every six months and pay interest, and pay insurance and storage charges; that Taylor would indorse these original and renewed notes, and procure them to be discounted and carried in some bank; that at the expiration of the four years, Levin would pay the notes, Taylor would bottle the whisky, and ship it to Levin, and would advance taxes, and give Levin 60 or 90 days credit for the taxes and bottling charges. Under this contract, business was carried on with fair satisfaction to each party, until February, 1917. At that date, Taylor was thus warehousing for Levin, and, of the variously maturing crops, a total of 7,150 barrels, represented by warehouse receipts attached to Levin's current notes, which notes aggregated about $193,000 (this is in addition to some smaller lots hereafter mentioned). For the interest, storage, and insurance items, which had accumulated against these 7,150 barrels, Levin had advanced and paid to Taylor a total of about $27,000. The Pacific Coast business in Old Taylor had grown and was growing very rapidly, and the contract was apparently very valuable to both parties. No term for its existence had been agreed upon, but it was clearly the reasonable implication that it should continue, as to the whisky thus purchased and paid for, until the arrival of the bottling and delivery period upon the last crop purchased.

On February 8, 1917, the San Francisco establishment of Levin was seized by the collector of internal revenue for several alleged violations of the internal revenue laws. It remained closed and in the possession of the collector, and business was practically suspended until about March 9th, at which time Levin succeeded in settling, by compromise, the alleged violations of law, and the establishment was returned, and Levin was in a position to resume business. In the meantime, and by a series of transactions ending March 11, Taylor had definitely decided to sever all relations with Levin, had paid up and taken over all the outstanding Levin paper at the banks, removed the attached warehouse certificates, sold the 7,150 barrels to Sherwood, another wholesaler of San Francisco, taken Sherwood's notes for the purchase price under a similar arrangement, and attached thereto as collateral the warehouse receipts. This Sherwood paper he then discounted in various banks.

Levin consistently refused to acquiesce in this cancellation, but, as each note became due, tendered the interest and a renewal, if it was renewable, and, if it was for whisky then of bottling age, tendered payment in full. All tenders were refused. In August, 1917, Taylor brought, in the court below, an action asking for an accounting for damages suffered through Levin's alleged infringement of Taylor's proprietary trade-mark and label rights in the Pacific territory. Levin appeared in the action and filed a counterclaim, asking general damages for the difference between the contract price and the market price upon each crop purchase at the date when it was to be bottled and delivered, and asking special damages for the destruction of his business. There was a reference to a master who made an elaborate report, covering the whole period down to November, 1919. It was found that there had been no infringement by Levin of any trade-mark or label rights, that Taylor had broken the contract, and that Levin had suffered damages assessed by the master at $183,000, in addition to the $27,000 advances paid by Levin. This report was confirmed by the District Court, and both parties appeal. Levin insists that, upon the facts found by the master, and additional liability clearly appearing, his damages should be assessed at about $960,000; Taylor insists that there should be no recovery, excepting for the $27,000, from the award for which he took no appeal.

Wm. W. Crawford, of Louisville, Ky. (Humphrey, Crawford & Middleton, of Louisville, Ky., and Hazelrigg & Hazelrigg and E. C. O'Rear, all of Frankfort, Ky., on the brief), for plaintiff.

Wm. Marshall Bullitt, of Louisville, Ky. (Leo T. Wolford, of Louisville, Ky., on the brief), for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] From the beginning of the controversy, Taylor contended that the contract with Levin was substantially one of agency, while Levin has insisted that the relations between them were those of vendor and vendee. It seems to have been thought that one or the other label must be applied, and that, when the contract had been thus classified, the legal rules applicable to the rejected theory would be eliminated from any application. We do not thus view the situation. We are content, so far as concerns the title to the whisky for which notes had been given, to accept and approve the findings below to the effect that this whisky had been set aside, appropriated, and paid for by the giving of the notes, and had become the absolute property of Levin, subject to the pledge evidenced by the warehouse receipts to secure the unpaid purchase price. In this respect, there was no agency; but this covers only part of the contract relations. The sharing of the Levin advertising expenses, the arrangement by which Taylor not only would sell to no one else in the Levin Territory, but would, as far as possible, compel all Eastern purchasers or jobbers of Old Taylor to keep out of it, the plan by which they used their joint credit to finance the deals over a continuing four-year period—all these elements of the arrangement constantly continued to be executory, and, though they did not necessarily evidence an agency in the strict sense of that term, they did show that the parties were engaged in a continuing, executory, joint adventure, to which each was to contribute his share for the common good. While their arrangement should continue, Taylor was to be solely dependent for his entire California and Nevada market upon Levin's good-faith efforts to promote the business, upon his integrity and honesty in their mutual dealings, and upon his continued maintenance of his status, which made him reasonably fit to have the exclusive sale of this article, and which would allow his paper to be discounted by the custom of banks. Levin was dependent upon Taylor, not merely to keep the letter of his contract, but to use the utmost good faith in his efforts to keep Old Taylor out of Levin's territory, as well as to maintain the quality of the article, produce it in quantity to satisfy Levin's reasonable demands, permit no unnecessary obstacles in the joint financing, and to co-operate in the effort to make the business successful. The parties themselves did not hesitate to call their relations an agency. Levin says, in his first letter:

"We take pleasure in advising you that we have this day made arrangements with your Mr. May for assuming the agency of Old Taylor whisky. * * * We discussed with him every phase of the agency question. * * * It is understood that we are to have the exclusive agency for the states of California * * * and Nevada. * * * There are not to be any restrictions placed upon our shipping into * * * Utah, Arizona, Wyoming, Montana, Oregon, and Washington. * * * You are to give them [Eastern jobbers] peremptory orders to refrain from shipping into the territory over which we have exclusive control. * * * You will never regret having placed this agency with us."

It is not material whether the name "agency" be adopted or repudiated, and when we hereafter speak of this exclusive agency, we intend the actual relationship, without regard to strict nomenclature; but we cannot doubt that many acts, on the part of Taylor or Levin, which would have justified the other in ending the relationship if it had been more technically of an exclusively agency character, would also justify the termination of the executory portion of this particular joint relationship, and such termination might leave unaffected their respective rights and remedies as to the portions of the contract, which had been so far executed, that entire repudiation would be inappropriate.

Taylor alleges two substantial grounds as a justification for his refusal to continue with Levin in business. One is that the governmental seizure of Levin's business and the developments in that connection created a situation which destroyed Levin's capacity to be a suitable California exclusive representative for Old Taylor under the contract; the other is that Levin had misrepresented and cheated in the matter of their joint advertising and salesman's account. The conclusions below have been that, whatever the disability of Levin to continue properly to represent and handle Old Taylor, this did not justify Taylor in appropriating Levin's whisky. This is conceded; but the results reached disregard the distinction between what was executed and what was executory.

The circumstances as to the seizure should be more fully stated. The actual offenses charged, as recited in the collector's letter, involve violations of eight different sections, some of them carrying possible penitentiary sentences. Taylor made a prompt visit to Washington, in Levin's behalf, and was informed by the Commissioner that Levin seemed to have committed about every offense on the calendar. The matter received great notoriety in the California newspapers. Interviews were published with the Commissioner that he would make no compromise without the approval of the district attorney, and with the district attorney that he should not approve any present compromise, but intended to obtain indictments and prosecute criminally. Prosecutions were also threatened, and thereafter carried on to conviction, under state laws, for adulteration, misbranding, etc. Not all charges of violating revenue laws imply moral turpitude, nor does guilt always derogate from the financial or business standing of the dealer charged; but these charges cover the keeping of false records and the substitution of goods under false labels and markings. Their nature and the sensational publicity they received justified the conclusion which the collector stated to Taylor's agent, May, and which May at once reported, to the effect that, whether Levin obtained a compromise or not, his reputation and trade prestige "are hopelessly impaired, carrying contagion to you and your goods."

It clearly appears that the Levin seizure made his paper unsatisfactory to the various banks which had discounted it. No bank would wish to renew the paper of a suspended business, even with a satisfactory indorser. Doubtless, their dissatisfaction in this case arose because Taylor hastened to tell them the facts; but we see nothing reprehensible on his part in this conduct. On the contrary, he might well think

that good faith to the banks, which had discounted this paper, required that they should have immediate information as to anything affecting the commercial status of either maker or indorser. At any rate, it was clear that, if the suspension of business was to continue, the paper could not be renewed and carried. On February 28, Taylor wired that paper was maturing,[1] and, to be renewed, must have a new maker of satisfactory commercial standing, and asking Levin's intentions. Levin replied by wire that he was arranging to organize a new company with ample capital to take over the account. On the same day, he wrote a letter, which presumptively reached Taylor at a date before the latter irrevocably decided to terminate the agency, though after he had tentatively concluded to do so. At any rate, it reveals the situation about three weeks after the seizure. Extracts are given in the margin.[2] During the latter part of February, Levin stated to May:

[1] From February 2 to February 24, four notes, aggregating $8,278, had matured.

[2] "I am, of necessity, using my father-in-law's stationery, as we are not permitted to enter our offices after the same are locked by the revenue officer. I can assure you that I can hardly find words adequate to express my utmost regret in having placed your company in the present predicament. * * * There is no question but what the collector has made a report black enough to justify him in the drastic action taken against my company. While I admit that I am neither a saint nor a god, nevertheless, my company is innocent of many of the charges preferred against us. * * * Our business increased with such leaps and bounds that it was utterly impossible for us to give personal attention to every detail of our business, and we allowed the bulk goods department to remain under the exclusive supervision of [an employee], in whom we had implicit confidence. * * * The fact of the matter is, I have not checked up the revenue book in the past three years. * * * However, while there have been violations of the regulations of the department, nevertheless we are not entitled to any such treatment as we have received at the hands of the collector. We repeat, there is not a single firm in the United States that has ever encountered such a misfortune for the same violations. * * * In what proved to be the most important details of our business, we were negligent. While the writer feels very much down in the mouth and worried and unnerved, nevertheless he feels that the E. H. Taylor, Jr., & Sons would much prefer to remain in the hands of the Levin boys than make arrangements elsewhere. I infer this, from the loyalty you have displayed in making your fight in Washington in our behalf. * * * We moreover hope that this matter will be settled by compromise within the next four or five days. If, on the other hand, it is turned over to the United States marshal, we have arrangements for bonds to the extent of $200,000, which, of course, will mean indictment. * * * At present, our ideas for the future are to reorganize under another name—probably the Great Western Liquor Company, or something of that order—and liquidate the Julius Levin Company. * * * This would place us in position whereby we could pay cash for all bottling charges and taxes and pay about $150,000 on the goods that you are carrying for us. * * * Our ideas for the future are to handle your account exclusively * * * and direct our efforts solely to furthering your interests. * * * While the writer admits his carelessness, won't you take into consideration our past honesty, loyalty, and integrity to your company? * * * We understand from Mr. May that there are other of our notes falling due which you are not in position to discount. We fully realize the predicament in which you have been placed, and we hope that you will do everything that you possibly can to hold these matters off for at least another 10 or 15 days, by which time we hope to be in position to arrange matters satisfactorily."

"I hope Taylor will treat me right, and all I ask of Taylor is to pay me the interest on [my interest in?] the goods that they are carrying for me, and if I get this amount, I am satisfied, and I am going in the automobile tire business."

Taylor had the right to act upon the situation as it reasonably appeared to him early in March. The future good of the business in Old Taylor, in California and the Pacific territory, was of dominating importance to him. Whether Levin would spend the next year or two in his own office or in the penitentiary was matter of doubt. At the best, his reputation for honesty and reliability had suffered such an injury (by his own fault) that he recognized the impossibility of pursuing the business in the old way and was planning to adopt a new name. His paper could no longer be discounted, unless the situation should change.

In our judgment and for the reasons we have stated, Taylor was amply justified in deciding not to continue the "exclusive agency," but to wind it up (Carpenter Co. v. Norcross, C. C. A. 6, 204 Fed. 537, 540, 123 C. C. A. 63, Ann. Cas. 1916A, 1035); but the exclusive agency was the heart of the matter. The parties would not have contracted to give and to carry the paper for a period of years, and to bottle and ship and to receive at the end of the periods, except as collateral to the exclusive representation. This is obvious enough; as Levin said in his first letter:

"The most important feature of this entire transaction is that we have your assurance that you will instruct the above-mentioned eastern jobbers not to ship any Taylor into our section."

If Taylor, after terminating the exclusive agency, had bottled and tendered to Levin one of the maturing crops, and upon a falling market, Levin would have been prompt to refuse to take and pay for the goods, upon the ground that his exclusive agency was essential; and he would have been plainly right. This illustrates that the right to the exclusive agency and the right and duty to bottle and deliver at the stated future periods are indissoluble; and it follows that Taylor was justified in terminating all executory parts of the contract.

If there were doubt about this conclusion, it would be removed by another consideration. As a part of the general relationship, Levin employed one Pratt as a traveling salesman, to push the sales of Old Taylor, and it was agreed that Taylor would pay one-half his actual salary and expenses. For a period of about two years, Taylor paid every month Levin's bill rendered, in which Pratt's salary and expenses were deliberately padded, so that, during this period, Levin thereby defrauded Taylor out of about $2,300, in addition to some other sums of a similar character. It is true that this fraudulent conduct ceased, so far as the record shows, about 1915, and it is true that the amount involved is small in comparison with the damages here claimed; but the fact of its existence was never discovered until the taking of proofs in this case, and fraud does not become condoned while it is being successfully concealed, nor is the fact that Levin's dishonesty profited him only $2,000 or $3,000 controlling.[3] This sum is not negligible.

[3] It throws light on Levin's real fitness to be trusted with the reputation of Old Taylor in his territory to contrast this now conceded fraud with

[2] If this fraud had been known to Taylor in March, 1917, and had been stated as a ground of his action in terminating the exclusive agency, his right to do so would hardly be questioned; and it was held in this court, as we now hold again, that the principal's ignorance of such misconduct, and failure to allege it at the time of discharge as a ground thereof, do not bar him from relying thereon as a sufficient ground, when the right to discharge is later called in question. Carpenter Co. v. Norcross, supra, 204 Fed. at page 539, 123 C. C. A. 63, Ann. Cas. 1916A, 1035. In the present contract, as to its executory portions, the continuing dependence of each upon the integrity and faithfulness of the other necessarily subjects it to the same rules in the respect now under consideration as are applied to strict contracts of agency.

[3] The matter of these false salary and expense accounts has still another aspect. It is difficult to regard Levin's hands as sufficiently clean to entitle him to receive the aid of a court of equity. Levin's counterclaim stood upon a cause of action quite independent from the trade-mark infringement which was the subject-matter of Taylor's bill, and could only have been permitted by way of a counterclaim in the same suit, by virtue of the enlargement given by equity rule 30 (201 Fed. v, 118 C. C. A. v). As to such a counterclaim, the defendant is the actor, who comes into court and asks the affirmative aid of equity, and we have no doubt that the rule of "clean hands" applies to him. We are inclined to think, also, that under the rule of remoteness, as it has been applied by this court (Cleveland-Cliffs v. Arctic, 261 Fed. 15, 23, 31, 171 C. C. A. 611), Levin's fraudulent accounts are closely enough connected with his demand in this case for an accounting so that they should bar the demand; but it is not necessary to decide this question. Certainly the fact that the overreaching can be compensated in damages, and that such compensation has been made by the decree below, does not prevent a court of equity from protecting itself by the clean-hands rule. Cleveland-Cliffs v. Arctic, supra, 261 Fed. at page 24, 171 C. C. A. 611.

[4] The justifiable cancellation by Taylor of the executory portions of the contract could not affect the title to the whisky, which Levin had bought, and the unpaid price of which was covered by his notes. Taylor's action was an unlawful conversion of this whisky. The ordinary measure of damages would be the difference between the contract price and the market price, at which Levin could have bought upon the market the same quantity of the same material; but since it is, to say the least, improbable that he could have procured this amount of this material elsewhere upon the same terms and conditions, and at least doubtful whether he could have procured it elsewhere promptly even for cash, Levin urges, and the master and the court below found, that he ought to recover those profits which he might have made. The propriety of assessing such profits as a measure of damages might well be

Levin's protestations in his letter of February 28: "Not one of our transactions with you were in the least degree shady. The writer can conscientiously state that we have never taken advantage of you to the extent of a five-cent piece; * * * our past honesty, integrity, and loyalty to your company."

conceded in some cases of this general class; but the conclusion which we have reached, as to Taylor's right to terminate the exclusive agency, makes such an assessment inappropriate here.

In the case of an ordinary commodity, lost profits may often be computed with a minimum of uncertainty; but here the exclusive representation in the Levin territory was at the base of the business which he had built up and which he would have carried on. As it turned out, some one else would have been thereafter the accredited representative of Old Taylor in the Levin territory. He would have been, practically, in competition with the hostile manufacturer of his brand, controlling the source. Inasmuch as he could not supply whisky of a later manufacturing date than 1912, his business would gradually run out and with a constantly increasing percentage of overhead. All these elements of the situation, added to the unexampled uncertainty as to effect of the then anticipated prohibitory and tax legislation, raise to the maximum the speculative features of an assessment of lost profits. We are not aware of any well-considered case where lost profits have been recovered under such conditions, and we think they bring the case within the rule forbidding speculative damages. Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Howard v. Stillwell Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Anvil Co. v. Humble, 153 U. S. 540, 549, 14 Sup. Ct. 876, 38 L. Ed. 814; Eckington Co. v. McDevitt, 191 U. S. 103, 112–114, 24 Sup. Ct. 36, 48 L. Ed. 112; Howard Co. v. Wells (C. C. A. 6) 176 Fed. 512, 516, 100 C. C. A. 70; Hollweg v. Schaefer Co. (C. C. A. 6) 197 Fed. 689, 701, 117 C. C. A. 83; Chicago Co. v. Tiernan (C. C. A. 8) 263 Fed. 325, 339.

[5] It is true that the value of this whisky did thereafter continue to increase, and that Sherwood, who bought it from Taylor, and Taylor, who thereafter repurchased part of it from Sherwood, made large profits; but this cannot affect the measure of damages. If profits are inherently too speculative for recovery, the fact that they happen to have materialized before the trial does not change the rule, although such materialization may be satisfactory evidence of their amount in cases where the law will undertake their computation. It might as well be urged that, if the wisdom of later years demonstrated that there would have been a loss, Taylor should be excused from paying the damages fixed by the market price measure. Indeed, when we observe, in retrospect, the three years following March, 1917, and note the prohibitory laws which took effect during that period, first in some states, and then nationally by war-time prohibition, and by constitutional prohibition, it is apparent that the inquiry whether any profits, and, if so, what amount of them, would have been realized during that period by a dealer who faithfully observed all the laws and regulations, state and national, is as purely conjectural and as highly speculative as any inquiry could well be.

To undertake to compare the contract price with the value which the property would have had to the vendee for his purposes is only to come again to the question of the profits which the vendee might have made and no criterion of damages remains, excepting the price at which the property might have been bought or sold by or to others. It is clear

that this property was worth more accompanied by an exclusive contract and a carrying contract such as the parties had together than it would have been to buy or sell on the market for cash, and to be devoted to sale in unrestricted competition. The benefit of every doubt is, therefore, given to Levin when we take, as the established market price for which Taylor should account, the sum for which Taylor was able to and did, at about the same time, sell the same goods, accompanied by practically the same carrying and exclusive features. There is every presumption that Taylor obtained the highest available price under these conditions, and there is no satisfactory evidence to the contrary. This difference was, as found by the master, about $72,000, and for this amount we think Taylor liable to Levin.

This is, practically, a recovery as if at law for a conversion. There would be no jurisdiction in equity to award it, excepting for the fact that the equity jurisdiction was properly invoked, and, in such a case, the court may deny the equitable relief sought and give purely legal relief. Howard v. Leete (C. C. A. 6) 257 Fed. 919, 922, 923, 169 C. C. A. 68. This same conclusion makes the rule of clean hands, even if it were otherwise applicable, ineffective to prevent this particular recovery by Levin; and since it is not in any fair sense part of a general accounting, but is rather in the nature of an independent recovery of damages, we think the amount named should bear interest at the legal rate in Kentucky from the 11th day of March, 1917.

We do not overlook that the $72,000 covers all the appreciation in the market price which had accrued, and it may well be that such appreciation includes, among its elements, the accrued carrying charges, and hence that recovery of the $27,000 as well as the $72,000 is, pro tanto, a double recovery. We pass this query without decision, because there has been no appeal from the award of the $27,000; and while it would doubtless be open to us to diminish the $72,000 recovery to meet this objection, if the objection should turn out to be well founded, yet we feel justified in interpreting the briefs of Taylor's counsel as a concession that, if the title had passed to Levin, so that he is entitled to recover as for a conversion, $72,000 is the right amount. Levin claims a considerably larger sum, even on this theory.

Fifteen barrels, which had been paid for in full by Levin, were never shipped to him. During the taking of proofs, Taylor, admitting his liability, tendered warehouse receipts, which Levin refused. For any reason which appears by this record, the tender should have been accepted. Taylor might, at his option, have continued to store these 15 barrels, treating them as the property of Levin, or might have sold them and held the proceeds for Levin. Under the circumstances, this option may be considered as continuing, and, upon settlement of the final decree, Taylor may, as he prefers, turn over these or equivalent certificates for 15 barrels, subject to storage and insurance charges since the tender, or pay the market value at the date of tender and without interest.

Just before and just after the seizure of Levin's business, Taylor had, at Levin's request, bought from other holders 425 barrels in order to meet Levin's needs for certain maturities; but shipment had not been

made, and Levin had not given notes or made any other payment. The record justifies the conclusion that the purchases were made by Taylor as agent for Levin, and the title was in Levin, subject to Taylor's lien for the advanced purchase price. These barrels were included in the sale to Sherwood by Taylor, and were therefore converted. Using the Sherwood buying price as the market price, the damages were $262.34, and this amount should be allowed, with interest from March 11, 1917.

There is no such resemblance between Taylor's trade-marked label and the one later adopted by Levin for another brand as to constitute unfair competition. Schlitz Co. v. Houston Co., 250 U. S. 28, 39 Sup. Ct. 401, 63 L. Ed. 822.

The decree below should be modified, so as to permit only the recoveries indicated by this opinion, and in other respects be affirmed. For the purpose of such modification, and the entry of a new decree and further proceedings in accordance therewith, the record is remanded. Neither party will recover any costs in this court.

DAVIDSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3462.

1. **Conspiracy ⇐47—May be established by inference from concert of action.**
It is not essential to establish conspiracy that actual proof be offered of a definite plan or agreement entered into by conspirators, but it is sufficient if the evidence shows a concert of action in the commission of the unlawful act or other facts and circumstances from which the natural inference arises that the unlawful, overt act was in furtherance of a common design, intent, and purpose of the alleged conspirators.

2. **Criminal law ⇐1159(2)—Appellate court cannot weigh evidence.**
In a criminal case an appellate court cannot determine the weight of evidence, but only whether there is substantial evidence that will sustain the verdict and judgment.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Criminal prosecution by the United States against Harry Davidson and others. Judgment of conviction, and defendants bring error. Affirmed.

John J. Sullivan, of Cleveland, Ohio, for plaintiffs in error.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 26th day of March, 1920, the federal grand jury returned into the United States District Court for the Northern District of Ohio, Eastern Division, an indictment against these plaintiffs in error and John A. Moore. The first count of this

indictment charges conspiracy to commit the offense of unlawfully, knowingly, and willfully interfering with the transmission of telephone messages over and by means of the telephone system of the United States while under control of the United States government. The second count charges the actual commission of this offense.

Upon the trial of the cause John A. Moore was, by direction of the court, found not guilty on either count.

Harry Davidson and James A. Smith were found guilty upon both counts. Richard Gavigan and Thomas Prendergast were found not guilty as charged in the first count, but guilty of the offense charged in the second count of this indictment.

Motions for new trial and in arrest of judgment were overruled, and separate sentences were imposed.

The plaintiffs in error ask a reversal upon two grounds:

(1) That the verdict is not sustained by sufficient evidence.

(2) Error of the court in the admission of evidence.

There are other assignments of error, but these are the only ones discussed in the brief of counsel for plaintiffs in error, and the only ones upon which counsel now rely.

Under the provisions of section 1011 of the Revised Statutes of the United States, this court has no authority to pass upon the weight of the evidence. Therefore, if there is any substantial evidence tending to support the verdict of the jury, the judgment of the trial court must be affirmed, in so far as this assignment of error is concerned.

It appears from the evidence that some time prior to July 23, 1919, the date of the alleged offense, a telephone union had been organized in the city of Cleveland and an official strike called by the Operators' Union and telephone men. These plaintiffs in error were not members of that union. Davidson and Smith were members of the Electrical Workers' Union, and Gavigan and Prendergast had filed their application for membership in the Electrical Workers' Union. While this strike was in progress the Bell telephone cables to the city hall were cut, and, on the day that the defendants are charged in the indictment with having committed this offense, workmen were employed in splicing and repairing these cables. This attracted a crowd at the city hall, and a large number of policemen were required to keep this crowd back from the place where the workmen were employed. Davidson was in front of the city hall where this crowd had assembled, both in the forenoon and afternoon of that day. Smith was there in the afternoon while this work was in progress. The evidence also shows that the nature of their employment required them to be at the city hall from time to time each day. This applies particularly to Davidson, but the testimony shows that his business at the city hall was inside the hall, and not out where the workmen were employed in repairing the telephone cable. The evidence, however, shows that he was outside watching this work during a large part of the entire day, and that he manifested considerable interest in it. One of the workmen engaged in this work of repair testified that Davidson asked him what he was going to do and he told him that the cables had been cut and "we are going to

fix them." Davidson replied, "I don't think you are." McMahon, the workman, then said to him, "The city hall is all out of service, and they have got to have service." To this Davidson replied, "The hell with the city hall." McMahon further testified that upon his return to this work after dinner, Davidson was standing at the same place where he was standing in the morning, when he had the first conversation with him; that, when he came up to Davidson he said, "Hello, Harry," or something to that effect, and that thereupon Davidson said to him, "Oh, go to hell; I don't want to talk to you."

C. M. Zimmerman, a post office inspector, testified that he saw Davidson there in the afternoon; that he was talking with a group of men about the men out at the manhole who were engaged in repairing the telephone cable; that he said they were "strike breakers, and had been imported from out of town, or words to that effect"; that Davidson and the men with whom he was talking "were congregated in the doorways on the landing"; that the police officers asked them to move away, and also asked them if they had any business there. Davidson replied, "Yes; I have as much business here as these fellows," pointing to the witness and another post office inspector named Smith, and Mr. Pannell a special agent of the Department of Justice. This was 2:30 in the afternoon. About 3:30 p. m. the plaintiff in error Smith came up the steps where Davidson was still standing. Davidson stopped him and asked him where he was going, but witness did not hear Smith's reply. Davidson then said to Smith, "Stick around; there may be something doing here pretty soon." Shortly after this the defendant Moore came up the steps where Davidson, Smith, and others were standing and said to them, "It's too damned bad somebody don't throw a bunch of bricks over there among those strike breakers."

[1] A charge of conspiracy is one that is not easily susceptible of direct proof, nor is it essential to establish conspiracy that actual proof be offered of a definite plan or agreement entered into by conspirators. It is sufficient if the evidence shows such a concert of action in the commission of the unlawful act, or such other facts and circumstances upon which the natural inference arises, that the unlawful, overt act was in furtherance of a common design, intent, and purpose of the alleged conspirators to commit the same. Calcutt et al. v. Gerig (C. C. A. 6) case No. 3451, decided February 18, 1921, 271 Fed. 220; Alaska S. S. Co. v. Longshoremen's Ass'n (D. C.) 236 Fed. 964; Farmer v. U. S., 223 Fed. 903–907, 139 C. C. A. 341.

This evidence discloses that Davidson, by his remarks from time to time, not only identified himself with the crowd that collected about the men engaged in making these repairs, but demonstrated that his sympathies were with the strikers; that he was opposed to the repair of these cables and antagonistic to the workmen employed in making the same. Not only did his statements to these workmen and to the police officers who asked him to move, evidence that he had more than passing interest in the transactions of that day, but his statement to Smith, "Stick around; there may be something doing here pretty soon," manifested his readiness to join in the accomplishment of the purpose of this conspiracy as stated in the indictment. The presump-

tion obtains that some motive prompts all human conduct. This evidence tends strongly to show the motive of both Davidson and Smith in remaining there, idly watching these operations, when the duties of their employment would naturally require their presence elsewhere. In view of the nature of the offense charged in the first count of this indictment, and the established rule of evidence permitting proof of facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intent, and purpose, coupled with the further fact that the evidence tends to connect and identify some of these alleged conspirators with the preceding transactions of that day, the admission of this evidence was not error. Nor did the court err in admitting the evidence of the statement made by Moore when he approached Davidson, Smith, and others congregated in the doorway of the city hall watching these workmen repair the cables. It is, of course, true that this statement of Moore, standing alone, would not tend to prove a conspiracy between Davidson and Smith, but the attitude of Davidson and Smith toward these workmen, and particularly the attitude of Davidson, at whose request Smith had remained in proximity to where these men were engaged in the work of repair, had been fully shown by the evidence, and from that evidence it appears that Moore made no mistake in addressing his remarks to these men; for the sentiments he expressed were in line with the sentiments expressed by Davidson several times before Moore came upon the scene. Davidson had already expressed his antagonism to the making of these repairs. He had refused, when requested by the policemen, to leave this overcrowded place. On the contrary, he insisted that he had just as much right there as the post office inspectors and the special agent of the Department of Justice. The statement made by Davidson to Smith, "Stick around; there may be something doing here pretty soon," clearly evidenced Davidson's purpose in remaining there. The purpose of Smith is evidenced by the fact that he did "stick around," and that shortly thereafter there was "something doing." From this evidence the jury had a right to find that there was an understanding, arrangement, and agreement between Davidson and Smith to remain at the place where these cables were being repaired for the purpose of awaiting an opportunity for accomplishing the identical purpose of the conspiracy as charged in the indictment.

But, if this evidence were wholly disregarded, the evidence in relation to subsequent events would be sufficient to sustain a conviction not only on the second count, but also of the crime charged in the first count of this indictment. It is wholly immaterial just when this conspiracy was formed. It is sufficient for the purposes of this indictment if the conspiracy was entered into immediately preceding the overt act. The evidence in this case tends to prove that Riley and Creps, two employés of the telephone company, had been sent by their superior officers, under guard of Kent and Fisher, to the private telephone exchange in the city hall to test out these lines; that they fully informed Miss Clark, who was in charge of this exchange, that they

were there for that purpose; that, finding the Bell lines were not yet in operation, one of them asked her to give him an Ohio state line, which she did, and over which he talked with Mr. Galloway, the senior test man, and also to Mr. Sheil, supervisor of cables, informing them that the Bell telephone lines were not yet in operation, and receiving from them instructions to sit down and wait for ten minutes and then call again. While these men were waiting Miss Clark left the room. She testified in this respect that she left the room for the reason that she considered herself insulted because one of the men had said in her presence, "What in the hell is it her business?" and that thereupon she left the room and went down to the first floor to the "Muny Light" trouble room and communicated that fact to some men there. The evidence tends to prove that shortly following this communication these plaintiffs in error, with three or four others, came up to the private exchange room and forcibly drove Riley and Creps from their work, assaulting, striking, and severely injuring one of them; that an assault was also made on Kent, who was one of the guards; that as soon as these plaintiffs in error and others in their company came into the room these two workmen told them their business and exhibited their badges showing that they were in the employ of the telephone company; that Davidson then said to them, "To hell with the company; we don't pay no attention to them things." Creps and Riley then started for the door, but the young lady who had summoned these men said, "I am closing this door," and shut one of them. The evidence also tends to prove that the language used in the presence of Miss Clark by some of plaintiffs in error, and others with them after they came into the exchange room, was not only much more profane and offensive than the alleged statements by one of the workmen that Miss Clark claims insulted her, but that they also called these workmen vile and indecent names. The evidence as a whole is not inconsistent with the conclusion that Miss Clark took no offense whatever and did not consider that she had been insulted by the profane and indecent language used by her champions. It is also a significant fact, if it is a fact, that when Creps and Riley started to leave the room she said to them, "I am closing the door," and shut one of the doors. There is also evidence in this record tending to prove that when Miss Clark returned to the private exchange room she leaned over and said to her friend, Miss Burkett, "There will be some fun here in a minute." It would therefore appear that the government offered some substantial evidence in relation to Miss Clark's conduct from the time these workmen entered the exchange room until the end of the transaction in question, tending to prove that Miss Clark's attitude was antagonistic, not only to the repair of these cables, but also to the men employed in that enterprise.

On the other hand, the evidence offered by the government tends to prove that neither of these workmen made the statement attributed to them by Miss Clark, and which she says she communicated to the plaintiffs in error in the trouble room of the Muny Light. They each deny having made any such statement. Her friend Miss Burkett, who was

there waiting to go home with her, heard no such language. She talked with these men and found nothing objectionable in their conversation or their demeanor. She did not understand that they were trying to insult any one.

If the jury believed the evidence offered on the part of the government in reference to the conduct of these plaintiffs in error, and particularly the language used by them when they reached the telephone exchange room that evening, it would be justified in finding that such words and conduct were wholly inconsistent with the theory of the defense that these men came there merely to protect Miss Clark from being insulted by the use of profane language in her presence by the workmen Creps and Riley. The jury would also be justified by this and other evidence offered on behalf of the government in reaching the conclusion that the reason given by Miss Clark for calling these men to her assistance was not in fact a reason, but an excuse, and that back of this there was a more substantial motive, not only upon her part, but upon the part of these plaintiffs in error, who proceeded forthwith in a summary manner to put these objectionable workmen and their guards to flight.

[2] There is, of course, a substantial conflict in all this evidence, not only relating to the transactions of the day, but also in reference to this transaction in the evening in the private exchange room at the city hall. This court, however, cannot determine the weight of the evidence. The only question for its determination is whether there is any substantial evidence that will sustain this verdict and judgment, and to that question there can be but one answer.

The judgment of the district court is affirmed.

LANE et al. v. UNITED STATES and four other cases.

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

Nos. 3536–3540.

1. **Waters and water courses ⇐111—Water course and not meander line is boundary of meandered lands.**
   In a government survey of public lands bordering on a body of water or water course, a meander line is properly run for the purpose of computing acreage of fractional lots; but the lake or water course, and not the meander line, is the true boundary, and the survey is not invalidated by the failure to include within the meander lines small, irregular areas of land.

2. **Waters and water courses ⇐111—United States cannot claim small areas between water and meander line of granted lands.**
   Where in the survey in 1839 of public lands bordering on a lake, which is still in existence, a meander line was run which was approximately accurate, though it included some small points of water extending into the land, and excluded some small pieces of land, the United States *held* not entitled, after the land became valuable for oil, to claim the areas of land outside the meander line as unsurveyed government land, as against the grantees of the tracts surveyed.

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

Appeals and Cross-Appeals from the District Court of the United States for the Western District of Louisiana; Rufus E. Foster, Judge.

Suits in equity by the United States against C. W. Lane and others, against the Gulf Refining Company of Louisiana, against the Southwestern Gas & Electric Company and others, against J. M. Walling and others, and against Jessie M. La Robadierre and others, consolidated for trial. From the decrees, the defendants in the four suits first named appeal. The United States files cross-appeals therein, and directly appeals in the last-named suit. Reversed, with directions to dismiss bills.

S. L. Herold, J. A. Thigpen, and Frank J. Looney, all of Shreveport, La. (D. Edward Greer, of Houston, Tex., and Hampden Story and J. D. Wilkinson, both of Shreveport, La., on the brief), for appellants and cross-appellees Lane and others.

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. (D. Edward Greer, of Houston, Tex., and Hampden Story and J. D. Wilkinson, both of Shreveport, La., on the brief), for appellees La Robadierre and others.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. These suits were brought by the United States to recover several small tracts of land in Caddo parish, La., and also to compel an accounting for oil and gas produced therefrom by appellants. The lands lie in separate tracts along the edge of Ferry Lake, in township 20 north of range 16 west, Louisiana meridian. This township was first surveyed in 1839 by United States Deputy Surveyor A. W. Warren, and the plat filed by him represents several fractional sections bordering on the lake. According to that plat the lands in litigation were included within these fractional sections.

Because of the discovery of oil thereon the township was resurveyed in 1917, under the direction of Arthur D. Kidder, Supervisor of Surveys for the General Land Office. By this later survey the lands in litigation are represented as lying between the meander lines of Warren's survey and Ferry Lake, and are designated as new subdivisions omitted from Warren's survey. The fractional sections surrounding the lake had been sold and patented from time to time, and acquired by appellants long before the resurvey of 1917 was made.

There are no disputed questions of fact. It was admitted by stipulation that Kidder's survey was accurately made, and that Kidder correctly re-established and reproduced Warren's survey; that the contour line of Ferry Lake, at mean high water, in 1812, when Louisiana was admitted into the Union, in 1839, when Warren made his survey, and in 1917, when Kidder made his survey, was 173.09 feet above mean Gulf level; that all the tracts of land in litigation lie above that elevation, and are upland in character; and that Ferry Lake is, and was in 1812 and 1839, a navigable body of water. It was also shown beyond question that Warren in his survey ran the section lines

to, and accurately established corners and set meander posts on, the contour line of Ferry Lake.

In running out his meander lines, Warren did not always follow the exact contour of the lake, but he approximated it very closely in so far as the lands involved in these suits are concerned. In some instances, irregular areas of land which jut out into the water are outside the meander lines, and in other instances, where the land sharply recedes, water is inside the meander lines. Very little difference in acreage between the land so excluded and the water so included is shown by the testimony. In at least one of the cases the area of water included exceeds the area of land excluded.

In the first mentioned of these suits Warren's survey represents the land in that fractional quarter quarter section as containing 26.80 acres; Kidder's survey adds as a new subdivision 5.67 acres. In the second suit, Warren's survey represents 114.80 acres; Kidder's survey adds 11.49 acres. In the third suit, Warren's survey represents 155 acres; Kidder's survey adds 27.87 acres. In the fourth suit, Warren's survey represents 23 acres; Kidder's survey adds 12.72 acres. In the fifth and last suit, Warren's survey represents 83.75 acres; Kidder's survey adds 22.71 acres. It is for these additional acres the government sues.

The cases were consolidated, and the court entered decrees sustaining the right of the government to recover the lands, and also holding appellants liable to account for various amounts realized from the sale of oil and gas, but allowing credit for the costs of production. The government by cross-appeal in the first, second, third, and fourth suits contends that appellants should not be allowed to deduct these expenses, but should be held liable as willful trespassers. In the fifth suit, that of United States v. La Robadierre and the Gulf Refining Company, No. 3540, the original defendants have not appealed, but the government by direct appeal assigns as error the deduction of expenses of operation and the failure to hold the Gulf Refining Company liable in solido with the other defendant.

[1] It is the contention of the United States that the lands in litigation, lying between the meander lines of Warren's survey and Ferry Lake, are public lands which were never surveyed until 1917. Appellants, on the other hand, assert title as owners of the fractional sections.

Section 2396 of the Revised Statutes (Comp. St. § 4804) deals with the boundaries and contents of public lands, and provides that boundary lines shall be ascertained by running straight lines from established corners to opposite corresponding corners, except that, in those portions of a fractional township where corresponding corners cannot be fixed, the boundary lines shall be ascertained by running from established corners "to the water course, Indian boundary line, or other external boundary of such fractional township." There is no other provision of law for the running of meander lines along a water course, but they are usually run by surveyors for the purpose of computing acreage. It is proper that they should show the sinuosities of the banks of the water course; for the water course, and not

the meander line, is the true boundary. St. Paul & P. Railroad Co. v. Schurmeier, 7 Wall. 272, 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; Producers' Oil Co. v. Hanzen, 238 U. S. 325, 35 Sup. Ct. 755, 59 L. Ed. 1330.

It was Warren's duty to bound the fractional sections on the lake, and it is apparent from his survey and field notes that it was his intention to do so. The survey is not invalidated by the failure to include within the meander lines small, irregular areas of land. In Mitchell v. Smale, supra, the survey called for 4.53 acres, but it was held that title to 25 additional acres also passed by the patent. In that case the Supreme Court said:

"The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed, and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

Meander lines, and not water courses, are held to be boundaries, where there is no body of water within a reasonable distance therefrom, as in Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; Producers' Oil Co. v. Hanzen, supra; or where there is no body of water at all, as in French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; Gauthier v. Morrison, 232 U. S. 452, 34 Sup. Ct. 384, 58 L. Ed. 680; Chapman & Dewey Lumber Co. v. St. Francis Levee District, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. 564; and Lee Wilson & Co. v. United States, 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128; or where there is gross fraud, as in Security Land & Exploration Co. v. Burns, 193 U. S. 167, 24 Sup. Ct. 425, 48 L. Ed. 662. These cases are relied upon by the government, but in our opinion they are inapplicable to the facts under consideration. In none of the cases cited on the government's briefs is the rule stated in Mitchell v. Smale overruled or even modified; but, on the contrary, in several of them that case is cited with approval.

Here the water course was in existence and was actually meandered. There is no suspicion or suggestion that Warren's survey of the lands in litigation was fraudulent. That part of his survey which is in question in these cases was made with a fair degree of accuracy, and for the purposes of computing the acreage and of showing the sinuosities of Ferry Lake as a boundary. It is not impeached by the fact that a subsequent survey, made with great minuteness because of the discovery of oil, disclosed comparatively slight variations from the established boundary.

There being no appeal by the original defendants in United States v. La Robadierre et al., No. 3540, the decree in that case is affirmed. In the other cases, the decrees are reversed on the original appeals, with directions to dismiss the bills of complaint, and the cross-appeals are dismissed.

PHILIPS v. GRESS MFG. CO.

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

No. 3621.

1. **Master and servant ⇐80(8)—Evidence held insufficient to prove a modification of profit-sharing contract.**
   In a suit for an accounting by one party to a profit-sharing contract, in which both parties alleged a modification of the original contract, where their testimony was in direct conflict, *held*, that neither had sustained the burden resting on him to prove the modification and the terms of the original contract *held* to govern their rights in profits made in an outside transaction not contemplated when the contract was made.
2. **Frauds, statute of ⇐44(1)—Parol agreement to terminate written contract and substitute another not to be performed in one year held invalid.**
   An alleged parol agreement for the termination of a written contract and the substitution of a different contract not to be performed within one year, *held* invalid and not enforceable, under the law of Florida.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit in equity by J. L. Philips against the Gress Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

W. E. Kay, Thomas B. Adams, and J. L. Doggett, all of Jacksonville, Fla., for appellant.

William M. Toomer and George C. Bedell, both of Jacksonville, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Appellant filed his bill to compel appellee to account to him for profits arising out of the sales of lumber and cross-ties. In the year 1913 appellant and appellee entered into a profit-sharing contract. Appellant, a man thoroughly acquainted with the lumber industry, had recently failed in business. Appellee, a Florida corporation, with headquarters at Jacksonville and a branch office in New York, was a manufacturer, and also acted as broker in the purchase and sale, of lumber and cross-ties. The contract provided for the establishment and maintenance of a separate office in Philadelphia for the sale of lumber, and for the equal division of net profits. Appellant was entitled to a drawing account of $500 per month, to be deducted from his share of the profits. The contract, which was evidenced by a letter from appellee to appellant, also provided:

"It is understood that you are to perform any services not outlined above, which may be in the general interest of the Gress Manufacturing Com-

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

pany, such as looking after the sales of cross-ties, etc.; but the tie business is expressly excepted from any division of profit. * * * You are not to sell any one in the New England states, or in the state of Virginia," etc.

The Philadelphia office was conducted in the name of the appellee company, and appellant was designated one of its vice presidents, although he never owned any shares of its capital stock. In 1914, while the contract was in force, there came a very great depression in the lumber trade on account of the war. Appellant agreed that his drawing account should be reduced temporarily to $350 per month. During this period of depression, M. W. Mercereau, president of the Valley Tie & Lumber Company, a Virginia corporation, received an invitation to go to London, with the end in view of furnishing lumber and cross-ties to the Great Eastern Railway Company of England. Mercereau was desirous of arranging to purchase for the railway company on a commission basis. He dealt in oak cross-ties, but, being unfamiliar with business dealings in either pine lumber or pine cross-ties, he requested M. V. Gress, appellee's president, to accompany him to London, after having acquainted him with the purpose of the trip. Being unable to comply, Gress sent the following telegram, dated October 3, 1914, to Philips, the appellant:

"Would you be agreeable to going to London Tuesday sixth with Mercereau cross tie proposition."

Philips agreed and accompanied Mercereau. Philips claims Gress agreed that the profit-sharing contract should apply to any business which might result out of, or because of, this trip. On the other hand, Gress claims that Philips agreed to take the trip without financial interest in it and merely for his drawing account. While in England, Mercereau was successful in securing for the Valley Tie & Lumber Company a commission from the Great Eastern Railway Company of England to purchase approximately 4,000,000 feet of lumber and 250,000 cross-ties. Appellant promptly notified appellee of this fact, and wrote to it a letter stating that Mercereau would purchase both the lumber and cross-ties from appellee, and named prices which he stated had been agreed upon. A few days later, and on December 3, 1914, Mercereau, for the Valley Tie & Lumber Company, and appellant, for the appellee company, executed in England an agreement which contained the following paragraph:

"It is understood and agreed that on the contract entered into by the Valley Tie & Lumber Company with the Great Eastern Railway Company of England for sleepers (cross-ties) and pitch pine timbers that the Gress Manufacturing Company is to furnish and does hereby agree to furnish the material called for in said contract at prices which it is now prepared to name, but which the Valley Tie & Lumber Company prefer shall be agreed upon on our return to New York and said Valley Tie & Lumber Company have had opportunity to satisfy themselves that prices named by the Gress Manufacturing Company are as low as is consistent with good material and responsible and satisfactory furnishing of this supply."

December 30, 1914, Philips and Gress met Mercereau by appointment at Staunton, Va., and there entered into a contract for the fur-

nishing by appellee to the Valley Tie & Lumber Company of the materials referred to in the earlier contract signed in England, at the prices there agreed upon. Appellant testified that the prices were not inserted in the contract of December 3d, although agreed upon and thoroughly understood, for the reason that Mercereau wanted to go through the form of taking competitive bids after he returned to the United States. At the time testimony was taken, M. W. Mercereau had died; but appellant is corroborated in this statement by E. K. Mercereau, the vice president of the Valley Tie & Lumber Company. When the parties gathered at Staunton, Gress at first named higher prices than had been agreed upon in England; but Mercereau insisted upon those prices, and intimated that Gress was undertaking to repudiate the agreement already made. Thereafter the bid of appellee company was reduced to conform substantially to the prices agreed upon at the time the contract of December 3d was drawn up and executed. Within a few days, appellant had secured the acceptance by responsible lumber and cross-tie dealers of orders for both lumber and cross-ties, which were afterwards filled at a considerable profit to appellee.

M. V. Gress, appellee's president, gave testimony, which was contradicted by appellant, to the effect that appellant on December 29, 1914, agreed, in the language of the answer, "that the contract for the opening and conduct of the said Philadelphia office, the transactions had in the said office of this defendant and the losses, failures and obligations in connection therewith, be blotted out of the memory of the parties and be mutually and entirely canceled and satisfied," and that appellant should enter the service of appellee at a salary of $5,000 per annum, and in addition should receive at the end of two years stock therein to the amount of $10,000.

[1] The evidence was taken before an examiner and, upon final hearing, the District Court dismissed the bill for the reasons stated in the opinion, as follows:

"It was contended on behalf of the defendant that it intended by such telegram under the circumstances to have the complainant go for his drawing account and expenses, while the complainant contends that his understanding was that he was to go on account of the profit-sharing arrangement. It seems to me that in the light of the surrounding circumstances; the fact that the contract under which profits were to be divided specifically excluded cross-tie business from that arrangement, the contention of the defendant is the most reasonable, unless the testimony shows by a preponderance, as the complainant contends, that a clear and definite understanding was reached in New York City by the complainant and Gress, the president of the defendant, that the business obtained as a result of such trip should be on the profit-sharing account. To establish this understanding the complainant relies upon his testimony and certain communications. This understanding is denied by Gress and by certain other persons to whom the complainant claimed to have stated such understanding. I do not find that the testimony shows such understanding by a preponderance, and therefore must find for the defendant on this issue. * * * The bill of complaint seeks also an accounting of the affairs of the Philadelphia office. In this case I find no demand for such accounting, except in connection with the London trip, and no refusal by the defendant to render such accounting, and on this phase of the case I find in favor of the defendant."

Under the profit-sharing contract, and without any modification of it, appellant was entitled to share in the profits on the lumber, but he was not entitled to share in profits on the cross-ties sold to the Valley Tie & Lumber Co. The provision to the effect that appellant was to perform any services not specified in the contract which might be in the general interest of appellee, and relied upon to defeat an accounting, is not to be interpreted as being sufficient to require appellant to engage gratuitously in an undertaking so important as the one which he performed. The character of service involved in a trip to Europe was within the class of business appellant was expected to do, and which was provided for in the profit-sharing contract.

It is also contended that appellant is precluded from recovery under the terms of the contract, which provide that he should not sell to any one in the state of Virginia. The argument is that the contract executed in England was not binding, because the prices and terms and conditions of delivery were not fixed. The contract was signed in Virginia merely for the convenience of the parties. It was to be performed elsewhere. Deliveries were actually made at South Atlantic and Gulf ports, and payments were made at Philadelphia. Besides, the parties by their conduct have placed an interpretation upon this clause of the contract by which it was made to prohibit only the sales by appellant of lumber to be used or consumed within the state of Virginia.

[2] The contention that appellant had agreed to surrender any rights under the profit-sharing contract, and to accept employment by appellee for a period of years at a fixed salary and for stock, is easily disposed of. It is admitted that such an agreement was never reduced to writing. It was, under its very terms, a contract not to be performed within a year, and was, therefore, unenforceable. McCrimmon v. Brundage, 53 Fla. 478, 43 South. 431.

The objection that Philips was a vice president of the appellee company assumes a state of facts which the evidence does not support. He could not be an officer without being a stockholder; and therefore it becomes unnecessary to consider whether the profit-sharing contract would be enforceable if appellee had entered into it with one of its real directors. The court below properly overruled these various contentions.

The burden of proof is, of course, upon the party asserting a change in the profit-sharing contract. Appellant claims the contract was so modified as to entitle him to share in profits arising out of the sales of cross-ties, and the burden is upon him to prove that modification. We agree with the District Judge that he failed to do so. The testimony is in direct conflict. There were only the two interested parties present, and there are not enough corroborating circumstances to justify the conclusion that the contract was so changed. Likewise, the burden was upon appellee to show that the profit-sharing contract was modified so as to take out of it the right of appellant to share the profits on lumber sold to the Valley Tie & Lumber Company. We realize that the opinion of the trial court on the evidence is entitled to great weight.

In this case, however, the District Judge did not hear the testimony, nor have the benefit of the opinion of a master, and we are constrained to hold that appellee did not sustain the burden of proving the modification it must establish in order to defeat an accounting of profits on lumber sold to the Valley Tie & Lumber Company. Just as the modification claimed by Philips is denied by Gress, so is the modification claimed by Gress denied by Philips. As Philips has failed to meet the burden required of him, so also has appellee failed to meet the burden required of it, to modify the written contract. We are of opinion that no change in the contract has been proved by either party, in so far as the English business is concerned. It is not reasonable to believe that appellee would have asked appellant to waive a right to share in profits in the very business he depended upon for a living. It is less likely that Philips would have yielded to a suggestion of that kind if made, or would have agreed to forego all opportunities to make profits out of the business in which he was engaged during the time he would necessarily be absent. It is not customary for men engaged in business either to make or to grant such requests.

If Philips could be expected to give up his share of profits, then it is difficult to understand why he engaged in this business at all. There was no reason for him to go for his drawing account. That was secured to him under his contract, and would have been advanced to him in any event. Besides, he was chargeable with that out of his share of the profits. If he went for that, he went for nothing. His subsequent conduct was not that of a man who had no financial interest in what was taking place. On the contrary, he was insistent on coming to terms with Mercereau. He objected to the action of Gress in attempting to secure higher prices, because he feared the contract would go elsewhere. After it was signed, he was most energetic in placing orders. Such conduct, on the part of a man who has no business interest in the transactions being carried on, would be most unusual. While Gress' mind dwelt more upon cross-ties than upon lumber, it was but natural that Philips was thinking more of lumber than cross-ties. Mercereau did not ask Gress to accompany him for the purpose of aiding him in the sale of cross-ties alone. Gress testified that he wanted assistance in securing orders for both lumber and cross-ties. With this knowledge, Gress telegraphed Philips that he wanted him to go to England on "a cross-tie proposition," withholding from him, for the time being at least, information that there might be an opportunity also for the sale of lumber; and although it be assumed that Philips would have gone to England merely for the purpose of selling cross-ties, if they alone were involved, it is highly improbable, it seems to us, that he would have agreed to surrender an opportunity to earn a profit in the sale of lumber.

Appellee claims appellant relied wholly upon a modification of the contract, because of the presence in the bill of the following averment:

"That before your orator left for England it was specifically understood by and between your orator and the defendant herein that any sales your orator

might effect in England were to go in the joint account of your orator in the conduct of the said Philadelphia business."

The bill also averred, however, that appellant had no other contractual relation with appellee, prior to the trip to England, than that created by the profit-sharing contract, and modifications thereof not necessary here to be noticed. The quoted averment was made only because the asserted modification would entitle appellant to a share in the profits arising out of the sales of cross-ties. Appellant is not thereby precluded from proving profits on the sales of lumber secured to him by the contract.

Appellant contended, and offered some testimony to prove, that cross-ties which are sawn on one side, though hewn on the other three sides, are technically considered as lumber. On the other hand, witnesses for appellee testified that anything put under railroad rails, except at bridges and switches, is a cross-tie. We are of opinion that the preponderance of evidence on that subject was with the appellee.

The conclusion is that appellant is entitled to an accounting of the profits arising out of the contract between the parties, dated August 13, 1913, including the profits on lumber, but excluding the profits on cross-ties, sold to the Valley Tie & Lumber Company in December, 1914.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROGERS v. LOGAN.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1921.)

No. 3662.

Money received ⊜6(6)—Money recoverable, where purpose for which received is not carried out.

In correspondence between the parties by letter and telegram, the sole subject of which was the purchase by plaintiff of stock of a corporation to be organized by defendant, in the course of which plaintiff wired, "will take the ten thousand," and remitted to defendant $10,000, a statement in a letter, "In all matters treat this $10,000 as you would your own," *held* not to authorize defendant to use the money in a partnership or joint adventure, nor to relieve defendant from the obligation to return it, where the corporation was not organized.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action at law by G. T. Rogers against J. J. Logan. Judgment for defendant, and plaintiff brings error. Reversed.

John C. Cooper, John C. Cooper, Jr., and H. P. Osborne, all of Jacksonville, Fla., for plaintiff in error.

William H. Rogers and Russell E. Colcord, both of Jacksonville, Fla. (Reynolds & Rogers, of Jacksonville, Fla., on the brief), for defendant in error.

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

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, G. T. Rogers (herein referred to as the plaintiff), against the defendant in error, J. J. Logan (herein referred to as the defendant). The declaration contained four counts. The first count was for money payable by the defendant to the plaintiff for money lent by the latter to the former; the second count was for money payable by the defendant to the plaintiff for money paid by the latter to the former at his request; the third count was for money payable by the defendant to the plaintiff for money received by the former for the use of the latter; and the fourth count was for the conversion by the defendant of $10,000 in cash belonging to the plaintiff.

The defendant pleaded the general issue and a special plea, which undertook to set up the existence of an unsettled partnership between the plaintiff and the defendant, and that the money received by the latter from the former was the former's contribution to the partnership capital. A demurrer to the special plea was overruled, and replications to that plea were filed, which replications were demurred to.

The rulings on the demurrers mentioned need not be passed on, as matter such as that which was set up or sought to be set up by the special plea was available to the defendant under the plea of the general issue. The averments of each of the counts would be disproved by showing that the money received by the defendant from the plaintiff was contributed by the latter to a partnership between the two, was used by the former in the partnership business, and that there had been no settlement or adjustment of that business.

The suit asserted a liability of the defendant to the plaintiff for the sum of $10,000 and interest, the sum mentioned being the proceeds of the plaintiff's check for $5,000 and his note for $5,000, sent by mail by the plaintiff from Binghamton, N. Y., to the defendant at Jacksonville, Fla., on July 21, 1916. In behalf of the plaintiff it was contended that the remittance was made to pay for $10,000 of corporate stock, which the plaintiff had agreed with the defendant to take, and that the defendant misapplied the money by using it for another purpose, which was not authorized or consented to by the plaintiff. In behalf of the defendant it was contended that the sum mentioned was contributed by the plaintiff to a partnership venture, to which the plaintiff and the defendant were parties, and was used by the latter for a partnership purpose.

The plaintiff, Mr. Rogers, lives at Binghamton, N. Y. The defendant, Mr. Logan, lives at Jacksonville, Fla. They became acquainted while Mr. Rogers was visiting Florida in the winter of 1915–1916. Logan called to the attention of Rogers a property known as the Atlantic Beach property, consisting of a hotel on the beach about 17 miles from Jacksonville and several thousand acres of land. The two discussed plans of acquiring the ownership of that property, subject to an existing mortgage on the whole or part of it. A plan discussed involved the formation of a corporation and the borrowing of a considerable sum of money. No agreement on the subject was reached while Mr.

Rogers was in Florida, but he stated he would try to arrange with a bank in New York for the loan desired. There was correspondence on the subject between Logan and Rogers after the latter returned to his home. That correspondence disclosed the following:

Rogers failed in his efforts to arrange for the desired loan. After this occurred, the following letters and telegrams passed between the parties:

"Jacksonville, Fla., June 17, 1916.

"Mr. G. Tracy Rogers, 5 Nassau Street, New York, N. Y.—My Dear Mr. Rogers: Your wire received, and in answer thereto would say that, since talking with you, we are completing the disposition of a part of the company's lot holdings to pay $30,000 or a little more of the indebtedness, so that the whole property, as it stands now, will cost us $170,000. Of this, we are to pay in $100,000 for stock in the new company, and we will then owe $70,000, which we have arranged for with banks and individuals for some time ahead, and we can carry it in this way for any reasonable time we want to. If we should get an opportunity in the meantime to refinance it, for a long period of time, at a reasonable rate, we would do it; but this is not absolutely necessary. I believe that the shares based on there being only $100,000 will be worth more than the way we figure it.

"I shall be disappointed to think you are not in on it, and would like for you to come in for ten or more. The control will rest in three of us—you, Mr. Raymond, of the Clyde Line, and myself, or you, Mr. H. Bull, and myself.

"Please write me on receipt of this, Monday, as I must proceed and get it closed up right away, both because the option has not long to run, and because of the fact that we have been figuring with some people on part of property, and we cannot do anything with them until we get this closed.

"If your friend, you mention, wants to come in for $10,000, it is all right with me. You can do just as you prefer about this. J. J. Logan."

"J. J. Logan, Jax. New York, June 19.

"Letter recd. Will take the ten thousand have written.

"G. T. Rogers."

"N. Y., June 19, 1916.

"J. J. Logan, Esq., Jacksonville, Florida—My Dear Mr. Logan: Our friend, Steele, will not be back for eight or ten days. I don't know whether he will have the other $10,000 or one-tenth interest.

"Let me know, by wire, when you must have the money, and I will have it on deposit with Simmons & Slade, subject to draft. Make it as late as you can, because I am going to Kentucky Thursday, from there to Joplin, Missouri, and then back here the latter part of the month.

"In all matters treat this $10,000 as you would your own. I congratulate you most sincerely on putting the deal through.

"With kind regards from Mrs. Rogers and myself to you and Mrs. Logan, I am,

"Yours truly, G. T. Rogers."

Between June 22, 1916, and June 24, 1916, telegrams and letters passed between Rogers and Logan in regard to Logan getting some one to take Rogers' place, because of unexpected calls upon the latter. On June 24th Logan sent to Rogers a letter, of the body of which the following is a copy:

"Your wire received, and in reply thereto would say that, after the receipt of your various communications on the subject, I subscribed the $10,000 for you, and stated to the parties that the funds would be available when the trade was ready to close. I do not see what else I can do but make it good if you do not, so would be glad to have you advise me definitely and finally on receipt of this. As I am going into it quite heavily myself, it would be considerably embarrassing to me to make good yours, as well as my own.

"If it would help you any, I could arrange it by your paying one-fourth or one-half the amount, and I will arrange to discount your note for three or four months for the balance."

The check and note above mentioned were remitted, with a letter of which the following is a copy:

"Binghamton, N. Y., July 21, 1916.

"Mr. J. J. Logan, Jacksonville, Fla.—My Dear Mr. Logan: I regret sincerely that I was away when your telegrams came. There was considerable mixup. You wired Mr. Cunningham or me in New York to have check, etc., at the Waldorf on Sunday. Mr. Cunningham called at the Waldorf and tried to find you, but did not succeed.

"Have just wired you as follows: 'Just returned Western trip. Wrote you June sixteenth asking for details organization, etc., also twenty-first asking to advise when it was closed. No reply these inquiries. Leave for New York Tuesday night. Write fully. Mailing six months note with interest for five, check for five.'

"I inclose check on Metropolitan Trust Company, for $5,000, and my note payable at the First National Bank, Binghamton, for $5,000, with interest.

"Of course I must know some of the details, whether you took care of the balance by a loan whereby we may be called on for more money or an assessment, what interest you and your friends control; in fact, I want to know what you would desire under like circumstances.

"This comes at a practically hard time on me, as I have had several unexpected calls on me, and it has made me hard up; but I know this is a good thing, and if pushed ought to be cleaned up in a short time with great profits. I have every confidence in your ability to take care of this or any other proposition you might undertake.

"I shall be here until Tuesday night. Must attend some meetings in New York Wednesday. Will be in Buffalo Thursday and Friday, and then expect to take a week's business trip with some capitalists into the northern part of Canada, returning from Montreal to Rutland, Vt.

"With kind regards to Mrs. Logan and yourself, and regretting sincerely that I happen to be away on the Great Lakes, I am,

"Very truly yours, G. T. Rogers."

On the same date Logan addressed the following letter to Rogers:

"Jacksonville, Fla., July 21, 1916.

"Friend Rogers: Without repeating wires passed between us, I gather that on account of some changes you would prefer to be relieved of the obligation to put $10,000 in the Atlantic Beach property. I, of course, acted on your letter and telegram saying you would take $10,000, and could not back out if I wanted to, and I don't want to; but, if it will help you, I think I would be willing to buy your interest if you can arrange to discount my note for a year or for six months with an agreement for one renewal of six months (my paying the discount, of course).

"I couldn't pay it for about a year, and wouldn't want to buy it, except on sufficient time, so I know I could meet it. The stock wouldn't be available in time to put it up as collateral, so you would have to be able to use my plain note.

"If this suits you better than to make the payment of $10,000, wire me on receipt of this.

"Yours very truly, J. J. Logan."

A letter of Rogers to Logan, dated July 22, 1916, contained the following:

"I remitted you the $10,000 promptly upon my return home yesterday, as you know by this time. I shall be governed entirely in this matter, as to sale of stock or holding it, by you. I am, as you know, relying entirely upon

your judgment in this matter; but I do want some details, which I have not received, and which I am entitled to. I trust you will send the same promptly."

The following is the body of a letter of Logan to Rogers, dated July 24, 1916:

"Your telegram of the 21st to hand, and in reply thereto would say that I wrote you on June 17th about the details of the organization, and should there be any other information you want, which is not contained therein, kindly advise, and I shall be glad to furnish it."

The above-quoted correspondence requires the conclusion that the remittance of the $10,000 by Rogers to Logan was in compliance with the former's agreement to take that amount of stock in a corporation, the organization of which was in charge of the latter, to whom was left the selection of another or others to be associated with them in the control of the proposed corporation. The circumstances attending the making of the statement contained in the Rogers letter of June 19th, "In all matters treat this $10,000 as you would your own," forbid giving to that statement the effect of authorizing Logan to use the money sent otherwise then in paying for the corporate stock which Rogers, by a telegram of the same date, agreed to take. Logan's letter of June 17th, to which Rogers replied by the telegram and letter of June 19th, was an invitation to Rogers to take stock in a proposed $100,000 corporation. The last-quoted statement is to be read in the light of the fact that the sole subject dealt with in the letter which contained it was the taking of stock in a corporation the promotion and organization of which were in charge of Logan. It could have meant no more than that, in the matter of taking such stock for Rogers, Logan was expected to use the $10,000 as he would use his own money.

After the date of the letter last above set out there was considerable additional correspondence between Rogers and Logan in regard to the same matter. Nothing in that correspondence furnished any support for a finding that Rogers consented that the $10,000 he remitted might be used otherwise than in paying for the stock he had agreed to take. A letter of Logan to Rogers, dated July 31, 1916, contained the following:

"Yours of the 28th to hand, and in reply thereto would say that the amount authorized capital of the new company has not been fully decided on yet. We will probably make it somewhere from $150,000 to $250,000, and when this company is duly incorporated and authorized to issue its stock, you will get title to 10 per cent. of the amount issued, and in the meantime I am holding for your account $25,000 of the first mortgage bonds on the property.

"If we make the capital stock of the company $250,000, we will probably issue to the original syndicate $150,000 of it, which would make your share $15,000, leaving $100,000 stock in the treasury for sale in future, if the stockholders should decide it was advantageous to sell it for improving the property or for other corporation purposes."

The reply of Rogers, dated August 5, 1916, contained the following:

"I was very much pleased to receive yours of the 31st ult. I think the plan of issuing 250 shares of stock, and issuing to the original syndicate 150, and then leaving $100,000 stock in the treasury, is a very good one. Of course,

you know by what I am doing that I am leaving everything to your best judgment. I regret that I was not able to take more, but I am tied up just now."

The just-quoted part of the correspondence shows that Rogers acquiesced in a proposed change in the amount of the capital stock of the corporation he was to take stock in; but neither that nor any other part of the correspondence indicated that Rogers consented that his money be used otherwise than for the purpose for which it was remitted. There was nothing in the correspondence to disclose to Rogers that Logan's scheme for the organization of the proposed corporation remained wholly unexecuted. The correspondence was the only evidence of the authority conferred on Logan by Rogers with reference to the use to be made of the $10,000 sent by the latter to the former. Nothing in that correspondence had any tendency to prove the existence of a partnership or joint adventure between Logan and Rogers, having for its object the acquisition of claims against the Atlantic Beach Corporation, the owner of the Atlantic Beach property, or the whole or part of that property, or that Logan, without effecting the organization of the contemplated corporation, was authorized to use the money remitted by Rogers in buying claims against the Atlantic Beach Corporation, or property belonging to that corporation.

Logan did not effect the organization of the proposed corporation, stock in which Rogers agreed to take. The remainder of the proposed capital stock was not taken, and the plan of getting a satisfactory third person as the associate of Logan and Rogers in the control of the proposed corporation was not carried out. Logan used the $10,000 sent by Rogers in paying or acquiring a note of the Atlantic Beach Corporation, which was signed also by Logan himself as joint maker, with $25,000 of that corporation's bonds attached. When this suit was brought, in November, 1917, the project of organizing a corporation, on the plan and for the purpose indicated in Logan's letter to Rogers of June 17, 1916, remained wholly unexecuted.

The plaintiff excepted to the refusal of the court to instruct the jury to find a verdict in his favor, and to its action in charging the jury to the effect that they might find from the evidence that there was a partnership between the plaintiff and the defendant for the purchase or attempted purchase of the property and assets of the Atlantic Beach Corporation and the sale thereof for their profit on equal terms. We are of opinion that the court erred in the rulings mentioned. The evidence without conflict showed that Rogers remitted to Logan the $10,000, to be used in paying for corporate stock the former had agreed to take; that the proposed corporation was not organized within a reasonable time, and remains nonexistent; and that the money remitted was used by Logan for a purpose not authorized or consented to by Rogers. The evidence discloses a case of money paid on a consideration which has failed, with the result that the payor is entitled to get his money back from the person who received and misapplied it. 14 Corpus Juris, 276.

The judgment is reversed.

POWELL, GARARD & CO. v. ERATH COUNTY, TEX., et al.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1921.)

No. 3626.

1. **Counties ⇐206(1)—Judgments of commissioners' court, on which warrants are based, are valid against collateral attack.**
   Under the law of Texas, judgments of the commissioners' court, on which warrants are based, approving bills rendered, are binding on the county, unless successfully directly attacked.
2. **Judgment ⇐518—Suit by county for cancellation of warrants issued on judgments held direct and not coliateral attack.**
   A suit by a county for cancellation of warrants issued on judgments of the commissioners' court *held* a direct and not a collateral attack on such judgments.
3. **Judgment ⇐461(5)—To invalidate for fraud, proof must be clear and convincing.**
   Where a judgment is attacked for fraud, the proof must be clear and convincing to warrant its being set aside, and facts which merely create a suspicion, but do not clearly prove the fraud charged, are not sufficient to overcome the effect of the judgment.
4. **Counties ⇐165—Warrants held legally issued and valid.**
   The commissioners' court of a Texas county, in making a contract on which warrants were issued, *held* to have legally complied with the requirement of the state Constitution (article 11, § 7), by providing for a tax levy to pay the interest and create a sinking fund for the indebtedness incurred.
5. **Counties ⇐165—Warrants issued to refund illegal warrants held invalid.**
   Warrants issued by a Texas county to retire outstanding warrants, some of which were illegally issued, *held*, under the decisions of the Supreme Court of the state, invalid to the extent that the original warrants were invalid.

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

Suit in equity by Erath County, Tex., and others, against Powell, Garard & Co. Decree for complainants, and defendant appeals. Reversed.

W. M. Harris and W. H. Graham, both of Dallas, Tex., and Marshall Hicks, of San Antonio, Tex., for appellant.

George Thompson, J. H. Barwise, Jr., and John J. Hiner, all of Fort Worth, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On December 17, 1917, Erath county filed a suit in the district court of said county, seeking to have canceled as void one issue of county warrants, for $120.000, and $18,999.14 of another issue of warrants aggregating $35,000. The $120,000 of warrants were issued to pay for certain road work done under a contract entered into between the commissioners' court of Erath county and one Dawson. The case was removed into the United States District Court for the Northern District of Texas at Fort Worth. Thereafter Powell,

Garard & Co. filed a suit in said United States District Court to recover upon certain of these warrants which had matured.

The cases were consolidated as a single cause in equity and the parties ordered to file amended pleadings setting up their contentions, which they did. The first-named contract was negotiated with said commissioners' court, consisting of five members, and was awarded to Dawson by the vote of three of the commissioners, Bowie, Lowe, and Miller. The sums to be paid thereon were payable in county warrants, which were issued in installments on judgments of the commissioners' court, approving the bills rendered and ordering the warrants issued. The $35,000 issue was to refund certain previously issued warrants, including $18,999.14 of warrants issued to Dawson for additional work done on said roads.

The county claimed the $120,000 issue was void because: (1) The instruments were bonds, and not warrants, and had not been authorized by popular vote. (2) Because they included 15 per cent., added for alleged services of Dawson. (3) Because they were road and bridge warrants, and no proper provision had been made in the contract for the payment of the interest due thereon and 2 per cent. sinking fund, as required by the Constitution of Texas; the 15 cents per $100 of the assessed taxable property in the county, authorized to be levied as a tax for road and bridge purposes, having been exhausted by previous charges thereon. (4) Because no authority to impound the revenues of future years existed. (5) Because the contract was not let on competitive bidding. (6) Because the money raised on said warrants was paid into banks and paid out by Dawson on his checks. (7) Because Bowie, one of the commissioners, was bribed to vote for the contract and warrants by the payment of $500 to him to secure such a vote. (8) Because Bowie and Lowe, commissioners, fraudulently approved estimates under the contract in sums in excess of the true amounts earned. (9) Because warrants were issued in the sum of at least $50,000 in excess of the value of the labor and material furnished.

As to said $35,000 of warrants the county insisted that $18,999.14 thereof had taken up warrants issued to Dawson for alleged additional work, when no contract had been made therefor, and no provision for the payment of the interest and 2 per cent. sinking fund on such warrants made at the time when issued; the warrants not being able to be paid out of the existing revenues. All of these warrants are owned by Powell, Garard & Co., who took the same bona fide.

The defendants in their answer moved to dismiss the bill because the same did not state a case, and particularly because it showed that the plaintiff had received large values as the proceeds of said warrants and contract, and no offer to do equity, or tender of the value of such property so received, was made. They also denied all facts attacking said warrants, and set up a counterclaim, asking to be allowed to recover the amounts then due on said warrants, or the reasonable value of the work and labor represented thereby.

The case was referred to a master. He found that the instruments were not bonds, but warrants, and as such were not negotiable instruments, but that the commissioners' court could issue the same without

a previous popular vote; also that the commissioners' court could impound the revenue of future years to pay the interest and principal thereof, and that such a contract did not have to be let on competitive bidding. He also found that the additional 15 per cent. for Dawson's service did not invalidate them; further that the manner in which the money was paid out had not brought any loss to the county.

He declined to make any finding as to the value of the improvements to the public roads of Erath county. This finding, therefore, failed to sustain the allegations of the bill that the warrants were issued in excess of the value of the labor and material furnished under such contract. He held that the approving of the estimates as made, and the orders for the issuance of the warrants by the county commissioners' court, constituted judgments; that they could only be attacked in a direct proceeding, but that the bill in equity filed was a direct and not a collateral attack.

He held that the testimony in the case convinced his mind that the contract was obtained by Dawson, through his agents, by means of bribery of E. Bowie, at the time a member of the commissioners' court, and whose vote was necessary to obtain the contract. He also held that no sufficient provision had been made for payment of the $120,000 of warrants, because he concluded that the existing indebtedness, with the current expenses, exhausted so much of the road and bridge fund as to leave an insufficient amount to pay the interest on the $120,000 of warrants and the 2 per cent. sinking fund. He held that, when the $35,000 of warrants were issued, they included $18,999.14 of warrants issued to Dawson, for which no attempt had been made to provide, and which had not been contemplated to be paid out of current funds, and that this rendered the $35,000 of warrants void to that extent.

It will be perceived that these findings of the master eliminate all attack upon these warrants, except the alleged bribery of Bowie and the alleged failure to make sufficient provision for the payment of interest and sinking fund, as required by Const. Tex. art. 11, § 7, which provides:

"* * * No debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least 2% as a sinking fund."

Exceptions to so much of the report as found against the validity of the contract and warrants, and denied relief to the defendants, were filed by Powell, Garard & Co. No exceptions were filed by Erath county. There are no persons, parties to the suit, except Powell, Garard & Co. and Erath county and its board of commissioners. Powell, Garard & Co.'s sole connection with the case is as owner of the warrants.

[1] 1. These warrants are based on solemn judgments of the commissioners' court, which are binding upon the county, unless successfully attacked. Padgett v. Young County (Tex. Civ. App.) 204 S. W. 1052; Edmondson v. Cummings (Tex. Civ. App.) 203 S. W. 428; Jeff Davis County v. Davis (Tex. Civ. App.) 192 S. W. 291; Busch & Co.

v. Caufield (Mo. App.) 135 S. W. 244; Vogt v. Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127.

[2] 2. Powell, Garard & Co. insist that these judgments are not open to a collateral attack and that this proceeding is not a direct attack. We do not think that this is a collateral attack on these judgments. On the contrary, it is a proceeding brought for the express purpose of attacking and setting aside the warrants, on the ground that the orders of the court on which they are based were void for the reasons alleged. Such a proceeding is a direct attack. Van Fleet on Coll. Attack, § 5; Crawford v. McDonald, 88 Tex. 629, 33 S. W. 325; Faysuox v. Kendall County (Tex. Civ. App.) 55 S. W. 583; National Surety Co. v. State Bank, 120 Fed. 593, 598, 599, 56 C. C. A. 657, 61 L. R. A. 394.

[3] 3. Where, however, a judgment is attacked for fraud, including the bribery of one member of the court, the proof should be clear and convincing to warrant its being set aside, and facts which merely create a suspicion, but which do not clearly prove the bribery as charged, are not sufficient to overcome the effect of the judgment. American Nat. Bank v. Supplee, 115 Fed. 657, 52 C. C. A. 293; Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702.

4. In this case we do not think the proof sustains the charge in the bill that E. Bowie, one of the commissioners whose vote was necessary, was paid $500 in order to induce him to vote for the contract and thereafter to vote for the warrants. H. H. Shelton, who negotiated the contract for Dawson, and who is charged in the bill with bribing Bowie, positively denied ever having paid, or promised to pay, such money. Dawson was not on hand until 10 days after the contract was made. The uncontradicted proof shows that the three commissioners, Lowe, Miller, and Bowie, who voted for this contract, openly favored the same before H. H. Shelton or any other parties in this transaction appeared on the scene. There is no proof of any money being paid to Bowie, or any negotiation being had with him in regard to the making of this contract. W. A. Shelton, one of the county's chief witnesses, testified that he never heard H. H. Shelton say that he had paid money to any one for any purpose, or that it was or would be necessary to pay any person or any man or any official any amount of money for any purpose.

No attack is made on the proceedings on the ground of any improper conduct of any one, except the alleged bribery of Bowie, and an allegation that Lowe and Bowie approved estimates for greater amounts than should have been, which last charge was not sustained by the master. The only testimony looking to the payment to Bowie of said $500 was a statement made by Netterville in his direct testimony that H. H. Shelton told him that Bowie and Lowe were to get $500 apiece, and that they said the other commissioners would have to be paid $500 each. On cross-examination he qualified this statement, admitting:

"Shelton did not tell me that he had paid it. I don't think Shelton ever paid it, because he didn't do the work."

Shelton denied having any recollection of any such conversation with Netterville, and also denied that he ever paid, or promised to pay, any

commissioner any sum. Lowe entirely contradicts Netterville. Miller was dead; but there is no contention that he was tampered with. The remaining commissioners voted against the contract. The master finds that Netterville's testimony is unsatisfactory, and that he was impeached in other matters and contradicted by the records.

The master finds that the amount of money deposited in bank to Bowie's account, which he regards as a circumstance tending to show bribery, may be entirely innocent, and may have consisted of moneys advanced by Dawson to Bowie to pay the hands in Bowie's district according to the contract. A circumstance which seemed to impress the master, to wit, the possession by Shelton of $1,500, is thoroughly accounted for, without contradiction; Shelton showing that he used $250 to pay Attorney Johnson a fee, which Johnson states he received for professional services, that he redeposited $1,100 in a bank at San Antonio, and that the remaining $150 were used by himself and Dawson for expenses.

The subsequent transactions between Dawson and Bowie were testified to without contradiction to relate to contracts obtained by Bowie, after he ceased to be a commissioner, with other counties, upon which Dawson was to pay him a commission. But the charge of this bill is that previous to the making of this contract Bowie was paid $500 as a bribe. The indictment introduced by the complainant in this case charges that Bowie accepted the $500 and after payment thereof voted for this contract. The testimony in this case completely disproves the charge as made, without contradiction. That Bowie may have been in other matters unprincipled, or that Dawson may not have been sufficiently particular, is not sufficient to set aside the judgments of the commissioners' court and invalidate these warrants, based thereon, now held by Powell, Garard & Co.

[4] 5. The next question is whether the requirement of the Texas Constitution (article 11, § 7), that no debt of any county shall be incurred without at the time provision being made for the interest thereon and at least 2 per cent. as a sinking fund, was complied with. The resolution of the commissioners making this contract provided for the issue of this $120,000 of warrants, and that 8 cents on each $100 of assessed taxable property for the years 1916 and 1917 and 10 cents on each $100 for year 1918 and subsequent years, or as much thereof as should be necessary, be appropriated to the principal and interest thereof. The assessed value of the taxable property of the county at the time was $12,320,180. Six per cent. interest and 2 per cent. sinking fund on the $120,000 of warrants would be $9,600. Eight cents on the $100 levied against the assessed value of the taxable property amounts to $9,856.14, and 10 cents to $12,320.18. The Constitution of Texas (article 8, § 9) provides:

"No county, city or town shall levy more than 25 cents for city or county purposes, and not to exceed 15 cents for roads and bridges."

At the time of the making of this appropriation, the previous warrants against this sum, except a small number, had been refunded, and 7 cents on the $100 had been appropriated to take care of them, 4 cents

of which amount would be released after the year 1917 by the payment of the warrants to which said sum was appropriated. In the case of Lasater v. Lopez (Tex. Civ. App.) 202 S. W. 1043, it is held that the—

"tax of 15 cents authorized by the Constitution for roads and bridges is not a current tax for maintenance purposes, and may * * * be used to be applied to the principal and interest of a debt."

It would therefore appear that at the time these warrants were ordered issued there was a sufficient amount of unappropriated tax to cover the same. It is not made to appear what the additional sums due to said roads and bridges fund, from fines, forfeitures, and other sources, would amount to. We think, therefore, that the taker of these warrants could rely upon the action of the commissioners, in appropriating said portions of said tax to provide for said interest and sinking fund, as a sufficient compliance with the Constitution of Texas, and that therefore the $120,000 of warrants are valid.

[5] On January 8, 1917, the commissioners' court by order created an issue of $35,000 of warrants to refund a number of outstanding warrants previously issued. Among these warrants were $18,999.14 of warrants issued to N. A. Dawson for additional work done on the roads of said county. No contract was made in regard to said work, and no provision for interest to become due thereon or for a sinking fund was made. So much of said $35,000 as represents said $18,999.14 of warrants is attacked as being issued in violation of said article 11, § 7, of the Constitution of Texas.

No appropriation was made to take care of the $18,999.14 of warrants originally issued to Dawson, and we do not think that it could be fairly concluded that Dawson, or the county, contemplated that these original warrants would be paid out of current funds during the year in which they had been issued. The fund had been exhausted by previous appropriations. It has been decided by the Supreme Court of Texas that refunding bonds can only be issued to retire bonds originally valid, and where the new bonds refund a number of old bonds which were not legally issued, only the portion representing the lawful debt is valid. Lasater et al. v. Lopez, Treas., et al. (Tex. Civ. App.) 202 S. W. 1039.

There is no attack made on the remaining $16,000.86 of said refunding warrants, or of the warrants refunded by them, and said warrants so refunded may be taken to have been issued with the expectation of being paid with current funds. McNeill v. City of Waco, 89 Tex. 83, 33 S. W. 322. We think that these $35,000 of refunding warrants are invalid to the extent of $18,999.14, and should be held valid for the balance, the warrants to be reduced pro rata.

In view of their counterclaim, the defendants are entitled to a decree for the amount of principal and interest due upon the valid part of this debt, and also for the amount due as principal and interest upon the $120,000 of warrants.

The decree below is reversed, and the case remanded for further proceedings in accordance with this opinion.

BERG et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1921.)

No. 5534.

1. **Courts ⇐497—First-acquired jurisdiction over specific property gives exclusive jurisdiction.**
   A suit by which the court first acquires the lawful jurisdiction of specific property by the seizure thereof, or from which it appears that it is, or will become, necessary to a determination of the controversy involved, or to the enforcement of the judgment or decree therein, for that court to seize it, to charge it with a lien or trust, to sell or exercise like dominion over it, thereby withdraws that property from the jurisdiction of every other court, so far as necessary, to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal.
2. **Courts ⇐508(2)—Federal court may enjoin interference with its prior acquired jurisdiction.**
   A suit in a federal court against an executor and the widow of the decedent, in which the bill alleged that complainant became surety on a bond to the executor for payment of the debts of the estate, that the executor secured a judgment on the bond in a state court which complainant paid, and that with the proceeds the executor paid creditors of the estate who held liens on specific lands described, which were owned by decedent and devised by him to the widow, and prayed that complainant be subrogated to such liens and the lands sold to pay its claim, *held* to vest the court with exclusive jurisdiction over such lands for the purposes of the suit, with power to protect its jurisdiction by enjoining defendants from prosecuting further proceedings in the state court designed to interfere therewith.

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

Suit in equity by the Fidelity & Casualty Company of New York against Alex Berg, guardian, and others. From an order granting an injunction, defendants appeal. Affirmed.

R. W. Blair, of Topeka, Kan. (Z. C. Millikin, of Salina, Kan., and T. M. Lillard, of Topeka, Kan., on the brief), for appellants.

E. H. Gamble, of Kansas City, Mo. (G. A. Spencer, of Salina, Kan., and Robert Stone, George T. McDermott, and Robert L. Webb, all of Topeka, Kan., on the brief), for appellee.

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

SANBORN, Circuit Judge. This is an appeal from an injunction against further procedure by Alex Berg, guardian of the estate of Ellen Amelia Shute, James H. Shute, and Thomas L. Bond, executor of A. F. Shute, deceased, in an action in the district court of Saline county in the state of Kansas. The injunction is the result of the pendency of two actions between the same parties in two courts of concurrent jurisdiction, and it was issued to prevent the defendants in the suit in the federal court from interfering by means of proceedings

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

in the state court with the exercise of the jurisdiction which the federal court claims over the specific real estate described in the complaint in the suit in that court.

[1] The question the case presents is: Did the district court of Saline county, in the state of Kansas, or the United States District Court of the District of Kansas first acquire jurisdiction over and dominion to seize and apply the real estate of Ellen Amelia Shute to the payment of the claim of the Fidelity & Casualty Company, a corporation, the plaintiff in the suit in the federal court. The rule of law by which the answer to this question must be determined is that the court which first acquired the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit from which it appears that it is or will become necessary to a determination of the controversy involved, or to the enforcement of its judgment or decree therein, for that court to seize, to charge with a lien or trust, to sell or exercise like dominion over it, thereby withdraws that property from the jurisdiction of every other court, so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein, free from the interference of every other tribunal. Mound City v. Castleman et al. (8th C. C. A.) 187 Fed. 921, 924, 110 C. C. A. 55; Lang v. Choctaw, Oklahoma & Gulf Ry. Co., 160 Fed. (8th C. C. A.) 160 Fed. 355, 359, 87 C. C. A. 307; Brun et al. v. Mann (8th C. C. A.) 145, 152, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Sullivan v. Algrem (8th C. C. A.) 160 Fed. 369, 370, 87 C. C. A. 318; McKinney et al. v. Landon et al., 209 Fed. 300, 305, 126 C. C. A. 226.

[2] The facts which condition the answer are these: A. F. Shute died seized of large tracts of real estate, all of which he devised to his widow, Ellen Amelia Shute, subject to his debts, which exceeded $50,000. His personal property was insufficient to pay his debts, and Thomas L. Bond, the executor of his will, instituted an authorized proceeding in one of the probate courts of Kansas to sell this real estate and apply its proceeds to the payment of the debts of the decedent. Section 4603 of the General Statutes of Kansas of 1915 provided that an order for the sale of real estate of such a decedent should not be granted, if any of the persons interested in his estate should give a bond in a sum and with sureties approved by the court to pay his debts and the expenses of the administration of his estate. James H. Shute, a son of the decedent, gave such a bond, with the Fidelity & Casualty Company as a surety thereon, the probate court approved this bond, and on February 10, 1917, ordered that the proposed sale should not be made. James H. Shute did not pay the debts, and on June 21, 1917, Thomas L. Bond, the executor of the will of the decedent, brought a suit on this bond in the district court of Saline county, Kan., against James H. Shute, the Fidelity & Casualty Company, and Alex Berg, the guardian of the estate of the widow, Ellen Amelia Shute, who was a person of feeble mind.

In his complaint the executor alleged the facts which have been recited, that the widow was the owner of all the property of which A. F. Shute died seized, that she was a person of feeble mind, and Alex

Berg was the guardian of her estate, and prayed for judgment against all the defendants for $50,000 and interest. This complaint stated no cause of action against Alex Berg, the guardian, or the widow. On August 10, 1918, the Fidelity Company filed its answer and cross-petition. It set forth certain defenses not now material, and averred that all the debts referred to in the complaint were debts against the estate of the decedent, that the widow was the "sole devisee, legatee, and beneficiary by reason of the payment thereof," and that if the Fidelity Company, by reason of the judgment of the court, should be compelled to pay these debts, it should "in equity and justice be subrogated to the rights of the creditors against the property of the estate of the said A. F. Shute, deceased"; and it prayed for the judgment of the court that, if a judgment should be obtained against it on its bond, it should be subrogated to the rights of the creditors against the property of the estate for any and all amounts which it might be compelled to pay to such creditors, and for such other and further relief as to the court might seem right and just in the premises.

On September 9, 1918, Alex Berg, guardian, filed his reply and answer to the answer and cross-petition of the Fidelity Company, and stated therein that he denied all the allegations of the answer and cross-petition, except that he was the guardian of the widow's estate, that she was of feeble mind, and that she was the sole devisee, legatee, and beneficiary under the last will of A. F. Shute, deceased. On December 20, 1918, the district court of the state rendered a judgment in favor of Thomas L. Bond, the executor, and against James A. Shute and the Fidelity Company upon their bond, for the sum of $50,000, interest and costs. No judgment or order against or in favor of Alex Berg, the guardian, was rendered or made. On March 17, 1919, the Fidelity Company paid that judgment to Thomas L. Bond, the executor. On the next day it filed in the suit in the state court its supplemental answer and cross-petition, wherein it alleged that on the day before it had paid the judgment in full, and it prayed that it might "be subrogated to the rights of the creditors against the property of the estate of the said A. F. Shute, deceased," in the amount of $50,730.85 and interest thereon at 6 per cent. per annum from March 18, 1919, and for "such other and further relief as to the court may seem just and right in the premises."

On May 31, 1919, the Fidelity Company brought this suit in equity in the United States District Court for the District of Kansas against Alex Berg, guardian of the estate of the widow, James H. Shute, and Thomas L. Bond, executor of the will of A. F. Shute, deceased. In its complaint it set forth the facts which have been recited relative to the proceedings in the probate court of Kansas, the giving of the bond for $50,000 by James H. Shute and the Fidelity Company to pay the debts of the estate of A. F. Shute, the action in the district court of Saline county, the judgment in that court on the bond, the payment of that judgment by the Fidelity Company to the executor of the estate of A. F. Shute, the facts that the executor paid, with the $50,730.85 he received from the Fidelity Company in payment of that judgment,

$2,145.08 costs of the proceedings of the probate court of Saline county in the matter of the estate of A. F. Shute, and $48,585.77 to 13 named creditors of that estate, the facts that there remained in the hands of Alex Berg, guardian of the estate of the widow in the state of Kansas specifically described real estate of which A. F. Shute died seized, the title to which passed from him to the widow under his will of the value of $120,000, that the 13 creditors whose claims the Fidelity Company paid held valid liens upon this real estate to pay their claims and that it was entitled to be subrogated to these liens. And that company prayed that it might be subrogated to the rights and liens of those creditors whose claims it had paid to and upon the real estate of which A. F. Shute died seized which was specifically described in its complaint, that the court adjudge it to have a first lien on this specifically described real estate for $50,730.85, which it paid to the executor and he paid to these 13 creditors, and that this specific real estate be sold and the proceeds thereof be applied to pay to the Fidelity Company the amount of this lien.

Between the commencement of this suit on May 31, 1919, and November 3, 1919, when the injunction was issued the defendants in this suit were taking various proceedings in the state court tending to interfere with the exclusive jurisdiction of the court below to apply the property described by the complaint in that court to the payment of the claim of the Fidelity Company. As those proceedings are not material to the determination of the question before this court, it is useless to recite them and they are omitted.

There can be no doubt that upon the filing of the complaint of the Fidelity Company and the commencement of the suit in the court below on May 31, 1919, that court acquired plenary jurisdiction to seize and apply the specific real estate described in the complaint to the payment of the claim of the Fidelity Company set forth therein, unless the state court had acquired jurisdiction of that property prior to that day. The Fidelity Company clearly stated in its complaint in the federal court the basis of its claim, the payment of the judgment on its bond, the names of the creditors of the decedent, A. F. Shute, whom and the amounts of their claims which it paid, that those creditors had valid liens upon the real estate which it specifically described and alleged to have been the lands of the decedent when he died and of the widow since, and it prayed that it be subrogated to the liens of those creditors upon those lands, that the lands be sold to pay the liens and that the proceeds be applied to pay its claim. It made the facts appear beyond doubt or cavil that it was or would become necessary to a determination of the controversy it presented, or to the enforcement of its judgment or decree in this suit for the court to seize, charge with a lien or trust, to sell or exercise like dominion over the real estate described in the complaint.

The commencement of the action in the state court invoked its jurisdiction to adjudge the single issue whether or not Thomas L. Bond, the executor, was entitled to a judgment against James H. Shute and the Fidelity Company on their bond. No other relief was sought by the executor. The action was a personal action, and no specific

property was mentioned or involved. It is true that, two months after the action in the state court was commenced, the Fidelity Company in its answer and cross-petition alleged that the debts set forth in the petition of the executor in the probate court to sell the real estate of the estate of A. F. Shute were debts against his estate, properly chargeable against it, that the widow was his sole devisee, and that, if the Fidelity Company should be compelled to pay those debts, it ought in equity and justice to be subrogated to the rights of the creditors, and that it prayed that, in case judgment was rendered against it on its bond, it be subrogated to the rights of the creditors of the estate for the amounts it should pay such creditors, and that it should have judgment against the estate of A. F. Shute therefor. It is equally true that the Fidelity Company on March 18, 1919, filed a supplemental answer and cross-petition in which it alleged that on the 17th day of March, 1919, it had paid the judgment on the bond to the clerk of the court, and that it prayed that it might be subrogated to the rights of the creditors against the property of the estate of A. F. Shute.

But the owner of the real estate then was not the estate of A. F. Shute. It was the widow, and before her real estate could be seized and applied to the payment of the amount the Fidelity Company paid, or should pay, it was essential to allege, and subsequently to prove, first, that the creditors of A. F. Shute, deceased, had liens or claims for certain amounts due them from A. F. Shute upon certain real estate of which he died seized, the title to which was passed to the widow; second, that the Fidelity Company, or the money it paid to the clerk of the court or the executor, had paid such liens or claims, that it sought to be subrogated to the rights of the owners of such liens or claims, and that it ask that the real estate subject to such liens or claims be sold to pay them. None of these essentials to the seizure and sale of the real estate of the widow appeared in the pleadings of the suit in the state court on May 31, 1919, when the suit in the federal court was commenced.

Conceding, without admitting, that the Fidelity Company might have filed such pleadings and might have followed such a course in the suit in the state court as to institute an adversary proceeding between it and the widow, that would have presented the indispensable issues between them, whether or not it had paid the creditors of the estate of A. F. Shute, and, if so, what creditors, and to what amounts, whether or not those creditors had liens or claims against specific property of the widow, and to what amount, whether or not it was entitled to be subrogated to the ownership of such liens or claims, and that it might have sought the foreclosure of such liens or claims and the seizure, sale, and application of certain real estate of the widow to the payment thereof, yet it did not do so, and it did not appear from the pleadings and proceedings in the state court on May 31, 1919, when the suit in the federal court was commenced, that it was or would be necessary to a determination of the controversies there involved, or to the enforcement of the judgment or decree of that court for it to seize, to charge with a lien or trust, to sell, or to exercise like dominion over any of the real estate of the widow described in the complaint in

this suit in the federal court. All that the Fidelity Company at that time prayed for was subrogation to the rights of one named creditor of the estate of A. F. Shute, deceased, and a judgment against the estate of A. F. Shute. It asked no relief against the widow, no seizure or sale of any property. The chancellor below found the fact to be that the federal court first acquired jurisdiction of the property in controversy. That finding is presumptively correct, and must prevail, unless the record clearly shows that an obvious error of law intervened, or the court made some serious mistake of fact.

No such error or mistake is perceived, and the order appealed from is affirmed.

AGRICULTURAL INS. CO. v. HIGGINBOTHAM.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1921.)

No. 5472.

Insurance ⇐83(1)—Evidence held insufficient to authorize submission of case to jury.

Evidence *held* insufficient, as matter of law, to sustain the burden resting on defendant, an agent of plaintiff insurance company, to establish by clear and convincing proof that a provision of his contract of agency limiting the amount for which he was authorized to issue a policy on grain had been orally waived or annulled, and overruling of a motion by plaintiff for directed verdict *held* error.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by the Agricultural Insurance Company against Charles E. Higginbotham. Judgment for defendant, and plaintiff brings error. Reversed.

Arthur R. Wells, of Omaha, Neb. (Stout, Rose, Wells & Martin, of Omaha, Neb., on the brief), for plaintiff in error.

P. E. Boslaugh, of Hastings, Neb. (W. G. Hastings, of Lincoln, Neb., and Stiner & Boslaugh, of Hastings, Neb., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The Agricultural Insurance Company, a corporation, the plaintiff below, brought an action against Charles E. Higginbotham, the defendant, for that, while he was its agent, authorized to deliver its policies of insurance against fire and legally bound by its line sheet, which constituted a part of his agency contract, not to issue any of its policies for an amount in excess of $2,500 on any lot of grain in elevators, he issued a policy of the plaintiff on August 18, 1916, for $8,000 to the E. Stockham Grain Company on its grain in elevators; that grain was burned on August 21, 1916, the plaintiff was obliged to pay and did pay to the assured on November 7, 1916, $8,000

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on account of that loss; and it demanded judgment against the defendant for the difference between $2,500, the limit of the amount the defendant was permitted to insure by a policy of the plaintiff, and $8,000 and interest on that difference from November 7, 1916. The only defense that it is necessary to consider in this court is that the plaintiff, after the defendant's appointment as its agent, as the defendant avers in its answer—

"instructed, urged, requested, and authorized defendant to solicit for insurance all kinds of property included within the classes upon which it issued contracts of insurance, in any amount that could be procured, and to issue policies and contracts of insurance thereon and in such amounts as could be procured, not violating the established rule, practice, and custom as to excessive insurance having regard solely to the value of the property insured."

Mr. Freeman was the state agent of the plaintiff, and was authorized to waive limits of the amounts of risks on its behalf. Mrs. Harrington was the defendant's business manager. She testified that before the policy in question was issued she had a conversation with Mr. Freeman, in which he told her to "get the business and send it on; get as large a line as I could and send them on." Freeman admitted that he had a conversation with her, and that he asked her to increase the plaintiff's volume of business, so that the company could get a larger premium income, and that he might have used the term "increase our line in Hastings," meaning the general volume of its business, and that the matter of excess lines, the specific writing of an excess liability on a particular risk, was mentioned in the conversations, and that there was a distinction between lines meaning the general volume of business and such excess lines. At the close of the trial the plaintiff requested the court to instruct the jury to return a verdict in its favor; the court refused to do so, and charged the jury that the defendant was bound by the limitation of $2,500 on grain in elevators, fixed by the line sheet, which was delivered to him and became a part of the contract of agency, and that the plaintiff was entitled to the verdict unless they believed the testimony of Mrs. Harrington as to her conversation with Mr. Freeman, but that if they believed her testimony the defendant was entitled to the verdict. These rulings are assigned as error.

In Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 659, 21 Sup. Ct. 275, 276 (45 L. Ed. 361), speaking of the submission of a case to the jury, Mr. Justice Brewer said:

"It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In Bell v. Carter (8th C. C. A.) 164 Fed. 417, 419, 420, 90 C. C. A. 555, 557 (19 L. R. A. [N. S.] 833), Judge Van Devanter, now Mr. Justice Van Devanter of the Supreme Court, said:

"Whilst it is true that a substantial conflict in the evidence must be determined by the jury as a question of fact, it is also true that when the evidence is undisputed, or is so clearly preponderant that it reasonably admits of

but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court."

This court has repeatedly held that:

"It is the duty of the trial court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting but is 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." Woodward v. Chicago, M. & St. P. Ry. Co. (8th C. C. A.) 145 Fed. 577, 578, 75 C. C. A. 591, 592.

The question in this case is: Was the conflict in the evidence so unsubstantial, and all the evidence taken together so clearly preponderant in support of the plaintiff's cause of action, that in the exercise of a sound judicial discretion a court could not reasonably sustain a verdict in opposition to it? We turn to the testimony for the answer. Repeated readings of the evidence have forced our minds to the conclusion that much depends upon the sense and meaning in which the words "line" and "lines" were used and understood by Mrs. Harrington and Mr. Freeman in the conversation to which she testified—much depends upon whether those words meant (1) the limit or limits of the amount of insurance which might be written by the defendant on lots of a specific class of property such as grain in elevators or on lots of specific classes of property, or (2) the class or classes of property themselves and the volume or volumes of business or risks which the defendant should procure for the plaintiff. Upon the question of the use and meaning of these words "line" and "lines," the testimony of the defendant in his own behalf is instructive. He testified that he had a conversation with Mr. Freeman regarding the business on September 9, 1915, in which Mr. Freeman was asking him for more business, and in which he promised him more, but told him that Hastings was a cut-rate town and "we would have to meet the rates"; that there were rates fixed by a board for some towns in Nebraska, but Hastings was not one of them, and business in that town was written at cut rates. He further testified, among other things, as follows:

"I told him I could get a large line of insurance on stocks and buildings and on grain, and if he would meet the rates that we would give him his share of the business of the office. * * * I told him that the other companies that we had in the office accepted these lines, and we wrote up the policies and submitted to them, and if his company would do the same we would be glad to give them their share of the business."

His answer to the question, "What, if anything, did he say regarding the limit that you could go on taking lines of insurance for the Agricultural Insurance Company?" was:

"He said the Agricultural was a large company, and they had good facilities for reinsurance, and they wanted the business and would carry good lines."

In this testimony of Mr. Higginbotham the word "line" was used once, and the word "lines" three times. And the sentence in which either of the words was used in each case demonstrates the fact that

it was not used in the sense of the limit or limitation of the amount of insurance that might be taken upon a single risk, or on a class or classes of risks, but it was used in each case in the sense either of the class or classes of risks, or the amount or volume of insurance business and of premiums that might be obtained.

Bearing in mind, now, that by the written or printed terms of the line sheet, which was in reality a part of the contract of agency, the defendant was expressly limited to a risk of $2,500 or less upon any lot of grain in elevators, and that the sense in which the words "line" and "lines" were used in the conversations between Mrs. Harrington and Mr. Freeman is material, let us examine the testimony of Mrs. Harrington, on which the verdict in this case rests. So far as that testimony is material to the issue, it was as follows:

"Q. Now, what did he say regarding the business of insurance? A. Previous to that we did not give the Agricultural a great deal of business because, if I may say, they were very stiff on rates; so I talked to Mr. Freeman about that at that time, and he said, 'Well, now that I have transferred this company to you people, we will expect you to give us a larger line.' * * * He says, 'What lines can you give us?' I says, 'I know I can give you some dwelling house and household goods, if you will meet the prevailing rate on dwelling houses.' And he says, 'What is that?' I says, 'The rate for fire, lightning, and tornado, which is called combined, is 1 per cent. and the prevailing rate for fire and lightning is 60 cents—'

"Q. For what term? A. Five years; usually written for five years; dwellings and household goods for five years. And Mr. Freeman says, 'All right, I will just meet that rate.' * * * And he says, 'I want some business on good stocks and buildings and other lines;' and he says, 'They are different rates, each building has a different rate, and isn't like dwelling houses or household goods.' * * *

"Q. Was there anything said in that conversation regarding the limit that you might go? A. No, sir; Mr. Freeman never mentioned any limit on anything to me.

"Q. Well, I don't mean the line sheet; but was there anything said by him at that time to you as to how far you might go in taking on a risk so far as its value? A. Of course he knew we would go according to the value. I think he had that much confidence in us that we wouldn't give him anything that was overvalued; but according to the value we would submit the line, and he would take care of it.

"Q. Did he say he would take care of it? A. I don't remember as he said just that; talked over about lines; told me to get the business and send it on; get as large a line as I could and send them on.

"Q. What do you mean by 'lines'? A. Mean the amount they call 'lines,' the amount that is covered on a risk or dwelling house."

Here the material testimony of Mrs. Harrington upon the issue in hand closes. Note that the last answer here is not, nor did Mrs. Harrington in her testimony say that Freeman meant or understood, or thought she meant by the word "line," or by the word "lines," the amount or the amounts that is covered on a risk or dwelling house, and that her testimony goes no further than the bare statement that she meant that. Yet, in the last analysis, it is upon this last answer of Mrs. Harrington that this verdict rests. And if this answer means anything, it means that Mrs. Harrington in her conversation with Mr. Freeman meant by the words "line" and "lines" the limit or limits of insurance that the defendant might lawfully place upon risks

taken by him for the plaintiff. So it is that, if that was not the meaning and effect of these words, there is no evidence to sustain the verdict.

But the testimony of Mrs. Harrington itself demonstrates the fact that such was not and could not have been the meaning of either of these words in any of the conversations or in any of the testimony she gave prior to the answer to this last question. The first time one of these words was used in that conversation, Freeman asked the defendant and Mrs. Harrington, his business manager, for a larger line, and that could have meant nothing but a larger share or volume of insurance business, not a larger limit on the amounts that they might place on different risks or classes of risks, for those limits were in the control of Freeman, and not of the defendant. The second time one of these words was used was when Freeman asked, "What lines can you give us?" and the answer was, "I know I can give you some dwelling house and household goods;" and the third time was when Freeman said, "I want same business on good stocks and buildings and other lines." In these places the word "lines" unquestionably meant classes of risks, certainly not limits as to the amounts to be risked, on specific lots or classes of property. The fourth time was when Mrs. Harrington testified, not that Freeman said, but that she and the defendant were to submit the line, and he would take care of it. That clearly meant that they would submit the class of risks, not the limit or limits of the amounts that might be placed on specific risks or classes of risks, for Mrs. Harrington herself testified that Mr. Freeman never mentioned "any limit or anything" to her. The fifth and sixth times that one of these words was used was when Mrs. Harrington testified that Freeman talked over the line, and told her to get the business and send it on; get as large a line as she could and send them on. Here, again, these words could not have meant limits of amounts of insurance on lots of different classes of property, because she testified he did not talk of such limits with her, and those limits were certainly not what she was to send on to him. The words could have meant nothing but classes of insurance business or risks.

This, then, was the state of the evidence on the crucial issue of this case when it closed. That evidence proved conclusively that by the printed line sheet, which became a part of the agreement of agency, the defendant was legally bound not to issue one of the plaintiff's policies of insurance on any lot of grain in elevators for an amount in excess of $2,500. The defendant pleaded and claimed that this agreement of limitation on the amount to be issued on grain and on the amounts to be issued on other lines or classes of risks was abrogated and annulled by the conversation between Mrs. Harrington and Mr. Freeman to which she testified. On well-settled principles such an abrogation of such a written or printed contract may not be lawfully adjudged without clear and convincing evidence that there was an agreement, understanding, and intention of both of the parties thereto that the original contract should be annulled and thenceforth held for

naught. The burden was upon the defendant to establish such an agreement by evidence of that nature. Mrs. Harrington testified that nothing was said by Mr. Freeman about these limitations, or the original contract which embodied them, that they talked of lines or a line of insurance business, and that she meant by those words the amount or the limit of an amount that is covered by a risk on dwelling house. But the sentences in which she testified that the words "line" and "lines" were used in the conversations between her and Mr. Freeman are such that they could not have conveyed such a meaning to any one who heard them, and they do not convey such a meaning to any one who reads them. And the conclusion is that there was no substantial evidence to sustain the defense that the limitation on the amount for which the defendant might issue a policy of the plaintiff for grain in elevators embodied in the line sheet, which became a part of the contract of agency, was ever abrogated, waived, or modified. The evidence of the existence of that limitation at the time the defendant issued the policy under consideration was so clearly preponderant that no other conclusion was reasonably admissible, and the court fell into an error in refusing to instruct the jury to return a verdict for the plaintiff.

The facts that in January, 1916, Mrs. Harrington wrote a policy of $2,500 on the contents of a garage, which was a prohibited risk under the agency contract, and Freeman approved it, but warned her not to issue another on a risk of that class, and that she wrote a policy of $3,000 to one Spotts on a stock of clothing, when the limit thereon under the contract was $2,500, and the plaintiff canceled it on receipt of the daily report, and wrote a letter to the defendant that it could not carry it at the stipulated rate, have not been overlooked. But the court below rightly held, and charged the jury, that these facts constituted no estoppel or waiver by the plaintiff of the limitation under consideration, and were immaterial unless they found the evidence sustained the defense based on the conversation between Mrs. Harrington and Mr. Freeman. They are not, therefore, material or relevant to the question of law that is decisive of this case in this court, and for that reason they have not been discussed.

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

UNITED STATES v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, First Circuit. June 29, 1921.)

No. 1488.

Master and servant ⇐13—Telegraph operator held not "on duty," within federal Hours of Service Act, during rest periods.

A railway telegraph operator, who was paid for about 12 hours' service out of 24-hour periods, but was in actual service only 5 or 6 hours, being released for periods of from 1 to 2 hours from time to time by

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

the train dispatcher, *held* not "on duty" for a longer period than 9 hours, in violation of Hours of Service Act March 4, 1907, § 2 (Comp. St. § 8678).

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

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action by the United States against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and the United States brings error. Affirmed.

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

John L. Hall, of Boston, Mass., for defendant in error.

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

JOHNSON, Circuit Judge. In this action the United States sought to recover penalties provided for violations of the federal Hours of Service Act of March 4, 1907, c. 2939, § 2, 34 Stat. 1416, Comp. Stat. § 8678, the material part of which is as follows:

"Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The defendant employed at its station at Marlboro Junction in the state of Massachusetts one Charles W. Crane as a telegraph operator. Two operators were employed by it at this station, which was one falling within the class of offices designated under the statute as "continuously operated night and day," although at certain hours it was closed. United States v. B. & M. R. R. (C. C. A.) 269 Fed. 89.

The question presented by the assignment of errors, is whether one of these operators, who went on duty at 4 o'clock p. m., and was not finally released from duty until 4 o'clock a. m., by reason of certain releases, during which time he was not required to stay at the station and was not subject to call, was employed more than 9 hours in the period of 24 hours upon 5 different days during the month of June, 1916.

Upon the days in question this operator went on duty at 4 p. m. and remained until from 7:20 to 7:27 p. m., when he was released from duty by the train dispatcher to return at periods varying on the different days from 8:35 p. m. to 9:20 p. m., during which time he was not sub-

ject to any call, nor required to remain upon the railroad premises, and could do what he chose with his time, which he employed, as he testified, sometimes in sleeping, sometimes in reading, and sometimes attending the theater. After this definite release he returned to his post and remained to an hour varying from 10 p. m. to 10:14 p. m., when he was again definitely released, under the same conditions, by the train dispatcher from service on 1 day until 12:15 a. m., and upon the other 4 days until 12:30 a. m., and after his return to duty at the end of the second period of release he remained on duty until 12:52 a. m. upon 2 of the days in question, 12:55 a. m. upon 2 others, and 12:58 upon the fifth, when he received a third release from duty until 3 o'clock a. m. upon two days, 3:05 a. m. upon the third day, 3:20 a. m. upon the fourth day, and 2:45 a. m. on the fifth day, and after his return to duty at the expiration of this release he remained at his post until 3:35 a. m. on one day, 3:58 a. m. upon the second day, 3:41 a. m. the third day, 4:10 a. m. the fourth day, and 3:55 a. m. the fifth day. Upon these days the aggregate of his actual service varied from 5 hours 13 minutes upon one day to 6 hours 9 minutes upon another, and his periods of release aggregated from 5 hours 46 minutes to 6 hours 41 minutes. If these periods of release are not to be deducted from his total hours of service, this telegraph operator was on duty nearly 12 hours out of the 24-hour period upon the days in question, and he received pay from the defendant company for the whole period of service.

The case was heard by the learned judge of the District Court without a jury, who has found that the release periods allowed to the operator should be deducted from his total hours of service, and that when he was released for a definite time by the train dispatcher he was not "on duty"; that these interruptions in the service of the operator—

"were at a time when Crane did not require meals, but did require rest. They were unrestricted; they were opportune. Crane was not subject to call during each period; and, while he was not advised, on the day before, of his exact number of minutes of rest on the following day, he was advised by his experience that these periods were to present substantial opportunities for release, from an hour to more than 2½ hours.

"Upon the testimony I am constrained to find that the times of release were of so substantial and definite a period that they clearly gave means of rest and recuperation. They were of a character which tended to prevent the dangers which arise to employees and to the public from continuing men in a hazardous occupation for a time so long and so indefinite as to render them unfit to give a service essential to their protection.

"Upon the testimony it cannot be said that Crane was, within the meaning of the statute, 'on duty' during these rest periods. During those periods he was not engaged in work; he was not charged with a responsibility which would prevent him from rest and recuperation.

"In my opinion the government has not, in either of the five counts of the declaration, made out a case of violation of the statute."

These findings of fact and the conclusion of law are assigned as error.

The controlling purpose of Congress in the enactment of this statute was the protection of the lives of the traveling public, by preventing the employment of men charged with responsible duties as to movements of trains by telegraph or telephone for so long a time as to render them incapable of performing their duties efficiently. While Congress al-

lowed by the statute the employment of other classes of employees for a period of 16 hours continuously and then a period of rest for 10 consecutive hours, or of 16 hours in the aggregate out of a 24-hour period, to be followed by 8 hours of consecutive rest, it fixed the period of employment of telegraph operators in stations operated day and night at 9 hours in the 24-hour period, and has made no exceptions which would cover stations where there were but few trains and but little work for an operator. It did provide that, in particular cases, the Interstate Commerce Commission might extend the time in which the statute should go into operation as to them; but no power was conferred upon the Interstate Commerce Commission, nor upon the court, to exempt from the provision of the act particular stations at which the common carrier might be released from the requirements of the act because of the small number of trains whose arrival or departure was to be announced.

The act applies to all stations "continuously operated night and day," and provides that a telegraph operator shall not "be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period" in such stations except in case of emergency.

It was held in United States v. A., T. & S. F. Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, that a telegraph operator who was employed for 6 hours and then, after an interval of 3 hours, for a period of 3 hours longer, in 24 hours, was not employed for a longer period than 9 hours. In this case the station and telegraph office were shut from 12 to 3 o'clock by day and by night, but open the rest of the day, and the telegraph operator was employed from half past 6 o'clock in the morning until 12 noon, and again from 3 p. m. to 6:30 p. m., or 9 hours in all of actual work.

Following this decision of the Supreme Court, it was held in Southern Pacific Co. v. United States, 222 Fed. 46, 137 C. C. A. 584 (C. C. A. 9th Circuit), that an employee other than a telegraph operator, who was released from duty for 1 hour, when he was free to come and go, if the period of release was a substantial and opportune period of rest under all the circumstances, did not work more than 16 hours consecutively, and that whether these periods were substantial and opportune periods was a question of fact for the jury.

In United States v. A., T. & S. F. Ry. Co. (D. C.) 232 Fed. 196, it was held by Pollock, District Judge, that a telegraph operator, who worked from the hour of 8 a. m. to the hour of 12 o'clock noon, and from the hour of 1 o'clock p. m. to the hour of 6 o'clock p. m., he being off duty during the time from 12 o'clock noon to 1 p. m., when he was not subject to call by the defendant company, was not so employed as to violate the statute.

In United States v. Minn., St. Paul & S. S. M. Ry. Co., 250 Fed. 382, 162 C. C. A. 452 (C. C. A. 8th Circuit), it was held that two periods, one of 3 hours 7 minutes, and one of 2 hours 24 minutes, during which a telegraph operator in a railroad station, who lived in the building, was off duty, and during which it was his practice to sleep, were substantial

periods of rest, and not to be counted as periods of labor under the Hours of Service Act.

On the other hand, it was held in C., R. I. & P. Ry. Co. v. United States, 253 Fed. 555, 165 C. C. A. 225 (C. C. A. 8th Circuit), that an hour allowed a telegrapher for meals, during which he was subject to recall, etc., could not be deducted from the whole time he was on duty, within the Hours of Service Act, so as to allow a railroad company to escape the penalty for violating the act by keeping him on duty more than 9 hours; that "he was at his employer's beck at any time, and might even be called to the office from the table." He was not free to go from his home beyond reach of summons for act of duty, but had to hold himself within call and with readiness to respond at any moment.

In United States v. Cornwall & L. R. Co. (D. C.) 268 Fed. 680, District Judge Witmer held: A period ranging from 20 to 50 minutes allowed a telegraph operator for meals will not be deducted in computing his consecutive hours of service, and that such intermissions must be counted as part of the continuous service.

The Supreme Court of the United States having decided that the 9 hours of service in 24 in which a telegraph operator is employed need not be continuous, but that the aggregate of his employment within the 24-hour period determines whether he has been employed more than 9 hours in contravention of the act, the test which has since been applied by the courts in the construction of this act has been whether the release periods were of such substantial length and at such a time as to afford rest and release from the strain of labor. In the present case the operator had three release periods, each of them of more than an hour in length, and knew each day when he came to work, as he testified, that he would receive these release periods at substantially the same time and for the same duration as on previous days. He was notified by the train dispatcher at the close of each period of actual service when he might leave and when he should return to his post, and during these intervals he was free to employ himself as he saw fit. His home was only about 1,000 feet away, and he sometimes went there during these periods. His duties were not exacting, and he was only required to report the arrival and departure of a few trains. He was released finally from duty at 4 o'clock in the morning, and had 12 consecutive hours for rest before returning to work.

Under the construction given to the statute in United States v. A., T. & S. F. Ry. Co., supra, and considering the definite periods of release given to the operator, under the circumstances of this case, we think, as did the District Judge, that he was not employed more than 9 hours in a 24-hour period.

In reaching the conclusion which we have, we do not wish it understood that we hold that such periods of release as were granted the operator in this case would in themselves, under all circumstances, break the continuity of service, because each case must be decided upon its own peculiar conditions. Under other circumstances, such periods of release might not be sufficient to break the continuity of service and af-

ford such an opportunity for rest and release from responsibility and mental tension as it is the evident purpose of the act to secure.

The judgment of the District Court is affirmed, with costs to the defendant in error.

O'BRIEN v. LASHAR et al.*

SAME v. ANDERSON et al.

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

No. 226.

1. **Corporations ⇐561(1)—Receiver not appointed merely to collect money.**
Equity will not appoint a receiver for an insolvent corporation, with powers limited to the collection of unpaid stock subscriptions, or moneys embezzled or converted by an officer.

2. **Courts ⇐327—Amount involved held insufficient to give jurisdiction to federal court.**
In a suit in equity for the appointment of a receiver of an insolvent corporation, to sue for two sums of money, one of $500 and the other of $700, alleged to have been embezzled, the amounts alleged were not sufficient to confer jurisdiction on the United States District Court.

3. **Corporations ⇐320(8)—Stockholder's bill held insufficient for failure to show efforts to secure redress.**
In a stockholder's suit for the appointment of a receiver for an insolvent corporation, to sue for money alleged to have been embezzled, allegations that one of the defendants appropriated certain sums, and in his report as treasurer falsely showed a disbursement of money were not sufficient under equity rule 27 (old rule 94 [29 Sup. Ct. xxxvii]), which requires an allegation setting forth efforts of plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action.

4. **Corporations ⇐320(7)—In stockholder's suit for receiver to collect unpaid stock, fraud held not alleged.**
In a suit by stockholder for the appointment of receiver to collect money due for stock in a corporation, allegations to the effect that the defendants, as officers, had failed to collect for stock for which they had subscribed, and that they altered and amended the records of the corporation, and had changed a certain by-law concerning the majority necessary in voting, are not sufficient allegations of fraud to support the suit.

5. **Corporations ⇐320(4)—Bill to redress frauds merely not entertained, when corporation insolvent.**
Equity will not entertain a stockholder's suit merely to redress fraud of the directors, if the fraud has produced insolvency, as it should then wind up the company.

6. **Corporations ⇐553(1)—Federal court held authorized to appoint receiver to collect stock subscriptions, if amount involved is sufficiently large.**
Under Gen. St. Conn. 1918, § 3443, providing that stockholders' bill for dissolution and the appointment of receiver to wind up corporation may be maintained for fraud or gross mismanagement of corporate functions, and section 3432, authorizing the directors to call subscriptions, the United States District Court may appoint a receiver for an insolvent corporation to collect money due on stock, when the officers fraudulently refuse to make such collections, if the amount involved is sufficiently large to be within the court's jurisdiction.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 51, 65 L. Ed. —.

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

Suits by James J. O'Brien against Walter B. Lashar and others and against Percy P. Anderson and others. From decrees dismissing the bills, plaintiff appeals. Affirmed.

See, also, 266 Fed. 215; 272 Fed. 1023; 273 Fed. 520, 521.

On the same day O'Brien filed the two bills above entitled; both have been dismissed as the result of motions under equity rule 29 (33 Sup. Ct. xxvi); such motions being the equivalents of special demurrers. Both suits arise out of O'Brien's dissatisfaction with the conduct of his fellow and majority shareholders in the two defendant corporations, and in each proceeding the defendants are the corporation itself and all the shareholders other than the plaintiff O'Brien.

The substance of what may be called the Land Company Case is this:

That corporation was formed by plaintiff, Lashar, and P. P. Anderson under the laws of Connecticut, with power (substantially) to deal in and improve real estate and buy and sell building supplies and material. The capital stock consists of 500 shares, at $100 par each. It is alleged that O'Brien took 200 shares and paid for them by a conveyance of real estate worth $20,000. Lashar and P. P. Anderson each subscribed for 150 shares, "to be paid for in cash." It is alleged that P. P. Anderson, as treasurer of the Land Company, "by false and fraudulent pretenses and statements" induced O'Brien as secretary to "participate in the issuance" to all the said incorporators, including himself, of certificates of stock "which state on their face that they are fully paid and nonassessable."

The bill avers that Lashar and P. P. Anderson have paid only a part of their subscriptions, but how much plaintiff does not know; but later the same document asserts that these defendants have paid "in fact * * * about $8,400" upon their stock subscriptions. It is then stated that plaintiff continued to be secretary and a director of the Land Company until August 15, 1919, before which date P. P. Anderson had transferred to the defendant J. J. Anderson 10 shares of Land Company stock. The stockholders' meeting was held on the date last mentioned, which plaintiff is said to have been "unable by reason of insufficient notice to attend." At this meeting O'Brien was dropped as secretary and director, and the corporate offices filled by the election of the two Andersons and Lashar.

It nowhere appears how much notice plaintiff had of this meeting, which was held at Bridgeport, Conn.; but the notice therefor is said to have specifically stated that one of the purposes of the meeting was to correct all errors in the minutes of the corporation with respect to "the issuance of shares of the capital stock of this corporation in payment" for 42 acres of land in Fairfield, Conn., and also to correct the certificate of organization, so as "to conform to the facts as to the amount of stock paid for in property and the amount of stock paid for in cash." The notice also stated that one of the objects of the meeting was to amend, alter, or repeal "sections 12 and 16" of the corporate by-laws.

The bill then charges on information and belief that at this meeting the individual defendants "did pass various resolutions purporting to change, alter, and amend the records of the corporation, so as to manufacture false and fraudulent evidence of the payment of their subscriptions, or to furnish a false and fraudulent defense to the action based upon the subscription contract." Further it is charged that "a certain by-law requiring the consent of 70 per cent. of the stockholders to amend" was repealed, and another by-law amended "without a 70 per cent. vote being obtained."

The bill further asserts that, "in an effort to correct the various abuses and neglects of duty on the part of the defendants [plaintiff] has served upon the defendants Lashar and P. P. Anderson a written demand that action be taken to call in the unpaid subscriptions, and [plaintiff] has further protested to the defendants requesting a repeal of the various illegal acts" at the corporate meeting of August 15, 1919. It is also asserted in

common form that at the time of the transactions complained of plaintiff was a shareholder and that the suit is not collusive. In point of fact plaintiff was a resident of New York and all the individual defendants of Connecticut.

The final charge is that the Land Company is "insolvent by reason of certain outstanding notes and obligations, which cannot be paid without the collection of the stock subscriptions owed to the said corporation by" Lashar and P. P. Anderson.

The prayer of the Land Company bill is that a receiver be appointed "over the property and affairs of the defendant corporation, and * * * that a judgment may issue against Percy P. Anderson and Walter B. Lashar, in favor of the Fairfield Park Land Company, for such sum or sums as may upon hearing be shown to be due to the said corporation for the balance of their stock subscriptions."

In the second suit, which may be called the Building Company Case, the bill avers that O'Brien, with the same P. P. Anderson and Lashar, organized at substantially the same time that they launched the Land Company another Connecticut corporation, viz. the Building Company, with a share capital of $10,000, of which each of these three men took in effect one-third, and paid into the treasury, Lashar $1,000, O'Brien $740, and Anderson $500. The business of this concern was to deal in real estate and "all rights pertinent thereto." Plaintiff continued to be secretary and director of the Building Company until August 15, 1919, and is still a stockholder; neither he nor any other shareholder has paid in on stock subscription more than the amounts above stated.

The bill then charges that about April 10, 1918, P. P. Anderson, being the treasurer of the Building Company, "misappropriated and converted to his own use and benefit" $700 belonging to the corporation, and when the same Anderson filed his annual treasurer's report in August, 1919, he said nothing about this $700, and "further failed to account for the sum of $500, being the amount of a mortgage" made to the Building Company by one Hutchinson, and in said report he "falsely states and shows a disbursement of $4,000," when in fact no such sum was "disbursed or paid out."

It is then charged that the Building Company is insolvent by reason of outstanding debts amounting to over $5,000, and is "unable to continue in business * * * by reason of its inability to obtain money or credit" and the failure (of the other shareholders, directors and defendants) to compel the treasurer, Anderson, "to pay into the corporation the moneys misappropriated by him." The bill contains the usual allegations that plaintiff was a stockholder at the time of the transactions complained of, and still is such stockholder, and that the suit is not collusive, and further that plaintiff, "in an effort to correct the various abuses and neglects of duty on the part of the defendants, directors and officers of said corporation, has served upon [the defendants] several notices and protests about the mismanagement and misappropriation of the funds of the corporation [by defendant Anderson], but his protestations were unheeded and ignored."

The prayer of this Building Company bill is that the court appoint "a receiver over the property and affairs" of the corporation, and that "defendant Anderson be compelled to make an accounting to the corporation of his acts as treasurer, and to pay to the corporation the sum or sums found to have been misappropriated and converted by him to his own use and benefit."

James J. O'Brien, of Boston, Mass., pro se.

William H. O'Hara, of Bridgeport, Conn., for defendant corporations.

Arthur M. Marsh, of Bridgeport, Conn. (Philo C. Calhoun, of Bridgeport, Conn., of counsel), for individual defendants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). What plaintiff conceived to be the substance of his appeal, as shown by as-

signments of error and argument, we have disposed of by the decision filed herein March 24, 1921, upon his motion to "strike out" most of the appeal record. It remains to consider whether his bills in equity, or either of them, shows a present cause of action properly pleaded.

Observing that plaintiff is not a creditor, but shareholder only, that he avers both corporations to be insolvent, and endeavors to allege fraudulent acts on the part of the individual defendants, we have much difficulty in assigning these bills to any recognized category of equitable remedies. As plaintiff has conducted his own cause, and as we think exhausted effort upon a mistaken point of practice, we are not advised, except by the language of the bills, under what head of jurisdiction the court is asked to entertain them.

It seems to us that they are: (1) If taken literally, merely efforts to obtain a receiver, in order to sue in one case for some thousands of dollars of unpaid stock subscriptions, and in the other for either $700 or $1,200 embezzled or converted by P. P. Anderson; (2) they may be intended as stockholders' bills, within the authority of Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, and summarized in Cook on Corporations, § 646; or (3) the endeavor may be to wind up the corporation—this interpretation being consistent with the allegation of insolvency and prayer for receiver.

[1] To take the bills literally, and appoint receivers with powers limited to plaintiff's prayers, would introduce a new and wholly undesirable jurisdiction in equity. The effort has sometimes been made to obtain a receiver for the purpose of doing what a solvent corporation has refused to do, but no reason has been or can be adduced why any such proceeding should be taken with an insolvent concern. Cf. Bartlett v. New York, etc., R. R. Co., 221 Mass. 530, 109 N. E. 452. In this view of the matter there is also a plain lack in the jurisdictional amount as pleaded in respect of the Building Company bill.

[2] Regarded as bills to remedy the frauds of directors, under Hawes v. Oakland, supra, it is plain that in the Building Company Case the bill does not show compliance with equity rule 27 (33 Sup. Ct. xxv) as that regulation (which is old rule 94 [29 Sup. Ct. xxxvii], with slight amendment) is well expounded in Smith v. Chase, etc., Co. (D. C.) 197 Fed. 466.

[3, 4] Pursuing this aspect of the case, the Land Company bill, if supportable as one to redress directors' frauds, quite fails in alleging facts constituting fraud; it being elementary that to merely cry fraud is not to allege it.

There is nothing unlawful in not collecting stock subscriptions at once, and nothing wrong in correcting erroneous or mistaken minutes and certificates, and no facts are alleged which, if true, show that the two Andersons and Lashar have necessarily done anything wrong; furthermore, of course, there would be no reason for entertaining a bill for fraud merely, if such fraud had produced insolvency. Equity should then proceed to wind up the company.

[5] We conclude that these bills must be viewed as an effort by a stockholder as distinct from a creditor to put his corporation into an equitable insolvency proceeding. We held in Maguire v. Mortgage

Co., 203 Fed. 858, 122 C. C. A. 83, that the courts of the United States as courts of equity had no power to entertain a stockholders' winding-up suit by means of a receiver of the corporate affairs, unless there were a statute of the state of incorporation authorizing such action. Cf. Taylor v. Decatur, etc., Co. (C. C.) 112 Fed. 449; Conklin v. United States, etc., Co. (C. C.) 140 Fed. 219; Jacobs v. Mexican, etc., Co. (C. C.) 130 Fed. 589.

[6] Such statute exists in Connecticut. G. S. § 3443 et seq. This act provides (inter alia) that, when there has been any fraud or gross mismanagement in the conduct of a corporation, or whenever its assets are in danger of waste, or whenever any good and sufficient reason exists for the dissolution of such corporation, any stockholder or stockholders owning not less than one-tenth of the capital stock may apply for dissolution and the appointment of a receiver to wind up its affairs.

There is no doubt that the collection of unpaid stock subscriptions is a corporate function, and G. S. § 3432, specifically provides that such subscriptions may be called by the directors "in such proportion and at such times and places as they think proper." Yet this provision, like almost every other matter of law, may be so abused or evaded as to constitute fraud. Wherefore, if directors refuse their statutory duty in the premises, a court of equity may in insolvency, through its receiver, itself order such payments to be made (Kroegher v. Calivada, etc., Co., 119 Fed. 641, 56 C. C. A. 257); and in like manner we perceive no reason under such a statute why the District Court in Connecticut could not appoint a receiver for a corporation rendered insolvent by the thefts of one director and condoned by the others, if the amount involved were sufficient.

We conclude, therefore, that this plaintiff could have sued in the court below, had he shown the jurisdictional amount and pleaded a case within G. S. § 3443. This he has not done, and has refused to do after ample opportunity granted for amendments.

Decrees affirmed, with costs.

In re EILERS MUSIC HOUSE (two cases).

OREGON EILERS MUSIC HOUSE v. SITTON (two cases).

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

Nos. 3529, 3548.

1. Bankruptcy ⇐287(1)—Form of pleading in proceeding by trustee is immaterial.

Where a court of bankruptcy has jurisdiction of a plenary suit by a trustee, the fact that he proceeds by petition as for a summary order is immaterial, if the parties appear and there is a full hearing on the merits, and in such case the proceeding will be treated as a plenary suit.

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

2. Abatement and revival ⟸17—Pendency of another suit as bar must be pleaded.

In a proceeding in a court of bankruptcy by a trustee against a third party to recover assets, the jurisdiction of the court is not affected by the fact that another action between the same parties involving the same issues, is pending in a state court, where such objection is not pleaded and there is no conflict between the courts over the possession of specific property.

Ross, Circuit Judge, dissenting.

Petition to Superintend and Revise Decree in Bankruptcy of, and Appeal from, the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

On rehearing. Affirmed.

For prior opinion, see 270 Fed. 915.

Thomas Mannix, of Portland, Or., for petitioner and appellant.

W. C. Bristol, of Portland, Or., for respondent and appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Rehearing was ordered in these cases on the representation of the appellant that a valid defense to the suits existed in the fact that, before the institution of these proceedings in the court of bankruptcy which were reviewed in this court on appeal, a plenary suit between the same parties and involving the same subject-matter was begun by the trustee in bankruptcy in a state court of the state of Oregon, which action was still pending.

The facts disclosed by the record are that on August 21, 1918, the trustee petitioned the court of bankruptcy for instructions, stating that he was in doubt whether he should proceed in the state court in a plenary suit against Oregon Eilers Music House asking for a receivership for the purpose of placing its alleged independent assets more completely under control, and asking the advice of the court. On August 23, 1918, the court authorized the trustee to proceed in any court of competent jurisdiction in the state of Oregon or elsewhere, by any such actions or suits as may be necessary for the purpose of reducing to possession and maintaining the control of all property and assets of the bankrupt's estate, and expressly authorized the trustee to bring any such action or suit against Oregon Eilers Music House or any of the individuals or officers controlling the same.

On March 15, 1919, in pursuance of that order, the trustee commenced in a state court of Oregon a plenary suit against Oregon Eilers Music House, wherein he set forth the facts and prayed for the appointment of a receiver to take possession of the assets of the defendant, and for a decree that all the property in the possession of the defendant and its officers be adjudicated to be the property of the bankrupt. The defendant in that action denied the jurisdiction of the state court and urgently insisted that the jurisdiction was solely in the court of bankruptcy. But, its demurrer having been overruled, it filed its answer on March 26, 1919, and joined issues on the averments of the complaint. Trial was commenced on May 6, 1919, but, after the

testimony of the trustee was received, the court, taking the view that the suit was brought simply for the purpose of obtaining the appointment of a receiver, held that the complaint did not set out sufficient facts to justify such appointment, and dismissed the cause. Thereafter the trustee appealed to the Supreme Court of the state of Oregon, but it was not until February 15, 1921, that decision was reached on the appeal. The court reversed the ruling of the trial court, and held that the complaint of the trustee stated a case for discovery and marshaling of assets of the bankrupt, on the theory that the defendant was a mere agent of the bankrupt, having no assets of its own, but doing business on the bankrupt's assets, which it was fraudulently disposing of in such a way as to result in loss to the bankrupt's estate, 195 Pac. 563. That decision was made one day after the decision of this court on the appeal. Nothing further has been done in that case.

In the meantime, on April 30, 1919, the trustee filed in the bankruptcy court a petition setting forth the facts as the trustee conceived them to be, and praying for an order upon Oregon Eilers Music House and its officers and agents, to show cause why the prayer of the petition should not be allowed, and praying for a complete and full hearing and determination of the rights of the defendants in and to the property described in the petition, and that the said property be brought into the control of the court, and for such further relief as the trustee might be entitled to upon the facts and the rules of equity. On May 1, 1919, an order was issued to show cause as prayed for, and it was duly served. On May 19, 1919, the Oregon Eilers Music House answered the petition and the order to show cause, setting up its denials of matters alleged in the petition, and alleging affirmative matter in support of its claim of right to retain the property involved. But the first portion of the answer alleged that the petition failed to state facts sufficient to constitute a cause of suit of any kind against the corporation, and that the court had no jurisdiction to entertain said petition, or to hear or determine any issue of fact or law between that corporation and the bankrupt, and that the petition should be dismissed because of the allegations which it contained.

Issue having been joined, the District Court, on June 21, 1919, made an order referring said cause to a special master in chancery, with instructions to act in conformity with the rules in equity and the practice of the court, and examine into, hear, and determine whether Oregon Eilers Music House is a part of Eilers Music House, bankrupt, as alleged by the trustee, and whether the property at the time when Eilers Music House was declared bankrupt, claimed by the Oregon Eilers Music House, belonged to the bankrupt at the time when the petition in bankruptcy was filed, or to Oregon Eilers Music House, and the special master was directed to take testimony and evidence, documentary and oral, "so that the whole matter can be heard upon the averments of the petition and the denial and affirmative matter set up in the answer." In pursuance of that order, the parties by their attorneys appeared before the special master, and exhaustive examination was made of the facts, voluminous testimony was taken for and on behalf of the respective parties and reduced to writing by the special master, the

hearings being had at numerous sessions, covering a period of about two months. The special master made an exhaustive and voluminous report to the District Court, and thereupon the appellant filed numerous exceptions to the report of the special master, and presented and argued the same to the court below. All the exceptions were overruled, and the judgment was entered which was reviewed by this court on the appeal; the appellant presenting in this court all the questions which it raised before the court below.

The objection that the matters in issue which were presented by the petition and the answer thereto could not be determined by a plenary suit in that court was never presented to the court below. The answer, it is true, alleged that the court had no jurisdiction to entertain said petition or to make said orders, or hear or determine any issue of fact or law between the parties. But this was an objection to the jurisdiction of that court to deal in a summary manner with the matters presented for determination, and the further answer of the appellant, in which it pleaded its attitude toward the suit which was brought in the state court, as hereinafter referred to, alleging that, if the allegations of the trustee in bankruptcy were true, he ought to have proceeded in the bankruptcy court, can only be taken as expressing its assent to the jurisdiction of the bankruptcy court in a plenary suit between the parties. That the court had jurisdiction to deal with and determine those matters in a plenary suit between the parties, with or without the defendant's consent, is shown by section 70, subdivision "e" of the Bankruptcy Act (Comp. St. § 9654). Collett v. Adams, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764.

[1] The proceeding in the District Court, although it was denominated a summary proceeding, was in fact a plenary suit.

"The form of pleading is immaterial, where the court has jurisdiction to proceed by way of plenary suit, and no seasonable objection is taken to the form of procedure, and where under the form of procedure adopted, the rights of the respondent are substantially as in a plenary suit." Loveland on Bankruptcy (4th Ed.) 1051.

In Milner v. Meek, 95 U. S. 252, 257 (24 L. Ed. 444), Chief Justice Waite said:

"The pleading filed by the assignee was appropriate in form for a petition in the bankruptcy suit, but it was equally good in substance as a bill in equity. It contained a complete statement of a cause of action cognizable in equity and a sufficient prayer for relief. There was no formal prayer for a subpœna, but process was issued and served. All the parties interested appeared, and presented their respective claims by answers, or answers and cross-petitions, with appropriate prayers for relief."

The doctrine of that decision was followed and applied by Judge Lowell in In re Steuer (D. C.) 104 Fed. 976, and by the Circuit Court of Appeals for the Fourth Circuit in Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371.

It is clear, therefore, that the appellant has had its day in court. The petition contained all the essential averments of a bill in equity. The answer set forth all the defenses which could have been alleged in an answer in equity. The defendant had ample opportunity to pre-

sent its contentions and all its evidence to sustain them. It availed itself of that opportunity. The merits of the controversy were determined in a court and in a plenary proceeding, in which all the substantial rights of the appellant were safeguarded, and it has had its remedy of appeal to this court upon the merits of the controversy.

[2] In the pleadings and proceedings in the court below the only reference to a prior proceeding in the state court is the allegation of the petition that proceedings had been taken and were pending under the General Laws of Oregon of 1915, page 127, in the circuit court of the state of Oregon, for the appointment of a receiver of Oregon Eilers Music House, and that when called for trial that corporation objected that the trustee ought to have proceeded in the bankruptcy court for the relief there sought, and the answer to the petition admitting that "some sort of a suit" was filed in the state court, and that when it was called for trial the defendant therein "made among other objections that, if the allegations of the trustee in bankruptcy were true, he ought to have proceeded in the bankruptcy court." The fact that a prior suit between the same parties for the same cause of action was pending in the state court was not pleaded as a defense to the proceedings in the bankruptcy court. The appellant presents it for the first time in its petition for rehearing in this court. There was no appointment of a receiver in the state court and none of the property involved in the litigation was taken into the possession of that court. It is the general rule that the pendency of a prior suit in a state court is not a bar to a suit in the Circuit Court of the United States by the same plaintiff against the same defendant for the same cause of action. Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983.

In Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, where numerous authorities were cited, it was held that the pendency in a state court of a prior action between the same parties for the same cause furnishes no ground for an abatement or for a stay of proceedings in a subsequent action brought by the same plaintiff in a federal court, where no conflict arises between the courts over the custody or dominion of specific property.

In McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 (54 L. Ed. 762), the court said:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

Exceptions to that rule are recognized in cases where the possession of the res vests in the court which has first acquired jurisdiction, and also in cases where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. Farmers' Loan, etc., Co. v. Lake St. Rd. Co., 177 U. S. 51,

20 Sup. Ct. 564, 44 L. Ed. 667; Wolf v. District Court, 235 Fed. 69, 148 C. C. A. 563; In re Lasserot, 240 Fed. 325, 153 C. C. A. 251.

But we need not pause to inquire whether the pendency of the suit in the state court might have been shown in abatement of the proceeding in the bankruptcy court. The controlling fact is that the pendency of the former suit was not presented by plea or answer in the federal court, nor was objection at any time made in that court that a prior suit in a state court involved the same matters in controversy. Such an objection must be pleaded, "otherwise it will be considered waived" (1 R. C. L. 19; 1 C. J. 101); and the objection must be made in limine, and it is waived by pleading to the merits (Stephens v. Monongahela Bank, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399; Marshall v. Otto [C. C.] 59 Fed. 249; Pierce v. Feagans [C. C.] 39 Fed. 587; City of North Muskegon v. Clark, 62 Fed. 694, 10 C. C. A. 591; In re Buchans Soap Corporation [D. C.] 169 Fed. 1017. In the case last cited, the court said:

"If the case is pending in the same court, the defense of a former action pending must be duly pleaded in the second action. The defendant in such second action cannot let the case go to judgment, and then, if the judgment does not suit him, claim that the pendency of the former action is a bar."

The decree is affirmed.

ROSS, Circuit Judge (dissenting). I respectfully dissent from the judgment of affirmance in these cases, as I did when they were last here (270 Fed. 915, 925), and for the same reasons as were then briefly stated in my dissenting opinion, and which views, in my judgment, find full support in the following decisions of other Circuit Courts of Appeals and of the Supreme Court not then cited: In re Yorkville Coal Co., 211 Fed. 619, 128 C. C. A. 570 (Second Circuit); In re Blum, 202 Fed. 883, 121 C. C. A. 241 (Seventh Circuit); In re Midtown Contracting Co., 243 Fed. 56, 155 C. C. A. 586 (Second Circuit); In re Goldstein, 216 Fed. 887, 133 C. C. A. 91 (Seventh Circuit); Babbit v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.

The records in the present cases show beyond question that the proceedings in the court below were summary proceedings in bankruptcy, and were so treated and declared both by the court and by the special master, who conducted them by appointment of the court. This I think is very clearly shown by this extract from the opinion of the court confirming the order of the master:

"Upon the issues thus joined the case was referred to the special master, who, after exhaustive and elaborate hearings, filed a report, in which he detailed the facts as he understands them and reaches the conclusion that the assets of the Oregon Eilers were in truth and in fact a part of the assets of the bankrupt's estate, and recommends that an order be entered requiring that they be turned over to the trustee. I have read this testimony time and again, I have examined it in the light of the arguments and briefs, and I am forced to concur in the views of the special master, although I do not agree with some of his findings of fact. He finds that as a matter of fact, at the time the stock of Graves & Co. was purchased, it was understood it should be done for the use and benefit of the individual stockholders of the Piano House; but I am of the opinion that this was a conclusion not warranted by the testimony. The records of the corporation and the entire transaction

are against any such conclusion. The contract entered into for the sale of the stock was made in the name of the Piano House and for its benefit. It was done in pursuance of resolution of the Piano House and was paid for by the Piano House.

"It is true that charges were made on the books against the account of individual stockholders for a part, if not all, the moneys used in paying the notes of the Piano House; but I am not able to determine whether that was merely a bookkeeping transaction or for some other purpose. The status of the accounts of these respective stockholders does not appear very clear from the testimony. It is in evidence, I believe, that at the time those charges were made there stood upon the books to the account of these gentlemen individually a credit sufficient to cover these charges; but whether there were any other obligations is not so clearly disclosed. In January, 1914, an audit of the books seems to have been made, at which time it was reported that there were stockholders' bills receivable outstanding amounting to $202,000. Whether any of this was outstanding at the time this transfer was made is not apparent. At the time of the bankruptcy, an expert examination of the books disclosed that there was about $400,000 due the corporation from these several stockholders; but I do not take this to be very material.

"The stock was purchased and paid for by the Piano House, it became the property of the Piano House, and the Piano House, as far as the record discloses, never has parted with that stock, and when it transferred its business and assets to the bankrupt, it naturally transferred this stock and the interest therein, together with the other assets. So that on the whole I am of the opinion that the report of the special master must be confirmed, and an order of that kind will be entered."

Nevertheless the present prevailing opinion treats the proceedings as a plenary suit, notwithstanding it expressly states that the trustee of the bankrupt had, long before instituting the summary proceedings, to wit, on August 21, 1918, petitioned the court of bankruptcy for instructions, on the ground that he was in doubt whether he should proceed in a court of the state in a plenary suit against Oregon Eilers Music House for the possession of the property in question, and for the appointment of a receiver thereof meanwhile, or take summary proceedings, and that, receiving from the bankruptcy court authority to commence such plenary suit, he did, on the 15th day of March, 1919, commence in a state court of Oregon an independent suit against Oregon Eilers Music House, wherein he set forth facts and prayed for the appointment of a receiver to take possession of the assets of that company, and for a decree that all the property there alleged to be in its possession be adjudicated to be the property of the bankrupt. A demurrer to that bill having been sustained by the court in which it was brought, the case was taken to the Supreme Court of Oregon, where on February 15, 1921 (195 Pac. 563), the judgment of the trial court of the state was reversed upon the ground that the complaint of the trustee in bankruptcy stated a case for the discovery and marshalling of the assets of the bankrupt.

In the present prevailing opinion of this court it is said that "nothing further has been done in that case." But suppose the state court, in protection of the actual possession of one of the corporations of the state, under bona fide claim of ownership, should proceed with the case and give judgment favorable to the Eilers Music House—what then? Since that suit antedated the summary proceedings here in question,

I am unable to see how such summary proceedings could operate as a bar thereto. On the contrary, I am of the opinion that the pendency of that plenary suit emphasizes the correctness of my conclusion that the bankruptcy court was without any jurisdiction summarily to take the property in controversy from the actual possession of the party claiming in good faith to own it.

In re TOOLE et al.

Petition and Appeal of FOSTER.

(Circuit Court of Appeals, Second Circuit. March 16, 1921.)

No. 66.

1. **Bankruptcy ⇐140(3)—Evidence held not to show indebtedness to customer whose securities had been repledged.**
   In reclamation proceedings against the receiver of bankrupt brokers to recover securities pledged with the brokers to protect petitioner's margin, evidence that on the day of the bankruptcy the indebtedness of the petitioner to the brokers was less than the value of securities of the customer in the hands of the brokers, aside from those in controversy, does not show that the petitioner was a creditor, and not a debtor, of the brokers, or was entitled to a delivery of the securities, since the brokers could hold all securities until the account against petitioner was paid in full.
2. **Brokers ⇐23—Can repledge securities pledged with them by margin trader.**
   In the absence of an agreement that they will not do so, stockbrokers have the right to repledge collateral deposited with them to secure advances on margin transactions.
3. **Brokers ⇐23—Parol agreement not to repledge securities held superseded by subsequent written agreement.**
   A parol agreement by a broker to keep in his vault securities pledged by a customer to cover advances in margin transactions, which was made before the brokerage firm was formed or the customer's account opened, was superseded by a subsequent agreement with the firm permitting the brokers to repledge the securities pledged with them by the customer.
4. **Bankruptcy ⇐140(3)—Brokers' customers, whose lawfully repledged securities were sold, are entitled to contribution from those whose securities were not sold.**
   Where a brokerage firm lawfully repledged securities pledged with them by their customers, and after the bankruptcy of the brokers the subsequent pledgee sold a portion of the securities to satisfy its debt and returned the others to the receiver in bankruptcy, the owners of the securities which were sold are entitled to contribution from those whose securities were returned, though they would not be so entitled if the returned securities had been unlawfully repledged, and therefore the owner of the securities which were returned cannot reclaim them from the receiver in bankruptcy.
5. **Bankruptcy ⇐140(3)—Right to contribution between brokers' customers, whose stock was repledged, is not affected by customers' knowledge.**
   The right to contribution between customers of a bankrupt brokerage firm whose securities had been lawfully repledged by the brokers is not affected by the knowledge or ignorance of the parties of each other's engagements.

Manton, Circuit Judge, dissenting.

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

Proceeding in bankruptcy against Charles B. Toole and Douglas Henry, individually and as copartners trading under the firm name and style of Toole, Henry & Co. Petition by Mark P. Foster for reclamation of certain bonds deposited as collateral security with the bankrupts was denied, and Foster petitions to revise and appeals. Affirmed.

See, also, 270 Fed. 195.

It appears that Toole, Henry & Co. were engaged in business as stockbrokers and members of the New York Stock Exchange in the city of New York. On April 2, 1919, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York praying that Toole, Henry & Co. be adjudged involuntary bankrupts. They were so adjudged, and Edwards H. Childs was appointed temporary receiver, May 8, 1919, a petition was filed by Mark P. Foster in the District Court aforesaid, praying for the immediate delivery to him by the receiver of 47 Green Bay & Western debenture B bonds, which were in the receiver's possession, but which the petitioner claimed that he was entitled to the immediate possession of as owner.

It appears that in June, 1917, Foster had delivered to Toole, Henry & Co., 67 Green Bay & Western debenture B bonds as security on a margin account, which was to be carried in his name with the bankrupts. After the petition in bankruptcy was filed, Foster made an investigation and ascertained that of the original 67 bonds deposited by him with the bankrupts 20 had been sold, 46 had been pledged to Levy Bros., engaged in a similar line of business as that of the bankrupts, along with a number of other securities which belonged to other customers of Toole, Henry & Co., as collateral security for a loan made by Levy Bros. to the bankrupts, and that 1 of said bonds was still in the vaults of the latter. On April 3 and 4, 1919, and other days immediately following the filing of the petition in bankruptcy, Levy Bros. proceeded to dispose of the various securities deposited with them, until they had reobtained the money advanced by them to the bankrupts, returning the excess securities and a sum of money to the receiver. They did not dispose of the 46 bonds belonging to Foster, but returned them to the receiver, who was and now is in possession thereof, together with the 1 bond that had never left the vault of Toole, Henry & Co.

It is conceded, and it is not open to dispute, that on the date of the filing of the petition in bankruptcy the margin account of Foster showed that his debit balance was $198,802.79, and that against that debit balance Toole, Henry & Co. had purchased for him and was carrying securities, exclusive of the Green Bay bonds, of the then market value of $219,420.62. Foster, claiming that the Green Bay bonds had been specially deposited to secure Toole, Henry & Co. against any loss on his margin account, brought reclamation proceedings to recover the 47 bonds from the receiver. The receiver offered to return the 1 bond which had remained in the vaults of the bankrupts, which offer was refused. Upon the hearing on the reclamation proceeding, the court determined that Foster was entitled to the delivery of said bonds, and on the 13th day of May entered an order requiring the receiver to turn over to the petitioner the 47 bonds in question. Upon a rehearing, the court stayed the order pending a hearing and determination upon an application made by the receiver to vacate and set aside the order, and thereupon entered an order referring the proceedings to the referee for his determination and adjudication. Hearings were duly had by the referee, at the conclusion of which he determined that Foster was not entitled to the delivery of the 46 Green Bay & Western debenture B bonds, but that he must share with the other creditors upon equal basis in the ultimate funds realized from the sale of the remaining securities redelivered to the receiver by Levy Bros. after the satisfaction of their debt. The report of the referee was confirmed by the District Court, and from the order confirming said report this appeal is taken.

Zalkin & Cohen, of New York City (Harry Zalkin and Nathan Coplan, both of New York City, of counsel), for respondent.

Paskus, Gordon & Hyman, of New York City (Arthur B. Hyman and Leopold Bleich, of New York City, of counsel), for petitioner.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The petitioner, Mark P. Foster, has brought this reclamation proceeding to recover possession of certain bonds which he had deposited as collateral security with his brokers, Toole, Henry & Co., the bankrupts, and which the latter in turn pledged to Levy Bros. along with the securities of other of their customers, to secure the repayment of a loan made by Levy Bros. to the bankrupts. It appears that Levy Bros. after the bankruptcy sold the securities of the other customers so pledged with them, but did not sell the Foster bonds. Those bonds were returned to the receiver of the bankrupts, together with $4,236.64 in cash. The question which arises is whether under these circumstances Foster is entitled to the return of the bonds, which it is admitted the receivers now hold, and which it is also admitted that Foster has identified by specific bond numbers, or whether the owners of the other securities which Toole, Henry & Co. pledged with Levy Bros., and which the latter sold, have any equitable rights in the Foster bonds by way of contribution.

At the time the receiver took possession he found 1 of the 47 Green Bay bonds, which the petitioner is demanding, in the "box" of Toole, Henry & Co. The referee determined that Foster is certainly entitled to the reclamation of that bond. In that opinion the District Judge concurred, and the soundness of that conclusion is not questioned in this case. The order which we are asked to review and revise is that made on June 26, 1919. It directed that Foster's petition be consolidated with the order of May 10, 1919, which referred all claims arising out of the Levy Bros. loan fund to the referee "for determination in the omnibus proceeding now pending against the Levy fund, to be determined in accordance with the rights and equities of those similarly situated as said Foster."

The petition asserts two grounds of error:

"(1) The failure of the court's order to direct the delivery of all 47 bonds to Foster.

"(2) Because the order directs that Foster 'must share in the ultimate funds with the other creditors as to the remaining 46 bonds on equal terms.' "

As respects the second of these objections, it is to be observed that all that the order objected to provides is that the determination is to be "in accordance with the rights and equities of those similarly situated as said Foster." So that, unless there are other creditors similarly situated, Foster cannot be prejudiced, and, if there are other creditors similarly situated, the rights of Foster cannot be higher than theirs.

[1] In his petition Foster, the customer, alleges that on the day on which the involuntary petition in bankruptcy was filed against the broker there was a credit balance in the petitioner's favor in excess of $20,000, on the account carried in his name on the books of the bank-

rupts. It appears, however, by Foster's own testimony that the debit charge against him on the bankrupts' book was $198,000, and that the market value of all of his securities, including the bonds now sought to be reclaimed, was at that time $230,000. As a stockbroker has a lien on the securities of his principal for the unpaid balance of any advances which the broker has made for his customer, it follows that Toole, Henry & Co. on the day prior to the bankruptcy were under no obligation to turn over the Green Bay bonds or any of the other securities to Foster, unless he had then and there tendered payment to them of his indebtedness of $198,802.79. It cannot, therefore, be said that the brokers were indebted to Foster on the day prior to their bankruptcy in the sum of $20,000, or in any other amount.

[2, 3] As Foster was a margin trader, Toole, Henry & Co., in the absence of an agreement that they would not do so, had the right to repledge collateral deposited with them to secure advances on margin transactions. In re Ennis, 187 Fed. 720, 109 C. C. A. 468; German Savings Bank v. Renshaw, 78 Md. 475, 28 Atl. 281; Furber v. Dane, 203 Mass. 108, 89 N. E. 227. Foster asserts that some time in 1916, and prior to the time when Toole, Henry & Co. had begun business, he had a conversation with Toole, who informed him of his plans, and wanted him to do his business through his firm, and told him that he would carry these bonds as security on marginal transactions and that "he would always keep these bonds in the vault." This alleged conversation was months before the firm was formed, and months prior to the delivery of the bonds by Foster to the brokers, which did not occur until June, 1917. Prior to this transfer of the bonds Foster had transacted his business through Willison & Co. He closed his account with that firm at the time these bonds were delivered to Toole, Henry & Co., and the delivery of the bonds was made by Willison & Co., when Foster closed his account with that firm. Prior to that Foster had transacted no business with Toole, Henry & Co.

We assume that the conversation already quoted, which Foster alleges took place between himself and Toole in 1916, actually occurred. But it appears that in January, 1919, Toole, Henry & Co. mailed to Foster a card, requesting him to sign the same and return it. He admits receiving, signing, and mailing it back. The card read as follows:

"Toole, Henry & Co., 120 Broadway, New York.

"Telephone, Rector 7870.

"The undersigned hereby understands and agrees that on all marginal business the right is reserved by you to close transactions where margins are running out without further notice, and to settle contracts in accordance with the rules and customs of the New York Stock Exchange and its clearing house, or on the curb or the exchange where order was executed, and that all securities, from time to time, carried upon my marginal account or deposited to protect the same, may be loaned or pledged by you, either separately or together with other securities, either for the sum due thereon or for a greater sum all without further notice, and that all transactions are subject to the rules and customs of the New York Stock Exchange and its clearing house or the curb or other exchange where order was executed.

"Sign full name, not merely initials. Mark P. Foster."

The parol agreement of 1916 above referred to was clearly superseded by the written authorization that all securities might be loaned or

pledged by Toole, Henry & Co. Thereafter the brokers pledged the Green Bay bonds with Levy Bros. and did so lawfully.

This brings us to inquire as to the law applicable to such a state of facts as exist in this case. The case of In re T. A. McIntyre & Co., 181 Fed. 955, 104 C. C. A. 419, decided by this court in 1910, must be referred to in detail, as we regard it as of controlling importance. It has been sometimes referred to as Pippey's Case. The facts in that case as respects Pippey were as follows: The firm of T. A. McIntyre & Co. had been engaged in the general brokerage business. On April 24, 1908, an involuntary petition in bankruptcy was filed against it and receivers were appointed. Adjudication followed on May 21, 1908. On March 4, 1907, McIntyre & Co. borrowed from the Metropolitan Trust Company $200,000 and deposited as collateral therefor a large number of stocks and bonds. The day prior to the filing of the petition in bankruptcy McIntyre & Co. pledged with the Trust Company, as a substituted collateral security for the loan of $200,000, 18 shares of Pullman Company common stock owned by Pippey and standing in his name, being certificate No. 10,277. Pippey had indorsed a transfer in blank on the certificate and delivered it to McIntyre & Co. as security for transactions thereafter to be had between them, no authority to repledge being given. On the day after the petition in bankruptcy was filed against McIntyre & Co., Pippey demanded his stock from the receiver of that company and was informed it was in the possession of the Trust Company. On August 30th he demanded it from the Trust Company and directed them not to sell the same. Various steps were taken by Pippey to recover the stock, which are set forth in the court's opinion, but which it is not important to repeat in this connection. It is sufficient for the present purpose to say that on April 24, 1908, the day on which the petition in bankruptcy was filed, the Trust Company applied $70,000 toward the payment of the $200,000, reducing the principal thereby to $130,000, and thereafter the Trust Company sold securities from time to time, applying the proceeds to the reduction of the debt. On May 6th the company had liquidated its claim of $200,000 out of the securities sold, and still held Pippey's certificate No. 10,277 for the 18 shares of the Pullman stock, as well as a cash credit of $832.16 to the estate in bankruptcy, and certain securities. The task was to determine the rights of the various claimants to this balance of cash and various shares of stock, which by order of the court had been redeposited in the Metropolitan Trust to remain there subject to the court's order.

The court below, after referring the matter to a master to hear and determine, ordered Pippey's Pullman stock to be sold and the proceeds put into a fund with the proceeds of the various other securities and the cash item of $832.16 above referred to, and directed that Pippey should share with others whose stock was improperly pledged by the brokers with the Trust Company and sold by it. This was practically applying the principle of general average to the situation. As this court observed when the case came before it:

"The pledge is treated as a common adventure, the securities sold as a sacrifice for the common benefit, to which all interests are required to contribute."

This court held that Pippey could not be thus required to contribute, and so much of the order as related to Pippey's stock was reversed, and the cause remanded, with instructions to direct the trustee to return his stock to him, or, if it had been sold, to turn the proceeds over to him. This court in the course of its opinion pointed out that McIntyre & Co. had no right to pledge Pippey's stock for any of its own debts, as the stock had been deposited with the firm merely as security against any losses from transactions on the market for Pippey's account. When it did pledge them the day before its failure, "the firm had no transaction pending and was itself indebted to Pippey. This was a larceny of his stock." This court said:

"By reason of the circumstances that when he left the certificate with the brokers it was duly indorsed with a transfer in blank executed by himself, he exposed himself to risk of losing his stock if the person to whom it was pledged, in good faith, for a valuable consideration, found it necessary to sell it in order to secure payment of his advances. That would be solely because Pippey would be estopped from asserting his title against the person who had parted with value on the faith of the transfer he had signed. But the pledgee has not found it necessary to sell the Pullman stock. It has repaid itself from other items of the pledged property. It no longer has any lien on such property. It can no longer avail of any doctrine of estoppel. Pippey's title to his stock is absolute. He is entitled to the certificate which represents that title. The trustees, in the language of the United States Supreme Court, 'have no better right in [it] than the bankrupt.' Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845."

In the same case this court determined the claim of Mrs. Hudson, which differed in an important particular from that of Pippey's. Her stock had also been pledged with McIntyre & Co., and had been by it turned over to the Trust Company, and was not sold by that company. but was among the securities turned over to the estate in bankruptcy after the company had liquidated its claim of $200,000 against McIntyre & Co. by the sale of other securities. Mrs. Hudson had not deposited her stock with McIntyre & Co. as security for transactions on her account, but had loaned it to the firm for use in its business; it being agreed, however, that the stock was to continue her property, and was to remain on the books in her name, and that the dividends were to be paid to her. This court held that as respects this stock it was not unlawfully pledged, and as it had not been sold it was bound to contribute to the payment of the loan for which it was pledged. In other words, equity will treat alike those similarly situated. As respects Pippey no one was similarly situated, and consequently there was no obligation of contribution. As respects Mrs. Hudson there were others who, like her, had consented that their stock might be similarly hypothecated, and as to them there was the obligation of contribution resting upon her.

The case of In re J. C. Wilson, 252 Fed. 631, in the District Court for the Southern District of New York in 1917, received careful consideration at the hands of the Judge who decided it. It involved an interesting question not passed upon in the McIntyre Case. On July 30, 1914, the brokerage firm of Wilson & Co. held for one Rolph 300 shares of Mexican Petroleum stock which had been paid for in full. The brokers without authority hypothecated these shares with Harris,

Winthrop & Co. There were other securities which Wilson & Co. also hypothecated without right with Harris, Winthrop & Co. After Wilson & Co. had been adjudicated bankrupts, Harris, Winthrop & Co. sold certain of the securities which Wilson & Co. had also wrongly hypothecated, but did not sell the Rolph stock, which, as we have said, was wrongfully hypothecated but which survived the liquidation. Rolph claimed, relying on the decision as to Pippey's stock in the McIntyre Case, that he was entitled to reclaim the identical 300 shares of his stock, but the court thought that the mere accident that Rolph's 300 shares survived liquidation did not give him equities superior to others whose stock had been unlawfully hypothecated with Winthrop & Co. by Wilson & Co. and sold by Winthrop & Co. to discharge their debt against Wilson & Co. In the course of the opinion of the District Judge, referring to the decision as to Pippey's stock in the McIntyre Case, it was said:

"It is true that the court held that the admiralty principle of general average was not applicable, and that the pledge should not be treated as a common adventure; but it did not disturb the proposition that it is the character of the equity which determines how any particular claim shall be classified. The case is quite different from one where a pledgee rightly sells collateral prior to a bankruptcy. In the absence of fraud or collusive arrangements, the result of such a sale is one of the hazards which may befall persons in a business of this character. If, however, it be held that, after a petition in bankruptcy has been filed, the pledgee, by selecting for sale some stocks and not others, can thereby save some stocks intact for the owners without the burden of contribution, and not others, it can readily be seen that the door will be opened for the most indefensible kind of favoritism, and possibly for corrupt bargains between the owners of securities and the pledgee. Indeed, a pledgee of his own motion, without any agreement with owners of securities, could easily safeguard his friends, to the detriment of others who were strangers to him. I am fully satisfied, therefore, that Rolph is in the same position as other class A claimants."

[4] We think the conclusion above reached was correct, and that the adoption of the contrary theory would lead many times to unfair practices and work gross injustice. The courts in the United States and England have long acted upon the principle that between different creditors equality is equity. Equality, according to Bracton, constitutes equity itself. All debts are generally deemed by courts of equity to stand in pari jure and are to be paid proportionally. In the case of stock unlawfully pledged and belonging to different owners, the equities are originally equal, and that equality is not disturbed by the fact that the stock of one is sold by the pledgee, while that of the other survives. So the principle of general average applied in maritime and commercial operations, and which required a general contribution to be made by all parties in interest towards a loss which is voluntarily incurred for the benefit of all, is indicative of the rule which should be applied in a case like this. The principle upon which contribution is founded does not rest upon contract but has its origin in natural law. Story's Equity Jurisprudence, vol. 1, § 490.

In Johnson v. Bixby, 252 Fed. 103, 64 C. C. A. 215, 1 A. L. R. 660, the Circuit Court of Appeals for the Eighth Circuit held that, where shares of stock deposited by customers with a brokerage partnership

were before bankruptcy of the partnership wrongfully pledged by it to secure its indebtedness to an innocent pledgee, and after bankruptcy the pledgee sold enough of the stock of customers A and B to pay the indebtedness, and thereafter, in addition, sold the stock of customer C. and the proceeds of that sale were traced intact into the bankrupt's assets, C was entitled to reclaim the same without contribution as to customers A and B. In the opinion the court said:

"As to contribution, the pledgee had a right to sell the Johnson and the Schoellhorn stock and apply the proceeds, because such action was necessary to pay its debt. So far as this record shows, the other collateral sold that day belonged to the bankrupt. The balance of such proceeds after payment was, so far as the pledgee was concerned, due the pledgor. But as it sprang from stock wrongfully pledged, and can be traced by the owners of that stock, it may be made subject to their superior rights. It is the only fund that can be so followed by them. This measures the maximum residue of their converted property which can be legally identified. The then unsold collateral (including the Bixby stock) was not in æquali jure with the proceeds of the prior sales. This collateral was burdened with no obligation of contribution. It was at that time freed from the pledge. No such obligation originated in the mere fact of a subsequent wrongful sale by the pledgee. No part of the proceeds of the Bixby stock was, or, under the circumstances, could properly be, applied to the debt. The entire proceeds of that sale remain intact, and can be traced. The mere fact that such were transmitted to the trustee in a common sum or payment with the above balance does not lessen Bixby's right therein. It does not create a right in Johnson or Schoellhorn to any part thereof."

In the above case the customers A, B, and C apparently stood in exactly the same relation to the hypothecating bankrupt. The lender who held the collateral paid himself by selling out the stock of A and B. He then sold out C's stock and paid over the proceeds to the receiver of the bankrupt. If we are right in understanding that A, B, and C stood in the same relation, and that the stock of each had been wrongfully pledged, then in holding that C was entitled, without contribution, to recover in solido the entire proceeds realized from the sale of his stock the court did not apply the principle intended to be announced in the McIntyre Case, and which was more fully set forth and applied in the case of In re Wilson. The doctrine of the Johnson Case is inconsistent with that announced in the McIntyre Case and in that of In re Wilson, which we prefer.

[5] We think that, when customers authorize their broker to pledge their securities for the payment of the broker's debts, each becomes to the extent of his pledge a surety for the payment of such indebtedness. As between themselves they become cosureties. All the collateral lawfully so pledged is subject to the same obligation and lien. The owners of the collateral, being in effect cosureties, must be entitled to contribution from each other for any loss sustained if the stock of one is sold to pay the debt for which the stock of the other was equally liable. This right of contribution does not arise from the contract, as already said, but rests upon principles of equity and natural justice. The principle is that where all are equally liable for the payment of a debt all are bound equally to contribute to that purpose. So that if the stock of A, B, and C is lawfully pledged for the payment of the debt of X, the stock of each is under the common burden, and if X sells the stock

of A and B, and leaves unsold the stock of C, the latter must contribute to A and B the excess they have paid above their share. But if, on the other hand, the stock of A is lawfully pledged, while that of B and C is unlawfully pledged, there is no obligation on the part of B and C to contribute, for there is no common burden as between A, on the one side, and B and C, on the other. The principle applies only in cases where the situations of the parties are equal as equality among persons whose situations are not equal is not equitable. The situations are equal when the parties are under a common burden. Screven v. Joyner, 1 Hill, Eq. (S. C.) 252, 26 Am. Dec. 199. It is immaterial whether the parties knew of each other's engagements or not. Durbin v. Kuney, 19 Or. 71, 23 Pac. 661.

In conclusion, it is to be observed that the order which we are asked to revise does not determine that Foster is not entitled to the return of the entire 47 bonds which he claims. Upon the testimony which appears in this record it is impossible to say whether or not he is entitled to them. It has not been disclosed under what circumstances the securities of the other creditors were pledged by the bankrupts, whether it was done lawfully or unlawfully. The order simply contemplates that the facts shall be ascertained, so that it may be seen whether there are other creditors similarly situated with Foster. If so, his rights cannot be superior to theirs.

The order is affirmed.

MANTON, Circuit Judge (dissenting). When Toole, Henry & Co. failed, they had the bonds in question, deposited under an agreement which, among other things, contained the following:

"The undersigned hereby understands and agrees that on all marginal business the right is reserved by you to close transactions where margins are running out without further notice, and to settle contracts in accordance with the rules and customs of the New York Stock Exchange and its clearing house, or on the curb or the exchange where order was executed, and that all securities, from time to time, carried upon my marginal account or deposited to protect the same, may be loaned or pledged by you, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice, and that all transactions are subject to the rules and customs of the New York Stock Exchange and its clearing house or the curb or other exchange where order was executed."

When the petition in bankruptcy was filed on April 2, 1919, the 46 bonds were pledged to Levy Bros., who were stockbrokers, together with other securities, as collateral for a loan made by them to the bankrupts. After filing the petition in bankruptcy, Levy Bros. proceeded to dispose of the various securities deposited with them as collateral for the loan and thus obtained payment of the indebtedness of Toole, Henry & Co. They returned such securities as they did not sell to the receiver, and he now has the 46 bonds in question belonging to the petitioner. It is claimed that these bonds must be sold, and that the funds received by the receiver on such sale should be paid to the other creditors whose bonds were hypothecated by the bankrupts with Levy Bros. and subsequently sold. The result in the District Court was reached on the authority of In re Wilson & Co. (D. C.) 252 Fed. 638.

If this court adopts the rule there laid down, there is no error in the result below. But I cannot agree that the rule laid down by the District Court in the Wilson Case finds support from other authorities, or is a rule which should be adopted by this court in this case. This litigation is between the receiver and the creditors of stockbrokers whose securities have survived the liquidation. The respective rights of the receiver and the claimant must be adjudged by the terms under which the bonds were pledged with the bankrupts. The referee has found as a fact that at the date of sale, the accounts of the bankrupts showed that the claimant was a creditor of the bankrupts for approximately $20,000. When the bonds were used by the bankrupts in pledging them with Levy Bros., they were not securing any indebtedness of Foster to the bankrupts and in using the bonds by pledging them, the bankrupts committed a wrong, for if, on the day when the pledge of the bonds was made to Levy Bros., the claimant had insisted upon closing his account with the bankrupts, he not only would have had the return of his bonds, but $20,000 due and payable in cash to close his account. The fact that the contract under which the bonds were deposited as security with the bankrupts authorized the bankrupts from time to time to pledge the bonds to protect the account of the claimant, and to loan or pledge them either separately or together with other securities, "either for the sum due thereon or for a greater sum all without further notice," should not be construed as a general authority in the bankrupts to convert the bonds to their own use and to pledge them for some obligation other than the obligations which the claimant might owe to the bankrupts. What the bankrupts did in pledging the securities with Levy Bros. was tantamount to a theft of the same, if they were used for purposes other than those which were authorized by the contract of pledge. In Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, the court said:

"The rule is generally recognized that, if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner, or, if the property has been sold, the proceeds of the sale takes the place of the property."

The court held further that the shares of stock held by a broker as collateral for the account of a customer, upon which the latter is indebted to the broker, are the property of the customer and as a trustee has no better right thereto than the bankrupt, the customer is entitled to their possession, and this right is not affected by the fact that the broker has hypothecated the shares. In such a case, the customer is entitled to the shares or their proceeds when returned to the trustee, and the court further held that the customer is entitled to the shares or their proceeds when returned to the trustee if the loan had been paid by the proceeds of other securities pledged therefor.

This court said in Re T. A. McIntyre & Co., 181 Fed. 955, 104 C. C. A. 419, in a similar transaction, where stock was improperly pledged by the brokers with a trust company to secure a loan and subsequently sold in satisfaction of that loan, and where the lower court made about the same disposition as it made in the case at bar:

"This is practically applying the principle of general average to the situation. The pledge is treated as a common adventure, the securities sold as a sacrifice for the common benefit, to which all interests are required to contribute. We do not think Pippey can be thus required to contribute. If he had been left undisturbed to prosecute the replevin suit, he would have recovered the specific piece of property, which he owned, had identified, and was entitled to. By not appealing from the original order, and by prosecuting his claim of his stock in the bankruptcy court, he did not abandon any of his legal rights, nor obligate himself to contribute to the reimbursement of any one whose stock had been sold."

Where shares of stock deposited by customers with a brokerage partnership were, before bankruptcy of the partnership, wrongfully pledged by it to secure its indebtedness to an innocent pledgee, and after bankruptcy, the pledgee sold enough of the stock of other customers to pay the indebtedness, and thereafter, in addition, sold stock of the claimant, the latter, the proceeds of the sale of whose stock were traceable intact into bankrupt's assets, was entitled thereto without contribution as to the other customers. C. C. A. Eighth Circuit, Johnson v. Bixby, 252 Fed. 103, 64 C. C. A. 215, 1 A. L. R. 660.

Here the claimant's stock was not sold to satisfy the debt of Levy Bros. It had been wrongfully pledged when the claimant was a creditor of the bankrupt. There was no authority to pledge it under the circumstances. The agreement petitioner signed with the bankrupts did not authorize it. The bankrupts had no right or title to the stock and at no time were they holding it for any other reason than as collateral security to protect them against the failure of the claimant to answer any call for margins on his purchases.

Under these circumstances, I think the claimant was entitled to an order directing delivery of the bonds to him.

BALDWIN SHIPPING CO., Inc., v. SOUTHERN PAC. CO.*

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3656.

Shipping ⇐104—Railroad agreeing to reserve steamship space held not liable on failure of brokers through whom booked to make reservation.

Where a railroad company, which, in consideration of shipments to the coast over its line, was accustomed to ascertain from steamship companies whether they could book such shipments and at what clearance and rate, and, if accepted, to send confirmations to its representatives on the coast, who exchanged confirmations with the steamship company, agreed with an exporter, which had failed to get space, "to reserve space for the transportation of, and to transport or cause to be transported" from San Francisco to Japan, a cargo of pig iron at $15 per ton, and, finding it impossible to secure space directly, booked it through brokers at such rate, which was cheaper than the steamship companies were asking, is not liable for breach of contract on the failure of the brokers to reserve space, the agreement being one of agency, though the railroad failed to disclose to the exporter the steamship with which it had booked the freight; it never having been able to ascertain the identity

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied October 10, 1921.

thereof from the brokers, the exporter having made no objection to booking the freight through brokers, who were not shown to be irresponsible, and there being no denial of an agent's duty to his principal.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Libel by the Baldwin Shipping Company, Inc., against the Southern Pacific Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The appellant presented three causes of libel in the court below, all of which were of similar nature, so that in this opinion it will be necessary to consider only the first. It was alleged that on or about June 22, 1917, the appellee agreed with the appellant to reserve steamer space for the transportation of, and to transport or cause to be transported from San Francisco, Cal., to Japan, 2,000 tons of pig iron and steel articles for late July, August, and September, 1917, clearance at the rate of $15 per ton; that the appellee did not reserve such steamer space; that the appellant duly tendered the appellee said pig iron and steel articles for transportation to Japan, and demanded steamer space for the transportation thereof, but the appellee failed and neglected and refused to accept said commodity for transportation, or to transport same, or to furnish or supply steamer space therefor, by reason whereof the appellant was obliged to and did procure other space and transportation for said commodity and was obliged to pay therefor $10,000 in excess of the agreed rate. The appellee in its answer denied the allegations of the libel, and by way of further answer alleged that at the time mentioned in the libel the appellee did not own, control, or operate any steamship between the port of San Francisco, or any Pacific Coast port, and any foreign port, nor did it own or operate any means of transportation between said ports; that the appellee has never published or filed with the Interstate Commerce Commission a through rate from any Pacific Coast port to any foreign port.

It was shown on the trial that on June 22, at San Francisco, the appellee wrote the appellant as follows: "Confirming phone conversation, we have booked for your account 2,000 tons of pig iron and steel articles, inexcessive sizes, Japan, late July, August, September, at $15 per ton, weight or measurement ship's option. This will be covered by Southern Pacific Contract 608. Kindly confirm in writing." The appellant answered: "This will acknowledge receipt of your letter of June 22, file 1-E, contract 608, booking for the account of the Baldwin Shipping Co. 2.000 tons pig iron and steel articles inexcessive sizes, Japan, late July, August, and September, clearance at ocean rate of $15 per ton, weight or measurement ship's option, covered by your contract 608. You have advised us that just at the present time you cannot divulge to us the name of steamer line with whom you have booked these 2,000 tons steel articles, but that you guarantee to protect $15 rate and clear on first-class steamers carrying lowest rate of insurance. As soon as you are able to advise us with whom you have booked this freight, please do so, in order that we may give instructions to our New York office relative to issuance of the bills of lading. * * * CC-Ny., In routing this business do not fail to see that the S. P. is the terminal delivery line."

The court below found that the appellee had never published or filed with the Interstate Commerce Commission any through or other rates from San Francisco to any foreign port, but that in the course of its business as a matter of accommodation, and to induce shippers to ship freight and merchandise over the Southern Pacific lines, the appellee had reserved space on steamers destined for foreign ports for freight and merchandise carried over its lines to San Francisco for foreign shipment, and held that, if the appellee was a mere agent to reserve steamer space, there was no claim of a failure or breach of duty in that regard, and if the undertaking was an absolute and unconditional one, the contract was against public

policy and void, citing J. H. Hamlen & Sons Co. v. Illinois Cent. R. Co. (D. C.) 212 Fed. 324.

E. B. McClanahan, S. Hasket Derby, H. W. Glensor, Ernest Clewe, and Carroll Single, all of San Francisco, Cal., for appellant.

Geo. K. Ford and Elliott Johnson, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We think it clear that the agreement between the appellant and the appellee was one of agency. In the libel it was alleged that the appellee agreed with the appellant "to reserve space for the transportation of, and to transport or cause to be transported from San Francisco, California, to Japan, 2,000 tons of pig iron" at $15 per ton, etc., and the breach of the agreement was alleged to be the fact that the appellee—

"did not reserve steamer space for said commodity, or any part thereof. * * * But appellee failed, neglected, and refused to accept said commodity or any part thereof, for transportation, or to transport said commodity, or to cause to be transported, or to furnish or supply steamer space for the transportation thereof."

The nature of the agreement is further indicated by the letter of the appellee to the appellant of June 22:

"We have booked for your account 2,000 tons of pig iron and steel articles," etc.

It was shown by the evidence that the appellee had solicitors in various cities in the eastern part of the United States, who made the round of firms who were known to be shipping to the west coast either domestic or foreign business, for the purpose of soliciting the routing of the business over the appellee's line, and that with respect to export business those solicitors would wire to the general freight office at San Francisco to obtain ocean space, and the ocean rate for a given quantity of tonnage that might be offered to them, whereupon the appellee would make inquiries of various steamship companies and ascertain whether they could book the shipments, and, if so, for what clearance and at what rate. That information would be wired back to the appellee's commercial agent in the east, and if the space and rate was accepted a confirmation would be sent to the appellee at San Francisco, and the appellee would exchange a confirmation with the steamship company accordingly.

It was shown, also, that in the spring and summer of 1917 space was very difficult to secure on vessels for exportation to China and Japan; that it was the policy of the appellee to book such space directly with the steamers, if possible, but that conditions at that time were such that it was often impossible to secure space for large tonnage, and it was necessary to book it through brokers; that C. R. Haley & Co., of San Francisco, were in the freight brokerage business, and were booking rates for shipments from San Francisco to China and Japan; and that the freight in question was booked through that firm, for the reason that their rate was the cheapest, they agreeing to furnish transpor-

tation at $15 per ton, while the steamship companies were asking $20 per ton. The evidence indicates, also, that the appellant had made effort on its own behalf to get space and had failed, and for that reason it had applied to the appellee.

All the facts point to the conclusion that the appellee was an agent for the appellant in endeavoring to facilitate the transshipment of goods from San Francisco, and that in good faith it carried out the agreement which is charged in the libel, an agreement to reserve steamer space for transportation of goods from San Francisco to Japan, and that in good faith it made an agreement with a broker at a rate lower than that demanded by the steamship companies. From the allegations of the libel it is evident that the damages which are sought to be recovered here are the difference between the rate of $15 per ton, and the rate which the steamship companies were at that time demanding.

But the appellant urges that the agreement was not one of agency, for the reason that the appellee refused to disclose to the appellant the steamship or steamship line with which it had booked the freight. The evidence, however, clearly shows that the appellee never refused to disclose any information which it possessed. Not being able to engage space directly with any steamship or steamship company, it did as it had done before, engaged space through a firm of brokers. The appellant suggests that the brokers were irresponsible, but there is nothing in the evidence to support the suggestion, other than the mere fact that the brokers failed to perform their contract. The appellee was never able to ascertain through C. R. Haley & Co. the name of any steamship or steamship line on which the goods were intended to be shipped. For that reason it was unable to give further information to the appellant. The appellant was furnished with a copy of the letter of the appellee to C. R. Haley & Co., of date June 28, 1917, in which it said:

"Please book for the Southern Pacific 2,500 tons pig iron and steel articles for August and December, clearance to Kobe and Yokohama, at $15."

The appellant made no objection to the appellee's action in so booking the freight, and we think the appellant was clearly chargeable with notice that the same course was pursued by the appellee in booking the shipments which are the subject of the second and third causes of libel. We are unable to see that at any time in the conduct of the appellee there was denial of an agent's duty to a principal. Taking this view of the nature of the agreement, we find it unnecessary to consider the other ground on which the court below denied liability.

The judgment is affirmed.

SMITH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1921.)

No. 5562.

1. **Obstructing justice ⇐16—Conviction for attempting to intimidate witness sustained by evidence.**
   In a prosecution under Criminal Code, § 135 (Comp. St. § 10305), for endeavoring to intimidate a witness by assaulting and beating him, where at the time of the assault the witness had once testified and was waiting recall in rebuttal, the jury *held* not precluded from finding the requisite intent from the natural effect of defendant's act, because he testified that he did not know the witness was to be recalled.

2. **Obstructing justice ⇐4—Offense of intimidating witnesses not limited to witnesses under subpœna.**
   It is not a defense to a charge under Criminal Code, § 135 (Comp. St. § 10305) for endeavoring to intimidate a witness by assaulting and beating him, that the person assaulted, who had testified, and who afterward testified as a witness at the time of the assault was not under subpœna.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

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

Covington & Grant, of Ft. Smith, Ark., for plaintiff in error.

Emon O. Mahony, U. S. Atty., of El Dorado, Ark., and J. S. Holt, Asst. U. S. Atty., of Ft. Smith, Ark.

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

SANBORN, Circuit Judge. The defendant below, Roy Smith, was indicted, tried, and convicted of unlawfully and willfully endeavoring, by assaulting and beating him, to influence, intimidate, and impede one Elmer Bohannon as a witness in a cause then pending in the United States District Court for the Western District of Arkansas, in which the Coronado Coal Company and others were plaintiffs and the United Mine Workers of America were defendants. He complains concerning the trial (1) that the court refused his request to instruct the jury to return a verdict in his favor; and (2) that it declined to instruct them that if, at the time of the assault and beating, Bohannon was discharged by the court from further attendance as a witness, and a certificate for his attendance as a witness was issued to him by the clerk of the court, and he returned to his home in Johnson county, and was afterwards notified by a telegram from one of the attorneys of the Coronado Coal Company et al. to return to Ft. Smith, where the cause was on trial, he would not be a witness subject to the orders or under the protection of the court, unless he appeared in the court as a witness and submitted himself to the jurisdiction of the court, or had been served with new process, and that the court charged the jury that if, at the time of the

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assault and beating, Bohannon had testified in the Coronado Coal Company case, had been discharged, and had gone to his home, and thereafter, while the case was still on trial and testimony was being taken before the jury, he had returned, upon receiving a telegram from one of the attorneys of the Coronado Coal Company, asking him to return and testify in rebuttal, then Bohannon was subject to recall before the jury.

Section 135 of the Criminal Code (U. S. Comp. Stat. § 10305) declares that—

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence intimidate, or impede any witness, in any court of the United States, * * * shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The first question in this case is whether or not there was any substantial evidence at the trial to sustain the verdict of the jury that the defendant below was guilty of a violation of this statute. These facts were conclusively proved: The trial of the Coronado Coal Company's case was in Ft. Smith, Ark. Bohannon lived in Hartford, Ark. He was subpœnaed by the plaintiffs' attorneys to testify in that case, and did testify on the call of the plaintiffs on November 1, 1918, and thereafter received his certificate for that day's attendance, was discharged as a witness, and went home. About the 14th day of November, 1918, he received a telegram from one of the plaintiffs' attorneys to come to Ft. Smith and testify in rebuttal. He came, afterwards proved his attendance in court on November 16 and 17, 1918, and testified in the case on November 17, 1918. About 4 o'clock in the afternoon of November 16, 1918, the day he came back to Ft. Smith from his home to testify the second time in response to the telegram, as he was walking on the street in Ft. Smith, within two blocks of the courtroom where the trial of the Coronado Coal Company's case was proceeding, the defendant Smith accosted him, charged him with having falsely testified in that case, and knocked him down. Smith testified that he told Bohannon that he had testified to a lie, and that he (Smith) knew that Bohannon had testified in the case, that he knew the trial was still proceeding, but that he did not know that Bohannon was going to testify again, that he thought he was through when he testified the first time, and that he was not trying to influence his testimony any way afterwards at all. Asked, "What was your purpose in stopping him there in front of the Western Union and asking him why he had sworn to a lie?" he answered, "I just wanted to find out what kind of a man he was, whether he was a man desirable or not."

[1] Counsel for the defendant Smith argue that this testimony shows that there was no substantial evidence of any intention on his part to impede or intimidate Bohannon as a witness, but that the object, intent, and cause of the assault and beating were a past event, Bohannon's first testimony. But Smith knew that Bohannon had testified and had gone home. Smith testified that he was mad on account of that testimony. He found Bohannon back in Ft. Smith, within two blocks of the courtroom where evidence was still being introduced in the Coronado Coal Company's case, and he knocked him

down. If he had struck him hard enough, the blow would have impeded him more; but it had a certain tendency to influence and intimidate him from again testifying. It was in the nature of a warning, at least, that if he testified again he might be struck again. The natural and inevitable consequence of an act may be considered in deducing the intention of the actor, and the argument that there was no substantial evidence in this case to warrant a jury in finding that Smith intended to influence, intimidate, or impede Bohannon from again testifying in the Coronado Coal Company's case in which Smith was one of the defendants, fails to convince.

[2] The second complaint is in effect that the court refused to charge that Bohannon, after he had first testified under subpœna, had been paid his fee, had been discharged, had been called to testify again by a telegram from one of the attorneys for the plaintiffs, who had originally subpœnaed him, and had returned in response to that call to Ft. Smith to testify in rebuttal, was not a witness in the case still on trial, although he again testified therein on the next day under the second call. The argument is that Bohannon was not under subpœna, or other order or direction of the court, and might lawfully have refused to come on the telegraphic call to the court, or might have departed therefrom, and therefore he was not a witness in the court, within the meaning of section 135 of the Criminal Code. But the decisive question here is not the duty or liability of one as a witness, but the duty and liability of one charged with endeavoring by the means specified in the statute to influence, intimidate, or impede a witness. The purpose of Congress in enacting this statute was not to charge witnesses with duty or liability, but to protect them and the administration of justice from corruptly threatening and intimidating acts by third persons.

Many, probably a majority, of all the witnesses who testify in courts of justice, do so without the service of a subpœna or other order of the court, pursuant to the request of the parties to the litigation or to the promptings of interest. They, however, are not less witnesses than those who testify under subpœnas. The corrupt threatening or forceful influencing or intimidation of witnesses who testify without subpœnas is not less pernicious than that of witnesses under orders of the court, and a construction which would limit the protection of this section to the latter class of witnesses is too narrow and unreasonable. The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpœnaed to come, of those who are called and accept the call to come without subpœnas, of those who are prompted to come by their interests, of those who expect to come, and of those who are selected and expected to come to testify in any case in any court of the United States, falls within the class described by the terms "any witness, in any court of the United States," in the section under consideration. State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Tisdale, 41 La. Ann. 338, 6 South. 579, 580; State v. Horner, 1 Marv. (Del.) 504, 26 Atl. 73, 74, 41 Atl. 139; Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148, 150; In re Brule (D. C.) 71 Fed. 943, 945.

Under the testimony in this case Bohannon was a witness in the Coronado Coal Company's case when he was assaulted and beaten by the defendant, and there was no error of law in the trial of this case.

Let the judgment below be affirmed.

AMERICAN BAPTIST HOME MISSION SOC. v. BOWMAN et al.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3505.

1. **Quieting title ⊜7(1), 30(3)—Suit to remove cloud held maintainable, and grantors the only necessary parties.**
Where the devisees of land under a will which provided that they should have no right to dispose of the land except by will sold and conveyed the land by warranty deeds, their subsequent claim of the right to dispose of the land by will *held* to constitute a cloud on the title of their grantee which would support a suit by him for its removal and that the grantors were the only necessary parties to such suit.

2. **Quieting title ⊜30(3)—Bill held defective for want of necessary parties.**
A bill to quiet title, involving construction of a will, *held* defective for want of necessary parties.

Appeal from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Suit in Equity by the American Baptist Home Mission Society against C. A. Bowman and others. Decree of dismissal, and complainant appeals. Modified.

Jordan Stokes, of Nashville, Tenn. (Stokes & Stokes, of Nashville, Tenn., on the brief), for appellant.

Knight & Beasley and Morton B. Adams, all of Nashville, Tenn., for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The appellant filed, in the court below, a bill said to be for the purpose of removing a cloud from real estate. The court dismissed the bill, without consideration of the merits, and for the reason that it was prematurely brought. The matter of title goes back to the will of Ann Toland, who died owning the fee of the land, and whose will provided:

"I give, devise and bequeath to my adopted children, Rhoda Ann Eliza Larkins and Ada Jane Larkins, all the real estate I now own or which I may hereafter come in possession of. This bequest carries with it no right to dispose of the real estate thus devised, except by will in case they should marry and have issue. If either should die without issue, then the other or her heirs shall fall heir to the interest of the decedent. If both shall die without issue, then I will and devise," etc.

After the testatrix's death, the Larkin sisters, named as adopted children, married brothers named Bowman, and children were born to each. Thereupon one sister filed a bill against the other in a Tennessee chancery court, asking a construction of the will to determine

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whether they took only a life estate or the fee, and a decree was made adjudging that they had good title to the fee. Then they made partition deeds, with warranty, and the title so conveyed by each has passed by mesne conveyances, with warranty, to the appellant. The bill alleges that these two sisters, their husbands, and their children and grandchildren are now asserting that the sisters took only a life estate accompanied by a power to devise, and that, on the death of these sisters, the children will take, and that the sisters claim the right to make valid devises of the lands, and have executed wills accordingly. The bill sought an injunction against such claims and a decree that plaintiff's title was good.

Whether the devise to the sisters, without power of conveyance except by will, accompanied by a devise over to others if the sisters died without issue, gave them an absolute fee or conditional fee or life estate, or gave any title or interest to the issue, are questions in which those who took the devise over were adversely interested. Obviously a decree made in a case in which they were not parties would not be an adjudication as against them; and it is open to them to contend that the sisters took only a life estate accompanied by conditional power to devise. It would be open to the sisters to make the same contention, if they were not estopped.

The living children and grandchildren of the sisters constitute the present representatives of the class referred to in the will as issue. Appellant's brief asserts that these persons are claiming title in remainder under the devise of the will. The bill of complaint is not clear to this effect, but is perhaps so intended—at any rate, it can, by amendment, be made so. The devise over on condition that the sisters die without issue carries some implication that, if there are issue, they will take; and, if so, and if the sisters have only a life estate, the issue would necessarily take in remainder under the will. We do not intend to sanction this theory by stating it; but we are not prepared to say that, if it is asserted on behalf of these issue, it is so without color that a bill to quiet title as against such claim would not lie.

[1] Of course, until the sisters die leaving wills devising these lands, there are no devisees in existence, and no bill like this can be maintained as against devisees; but it does not follow that it will not lie against the sisters themselves. Since it would be improbable that they should claim the right to devise by will property of which they had owned the fee and which they had conveyed away, it must follow that their claim of a right to devise is upon the theory that they would be thereby executing a right given to them by will, rather than disposing of their own absolute property. Plaintiff's claim is that these sisters are, by their conduct and by their warranty deeds, estopped from claiming that there is any such unexecuted right or from executing it if there is one. Even if their theory is right, the sisters are under no obligation to make any will, and no expectant devisee has any right to insist that they do so.

The controversy is complete between plaintiff claiming under warranty deeds from these two sisters, and the sisters claiming that

they still have an interest authorizing them to make a further valid conveyance. To determine this controversy requires no other parties. Even if the power were merely one to appoint, under the Toland will (and that would be a stronger case than this for thinking such a bill as this premature), we can see no reason why the donee of the power—if it were one the execution of which involved no trust and was to be voluntary on his part—would not be the sole defendant necessary to a suit to determine whether the power existed. The cases cited in support of the decree below pertain to situations where the indefinite interests in expectancy had been created by the original instrument; not where they were merely subject to creation by the optional act of a living person. We think the existence of a claim of right said to arise under the will to convey a title better than plaintiff's which is derived through the will, creates a cloud which entitles the plaintiff to a hearing and decision upon the rightfulness of such claim. Ward v. Chamberlain, 67 U. S. (2 Black.) 430, 445, 17 L. Ed. 319.

The ruling of the Supreme Court of Tennessee, in an analogous case brought by this plaintiff against the children and grandchildren only, is not applicable. So far as the bill in that case sought to reach clouds dependent on the power of the sisters to make a will, the bill was dismissed—as we understand the opinion of the court—upon the express ground that the children and grandchildren had no interest as devisees and that the sisters were not parties defendant. We infer that the Supreme Court must have regarded this as the substantial object of the bill, and predicated the dismissal wholly upon that ground, since it could not have been intended to say that a bill to remove a cloud must be dismissed on demurrer if the court is of the opinion that when the ambiguous instrument in the chain of title is properly construed, the plaintiff's title is good and the defendant's claims unfounded; nor can we, with any certainty, draw the inference that the Supreme Court thought the plaintiff's construction of the will in question was so certainly right that no ambiguity remained upon which to base enough of a claim to be a cloud.

[2] The decree of dismissal could be justified upon another ground. So far as the bill in the court below was one generally to quiet title —and perhaps this was its substantial aspect—it was defective for lack of having brought in those who would take the devise over, and perhaps, also, the legal heirs of the testatrix. Clearly the first class, and perhaps the second, must be heard before there can be satisfactory adjudication that plaintiff's title is good. Whether a title should be quieted piecemeal is probably discretionary, according to the facts of the case; but here a decree binding only against the two sisters and their issue would be so ineffective to reach the substantial question that we think the case should not proceed without the presence of the other necessary parties. We assume, without deciding, that it will be possible to bring in parties who, under the rule of virtual representation, will sufficiently stand for all future contingencies of interest. Pugh v. Frierson, 221 Fed. 513, 524, 137 C. C. A. 223.

The decree should be modified, so as to permit the plaintiff to amend

by making additional parties, and the record is remanded with instructions to modify the decree accordingly, and thereafter, in case of such amendment, to take further proceedings not inconsistent with this opinion.

CAPPS v. UNITED STATES BOND & MORTGAGE CO.

(Circuit Court of Appeals, Eighth Circuit. June 13, 1921.)

No. 5701.

Mortgages ⇐312(1)—Statutory penalty for neglect or refusal to release recoverable only by mortgagor.

Under the statute of Oklahoma providing that, "if the holder of any mortgage on real estate shall neglect or refuse for ten days after being requested by the mortgagor, his agent or attorney, to release such mortgage, such holder of a mortgage shall forfeit and pay to the mortgagor one per centum of the principal debt per diem from and after the expiration of the said ten days," such right of recovery is limited to the mortgagor, and the penalty cannot be recovered by his grantee of the land.

In Error to the District Court of the United States for the Western District of Oklahoma; Frank A. Youmans, Judge.

Action at law by J. H. Capps against the United States Bond & Mortgage Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. G. Snyder, of Oklahoma City, Okl. (F. B. Owen, of Oklahoma City, Okl., and J. O. Counts and John B. Wilson, both of Frederick, Okl., on the brief), for plaintiff in error.

John Embry, of Oklahoma City, Okl. (Embry, Johnson & Kidd, of Oklahoma City, Okl., on the brief), for defendant in error.

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

LEWIS, District Judge. In September, 1912, one Cornelius gave to the defendant Bond and Mortgage Company a mortgage on his 160 acres of land in Oklahoma to secure the payment of his note for $2,500 and accruing interest, and at the same time he gave defendant a second mortgage on the land to secure his note for $500 and accruing interest. Thereafter defendant sold the $2,500 note to the Penn Mutual Life Insurance Company. Later there was default and foreclosure of the second mortgage, and at the sale the equity was bought in by the defendant, for which it received the sheriff's deed. In 1916 the defendant sold the land to Capps, plaintiff, for $3,000, $500 of which Capps paid and assumed and agreed to pay off the first mortgage debt. The defendant bought back the $2,500 note and mortgage from the Penn Company about the time of its transaction with Capps.

In November, 1917, Capps paid off the first mortgage and defendant sent to Capps by mail the $2,500 note, the mortgage given to secure it,

the abstract of title to the 160 acres, and an assignment of the $2,500 note and all claims under the mortgage which it had received from the Penn Company. The assignment back of the note and mortgage from the Penn Company to defendant was made out in extended formality and executed by the Penn Company over its corporate seal. The defendant took this document to be a deed of release of the first mortgage, though it did not describe the land; and in its letter of transmission to Capps said a release of the mortgage was enclosed, and advised Capps to have it recorded. Correspondence followed between Capps and defendant, in which the latter's agent insisted that a release had been sent to Capps with the other papers. Capps at first thought that the assignment from the Penn Company was a release, and had it recorded. The defendant was not convinced of its mistake until Capps later returned the assignment to defendant. Capps through his attorneys then sent to defendant at its home office in Texas a release deed which they had prepared, and requested that it be executed and returned. Defendant replied that before doing so it wished to see the abstract of title, and requested that the abstract be forwarded to it so that it could be examined and the release prepared and executed, which it said in its letter of June 26, 1918, it desired to do "at the earliest possible date." That letter seems to have closed the correspondence. It remained unanswered, the subject was dropped, and there was no further communication.

On April 16, 1919, Capps brought this action to recover $8,850 of defendant on the ground and because of its failure to execute and deliver to Capps a release deed, basing his action and right of recovery wholly on a State statute which reads:

"If the holder of any mortgage on real estate shall neglect or refuse for ten days after being requested by the mortgagor, his agent or attorney, to release such mortgage, such holder of a mortgage shall forfeit and pay to the mortgagor one per centum of the principal debt per diem from and after the expiration of the said ten days, to be recovered in a civil action in any court having jurisdiction thereof, but such request must be in writing and describe the mortgage and premises with reasonable certainty, and be accompanied by the expense of filing and recording such release."

By the express terms of the statute the right to the penalty is given only to the mortgagor, that is, the mortgagor is the only person named to whom the forfeit runs and shall be paid, and no one else is given the right by the terms of the statute to sue and recover it; and because of that the trial court held that Capps was not included within the statute, and hence had no right to recover the penalty, and found the issues for the defendant. The Supreme Court of Oklahoma has not given construction to this statute, but similar statutes have been considered in other States. Some of them by their terms, as here, confine the right to the penalty to the mortgagor, while others give it to his assignees and heirs also. This difference is said to be attributable, in the first instance, solely to a regard to the credit of the mortgagor and is personal to him; and in the second, where the right runs to the assignee and heir also, the principal purpose is to have the title cleared. Chief Justice Dillon, in Deeter v. Crossley, 26 Iowa, 180, considered a statute of the first kind, in which he said:

"Unsatisfied mortgages of record tend to affect the pecuniary standing and credit of the mortgagor in business circles."

And Justice Brewer, in Thomas v. Reynolds, 29 Kan. 304, dealt with a statute of the second kind, in which the right was given also to the grantee or heirs of the mortgagor. He pointed out the exact terms of the Iowa statute considered in Deeter's Case, where the right of recovery was given only to the mortgagor, and said:

"If the mortgagor is the party alone entitled to recover the penalty, his rights are, of course, the only ones intended to be secured by the statute; and in support of such a statute, the reasons given by Judge Dillon as above are entirely satisfactory,"

—but held that under the Kansas statute the grantee of the mortgagor might recover the penalty. The same distinction is noted in Livingston v. Cudd, 121 Ala. 316, 25 South. 805, construing a similar statute in Alabama. See also Wilkerson v. Sorsby, 201 Ala. 182, 77 South. 708; Jones v. Loan & Trust Co., 7 S. D. 122, 63 N. W. 553. There is additional support to the construction given this statute by the trial court. The Oklahoma statute requires a chattel mortgagee to deliver to the mortgagor on payment of the debt a certificate of discharge, and on his refusal to do so it subjects him to a penalty in favor of the mortgagor or his grantee or heirs. This marked difference between the two statutes could hardly have escaped legislative attention. In the one the right to the penalty is given to the mortgagor only, and in the other to the mortgagor, his grantee or heirs.

Furthermore, we doubt that the facts brought defendant within the statute. It will be observed that the penalty is not imposed on a mortgagee who fails or omits to make the release, but on one who neglects or refuses to do so. The defendant did not decline to give the release; it thought it had done so at the time it turned over to Capps all the title papers. When it found out its mistake in sending the Penn Company's assignment instead, it wrote Capps that it desired to make a release deed "at the earliest possible date," and asked Capps to send the abstract for that purpose. If that did not suit Capps' convenience he might have returned the mortgage, which would have served as well; but his counsel chose to stand flatly on their demand that defendant execute the release which they had prepared and sent, without more. The defendant had taken many mortgages on Oklahoma lands, and many of them had not then been paid off. Its interest, and the interest of those to whom it had assigned these securities, entitled it to more than the word of Capps' counsel before acting, and its request was a reasonable one. It may be conceded that a failure or omission to do what the law requires may under circumstances amount to neglect or refusal to act, but there is nothing here indicating that defendant was attempting to evade giving the deed; it had expressed its desire to do so, and asked that Capps furnish to it the facts on which it could intelligently, and in keeping with its own interest and the rights of others, act. It is said that defendant had data then among its files, made by it when it took the mortgage from Cornelius, from which it could have drawn the deed; but those at best were second-hand, made by employees, and

would hardly impress a reasonably cautious man as a final and safe guide. Pending such a request we very much doubt that defendant neglected or refused to make the release.

We are not convinced that the trial court erred.

Affirmed.

SUTHERLAND v. PAYNE, Agent.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1921.)

No. 3495.

1. **Trial ⟸255(2)—Duty of court to charge on all issues supported by substantial evidence.**

   Aside from any request to charge on any phase of the case it is the duty of the trial court to submit to the jury all the issues joined by the pleadings if any substantial evidence was offered in proof of such issues by the party on whom rests the burden to establish the affirmative thereof.

2. **Railroads ⟸338—Failure to stop train striking automobile observed held not negligence under last chance doctrine.**

   That the fireman on a train while the whistle was being blown saw plaintiff slowly approaching a crossing 350 or 400 feet ahead in an automobile and took no action to stop the train *held* not to tend to support an allegation of negligence under the "last chance" doctrine on the ground that those in charge of the train saw plaintiff in a dangerous position and did not try to avoid his injury, the fireman being justified in supposing that he would stop before reaching a point of danger.

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 Hugh A. Sutherland against John Barton Payne, as agent operating the Pennsylvania Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Newcomb, Newcomb & Nord, of Cleveland, Ohio, and Sheldon & Rinto, of Ashtabula, Ohio, for plaintiff in error.

Squire, Sanders & Dempsey, and Thos. M. Kirby, all of Cleveland, Ohio, for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 11th day of December, 1919, the plaintiff in error, Hugh A. Sutherland, filed his petition in the United States District Court, Northern District of Ohio, Eastern Division, against Walker D. Hines, Director General of Railroads, to recover for personal injuries sustained by him by reason of a passenger train belonging to the Pennsylvania Company and operated by defendant, striking the automobile in which plaintiff in error was riding, at the Nathan street crossing in the city of Ashtabula, Ohio.

The petition stated three several assignments of negligence on the part of the defendant in the operation of this train. It contained further averment that the defendant was negligent in allowing the crossing to become defective, unsafe, and out of repair. As a separate

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ground of negligence plaintiff averred that after the defendant's engineer and fireman, in charge of said train, saw plaintiff upon the crossing, in front of said engine and in a place of danger, they negligently, carelessly, and recklessly failed to exercise ordinary care to stop the engine or to so operate the same as to avoid running upon and against the plaintiff's automobile and injuring the plaintiff.

The defendant answered, denying the allegations of negligence contained in the plaintiff's petition, and, further answering, averred that plaintiff was guilty of negligence directly and proximately contributing to his injury.

On the trial of the cause the jury returned a verdict for the defendant, upon which verdict judgment was rendered accordingly.

The plaintiff in error seeks a reversal of this judgment for error of the court in refusing to charge the jury as requested, in reference to the "last chance doctrine," as alleged in the fourth and fifth paragraphs of the plaintiff's petition.

It is insisted upon the part of the defendant in error that this record fails to show that the plaintiff made any such request to charge. It does not affirmatively appear from the record that the plaintiff made any such request, although what purports to be such a request is found in the assignment of errors. It does appear, however, that after the court had charged the jury, the plaintiff excepted—

"to the charge of the court in withdrawing from the consideration of the jury the fourth specification of negligence, therefore not permitting the jury to pass upon the question as to whether or not, after seeing the plaintiff on the tracks and in front of the train, they exercised ordinary care to try to so operate the train as to avoid injuring him."

[1] This exception we think sufficiently presents the question, especially in view of the fact that the court, in stating the issues to the jury in its general charge, did not refer to the fourth assignment of negligence contained in plaintiff's petition as one of the issues made by the pleadings in this case. Aside from any request to charge on any phase of the case, it is the duty of the trial court to submit to the jury all the issues joined by the pleadings, if any substantial evidence was offered in proof of such issues by the party upon whom the burden rests to establish the affirmative thereof.

[2] In this case the plaintiff offered evidence tending to prove that the fireman had seen the plaintiff approaching the railroad crossing in a slow-moving automobile when the train was between 350 and 400 feet from the point of collision. The only evidence upon that question is the evidence of the fireman himself, who testified that he was on the seat box on the left side of the engine going forward; that he saw the automobile coming slowly onto the track; that his train was running from 30 to 35 miles an hour; that the plaintiff kept right along slowly, and he expected he was going to stop; that when he saw plaintiff was not going to stop he called to the engineer, when the engine was two or three car lengths from the crossing. The fireman further testified that he could have jumped from his seat and pulled the whistle

cord when he first saw the approaching automobile, but that at that time the engineer was blowing the whistle.

The engineer testified that he was on the right-hand side of the engine; that he could not see the plaintiff's automobile approaching the crossing; that he did not hear any alarm from his fireman; that he did not see the plaintiff until he was about 20 feet away from him; and that it was then too late to stop.

It is claimed upon the part of the plaintiff in error that the fact that the fireman saw the automobile approaching when the train was more than 350 feet distant from the crossing, and failed to notify the engineer of that fact, taken in connection with the evidence tending to show that the crossing was out of repair, defective, and unsafe, tends to support the allegations in his petition that the engineer and fireman in charge of said train—

"after they could and did see that the plaintiff was upon said crossing, in front of said engine and in a place of danger, negligently, carelessly, and recklessly failed to exercise ordinary care to stop the engine or to so operate the same as to avoid running upon and against the plaintiff's automobile and injuring the plaintiff."

It is apparent that this evidence does not even tend to prove these allegations of the petition. The plaintiff was not "upon the crossing in front of said engine and in a place of danger" when the fireman first saw him, nor was the fireman aware of the fact that the plaintiff was about to place himself in such a dangerous position until the train was about three car lengths away from the crossing. Then he undertook to give the alarm, which was not heard by the engineer, who in fact did not see the plaintiff or know of his danger until the train was about 20 feet away from him. Illinois Central R. R. Co. v. Ackerman, 144 Fed. 959, 76 C. C. A. 13; Railroad Co. v. Summers, 173 Fed. 358, 97 C. C. A. 328; Railroad Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130; Robbins v. Penna. Co., 245 Fed. 435, 157 C. C. A. 597; Railroad Co. v. Maidment, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; Brommer v. Penna. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

Upon this state of the proof the trial court did not err in holding that the fourth allegation of negligence was not sustained by any evidence, and for that reason properly refused to submit the issue raised thereby to the jury.

Judgment affirmed.

PATTERSON et al. v. HAMILTON.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3646.

1. **Ejectment ⇐17—Prior possession sufficient against trespasser.**
Within Comp. Laws Alaska 1913, § 1133, providing that one who has a legal estate in real property and a present right to possession may recover possession, and section 1135, providing that the complaint shall set forth the nature of plaintiff's estate, prior possession of plaintiff is sufficient against a mere trespasser.

2. **Appeal and error ⇐260(2)—Exception to ruling on evidence necessary.**
That no exception was taken to ruling sustaining objection to evidence is sufficient answer to assignment of error thereon.

3. **Ejectment ⇐90(2)—Quitclaim from third person to defendant properly excluded.**
Quitclaim, executed after commencement of the action and offered in support of the defense in ejectment for tideland, that H., owner of adjoining upland, had quitclaimed to defendants all his right, title, and interest, was properly excluded; there having been no proof that H. had possession of the land in controversy, or that the deed tended to show that H. had possession or right of possession prior or superior to that of plaintiff.

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

Action by Amelia Hamilton against C. A. Patterson and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Shoup & Shoup, and A. H. Zeigler, all of Ketchikan, Alaska, and James Wickersham, of Juneau, Alaska, for plaintiffs in error.

Will H. Winston and Chas. H. Cosgrove, both of Ketchikan, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error in her action of ejectment in the court below recovered judgment for the possession of a small tract of tideland adjoining the town of Ketchikan. She alleged in her complaint that on July 1, 1919, and for more than nine years prior thereto she had been lawfully possessed "and is now entitled to the possession of the tract described in the complaint," and that on or about July 26, 1919, the defendants unlawfully entered into the possession of said premises and ousted her therefrom. The defendants in their answer denied the allegations of the complaint and set up a general demurrer to the complaint on the ground that the land is tideland, and that the facts alleged were not sufficient to entitle the plaintiff to recover in ejectment, or at all.

[1] Although no ruling was had on the demurrer, and no error is assigned to any ruling of the court below concerning the sufficiency of the complaint, the defendants now contend that the complaint is wholly insufficient to sustain the judgment. They point to the Code

of Civil Procedure, Compiled Laws of Alaska, §§ 1133 and 1135, the former of which provides that—

"Any person who has a legal estate in real property and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action," etc.

And section 1135 provides:

"The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years," etc.

And they contend that the complaint is fatally defective, in that it fails to show a legal estate in real property, and fails to set forth an estate in fee for life or for a term of years. We find no merit in the contention. The statutes so referred to are adopted from the laws of Oregon, and they have received construction in Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163, where the court, after referring to the fact that in Alaska the only titles that could be held were those arising by reason of possession and continued possession, held that it was sufficient if the plaintiff in ejectment alleged that for more than nine years he and his grantors were the owners by right of prior occupancy and actual possession of the land in dispute. The court cited with approval Carroll v. Price, 81 Fed. 137, where the District Court of Alaska had held that ejectment would be entertained for the purpose of determining the right of possession to either uplands or tidelands in that district between two contending parties claiming the same piece of ground. And such was the settled construction of the Oregon statutes before their adoption for Alaska. In O. R. & N. Co. v. Hertzberg, 26 Or. 216, 37 Pac. 1019, it was held that a prior possession of land for any length of time is prima facie evidence of title and will authorize a recovery in an action in ejectment against a mere volunteer or trespasser. That construction has been followed in later decisions. Kingsley v. United Rys. Co., 66 Or. 50, 133 Pac. 785; Sommer v. Compton, 52 Or. 173, 96 Pac. 124, 1065; Gallagher v. Kelliher, 58 Or. 557, 114 Pac. 943, 115 Pac. 596. It was adopted by Judge Deady in Wilson v. Fine (D. C.) 38 Fed. 789, and by this court in Campbell v. Silver Bow Basin Min. Co., 49 Fed. 47, 1 C. C. A. 155, and Arness v. Petersburg Packing Co., 260 Fed. 710, 171 C. C. A. 448.

[2, 3] Error is assigned to the ruling of the trial court in excluding from the evidence a deed offered by the defendants to sustain their affirmative defense wherein they had set forth that on July 26, 1919, Mark Hamilton, the only owner of upland adjoining the land in controversy on the southerly end thereof, had conveyed to the defendants by quitclaim deed all his right, title, and interest therein, a copy of which deed was annexed to the answer as an exhibit. When the deed was offered in evidence the objection was made that it was immaterial to any issue in the case and irrelevant. The objection was sustained, and no exception was taken to the ruling. The fact that no exception was taken is a sufficient answer to the assignment of error, but in addition to that it appears that there was total absence of proof to show that Hamilton had possession of the property in controversy, or

that the quitclaim deed, which was in fact executed on July 28 and two days after the commencement of the suit, showed or tended to show that Hamilton had possession or a right of possession prior or superior to that of the plaintiff.

We find no merit in the contention that it was error to deny the defendants' motion at the close of the trial that the jury be instructed to return a verdict in their favor. The court, under instructions, to which no exception was taken, submitted to the jury the question of the possession on which the plaintiff relied, and charged them that possession is the actual exercise by a claimant of the present power to deal with the property and to exclude others from meddling with it, that it implies a subjection to the will and dominion of the claimant, and is evidenced by occupation or by appropriation, and by making a use of the land in the ordinary way, or by making any use for which it is suitable, and that the indicia of possession must be evidenced, either by a visible inclosure and use of the land claimed, or by the construction of building or buildings, pier, mole or jetty, or by making or placing some other useful structure thereon, or some permanent thing of value sufficient to show the good faith of the claimant. It would serve no useful purpose to review the testimony. It is sufficient to say that there was evidence from which the jury might have found possession in the plaintiff under the instructions of the court, and there was also evidence that the plaintiff had paid the taxes on the property from the beginning of her possession.

The judgment is affirmed.

BARBER STEAMSHIP LINES, Inc., v. N. P. SLOAN CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1921.)

No. 138.

Shipping ⊂=147—Compressed cotton measured according to system in use at port of shipment, instead of system in use at place where compressed.

Compressed cotton, being shipped from New York under a contract guaranteeing the cotton to be of a certain density to the cubic foot, should be measured, in ascertainment of the number of cubic feet, by the New York system of measuring a bale of cotton, around the bulge of the cotton, instead of by the system, in use at the place where the cotton was compressed and other Southern ports, of measuring the bale around the middle band between the bulges of the cotton.

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

Libel by the Barber Steamship Lines, Inc., against the N. P. Sloan Company. Decree for libelant, and respondent appeals. Affirmed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine and Harry D. Thirkield, both of New York City, of counsel), for appellant.

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Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and Robert McLeod Jackson, both of New York City, of counsel), for appellee.

Before WARD, HOUGH and MANTON, Circuit Judges.

WARD, Circuit Judge. May 21, 1917, the N. P. Sloan Company entered into a freight contract with the Barber Steamship Lines, Inc., whereby they agreed to deliver 1,000 bales of compressed cotton which they guaranteed to be of a density of 32/34 pounds to a cubic foot and the steamship company agreed to transport it to Havre on the steamer Asborg for $5.50 plus 10 per cent. primage per 100 pounds. The obvious purpose of the guaranty was to insure the steamship company as to the amount of cargo space to be occupied by the shipment.

September 18, 1917, the Sloan Company shipped and the steamship company loaded upon the steamer Asborg 1,000 bales, which had been compressed at Savannah, Ga., forwarded by rail to Jersey City and thence by lighters to the steamer; the weight of the shipment being stated as 482,935 pounds. Upon arrival alongside 93 bales, taken at random to represent the whole shipment, were measured in accordance with the practice in New York by wooden calipers with a rule around the bulge of the cotton between bands, and this measurement showed a content of 17,795 cubic feet. The freight charged was on 17,750 cubic feet, $34,364; there being no explanation about the difference of 45 cubic feet. If the bales had been measured in accordance with the practice at Savannah and other Southern ports, around the middle band between bulges of the cotton, the bulges would have been excluded, and the number of cubic feet would have been 15,091; the freight on that measurement being $29,217.57.

It is obvious that the New York system of measurement would show the cubic space needed for the shipment, which was the purpose of the guaranty, and that the Savannah system would not. Judge Mack held that the New York system applied to a shipment by steamer sailing from New York under a contract containing this special guaranty, and we agree with him. It showed the weight per cubic foot to be 27 pounds, instead of 32/34 pounds as guaranteed.

The steamship company presented their bills for $34,364, while the Sloan Company refused to pay more than $29,217.57. Thereupon the steamship company notified the Sloan Company that 100 bales would be taken out of the steamer and reweighed by a certified government surveyor and remeasured by a certified government measurer, and asked the Sloan Company to have a representative present to see that the weights and measurements were taken correctly. The Sloan Company did send a representative, who admitted that the weights and measurements were taken correctly.

Thereupon it was agreed between the parties that the steamship company should transport the shipment under clean bills of lading at the rate of freight admitted to be due by the Sloan Company, on condition that the Sloan Company give a surety company bond in the amount of the excess claimed by the steamship company of $5,146.43, which is the

amount that would have been paid, had cotton of a minimum density of 32 pounds per cubic foot been carried on the cubic content by New York measurement, the condition of the bond being to pay any sum not in excess thereof that might be determined in favor of the steamship company in a suit to be begun by them against the Sloan Company.

There was a good deal of argument on the theory that the bales had been expanded as the result of handling, and especially if they had been screwed down in the hold. The proof is that they were not screwed down, and there is no evidence of any expansion. It is also sought to apply the terms on the back of the freight contract, which fix the compensation to be paid where standard bales fall short of the minimum density of 22½ pounds per cubic foot; but these terms do not apply to this contract for high-density cotton of a minimum density of 32 pounds per cubic foot.

The decree is affirmed.

BACIGALUPI v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3664.

1. **Poisons ⇐9—Indictment for dispensing morphine held to show defendant was a person required to register under statute.**
An indictment alleging that defendant, being a person required to register, unlawfully, willfully, and knowingly sold, dispensed, and distributed a derivative of opium, to wit, six grains of morphine, which was not then in original stamped packages, nor taken from original stamped packages, sufficiently alleged that defendant was a person required to register, under Act Dec. 17, 1914 (Comp. St. §§ 6287g–6287q), as amended by Act Feb. 24, 1919 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287*l*).

2. **Indictment and information ⇐203—Sentence permissible under single count must stand, when verdict general, though some counts not good.**
Where defendant was found guilty by a general verdict on all four of the counts of an indictment, and a general sentence not exceeding that permissible on a single count was imposed, the sentence must stand, though some of the counts are defective.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice I. Dooling, Judge.

John Bacigalupi was convicted of offenses, and he brings error. Affirmed.

Nathan C. Coghlan, of San Francisco, Cal., for plaintiff in error.

Frank M. Silva, U. S. Atty., and W. H. Tully, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was found guilty and sentenced under four counts of an indictment. The first two counts are similar. They charge that the defendant did violate the requirements of the Act of December 17, 1914 (Comp. St. §§ 6287g–

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6287q), as amended February 24, 1919 (40 Stat. 1130 [Comp. St. Ann. Supp. 1919, §§ 6287g, 6287*l*]), in that, being a person required to register under the terms of said act, he did then and there unlawfully, willfully, and knowingly have in his possession, with intent to sell, a certain derivative of coca leaves, to wit, eight bindles of cocaine hydrochloride, 13 grains each, etc., without having registered with the collector of internal revenue, and without having paid the special tax required by law. The third and fourth counts charge the violation of said act and the amendment thereof, in that, being a person required to register under the terms of said act, he did unlawfully, willfully, and knowingly sell, dispense, and distribute a certain derivative of opium, to wit, six grains of morphine, which morphine was not then and there in original stamped packages, nor was it taken from original stamped packages. A demurrer to each count of the indictment was overruled, and the grounds of the demurrer were subsequently presented in a motion in arrest of judgment, which was likewise overruled.

[1] The plaintiff in error contends that each count of the indictment is fatally defective, in that it fails to show that the defendant was a person required to register under the act, in that it contains no allegation that he was one of the persons who "import, manufacture, produce, compound, sell, deal in, dispense or give away opium," etc.

The first two counts of the indictment charge that the defendant had in his possession "with intent to sell" the derivatives of coca leaves and the derivatives of opium described therein. Whether it is sufficiently alleged therein that the defendant was one of the classes of persons who were required to register under the terms of the act we need not pause to consider. The third and fourth counts charge that the defendant "did knowingly, unlawfully, and willfully sell, dispense, and distribute" derivatives of opium and derivatives of coca leaves. That allegation is sufficient, we think, to show that he was a person who was required to register under the Act of December 17, 1914, and the amendment of February 24, 1919. Pierriero v. United States (C. C. A.) 271 Fed. 912.

[2] He was found guilty by a general verdict on all four of the counts of the indictment. The sentence which was imposed was a general sentence, and it does not exceed a permissible sentence upon a single count. It is well settled that, where a verdict of guilty is rendered upon several counts, and the sentence does not exceed that which might be properly imposed upon conviction on the counts which are good, the sentence must stand. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; Kalen v. United States, 196 Fed. 888, 116 C. C. A. 450; Wetzel v. United States, 233 Fed. 984, 147 C. C. A. 658.

The judgment is affirmed.

SANFORD v. UNITED STATES.

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

No. 5822.

Internal revenue ⇐2—Distillery provision of statute repealed by Prohibition Act.

Rev. St. §§ 3258, 3279, 3281 (Comp. St. §§ 5994, 6019, 6021), relating to the operation of stills, were repealed by National Prohibition Act, § 35.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Criminal prosecution by the United States against Charles Sanford. Judgment of conviction, and defendant brings error. Reversed.

Hal L. Norwood and J. I. Alley, both of Mena, Ark., for plaintiff in error.

J. S. Holt, U. S. Atty., of Ft. Smith, Ark.

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

PER CURIAM. The plaintiff in error, defendant below, was indicted, tried, convicted, and sentenced under count 1 for unlawfully having in his possession a still and distilling apparatus for the production of spirituous liquors set up without having the same registered as required by law, in violation of section 3258, U. S. Rev. Stat. (Comp. Stat. § 5994), under count 2 for unlawfully carrying on the business of a distiller of spirituous liquors without having given bond as required by law, in violation of section 3281, U. S. Rev. Stat. (Comp. Stat. § 6021), and under count 4 for unlawfully working in a distillery for the production of spirituous liquors upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law, in violation of section 3279, U. S. Rev. Stat. (Comp. Stat. § 6019).

As it has been conclusively determined by the decision of the Supreme Court in United States v. Boze Yuginovich et al., 255 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, wherein the opinion was filed June 1, 1921, and by the decision of this court in Ketchum v. United States (C. C. A.) 270 Fed. 416, that the sections of the statutes on which the convictions and sentences in this case were based were repealed by National Prohibition Act (41 Stat. 305) § 35, before the time when the offenses were alleged to have been committed, the judgment and sentences in this case must be reversed, and the defendant must be discharged. Let an order to that effect be made and entered on the authority of those decisions, and let the mandate go down forthwith.

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GALEHOUSE v. BALTIMORE & O. R. CO. et al. (two cases).

(District Court, N. D. Ohio, E. D. August 16, 1921.)

Nos. 10262, 10281.

1. **Removal of causes ⇐36—Joining resident defendants not served does not prevent removal.**
   In an action against a foreign railroad company, the joinder of six members of the train crew, whose names were unknown and who were not served with summons, does not prevent the action from being one against the corporation alone, so that it was entitled to remove to the United States court.

2. **Courts ⇐343—State rule that master and servant cannot be jointly sued is controlling in federal courts.**
   The established law in Ohio that a joint action cannot be maintained against a master and servant where the master's liability arises solely from the legal relationship existing between them under the rule of respondeat superior is binding on the United States courts in determining the right to remove such action from the state courts.

3. **Removal of causes ⇐49(1)—Controversy is separable if defendants could not be jointly sued under state law.**
   An action against a foreign corporation and resident defendants presents a separable controversy which the foreign corporation can remove to the United States court, where, under the state law, the defendants could not be jointly sued.

4. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Corporation not liable for negligence of Director General.**
   The corporation owning a railroad is not liable for the negligent operation of the trains while the railroad was under the control of the Director General.

Separate actions by James B. Galehouse, as administrator of the estate of Joseph Koble, deceased, and by James B. Galehouse, as administrator of the estate of Charles Koble, deceased, against the Baltimore & Ohio Railroad Company and others, begun in the state court, and removed by the named defendant to the United States District Court. On motions by the plaintiff in each case to remand to the state court, and on demurrers by the named defendant to the petition. Motions to remand overruled, and demurrer sustained.

Kean & Adair, of Wooster, Ohio, for plaintiff.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. These causes are pending on motion of plaintiff to remand to the state court, whence they were removed on petition alone of the defendant the Baltimore & Ohio Railroad Company, and on a general demurrer of the Baltimore & Ohio Railroad Company to the petitions filed herein after removal.

[1] The motions to remand will be denied. The petitions name therein as defendants, in addition to the railroad company, six persons by the name of Doe whose true names are unknown, but are said to be the members of the train crew in charge of the train which collided with an automobile in which plaintiff's decedents were riding, at a pub-

lic crossing. This collision, it is said, was due to the negligent operation of the train by these several members of its crew. Summons was taken out against all the defendants thus named, but was served only on the railroad company. The action pending at the time of such removal was therefore one against the railroad company alone, and the removal was proper.

[2] Moreover, if summons had or could have been served on the train crew, they would, under the law of Ohio, have been improperly joined, and the controversy between the plaintiff and the defendant railroad company would be a separable controversy from that between the plaintiff and the members of the crew. In Ohio it is settled law that a joint action cannot be maintained against master and servant in any case where the master's liability for the wrongful and negligent act of the servant arises solely and only from the legal relationship existing between them under the rule of respondeat superior, and not by reason or because of the master's personal participation in such wrongful or negligent act. Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; French, Adm'r, v. Construction Co., 76 Ohio St. 509, 518, 81 N. E. 751, 12 L. R. A. (N. S.) 669; Robbins v. Pennsylvania Co. (6 C. C. A.) 245 Fed. 435, 157 C. C. A. 597.

[3] Upon the facts stated in the two petitions, these cases fall within this rule, and the state rule is controlling in this court as to the right of removal. If under the state law a joint action cannot be maintained against the master and servant, the controversy, when both are joined, is a separable one which may be removed. Robbins v. Pennsylvania Co., supra, 245 Fed. 435, 157 C. C. A. 597; Veariel v. United Eng. & Foundry Co. (Day, Judge) 197 Fed. (D. C.) 877; Chicago, etc., Ry. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473. The two federal cases last cited arose in Ohio and were held removable for the reasons herein stated.

[4] The demurrers of the defendant railroad company will be sustained. The collision occurred and the cause of action arose June 22, 1919. On this date the lines of the defendant railroad company were being operated by the Director General of Railroads under what is known as federal control. The liability, if any, for injuries thus caused is upon the Director General, and not upon the railroad company as owner of the lines. This is settled law. See Haubert v. Railroad Co. (D. C.) 259 Fed. 361; Erie Railroad Co. v. Caldwell (6 C. C. A.) 264 Fed. 947. The holding of these cases has been approved and adopted by the U. S. Supreme Court in a recent case (Missouri Pac. R. Co. v. Ault, 255 U. S. ——, 41 Sup. Ct. 593, 65 L. Ed. ——) in which Mr. Justice Brandeis delivered the opinion.

Plaintiff's motions to remand will be overruled. Defendants' demurrers will be sustained. Proper exceptions will be allowed plaintiff.

LOUISIANA & P. B. RY. CO. v. UNITED STATES. *

(District Court, W. D. Arkansas, Texarkana Division. March 4, 1921.)

No. 44.

Commerce ⟸95—Order of Interstate Commerce Commission not reviewable.

A finding by the Interstate Commerce Commission that a prior order making an allowance to tap lines for the haul of cars from place of loading to the junction point, based on mileage, covered only the direct movement from loading to junction point, and did not entitle a tap line to include additional distance necessary to reach a weighing scale, on the ground that it was not shown to be a necessary movement by such line, *held* correct as matter of law and not reviewable on the facts, where all the evidence on which it was based is not before the court.

In Equity. Suit by the Louisiana & Pine Bluff Railway Company against the United States. Decree for defendant.

Suit under Commerce Court Act (36 Stat. 539) and Urgent Deficiencies Act Oct. 22, 1913 (38 Stat. 219), to enjoin, set aside, annul, or suspend order of Interstate Commerce Commission, June 10, 1919 (53 Interst. Com. Com'n R. 475), fixing allowances or divisions to be paid by Missouri Pacific Railway Company to Louisiana & Pine Bluff Railway Company, the entire capital stock of which is owned by Union Sawmill Company, the principal shipper over its line. Final hearing on motion of Louisiana & Pine Bluff Railway Company for permanent injunction, and on motion of defendants to dismiss the petition.

Luther M. Walter, of Chicago, Ill., Barker & Britton, of St. Louis, Mo., Gaughan & Sifford, of Camden, Ark., and Borders, Walter, Burchmore & Collin, of Chicago, Ill. (Harry C. Barker and Roy F. Britton, both of St. Louis, Mo., T. J. Gaughan and J. T. Sifford, both of Camden, Ark., and Luther M. Walter and John S. Burchmore, both of Chicago, Ill., on the brief), for petitioner.

Blackburn Esterline, Sp. Asst. Atty. Gen., for the United States.

W. R. McFarland, of Norfolk, Neb. (P. J. Farrell, of Washington, D. C., of counsel), for Interstate Commerce Commission.

Before STONE, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

PER CURIAM. On July 29, 1914, the Interstate Commerce Commission entered an order making allowances to tap lines such as this plaintiff. So far as here material, these allowances were $3 per car for distances between 1 and 3 miles from loading to junction point and 1½ cents per 100 pounds for distances from 3 to 6 miles. Cars loaded with lumber at the platforms of the Union Sawmill Company, if hauled directly to the junction point at Dollar Junction, travel slightly less than 3 miles; but, if taken by way of a track scale, located in the opposite direction from the junction, they travel 3.25 miles. The scales are located on the track of and controlled by the trunk line, but the tap line has contractual rights to use that portion of the trunk line.

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*Decree affirmed 256 U. S. —, 42 Sup. Ct. 25, 65 L. Ed. —.

In a decision and order of the Commission, entered June 10, 1919, it was determined that the plaintiff could not include the distance of the scale haul, and was entitled only to the charge of $3, based upon a haul of less than 3 miles. The basis of this decision was that it had not been shown that it was necessary for the tap line, rather than the trunk line, to take this weight. After denial by the Commission of a petition to modify this order, this complaint was filed to enjoin the enforcement of the above order of June 10, 1919. Issues have been joined by answer, and the United States has filed a motion to dismiss. By consent of parties the matter has been heard on final submission upon the pleadings and a subsequent supplemental order of the Commission introduced in evidence. This latter order is not regarded as affecting the issues.

The Commission (40 Interest. Com. Com'n R. 470) interpreted and applied its order of July 29, 1914, which established the basis of tap line charges, as contemplating a direct haul from the loading point to the junction point, without any diversion not made necessary to safely and properly reach such junction point. It there said (italics ours):

"In other words, the Pine Bluff, in order to bring about an increase in its earnings, claims to be entitled to compensation for an *out of line haul* to the scale track of nearly a mile. Were we to lend our approval to any such arrangement, not only would the Pine Bluff be placed in a more advantageous position then any other tap line in this territory performing a similar service, but such a ruling would open the way in the case of many tap lines for a relocation of their track scales, so as to require a long back haul, and in that way to lay a basis for divisions or allowances very materially in excess of those *fixed by the Commission for the distance covered by a direct movement from the mill to the junction.*"

We accept this interpretation, by the Commission, of the meaning of its own order, not only because the order itself is clearly susceptible of such interpretation, but because of the evil results (as set out in the above quotation) which might follow any other conclusion. As to the importance and imminence of such results we are inclined to respect the fears of the Commission, for, as said by the Supreme Court in O'Keefe v. U. S., 240 U. S. 294, 303, 36 Sup. Ct. 313, 317 (60 L. Ed. 651):

"A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others."

Taking this as the meaning of this order, we turn to its application to this action. The Commission has found in this case (53 Interst. Com. Com'n R. 475) that "the evidence does not show that it is necessary that the shipments be weighed by the tap line rather than by the trunk line." We cannot review this finding, as we have only a portion of the evidence before us. Therefore we find no error of fact in the findings of the Commission here involved, nor any misapplication of law.

Therefore the bill should be, and is, dismissed.

THE CITY OF NORWICH.

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

1. **Judgment ⊂=345—Opinion filed is not final decree, which precludes further hearing after expiration of term.**
   An opinion filed, unless so written as to indicate that intention, is not to be deemed a final decree within the rule that the court is without power to vacate or modify its decree after expiration of the term.
2. **Seamen ⊂=13, 19—Under British law entitled to wages, transportation, and maintenance on wrongful discharge.**
   Seamen on a British vessel, wrongfully discharged in this country, *held*, under British law proved, entitled to wages, transportation, and maintenance.

In Admiralty. Suit by Fazel Ahammed and 32 others against the steamship City of Norwich. Decree for libelants.

See, also, 273 Fed. 304.

Silas B. Axtell, of New York City, for libelants.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (V. S. Jones and Clietus Keating, both of New York City, and L. De Grove Potter, of White Plains, N. Y., of counsel), for claimant.

GARVIN, District Judge. Libelants, more than 30 in number, are in a strange land, apparently penniless, and practically friendless. There should be a prompt adjudication of their claim, so that they may have immediate relief. I shall therefore attempt little more than a statement of my conclusions.

[1] After a trial of the issues, the court filed an opinion in writing, by which the libel was dismissed without costs. Before the term expired counsel for libelants applied to the court for permission to amend the libel and take further proof. After the expiration of the term during which the case was tried and opinion filed, the libelants obtained permission to reopen the case and to amend the libel, in order that British law might be pleaded and then proved. The application was granted, the libel has been amended by setting up British law, which has now been proved.

The claimant asked that the libel again be dismissed, on the ground that the opinion of the court, which directed that the libel be dismissed, without costs, constituted a final decree, and that, inasmuch as the term at which it was rendered had expired, this court had no power to reopen the case. It is undoubtedly true, generally speaking, that with the expiration of the term within which a final decree is entered all power to set aside, vacate, modify, or annul the same is lost. Winslow v. Staab, 242 Fed. 427, 155 C. C. A. 202, is a recent authority for this well-settled rule.

I do not understand, however, that an opinion of a court is its decree, unless perhaps the opinion is so worded as to make it apparent that the court intended to make no further decree in the matter. That was not the case here. The opinion was in a form very common and invariably followed by a decree. I have considered In re Barnes, Fed.

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

Cas. No. 1,011, and United States v. Stoller (D. C.) 180 Fed. 910; but I do not regard either as authority for the proposition that the written opinion of the court, rendered after submission of the case, and for the purpose, at least in part, of explaining the applicability of controlling principles of law, is to be deemed the decree of the court, unless it be written so as to indicate such an intention.

[2] The case has been again submitted, after British law has been proved. By that law libelants are entitled to recover wages, transportation, and maintenance, inasmuch as the court found, and now finds, that they were wrongfully discharged and that their contract was broken. No general damages for hardship in connection with sleeping on the pier will be allowed. There will be, therefore, a decree for the libelants. No reference to ascertain the damage, as the amount will be fixed when the decree is signed and after hearing counsel. Settle decree on notice.

LEDBETTER v. BAILEY, Collector of Internal Revenue.

(District Court, W. D. North Carolina, at Greensboro. July 30, 1921.)

1. **Internal revenue ⇐28—Assessment and enforcement of taxes held illegal.**
   The action of the Internal Revenue Department in making assessments of taxes for illegal manufacture of liquor, filing liens and issuing warrants of distraint against citizens who had no notice or knowledge of the proceedings, and in many cases had not been charged with any offense, based on reports of prohibition agents, *held* without authority of law.

2. **Internal revenue ⇐28—To preclude injunction against collection of tax, the manner of assessment and collection must be legal.**
   In order to make applicable Rev. St. § 3224 (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," the tax which is to be collected must be founded upon some proper subject of taxation, must be assessed in a proper way, and collected in a legal manner.

3. **Internal revenue ⇐2, 45—Taxes cannot be assessed and collected under National Prohibition Act.**
   Under the provisions of Volstead Act, tit. 2, § 35, internal revenue taxes cannot be assessed or collected. The double tax provided for in said section and the penalties prescribed are nothing more nor less than punishment for the commission of criminal offenses, and these penalties must be collected by civil actions or pronounced as judgments in criminal cases.

4. **Internal revenue ⇐45—Assessment and collection of penalties by Internal Revenue Department may be enjoined.**
   The penalties provided for the illegal manufacture or sale of liquor by Volstead Act, tit. 2, § 35, cannot be assessed, and collection made by distraint by the Internal Revenue Department, and a suit to restrain such collection is not prohibited by Rev. St. § 3224 (Comp. St. § 5947).

In Equity. Suit by J. M. Ledbetter against J. W. Bailey, Collector of Internal Revenue, with 28 other cases. Decrees for complainant.

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

The bill filed by the complainant Ledbetter was in substance as follows:

That the complainant is a citizen of Wilkes county, in the Western district of North Carolina, and that the defendant is collector of internal revenue for the district of North Carolina; that in January, 1921, notice was sent to the complainant that an assessment of taxes and penalties had been made against him, aggregating $3,083.34, on the ground that the complainant had operated or permitted to be operated on his premises an illicit distillery for the manufacture of spirituous liquors. This notice was the first information to complainant that such claim for taxes against him was in existence. Payment of the said taxes was demanded. Soon thereafter complainant filed an application for the abatement of the said assessment on the form prescribed by law, in answer to which the complainant received the following communication, signed by the collector, bearing date of February 24, 1921.

"An examination of the records of this office shows that there is an outstanding assessment for taxes and penalty against you in the sum of $3,083.34, against which you have filed a claim for the abatement on form 47. You are herewith advised that a bond, for the penal sum of at least the amount of the assessment due, must be submitted by you as principal, with a recognized surety company as surety, in favor of the collector of internal revenue, Raleigh, N. C., in support of the above-mentioned claim for abatement. A blank form of bond which is acceptable to the collector of internal revenue is herewith enclosed.

"You are further advised that, unless the bond is duly furnished as suggested, the assessment must be paid and a claim for refund filed with the collector of internal revenue on form 46. In the event neither of the above-mentioned procedures is followed, the property of the assessed party will be seized under warrant of distraint by the United States of America. A further stay of the collection of the tax and penalty assessed against you cannot be granted for the consideration of the existing claim for abatement which you have already filed, unless the bond is furnished as suggested."

Complainant denies that he had ever engaged in the manufacture of distilled spirits, or permitted the manufacture of distilled spirits on his premises; further that no charge to that effect has ever been filed against him in any court of the United States or of the state of North Carolina. Complainant alleges that he made no effort to give the bond required, and that he was unable to make the cash payment of the taxes; that both of said requirements were unauthorized by law and were oppressive; that the collector was about to proceed against his property and sell the same under warrant of distraint; whereupon complainant, further alleging that he had no adequate remedy at law, brought this his bill, in which he seeks to have the collector enjoined from further proceeding.

The bills of complaint in the other cases under consideration, in their principal features, are in substance similar to the foregoing. There, are, of course, parties of different names, and the amount of assessment, the time of notice, etc., are also different. Additional facts, such as have been disclosed in the course of these proceedings, will be referred to in discussing the questions involved.

There are 28 cases in addition to the one stated, in all of which bills in equity are filed by the several complainants against J. W. Bailey, collector of internal revenue for the district of North Carolina (in some instances the name of the deputy having a warrant of distraint in hand is added as codefendant), seeking to enjoin the collector from proceeding with warrants of distraint, and making sales of property of plaintiffs to satisfy arbitrary assessments for taxes and penalties, made by the Commissioner of Internal Revenue, and placed in the hands of the collector for collection.

The cases were heard upon motion of government's counsel for dismissal of the several complaints, on the ground that in law the same had no standing in court, because upon the face of the complaints it appears that the suits were brought to enjoin the collection of taxes. No answers have been filed in any of the cases, so the court feels justified in taking to be true the averments of the several complaints; at any rate, in the absence of answers, they are taken to be admitted.

James W. McNeill, of Washington, D. C., John R. Jones, of North Wilkesboro, N. C., and W. P. Bynum, of Greensboro, N. C., for plaintiff.

B. W. Andrews, of Washington, D. C., Asst. Counsel, Internal Revenue Bureau, and S. J. Durham, U. S. Atty., of Gastonia, N. C., for defendant.

BOYD, District Judge (after stating the facts as above). In considering the principal questions involved in these several cases, it must be borne in mind, that, in order to be subject to the provisions of the Volstead Act (41 Stat. 305), untaxpaid liquors must be manufactured and sold for beverage purposes and no other. In the main the federal courts are taking the view that the laws, so far as distilled spirits for use as a beverage are concerned, are defunct, having been superseded by the Eighteenth Amendment to the Constitution and the legislation enacted by Congress in aid of its enforcement. Yet, notwithstanding this, the authorities are attempting to call to their aid in the assessment and collection of taxes, assessed as it is claimed under the Volstead Act, statutes which were enacted as a part of a system intended to secure to the government taxes, by levying assessments upon distilled spirits at a time, when it was not only lawful to manufacture and sell them for beverage purposes, but at a time when the government encouraged the manufacture and sale of such spirits, in order to have revenue derived therefrom for public uses.

In the effort to utilize these extinct laws, the method has been adopted of filing notices of liens with the clerk of the United States District Court in the district where the lands of the alleged taxpayer, who has been assessed, are situated. These notices are similar in form, and for a better understanding of their contents the following are selected from the great number filed in this district:

"Notice of Tax Lien under Internal Revenue Laws.

"Pursuant to the provisions of section 3186 of the Revised Statutes of the United States, as amended (37 Stat. 1016), notice is hereby given that there have been assessed under the internal revenue laws of the United States, against the following named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

"Name of taxpayer, J. Dan Long and Lon. D. Pusser. Residence or place of business, Unionville, N. C. Nature of tax, illicit distilling. Taxable period, twelve months, 1920. Amount of tax assessed, $3,551.20. Additional (penalty) tax assessed, $177.56. Date of assessment, October, 1920.

"J. W. Bailey, Collector.

"Name of taxpayer, J. Westley Hollifield. Residence or place of business, two miles north of Marion, N. C. Nature of tax, illicit distilling. Taxable period, four months, 1921. Amount of tax assessed, $666.67. Additional (penalty) tax assessed, $1,166.67. Date of assessment, May, 1921.

"J. W. Bailey, Collector.

"Name of taxpayer, Silas Reavis and Elsie Foster. Residence or place of business, Yadkinville, N. C. Nature of tax, illicit distilling, double tax on two gallons spirits. Taxable period, two months, 1921. Amount of tax

assessed, $357.93. Additional (penalty) tax assessed, $1,087.33. Date of assessment, July, 1921.

"J. W. Bailey, Collector.

"Name of taxpayer, Will Umstead. Residence or place of business, eight miles northeast of Hillsboro, N. C. Nature of tax, illicit distilling. Taxable period, three months, 1921. Amount of tax assessed, $500.00 Additional (penalty) tax assessed, $1,125.00. Date of assessment, May, 1921.

"J. W. Bailey, Collector.

"Name of taxpayer, Jim White, Tom Scarlett, and Oscar Grubb. Residence or place of business, ten miles east of Lexington, N. C. Nature of tax, illicit distilling and double tax on eighteen gallons spirits. Taxable period, five months, 1921. Amount of tax assessed, $1,063.73. Additional (penalty) tax assessed, $1,208.33. Date of assessment, May, 1921.

"J. W. Bailey, Collector."

These assessments were all made in Washington and forwarded to the collector at Raleigh, who issued his warrants of distraint and caused notices like the above to be filed in each case. This action was taken by the collector in response to instructions from headquarters in all of the pending cases, which number about 28, as before stated, and in which suits are brought for injunction.

[1] As the court is informed, these assessments were all made by the Prohibition Commissioner in Washington, delivered by him to the Commissioner of Internal Revenue, who approved the same and transmitted them to the collector. It would make no difference, however, whether this course was pursued, or the assessments were made in the first instance by the Commissioner of Internal Revenue. Reports sent in by the subordinate officers, engaged in enforcing the anti-liquor laws, constitute the bases upon which these assessments are made. The reports, therefore, must necessarily be founded largely upon hearsay, and opinions formed by the subordinate officers, from circumstances existing or supposed to exist. These officers could not, in the very nature of things, have any personal knowledge in the great majority of cases as to the ownership of an illicit distillery, its capacity, the length of time or in what particular months operated, or the quantity of spirits, if any, actually produced. In some of the pending cases the alleged operators have been indicted. A few have been convicted; others discharged by verdicts of not guilty, or the entry of nolle prosequis; and in others no criminal proceedings have been taken at all.

In none of the cases have the alleged taxpayers been notified in advance of the assessment, or that taxes were claimed against them. The first notice of the assessment to the persons assessed is when the deputy collector goes with his warrant of distraint to make a demand for taxes, and to further advise that, unless the taxes are paid, the property of the alleged taxpayer will be promptly subjected to sale. It will thus be seen that the persons against whom these claims are made have not had an opportunity to be heard; the whole proceeding being on the part of the government and altogether ex parte.

It is true that the taxpayer can file with the Commissioner of Internal Revenue a claim for abatement; but the deputy collectors have absolutely refused, when a claim for abatement is filed, to delay action under the warrant of distraint, unless the taxpayer gives a solvent bond, to be approved by such deputy or the collector himself, conditioned to

pay the tax, in case the claim for abatement is denied. The taxpayer was further advised that he could pay the tax and penalties in cash under protest, and file his application with the collector for a refund. Either of these methods of relief was absolutely beyond the reach of the alleged taxpayer in the great majority of these cases, for the bonds required could not be furnished and the amounts assessed and demanded were far beyond ability to pay, and by these methods the victims of these secret and arbitrary assessments are to be bereft of their property without being accorded a day in court to make defense.

Referring again to the reports upon which these assessments are based, it is an irresistible conclusion, from the character of the notices, the contents of the liens filed, and the manner of assessment, that the information furnished to the taxing authorities in Washington is largely the result of unfounded opinion and alleged facts, existing only in the minds of those who have sent in the statements. It is evident that the imaginations of these reporters in many instances have been allowed to take unrestrained flight, and have thereby reached heights inconceivable to the normal mind, and, further, the manner of the execution of the act which we are now considering, by the agencies appointed for its enforcement, has been in many instances such as to transgress the sacred barriers provided by the Constitution for the protection of person and property in this country. The conduct of some of these subordinates has been both arrogant and ruthless, and has reached a degree which has aroused the indignation of many of the best citizens in the land.

An illustration of the character of circumstances which are quite often relied upon by the officers as sufficient to warrant the arrest of an accused person and to authorize criminal proceedings against him, as well as to constitute the basis of assessment for taxes and penalties, the following is quoted from the case of Jake Holmes, Plaintiff in Error, v. United States, Defendant in Error, 275 Fed. 49, which was decided by the Circuit Court of Appeals for the Fourth Circuit July 5, 1921. In that case the government's witnesses were three prohibition agents, and Judge Knapp, in delivering the opinion of the court, says:

"It is conceded that they went upon defendant's premises in his absence, without his knowledge or consent, and without a search warrant or other process. They testified to finding in the yard behind his house certain articles which they claimed were parts of a still, namely, a five gallon kerosene can, which had the smell of still beer and appeared to have been on the fire; a ten or twelve gallon keg containing some corn beer, which would have been "ready" in a few days; a piece of galvanized iron pipe, which they said had been coiled to use for a worm; and a wooden tub, called by them a "flake stand," in which defendant's wife was washing clothes at the time. One of the men went into the house and brought out another can, similar to the one found in the yard. No whisky was discovered on the premises. They broke up the keg and tub, but carried away the cans and piece of pipe, and threw them into the Congaree river. Learning that defendant was at a ginery in the neighborhood, they went there and arrested him without a warrant."

The testimony proposed by the government in the above-cited case furnishes a fair sample of that relied upon in similar prosecutions, which have been and are now pending in this judicial district. The

court is led to believe that such conditions as presented above furnish the basis for assessment of taxes and penalties under the Volstead Act; and not only this, but this case shows how the officers of the government assume the right to enter upon and search the premises and dwelling of a citizen without authority, and seize and destroy property found there without warrant of law.

Is it not time to call a halt, and retrace our steps, until we find ourselves safely within the protecting fold of the American Constitution? It is amazing to think that an accredited officer of the United States would, without warrant or other process, invade the dwelling of a citizen, and seize a tub, in which a helpless woman was doing her domestic washing, and break it to pieces. Such conduct savors more of the act of a barbarian than of an officer holding a commission from this great government, dealing with an American citizen.

The framers of our organic law undertook to guard against the invasion of the rights of the citizen with respect to the liberty of his person and the sacredness of his home and property, and with this end in view provided for trial by jury, for the security of persons, houses, papers, and effects against unreasonable searches and seizures, and that the property of a citizen should not be taken without due process of law. Can the proceedings which have been inaugurated and are being fostered by the federal authorities for the enforcement of the Volstead Act be upheld as due process of law, or in other words can the provisions of the Constitution which undertake to protect property from wrongful seizure, forfeiture, or confiscation be so construed as to permit citizens to be subjected to penalties decreed in secret, without notice, and without the benefit of a hearing. If so, in my opinion the meaning of the provisions of the Constitution above referred to have been misunderstood by the people.

So far the discussion of the subject in hand is intended to point out, if possible, the objectionable methods adopted by the authorities in the enforcement of the prohibition laws, in order that such methods may be corrected. The Eighteenth Amendment is a part of the organic law of the nation, and as such should have the support of the people generally, and laws that are passed for the carrying out of the amendment, to the full extent of its purposes, should not only be sustained by public sentiment, but should have the active aid of all good citizens in their enforcement. St. Paul says: "Let all things be done decently and in order." This injunction could be well applied to the execution of public law.

[2] Coming more particularly to the legal propositions involved in our present cases, it is insisted that these assessments are for taxes, and that under the provisions of section 3224, Revised Statutes (Comp. St. § 5947), the courts are powerless to provide injunctive relief against the assessment or efforts to collect. The section referred to reads as follows:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This is a statute having in view the orderly and uninterrupted collection of the revenues of the government, which are necessary to meet

its current expenses and public obligations. But in order to make this statute applicable, a tax which is to be collected must be lawful; it must be founded upon some proper subject of taxation, must be assessed in a proper way, and collected in a legal manner. The application of this section of the law is well discussed in the case of Thome v. Lynch, Collector of Internal Revenue, 269 Fed. 995, in the District Court for the District of Minnesota. Judge Booth, in delivering the opinion, says:

"The broad reason underlying section 3224 is that the government shall not be delayed or interfered with in the collection of its revenues. This is clear from the decisions in the cases wherein the statute has been applied. They relate to exactions properly called taxes; that is, exactions for revenue for the uses of the government."

He cites in support of his view the following cases: Barnes v. Railroad, 17 Wall. 307, 310, 21 L. Ed. 544 (tax on dividends); Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901 (internal revenue tax on tobacco); High v. Coyne, 178 U. S. 111, 20 Sup. Ct. 747, 44 L. Ed. 997 (tax on legacies); Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557 (tax on incomes).

This doctrine is also sustained by the decision in Ketchum v. United States, 270 Fed. 416, which case is consolidated with Weldon v. Same and Henderson v. Same. The decision is of the Circuit Court of Appeals of the Eighth Circuit; the defendants being indicted severally for having a still and distilling apparatus for the production of spirituous liquors in their possessions, without being registered as required by law, for carrying on the business of a distiller without giving the bond required, for carrying on the said business with intent to defraud the United States of the tax on the spirits distilled, etc. I quote from the opinion in that case as follows:

"They could not have carried on the business of a distiller of spirituous liquors, even if they had given a bond, and there was no way by which they could give such bond. The laws in force absolutely prohibited such business, bond or no bond. They could not have carried on the business of a distiller in spirituous liquors with intent to defraud the United States of the tax on the spirits distilled by them, for the reason that at the time the offense charged was committed it would have been impossible for the defendants to pay any tax, or to receive any protection, even if it had been paid. There was no tax to be paid. To absolutely prohibit the manufacture and sale of spirituous liquors, and then to send persons engaged in such business to the penitentiary because they had not paid a tax on the spirits distilled, involves such a contradiction of purpose that there would seem to be no escape from the conclusion that the law requiring the payment of a tax is inconsistent beyond all reasonable doubt with the Act. * * * The claim is made that, notwithstanding the manufacture and sale of spirituous liquors is absolutely prohibited, still the government intends to collect revenue taxes on such business. Of course, such a procedure would be legally and morally impossible. The language of the section absolutely prohibits the payment of any tax in advance, which negatives the idea that the business may be taxed in the sense of the sections of the law upon which the indictment in this case is based."

Counsel for the government takes the position that these assessments are authorized by title 2, § 35, of the Volstead Act, which reads as follows:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

It will be observed that this section undertakes to preserve the right to assess taxes against persons responsible for the illegal manufacture and sale of intoxicating liquors, in double the amount provided by existing law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. There is no method prescribed in the act for the assessment or collection of such taxes or the collection of the penalties, and therefore the authorities have resorted to certain provisions of the former internal revenue laws, and have undertaken to include in assessments, not only the amount which is estimated as double taxes upon spirits actually distilled, but also the full amount of the penalty, the amount of which is definitely stated in the act.

On examination of the internal revenue laws, which were a part of a system for the assessment and collection of taxes on distilled spirits, when the manufacture and sale of such spirits were authorized by the government, it will be seen that there was no authority to collect by distraint specific penalties; but the law did provide that, in a case of the failure of a taxpayer to pay the amount of the taxes assessed against him, an additional percentage would be added. This additional percentage was of course governed by the amount of taxes assessed, and the tax together with the addition, could be collected either by distraint or in a civil action.

Under the present law the penalty is made entirely separate and distinct from the amount of the taxes; it is not prescribed as an additional percentage for the nonpayment of the tax, yet it is included in the assessment before the demand is made upon the taxpayer for payment. The provisions of the internal revenue laws with regard to specific penalties imposed for their violation provided for the collection of such penalties by civil actions, in the name of the United States, and there is no authority for their collection in any other manner. It must therefore necessarily follow that the penalties prescribed in the present act cannot be included under the head of taxes, and their collection enforced by warrant of distraint, issued under an alleged assessment for taxes. The situation then presents itself of an alleged tax assessment upon an outlawed subject, augmented by the addition of a specific penalty prescribed for a violation of law.

Besides, as above stated, under the old system, the penalty was not added to the tax until after the payment of the same was demanded and

refused, or unnecessarily delayed. In the present cases the penalties are added and included in the assessment before the alleged taxpayer has any notice whatever that there is such a claim existing against him. The penalty under the internal revenue system was added because of the nonpayment of the tax; the penalties under the Volstead Act are prescribed as punishment for the illegal manufacture and sale of intoxicating liquors for beverage purposes.

The right to assess taxes for the manufacture and sale of intoxicating liquors for beverage purposes, as provided in the Volstead Act, and to include in such assessments the specific penalties set forth in the said act, is discussed in many cases, several of which are hereinbefore referred to, and to these may be added the case of Accardo v. Fontenot, Collector, with which the cases of Struve v. Same, and Carlisi v. Same were for convenience consolidated. This opinion is reported in 269 Fed. 447. It was rendered by Judge Foster of the Eastern District of Louisiana, and is a most learned and forceful one, and in the line of reasoning and conclusions reached the court here fully concurs.

It may be well, before concluding the views of the court on the subject under consideration, to refer to the fact that evidence of illegal manufacture or sale of illicit spirits must be furnished to the Commissioner before he is authorized to proceed to make an assessment. The term "evidence" in the act must be construed to carry with it its legal and technical force. It is elementary that—

"Evidence is intended to describe conditions from which inferences may be logically drawn as to the existence of facts under investigation."

"Evidence is intended to furnish a lead to induce persuasion of the existence or nonexistence of facts in issue. It is the physical means by which the belief of the existence of a given fact is created."

The unsupported reports of officers, such as are described before, indefinite and uncertain as they necessarily must be, and as the notices and liens hereinbefore set out indicate, cannot be evidence such as is contemplated by law, sufficient to establish facts to be used as a basis for a proceeding against either the person or the property of a citizen.

[3, 4] The conclusions of the court are therefore that under the provisions of section 35 of the Volstead Act taxes cannot be assessed or collected; that the double tax provided for in the act, and the penalties prescribed, are nothing more nor less than punishment for the commission of criminal offenses; that these penalties must be collected by civil actions, or pronounced as judgments in criminal cases; that the provisions of section 3224 do not apply, and that these suits are not forbidden thereby; that the court has jurisdiction to entertain the suits and issue the orders of restraint or decrees for injunction sought thereby.

Decrees in accordance with the views expressed will be drawn and filed in each of the several pending cases.

NORTHWESTERN BELL TELEPHONE CO. v. HILTON, Atty. Gen., et al.

TRI-STATE TELEPHONE & TELEGRAPH CO. v. SAME.

(District Court, D. Minnesota, Third Division. March 15-17, 1921.)

On Motion to Stay Proceedings.

1. **Courts ⇐506—Interlocutory injunction not denied by federal court because of pending action in state court, when stay in that court not as broad as relief sought in federal court.**

Under Judicial Code, § 266 (Comp. St. § 1243), proceedings for an injunction to restrain the enforcement of state statutes or administrative orders will only be stayed because of the pendency of an action in the state court to enforce such statute or order, when the action in the state court is such that the same issues can be framed and the same questions considered and decided as are raised in the federal court, and the temporary relief granted by the stay in the state court must be of as broad a scope as that asked in the federal court; and hence proceedings by telephone companies to enjoin the enforcement of existing rates could not be stayed, where the stay granted by the state court did not suspend an order of the Railroad and Warehouse Commission denying increased rates, and a state statute forbidding the charging of different rates than those on file with the commission.

On Motion to Dismiss.

2. **Courts ⇐299—In suit to enjoin enforcement of telephone rates, complaint held to state cause of action within jurisdiction of federal court.**

In suits by telephone companies to enjoin state officials from enforcing existing telephone rates and an order of the state Railroad and Warehouse Commission denying an increase of rates, a company alleging diversity of citizenship, and that more than $3,000 was involved, and that the order denying an increase of rates would deprive the company of its property without due process of law, contrary to Const. Amend. 14, § 1, that the existing schedule was noncompensatory and confiscatory, and that, if the company disregarded the order and the existing schedule, it would be subject to criminal prosecution and punishment by fine or imprisonment, on its face stated a cause of action within the jurisdiction of the federal court.

3. **Courts ⇐299—Jurisdiction of federal court determined from plaintiff's statement.**

The jurisdiction of a federal court is to be determined on the statement by plaintiff himself in his complaint.

4. **Telegraphs and telephones ⇐33(1)—Commission's investigation of rates and companies' applications for temporary increases held distinct proceedings.**

Where a state Railroad and Warehouse Commission commenced an investigation of telephone rates on its own initiative, and before completion of the investigation telephone companies filed applications for increased rates temporarily, the two proceedings were independent, and relief in the subordinate proceeding need not await relief in the main proceeding, nor need the relief in the main proceeding depend on whether the relief in the subordinate proceeding was granted or denied.

5. **Courts ⇐493(3)—Notwithstanding provision for appeal from order of commission, telephone company held authorized to resort to federal court.**

Under Laws Minn. 1915, c. 152, as amended by Laws 1919, c. 183, authorizing the district court to modify final orders of the Railroad and Warehouse Commission fixing telephone rates and charges, if unreasonable or unlawful, and preventing the order of the commission from be-

coming final until decision of the appeal to the district court, the district court has only judicial power, and when an order of the commission was made the legislative stage had come to an end, and the judicial stage had been reached, and a telephone company, whose application for increased rates was denied, might resort to the federal District Court by suit for injunction, instead of resorting to the state district court.

6. **Public service commissions ⊂=19½, New, vol. 12A Key-No. Series—Telephone companies held entitled to enjoin enforcement of old rates, pending investigation before commission.**

Where a state Railroad and Warehouse Commission commenced an investigation of telephone rates on its own initiative, pending which telephone companies made applications for temporary increases in rates, which were denied by the commission, the telephone companies could sue in a federal court to enjoin enforcement of the order denying the temporary increases, though the main proceeding was still pending before the commission, where it was likely to continue for a very considerable period of time.

On Motion for Restraining Order.

7. **Telegraphs and telephones ⊂=33(1)—Restraining order permitting charging of increased rates granted, pending application for interlocutory injunction.**

Pending an application for an interlocutory injunction against the enforcement by state officials of existing telephone rates and an order of a state commission denying temporary increases, where it appears that the existing rates are confiscatory, that the companies have been trying for several months to get temporary relief, and that every day's delay is important and perhaps vital, and it cannot be told when the application for an interlocutory injunction can be heard by three judges as required by law, a temporary restraining order, granting an increase in rates until the hearing of such application, will be granted, on conditions protecting customers in case it is finally determined that the increase ought not to have been granted.

In Equity. Suits by the Northwestern Bell Telephone Company and by the Tri-State Telephone & Telegraph Company against Clifford L. Hilton Attorney General of Minnesota, and others. On motions to stay proceedings, to dismiss, and for a restraining order, and on application for an interlocutory injunction. Motions to stay proceedings and to dismiss denied, and motions for restraining order and applications for interlocutory injunctions granted.

Edmund A. Prendergast, of Minneapolis, Minn., and O'Brien, Young, Stone & Horn, of St. Paul, Minn., for plaintiff Northwestern Bell Telephone Co.

Clarence B. Randall and O'Brien, Young, Stone & Horn, all of St. Paul, Minn., for plaintiff Tri-State Telephone & Telegraph Co.

Clifford L. Hilton, Atty. Gen., and Henry C. Flannery, Asst. Atty. Gen., for defendants.

On Motion to Stay Proceedings.

BOOTH, District Judge. [1] This is a motion to stay the proceedings in this court, under section 266 of the Judicial Code (Comp. St. § 1243), based upon an action started in the state court of Ramsey county.

It appears that in 1915 or 1916 a proceeding was started before the Railroad and Warehouse Commission to investigate and determine a basis for reasonable rates to be charged by the telephone companies, and evidence was introduced as early as 1918 and as late as November, 1920; that up to the present time no evidence has been introduced on behalf of the state; that about November, 1920, a collateral inquiry was injected into this main proceeding by the telephone companies, in the way of application for increased rates temporarily; that that collateral inquiry was taken up and pursued by the Railroad and Warehouse Commission, and that an order was entered, on February 9, 1921, denying the application; that thereupon suits were brought in this court by the telephone companies, seeking to enjoin and restrain the Attorney General and the Railroad and Warehouse Commission from enforcing the order entered February 9, 1921, or from interfering with an attempt on the part of the telephone companies to increase their present rates. The matter is now pending before this court on a motion for a temporary restraining order, pending a hearing before an enlarged court of three judges for preliminary injunction. While that motion is pending here, and before a temporary restraining order has been issued, action is started in the state court of Ramsey county, asking for a mandatory injunction to compel the telephone companies to respect and abide by the order of the Railroad and Warehouse Commission of February 9, 1921, and also to respect and obey rates theretofore in force.

Section 266 of the Judicial Code provides:

"That if before the final hearing of such application [application for interlocutory injunction] a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state."

The language of that provision in section 266 evidently was framed more with a view to a new order that might be made, or a new statute that might be passed, rather than to an old statute that had already been in force for some time, or an old order that had been made and continued in force, and the purpose of the statute undoubtedly was that, when such new order was made or such new statute passed, and action was taken by the public utility to restrain the execution and enforcement of the statute and the order, a preliminary injunction might issue, if the facts warranted it, pending determination of the suit, as to whether such statute or order was unconstitutional and confiscatory. But if, while such a suit was pending in the federal court to obtain a preliminary injunction, action was commenced in the state court for the purpose of enforcing the new statute or the new order, and a stay of proceedings entered in the state court, staying the enforcement of the new statute or the new order, pending the suit, then the proceedings in the United States court would be stayed until the suit in the state court had terminated.

In the present instance there is no new statute which has been passed, and which is attacked; but the order which has been attacked is the order of February 9, 1921, by the Railroad and Warehouse Commission, and that order refused the application for increased rates, and determined that the present rates should remain in force and effect. That order must be read in connection with the statute then in force and now in force. Section 6 of chapter 152, Laws Minn. 1915, known as the Telephone Law (Gen. Stat. Minn. Supp. 1917, § 4623—6), reads that—

"It shall be unlawful for any telephone company to collect or receive a greater or less rate or charge for any intrastate service rendered by it than the rate or charge named in the schedules on file with the commission, and no new rate shall take effect till the date named by the commission, which shall not be less than ten days after it is filed."

The order and the statute must be connected together, must be considered together, and are attacked, as I construe the amended bill of complaint, in each of these suits now pending here. Now, when action is taken in the state court to cause a stay of proceedings in the federal court, the meaning of section 266, as I construe it, is that that action must be such in the state court that the same issues can be framed and the same questions considered and decided in the state court as have been raised by the pleadings in the federal court, and pending the determination of that suit in the state court the temporary relief that must be granted by the state court in a stay order must be of as broad a scope as the temporary relief which is asked in the federal court, where the suits have already been started.

It may be true that the issues raised in the state court, in this mandatory injunction suit, may be so framed as to raise all of the questions that are raised in the suits here in this court. I say that may be the case. I am not clear in my mind whether that is the case, but it might be assumed that it is the case. But, clearly, the stay order which has been entered in the state court is not of the same scope and character as the temporary relief which is demanded in this court on the application for a restraining order, and as demanded in this court on an application for a temporary injunction before the enlarged court of three judges. If counsel for defendants here would state in open court that the stay order in the state court would be construed as meaning that the order of the commission of February 9, 1921, as well as the provisions of section 6, chapter 152, the Telephone Law, would be suspended during the carrying on of the action in the state court, he would have a case brought within section 266 of the Judicial Code; but on the face of the order of the state court it is not of that scope, and since it is not of that scope the provisions of section 266 of the Judicial Code have not been complied with.

I do not know of any adjudicated cases in the reports in reference to this particular matter of actions in state courts staying proceedings in the federal courts under section 266 of the Judicial Code I do remember, however, in the Kansas Natural Gas Company litigation, that a suit was commenced by the St. Joseph Gas Company against the Missouri commission, and it was sought to restrain the commission

from putting into force and effect an order which the commission had made denying the application of the St. Joseph Gas Company to put into effect a schedule of rates. The St. Joseph Gas Company brought suit in the federal court, and made an application for a temporary injunction, and a hearing was set before three judges, at Council Bluffs. Judge Smith, Judge Campbell, of Oklahoma, and I sat. At that hearing counsel for the commission came into the court and stated, and had his papers with him, that an action had been commenced in the state court to determine the validity of the order of the Public Service Commission of Missouri, and that all proceedings under that order also had been stayed by the state court, and upon making that showing the hearing before the three judges was postponed until the determination of that state suit. Now, under the law of Missouri, a public service utility company may file a schedule of rates with the Public Service Commission, and unless the Public Service Commission within a certain specified time takes action to refuse the allowance of that schedule of rates, the rates go into force and effect of their own right; whereas, if within the limited time the Public Service Commission does take action, either on its own initiative or the initiative of some one interested, then an investigation is had and the schedule is suspended.

In the particular case that I referred to the Public Service Commission had taken action to prevent the going into effect of the new schedule of rates filed by the St. Joseph Gas Company, and when the state action was brought and a stay order was entered in the state court, it stayed the proceedings under the order of the Public Service Commission, and, as a result, put into force and effect the new schedule of rates which had been filed by the St. Joseph Gas Company, pending the determination of the suit in the state court. That is the only instance that I know of where the suit in the federal court has been stayed by reason of action taken in the state court; and in that particular case the action was stayed because the suit in the state court was of such character that all of the issues could be determined, and also there was a stay entered whereby the new schedule of rates, which had been prepared and filed with the commission by the St. Joseph Company, was allowed to go into force and effect, pending the litigation in the state court.

It seems to me, therefore, that because the Railroad and Warehouse Commission, defendants in this case, or the state of Minnesota, plaintiff in the state court case, have not completely complied with the provisions of section 266 of the Judicial Code, that the motion for a stay of proceedings in this court in the two suits now pending here must be denied; and it is so ordered.

Mr. Flannery: Exception.

The Court: Exception may be entered in the record.

On Motion to Dismiss.

This motion to dismiss is based upon several grounds:

First. That the Railroad and Warehouse Commission of the state of Minnesota, by virtue of the provisions of chapter 152, Laws of

Minnesota of 1915, as amended by chapter 183, Laws of Minnesota of 1919, is vested with power and authority to prescribe rates and charges for the intrastate telephone service of the plaintiff company in the state of Minnesota; that said commission has initiated a proceeding wherein it is seeking to determine the fair value of the plaintiff's property, used in furnishing such service, and to prescribe reasonable rates, which will yield a reasonable return upon such value; that the plaintiff has appeared in said proceeding and introduced evidence relating to such matters; that said proceeding is still pending, and the commission has made no final determination thereof, or issued any order therein determining the fair value of plaintiff's property, or prescribing reasonable rates and charges for the reasonable intrastate telephone services of the plaintiff in the state of Minnesota.

Second. That if the order of said commission of February 9, 1921, is a final order determinative of the question of what are reasonable rates and charges for the plaintiff company, then the plaintiff company was secured the right to have such order modified, if unreasonable or unlawful, by the district court of the state of Minnesota, under the provisions of said law, and such order would not have become final or in any way determinative of plaintiff's rights until such appeal had been decided, if such appeal had been taken, and that no such appeal has been taken.

Third. That the legislative function of establishing reasonable rates for the plaintiff company would not have been completed until after the order of such district court upon appeal, if such appeal had been taken.

Fourth. That the suit is premature, and this court without jurisdiction in the premises.

In view of that motion and the grounds, it becomes necessary to consider very briefly the history and present status of this controversy.

[2, 3] It appears from the record that on July 1, 1916, the companies came under the jurisdiction of the Railroad and Warehouse Commission of the state; that the rates then in force were continued thereafter; that in 1917 the commission began, on its own initiative, a broad investigation as to rates; that either in 1917 or 1918 the taking of evidence began in that investigation; that on July 1, 1919, new rates were established by the federal government, which had taken over for the time being the operation of the telephone lines; that in November, 1920, the companies completed their evidence in the main inquiry, and upon the completion of their evidence initiated themselves, before the Railroad and Warehouse Commission, a subordinate inquiry as to temporary rates to be charged by the companies, pending the determination of the main proceeding; that on February 9, 1921, an order was made by the Railroad and Warehouse Commission denying this increase of temporary rates; that on February 19, 1921, the present suit was started in this court.

The complaint in this suit alleges jurisdiction on two grounds: First, diversity of citizenship and amount of more than $3,000 involved; second, that the controversy arises under the laws and Constitution of the United States. The complaint alleges that prior to

the 1st of January, 1920, a schedule of rates which had theretofore been established by the Railroad and Warehouse Commission was in force, that schedule being shown by an exhibit, Schedule A, attached to the bill of complaint; that the order of February 9, 1921, denying any increase of rates temporarily, and the enforcement of the present Schedule A, will deprive the company of its property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; that the present schedule is noncompensatory and confiscatory; that if the company disregards the order of February 9, 1921, and the present schedule of rates, it will be subject to criminal prosecution and to punishment by fine or imprisonment. The prayer of the complaint is that the rates in Schedule A, present rates, be adjudged to be confiscatory; that an injunction against the defendants issue, restraining them from enforcing the rates in Schedule A, and that they also be enjoined and restrained from interfering with the establishing of a proposed schedule, which is set forth as Schedule J; and that the state authorities be restrained from enforcing any penalties against the plaintiff for disregarding the rates in the Schedule A.

On the face of the complaint a cause of action within the jurisdiction of this court is plainly stated, and the jurisdiction of the federal court is to be determined on the statement by the plaintiff himself in his complaint. I think that proposition is too well established to require the citation of any authorities or further discussion of the proposition. But the claim is made by the defendant that the plaintiffs had the right to appeal from the order of February 9, 1921, to the state district court, and until that was done, and the state district court had acted, the legislative stage of the inquiry as to rates had not passed, and the judicial stage had not been reached, and that therefore the present suit is premature. This necessitates a brief examination of the order of February 9, 1921. That order is entitled in both proceedings; that is, in the main broad inquiry before the commission, and also the subordinate inquiry as to temporary rates, which had been initiated by the company.

[4] Those two proceedings, in my judgment, were independent; that is to say, the relief in the subordinate proceeding need not wait relief in the main proceeding, nor need the relief in the main proceeding depend in any way upon whether the relief in the subordinate proceeding was granted or denied. The two proceedings are distinct and separable. The evidence in the subordinate proceeding was ended prior to the entry of the order of February 9, 1921, and that order denying the increase of temporary rates was the end of the matter of temporary increased rates, so far as the Railroad and Warehouse Commission was concerned, on the then pending application.

[5] The state district court, under the laws of Minnesota, as construed by the Supreme Court of the state, could not put itself in the place of the Railroad and Warehouse Commission, and retry the issues and establish new rates. It had no legislative power, but judicial power only; therefore, in my judgment, when the order of February 9, 1921, was made by the Railroad and Warehouse Commission, the

legislative stage had come to an end, and the judicial stage had been reached. That being so, there can be no question but what at that stage the company might resort to the state district court, or to the federal District Court, as it saw fit. It chose the latter forum.

But it is claimed by the defendants that the main proceeding is still pending and undetermined, and that it is not proper for this court to entertain the present suit for that reason. Plaintiffs claim, however, that the main proceeding before the commission has come to an end. This question is not free from doubt in my mind. It may be true that the main proceeding before the commission is ended; but I am not inclined to take that view. I am more inclined to the view that the main proceeding has not come to an end, and is not likely so to do for a long period of time, and my reasons for holding that view are as follows:

First. The majority of the commission, neither in its order nor in the memorandum attached, stated that the main proceeding is ended, nor that it is near its end, and it seems to me that, if either of those things were true, some mention would naturally have been made of the facts.

Second. Commissioner Putnam nowhere states in his memorandum of dissent—and he would have been likely so to state if it were a fact—that the main proceeding was ended, or that it was about to come to an end.

Third. Commissioner Putnam, if he had thought the main proceeding ended, would not have used the following language, found on page 13 of his memorandum of dissent:

"The following table represents my conclusions in this case as to the actual minimum requirements of the company at this time. This table does not represent all that the company legally may be entitled to upon the completion of its entire case."

It seems to me that that plainly is a recognition on the part of Commissioner Putnam that the main proceeding was still pending.

Fourth. Commissioner Putnam, if he thought the main proceeding likely to come to an end, in all probability would not have felt called upon to write the memorandum he did, but would have awaited the final order of the commission.

Fifth. Commissioner Putnam, if he thought the main proceeding likely to end soon, would in all probability not have recommended, as he did, tentative rates for the period of six months. On page 14 of his memorandum he says:

"I would recommend that the company be authorized to file with the commission tentative rates for the services they are rendering; that these rates be checked by the experts of the commission with the data that the commission has now on hand in regard to property values and operating costs by exchanges; that if, from the examination thus made by the experts of the commission, in their judgment the rates are reasonable and adequate, the commission then authorize those rates to become effective as temporary rates for a period not exceeding six months."

It seems to me he would not have used that language if he had thought the main proceeding at an end, or if he had thought it was likely to come to an end in the near future.

Sixth, and finally. If it has taken some two or three years to reach the present point in the main proceeding, viz. the close of the companies' cases, it is hardly reasonable to expect that the end of the whole proceeding is close at hand. The record here discloses that the experts for the Railroad and Warehouse Commission have been gathering data for a year or more, and that evidence will have to be introduced by those experts concerning those data. After that, rebuttal evidence undoubtedly will have to be introduced on the part of the companies. After the evidence is introduced, arguments will have to be made, and finally consideration will have to be given by the commission to the evidence and the arguments, all before they reach a conclusion, and all before the main proceeding comes finally to a close.

[6] The situation then presents itself of a main proceeding likely to continue for a very considerable period of time, and of a subordinate proceeding having reached the judicial stage, and the question arises whether it would be improper for this court to take any action touching a temporary provisional remedy as prayed for in the subordinate proceeding. The case of Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin (D. C.) 267 Fed. 711, has been cited, and I have given that case consideration. It appears in that case that the company itself had initiated proceedings before the Railroad and Warehouse Commission to have a broad inquiry made as to rates charged by the company in some 32 towns or cities. It appeared that the commission, before the bill was filed in the federal court, had granted some emergency relief to the company. It appeared that 3 towns had already been passed upon finally by the commission. It appeared that the bill was then filed by the company in the federal District Court to enjoin the commission from interfering with schedules which the company proposed to put in force and effect, not merely in the 3 towns which had been passed upon finally, but, as I read the decision, in all of the 32 towns which it served. It appeared that the company asked judgment of the federal District Court merely on an apprehension of what the commission might possibly do. There was no claim that there was any arbitrary or capricious action on the part of the commission, and it appeared that the Railroad Commission was still functioning after the company filed the bill in the federal District Court.

Under those circumstances, the federal District Court, being an enlarged court of three judges, in accordance with the provision of section 266 of the Judicial Code, used the following language:

"If, therefore, we assume that the plaintiff in this case invoked the jurisdiction of the state Railroad Commission for the broad purpose of considering and revising its rates as disclosed by itself in the petition filed in July, 1919, it would be anomalous to recognize the constant alternative of resorting to equity merely if because of delay, disappointment in partial determination, or for other considerations, the further prosecution, or the awaiting of the final result, of the commission proceedings was no longer desirable."

And again:

"Taking the broad case made by the plaintiff's bill, it is not that the rates originally fixed are now confiscatory, and that the state, through the de-

fendant commission, adheres to them and refuses to give consideration to the facts recited in the bill; for the plaintiff has availed itself of the jurisdiction furnished by the state to conduct an inquiry into its rates and to award an increase."

And again:

"Is the plaintiff in the present case disclosing, or attempting to disclose, a denial of, or an aggression upon, its property or property rights by the state, upon the same facts disclosed before the commission or inhering * * * in the rate complained of; and has the state finally denied the plaintiff's right upon the facts so disclosed? This query, so it seems to us, is expressly answered in the negative."

Finally:

"This conclusion is reached upon consideration of the bill in its broader aspect and purposes, and is not limited to a consideration of the case which might be made upon the narrow facts pertaining to any one or all of the three communities concerning whose rates the commission has made an award. We are taking the situation in its entirety, as the plaintiff professed to present it, both in its application before the defendant commission and in its bill which invokes the interference of the court as against the whole subject of rates rendered for service in the various communities referred to."

Now, it seems to me that the differences between the Wisconsin case and the case at bar are more numerous and of greater import than the points of similarity between the two cases. I am of the opinion that the present situation in the case at bar is to be governed by the principles laid down in the case of Love v. Railroad, by the Circuit Court of Appeals in this circuit, 185 Fed. 321, 107 C. C. A. 403. And in that case the syllabus was written by the court, Judge Sanborn rendering the decision. A portion of the syllabus is as follows:

"It is as much a violation of the Fourteenth Amendment to the Constitution to take the property of a railroad company without just compensation during the process of rate-making as it is after the completion of that process."

My conclusions are:

1. That the court has jurisdiction of the present suit.
2. That the matter of temporary rates before the Railroad and Warehouse Commission reached the judicial stage on the entry of the order of February 9, 1921.
3. That the suit instituted in this court was not premature.
4. That the fact of the pending main proceeding before the commission does not make it improper for this court to entertain the present suit and grant temporary relief, if the facts in the case warrant. Whether the facts do warrant temporary relief, and, if so, to what extent, will be determined at the close of the evidence in both cases.

On Motion for Restraining Order.

As I have already indicated, I have reached the conclusion that the court has jurisdiction to entertain this suit, and also that the suit itself is not premature, and also that the pendency of the main proceeding before the commission does not necessarily preclude action by the court in this present suit, if the facts warrant.

[7] It is unusual for plaintiffs to ask relief of this kind on an application for restraining order; but the plaintiffs in these cases jus-

tify their action in so doing on the ground of an emergency situation. They claim that the evidence shows that they are each suffering a daily loss in large amounts, under the present rates, and that that daily loss is coupled with the demand on the part of the public and on the part of the Railroad and Warehouse Commission for improved service.

I am not going to attempt to analyze the evidence that has been introduced in this case. I could not do it, and do it satisfactorily, either to myself or counsel, without giving the matter considerably more time than I have been able to devote to it while this case has been here before me; but I have given as close attention as I could to it as it has been introduced, and to the arguments of counsel, as they have been made, and I have from such consideration reached the conclusion that the present rates that are being charged by each of the companies are confiscatory, when they are considered with reference to any fair valuation that may be placed upon the respective properties, when they are considered in reference to reasonable operating expenses, and when they are considered in reference to reasonable amount to be set aside for depreciation-reserve and taxes.

I have also reached the conclusion that the showing here is of such a character that temporary relief should be granted, even pending the investigation that is now going on before the Railroad and Warehouse Commission in the way of a broad inquiry as to valuations and proper and reasonable rates; and in that opinion, that there should be temporary relief, even while that main proceeding is going on, I have the support at least of one of the Railroad and Warehouse Commission, and I do not understanding that the other members of the commission denied that there was need for temporary relief, but based the refusal of such relief on the ground that the present service was inadequate.

As I have already intimated, the record shows that the service has been inadequate, and perhaps still is inadequate, yet the record also shows that the causes of such inadequacy have been of such character that in my judgment temporary relief should not be precluded by reason of the fact of such inadequacy. There is no claim here, and, so far as the record has been called to my attention, nothing in the record that indicates any bad management on the part of either of these companies, or that there was bad faith on the part of either of the companies, or that indicates negligence on the part of either of the companies in carrying on the work of serving the public. Apparently Commissioner Putnam did not think that the inadequate service under all the circumstances should preclude temporary relief, and in the opinion he reached in regard to that matter I concur.

The question is now: Should relief be granted at the present time, or wait until the hearing before the three judges, which will be called under the statute to consider the question of preliminary injunction? Ordinarily I should answer that question by saying that it ought to await the hearing and determination before the three judges. But in this case the companies have been trying to get temporary relief ever since last November, and every day's delay in getting the tem-

porary relief is extremely important, and perhaps vital. Just when the hearing before the three judges can take place we none of us know, although we all hope that it may take place not more than 30 to 60 days hence. But, inasmuch as that is not definitely decided, I think the relief should be afforded by this court on this application for a temporary restraining order, even though the proceeding is somewhat unusual.

The question remains: What should be the relief demanded? That depends upon the showing made here by the respective parties. As I have stated, I have tried to consider this evidence carefully as it has been introduced, and also the arguments of counsel; but, as I have also stated, I shall not undertake to analyze or go over in review these affidavits, or any of them. The relief demanded is an emergency relief, and the decision that is now rendered must be considered as an emergency decision.

I have read very carefully and considered the order of the Railroad and Warehouse Commission, with the memorandum attached by the majority of the board, and also the memorandum attached to that order by Commissioner Putnam. I have considered what he has to say in regard to the various questions that were brought before the commission—the same questions that have been brought before this court. He has had the whole matter before him many days, and doubtless he has given it very careful consideration. From what I have heard here, I think that his conclusions were fully justified, and that the evidence here introduced fully justifies the same conclusions that he has reached. I also think that the figures adopted by him in his recommendation for temporary relief, pending the conclusions of the final, broad hearing, are eminently fair to both sides. I think they are fair to the public, and, under all the circumstances as a measure of temporary relief, I think are fair to the two companies.

I have therefore concluded to adopt the final figures of Commissioner Putnam, in making his recommendation, as a basis for the temporary relief to be afforded in these two cases; and the temporary restraining order granted will be that the defendants are restrained from interfering with a schedule of rates based upon figures used by Commissioner Putnam in making his final recommendations. That relief will be granted upon condition that the companies individually give a bond in a sufficient amount, to be approved by the court, conditioned to reimburse customers the excess over the present rates, in case it is finally determined that this temporary increase ought not to have been granted. The temporary increase will be granted, and restraining order, of course, will be in effect only until the hearing and final determination of the three judges, or until further order of this court. There will be a further condition that the companies each of them keep their accounts in such a way that this excess due to the increased temporary rates paid by each customer can be readily and accurately ascertained. And there will be a third condition, that the companies and each of them forthwith make application to the Railroad and Warehouse Commission for such suggestions, if any, as the

commission may have, as to what can be done to improve the present service, and the money that is derived from this increase in temporary rates will be applied, so far as necessary, in carrying out the suggestions of the Railroad and Warehouse Commission, if any such suggestions are made, and are feasible.

Now, counsel can get together and draw the restraining order, embodying the results of what I have said, if I have made myself clear —may present such an order to the court, and it will go into effect at once. The manner of billing will have to be determined from a practical standpoint, and probably counsel could suggest better than I can what that practical method will be. I see no objection to having separate bills sent out from the time when this order goes into effect, where such billing covers a period of time prior to the going into effect of the temporary restraining order, and also a period of time subsequent; that is, to have one bill on the old rate up to the time the temporary restraining order goes into effect, and a separate bill for the balance of the time. Two bills will be necessary, of course, only where the period of time covered includes a time prior to the effective date of the temporary restraining order, and also a time subsequent to it.

Mr. Flannery: May we have an exception to the court's ruling?

The Court: An exception may be noted to the decision of the court and the order.

The foregoing oral decisions were rendered at the hearing of the motion for a restraining order. Inasmuch as a transcript of them was furnished counsel, and reference has been made to them by counsel upon the hearing for a preliminary injunction before the enlarged court of three judges, and also by Circuit Judge Sanborn in announcing the decision of that court, it is at the request of counsel ordered that the foregoing transcript be filed as part of the record in the case.

[Signed] WILBUR F. BOOTH, Judge.

On Hearing of Applications for Interlocutory Injunctions.

Before SANBORN, Circuit Judge, and MORRIS and BOOTH, District Judges.

SANBORN, Circuit Judge. These applications for interlocutory injunctions present three principal questions: First. Were these suits premature? Second. Were they legally stayed by the provisions of section 266 of the Judicial Code, in view of the fact that the state brought a suit against the companies and the state court stayed proceedings under the order of the commission denying the application of the companies for increased rates? And, third. Are the old rates, which the statutes, in the absence of relief in equity, require the companies to use, confiscatory? On the application for the restraining orders and in other proceedings in these cases Judge BOOTH was compelled to decide and express his opinion upon each of these questions, and those opinions have been printed. He answered the first and second questions in the negative, and the third in the affirmative.

Upon the applications now in hand this court has received and examined evidence, heard arguments, and deliberately considered the questions in the light thereof, and it is unanimously of the opinion that the answers to these questions already given were correct, and that the reasons assigned therefor were sound. The court therefore refers to, affirms, and adopts the opinions of Judge BOOTH upon the questions there discussed, and interlocutory injunctions will be issued.

The proof before us has left no doubt in our minds that the old rates fail to produce sufficient income to escape confiscation in either of the cases. We are of the opinion that the rates prescribed by the restraining orders are probably still too low, but this is not certain. They approximate reasonable rates, expense and annoyance follow changes in them, and we are of the opinion that they should be maintained for a test period of six or eight months, at the end of which time any party to the suit, who can make it appear by proof that under the law they are either too high or too low, may apply to the court for relief.

McNEIL & HIGGINS CO. v. CZARNIKOW-RIENDA CO.

(District Court, S. D. New York. June 2, 1921.)

1. Sales ⊜=434—Complaint held not to allege nonconformity to description; "fine granulated."
   In a complaint for breach of warranty for a sale of Eastern cane fine granulated sugar, of a specified brand, allegations that the sugar was off and irregular in color and crystallization not up to the quality of standard Eastern cane sugar or the usual quality of the specified brand does not allege a breach of the warranty implied under New York Sales of Goods Act, § 95, that the goods shall conform to the description, since "fine granulated," when applied to sugar, relates to the size of the granules, not to the quality.

2. Sales ⊜=272—"Merchantable quality" means good enough to pass under description.
   Under New York Sales of Goods Act, § 96, subd. 2, implying a warranty that goods are of a merchantable quality "merchantable quality" means a good enough delivery to pass generally under that description after full examination.
   [Ed. Note.—For other definitions, see Words and Phrases, Merchantable Quality.]

3. Sales ⊜=272—Buyer cannot complain if goods were of average quality of specified brand.
   A buyer of goods of a specified brand cannot complain that the goods were not merchantable if in fact they were up to the average of the goods of that brand.

4. Sales ⊜=272—Dealer in specified brand impliedly warrants it is merchantable.
   A seller of goods, who is a dealer in the specified brand, impliedly warrants that the goods of that brand are of the average quality of that brand, under New York Sales of Goods Act, § 95, subd. 2.

5. Sales ⊜=272—General dealer does not impliedly warrant specified brand is merchantable.
   A general dealer in filling an order for a specified brand in which he does not especially deal, but purchases on the open market to fill the

order, does not impliedly warrant that the goods of that brand are merchantable so that a complaint for breach of such implied warranty which fails to allege that the defendant was a dealer in that brand of goods is insufficient on demurrer.

At Law. Action by the McNeil & Higgins Company against the Czarnikow-Rienda Company. On demurrer to the complaint for insufficiency in law. Demurrer sustained.

The first cause of action in the complaint alleges that the plaintiff bought and the defendant sold 5,000 bags of sugar "Eastern cane fine granulated * * * (Federal Sugar Refining Company brand)"; that the defendant "stated, represented, and warranted in said agreement" that the sugar would be as above described; that the plaintiff accepted and paid for such sugar, but that it "did not comply with said contract or said warranty and representations in that said sugar was off and irregular in color, irregular in crystallization, not uniform, not up to the quality of standard Eastern cane sugar, and not up to the usual quality of Federal Sugar Refining Company brand sugar." For this reason the plaintiff rescinded the sale, resold the sugar, and sues for the loss.

The other causes of action are precisely the same except that the shipments were smaller, and that the plaintiff sues for damages because of the breach of the implied warranty.

Garrard Glenn, of New York City, for the demurrer.
Sumner Ford, of New York City, opposed.

LEARNED HAND, District Judge. The Sales of Goods Act (article 5 of the Personal Property Law of New York [Consol. Laws, c. 41]) does not change the general rule of the common law that sales of chattels prima facie are made caveat emptor (section 96). It does provide (section 93) that "any affirmation of fact or any promise by the seller relating to the goods is an express warranty," when reasonably relied on, unless it concern their value or the seller's opinion of them.

[1] Again, section 95 provides that, when there is a sale by description, there is an implied warranty that the goods shall conform to the description. The complaint does not allege any violation of either of these sections. To say that the sugar was off color and not regular does not contradict its being "Eastern cane fine granulated" and of "Federal Sugar Refining Company brand." It is argued that "fine" means "excellent," "superior," or "pure," but that I should say was not so. "Fine granulated" normally would mean "finely granulated," and refer to the size of the granules. At least, that would be its meaning unless the trade means something else. Besides, if it refers to the excellence of the sugar, it is clearly within the exception of section 93, since it is an adjective of opinion. If it means "pure," there is no allegation that the sugar was impure.

Section 96 of the Sales of Goods Act governs warranties of quality. It provides:

"There is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied * * * except as follows."

Of the six following subdivisions only two, subdivisions 2 and 4, can possibly be considered relevant. Subdivision 2 reads as follows:

"Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."

Subdivision 4 reads:

"In the case of a contract to sell or a sale of a specified article under its patent or other trade-name, there is no implied warranty as to its fitness for any particular purpose."

[2] Under subdivision 2 the sugar must have been "merchantable quality," which means a good enough delivery to pass generally under that description after full examination. "Medium quality or goodness" (Howard v. Hoey, 23 Wend. [N. Y.] 350, 35 Am. Dec. 572) seems to me perhaps too high a standard.

[3] The allegation is that this sugar was "not up to the quality of standard Eastern cane, and not up to the usual quality of Federal brand sugar." These are the only material allegations in the complaint under either subdivision. Let me assume on demurrer that the allegation is equivalent to saying that the sugar was not merchantable Eastern cane, and that, though in fact Federal brand, it was not of a quality equal to what would pass on examination for Federal brand. If the average Federal brand was itself not merchantable Eastern cane—that is, if the brand was known to be inferior—the plaintiff has no ground of complaint. He got what he ordered if he got average Federal brand. Therefore the breach, if any, consisted in delivering what might be called "nonmerchantable" Federal brand.

[4] The case, therefore, comes down to whether in a sale of fungibles a stipulation for a specific brand or make is to be taken as part of the description of the goods. It is true that literally a brand only means that the goods are made by the brand owner, and it is argued that, if so made the contract is fulfilled. Yet that argument, when applied to the description proper, would, and for long did, preclude any implied warranty whatever, because the assumption in these cases always is that the goods literally conform with the description. The implied warranty is an added obligation imposed by law. Williston on Contracts, § 984. It seems to me that precisely the same considerations make for a similar implied warranty touching the brand as touching any part of the description. Although the goods are actually made by the owner, unless they be of passing grade for such goods, the buyer is disappointed in his reasonable reliance. The case can be tested by the supposed sale of a manufacturer. Assume that, having a reputation distinguished by his brand, he agrees to sell under that brand. Presumably the brand means some uniform quality, which has made it known and desired. The buyer exacts it because he expects the delivery to have that quality. The seller knows of the buyer's expectations, and he is in a position to know whether the delivery conforms with those expectations. He knows that the buyer relies upon his better knowledge to insure their realization. He cannot suppose that the buyer cares for the fact that he makes the goods independently of the quality of which that fact assures him. If he is charged with more than a literal compliance with any part of the description because

of his better information, he ought, I should say, be charged with this. If not, it can only be because the brand is taken as signifying nothing in the quality of the goods, an erroneous understanding of the parties' meaning. If this be true for a manufacturer, it is under section 96, subd. 2, also true for any seller who deals in the brand.

I have not been able to find any case exactly in point. Dounce v. Dow, 64 N. Y. 411, went off on the question of waiver, and the court expressly declined to pass upon the question raised here. In Taylor v. Dalton, 3 F. & F. 263, a nisi prius ruling of Baron Martin, the case was very closely in point to that at bar, and the ruling in the present defendant's favor. Still it is not exactly on all fours with it. In Lindsborg, etc., Co. v. Danzero, 189 Mo. App. 154, 161, 174 S. W. 459, 461, there is a suggestion obiter that the delivery must come up to "the standard of its class," but it cannot be taken even as a dictum to that effect. Such a dictum occurs in Polly v. Arony (App. T.) 172 N. Y. Supp. 305, 306.[1] On the other hand in Beck v. Sheldon, 48 N. Y. 365, the case was of a sale made by a manufacturer of pig iron to be made at his furnaces, and of No. 1 and No. 2 grade. The buyer asserted that it was not as good as those grades made elsewhere or in earlier years by the seller. The court said, though obiter, that the contract was satisfied by the product of the seller's furnaces of that grade, regardless of whether it was merchantable or equal to the earlier product. Earl, C., declined to pass upon this point. On the whole, therefore, the cases appear to me to be ambiguous, and none of them except Polly v. Arony, supra, since the statute. The point seems to open on principle.

Subdivision 4 has clearly nothing to do with the question; it touches only the warranty of fitness defined in subdivision 1, and that, too, when the sale is of a "specified" article. The warranty here is of merchantability, and the two are not to be confused. Where the buyer specifies what he wants, he can, of course, not rely upon any superior knowledge of the seller that it will serve his purposes. If he did, he must give the seller some latitude of selection. But he may still insist that it must be of a quality which will pass in the market under that description, and he may rightly rely upon the seller to secure him such a quality.

[5] Nevertheless the complaint here is bad, even with every allowance for ambiguity of language, because it does not allege that the defendant dealt in this brand of sugar. If it was only a general dealer and had no especial acquaintance with the brand in question, the sale was caveat emptor (provided the goods were of the specified brand), no matter whether they were unmerchantable Eastern cane or not. Such a seller is entitled to fill the order according to the letter, to go into the market and buy the brand specified.

The supposed insufficiency of the allegation of reasonable notice would seem to me immaterial. Apparently it is only when the buyer demands a rescission under section 150 (3) that he must give notice.

[1] Determination modified by First Appellate Division, and as so modified affirmed (188 App. Div. 886, 175 N. Y. Supp. 917).

When, as in the last four counts, he sues for damages for breach of warranty under section 150 (1 b), I should think that no notice was necessary. I am not aware that the New York Court of Appeals has ruled to the contrary, and the statute seems to me explicit. At any rate, it is unnecessary now to decide the point, because the complaint must be amended anyway, and it is to be hoped that the plaintiff, if he keeps the allegation at all, will set out the facts. It is a dilatory method to force the defendant to a bill of particulars and then to a motion for judgment on the pleadings. Nor do I mean to say that the allegation as it stands should survive demurrer.

Demurrer sustained. Judgment respondeat ouster within 20 days.

UNITED STATES v. HEITLER et al.

(District Court, N. D. Illinois, E. D. May 6, 1921.)

No. 7465.

1. **Indictment and information ⇐184—No variance because evidence shows persons alleged to be unknown were known to grand jury.**
   In a prosecution for conspiracy to violate the National Prohibition Act by shipping a carload of whisky and distributing it among bootleggers or dealers, where the indictment named 31 conspirators, and there were various other persons who may or may not have been parties to the conspiracy, there was no fatal variance, because the indictment charged the defendants named with conspiring with divers other persons to the grand jurors unknown, while offered evidence would have shown that some of the other persons were known to the grand jurors, where the indictment alleged the means and overt acts with sufficient particularity to inform defendants of the nature and cause of the accusation, as required by Const. Amend. 6.

2. **Conspiracy ⇐47—Participation in offense intended to be committed does not make defendant guilty of conspiracy.**
   To establish a conspiracy to violate a certain criminal statute, the evidence must convince the jury that defendants did something more than participate in the substantive offense which was the object of the conspiracy.

3. **Indictment and information ⇐124(2)—All conspirators need not be joined in single indictment.**
   There is no requirement in the law that all conspirators be joined in a single indictment, and only such as may well be tried in one case should be named in one indictment.

4. **Criminal law ⇐683(1), 684—Evidence held properly admitted, both as rebuttal and as within the court's discretion to admit.**
   On a trial for conspiracy to violate the National Prohibition Act, by shipping a carload of whisky under a false permit and distributing it to bootleggers and dealers, where defendants denied returning money to purchasers whose whisky was taken from them by "highwaymen," as testified by witnesses for the government, and denied that M. was employed to sell any part of the carload of whisky, evidence in rebuttal that certain sums of money were sent to a witness in an envelope after a conversation with two of the defendants, and testimony of M. that he was so employed, was properly admitted, both because it was proper rebuttal and because it was

within the court's discretion to admit it, even though properly a part of the government's evidence in chief.

5. **Criminal law ⊜599—Defendants held not surprised, and not entitled to continuance of one day at close of government's case.**
On a trial for conspiracy to violate the National Prohibition Act, defendants *held* not surprised by the government's testimony, and hence the denial of a continuance for one day at the close of the government's testimony was not error, especially where the court did take a short recess, and the defendants produced a witness who left the impression that further delay was unjustifiable.

6. **Criminal law ⊜510—Uncorroborated testimony of accomplice may be sufficient.**
A conviction may rest on the uncorroborated testimony of an accomplice.

7. **Criminal law ⊜762(3)—Expression of opinion as to sufficiency of accomplice testimony should depend on testimony.**
If a requested instruction advising the jury that a conviction should not rest upon the unsupported testimony of accomplices was intended merely as an expression of the court's opinion of the weight to be given such testimony, it was within the trial court's judgment whether such expression of opinion should be given or not, and in expressing such opinion he should be guided by the testimony in the particular case rather than by any general rule.

8. **Criminal law ⊜720(1)—Argument that alibi was "faked alibi" not improper; "fake."**
Where it was the contention of the government that witnesses testifying to an alibi were either mistaken or testified falsely, it was not improper for counsel for the government in his argument to refer to the alibi as a faked alibi, since "fake" means to make or construct, and a "faked alibi" is a made, manufactured, or false alibi.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Fake.]

9. **Criminal law ⊜723(5)—Not court's province to determine appropriateness of counsel's characterization of defendant.**
It was not for the court to determine the wisdom or appropriateness of counsel's characterization of defendant as a "Shylock," but merely to determine whether there was any evidence to justify the argument, especially where the court told the jury to disregard the entire statement, on defendant's counsel insisting that the statement reflected on defendant's race and religion.

10. **Criminal law ⊜919(3)—Argument not ground for new trial, when in part supported by evidence and in part characterized by court as improper.**
Argument of counsel for the government that defendant was meek and humble on the stand, and was not the same man that threatened F. with death in a certain station, or the same "king of the underworld," who with a snap of his fingers held the lives of men in his grasp, did not require a new trial, where there was testimony that defendant did threaten F. with death in such station, and the court charged that the statement that defendant was king of the underworld and held the lives of people in the snap of his fingers was improper.

11. **Criminal law ⊜919(3)—Argument held not ground for new trial, where court charged jury not to consider anything outside the record.**
The argument of counsel for the government, if made as claimed, that defendant could swim in the tears he had caused, if gathered in one reservoir, did not require a new trial, where the court, who did not hear such argument, referred to the claim that it was made, and admonished the jury that anything outside the record was not proper.

Michael Heitler and others were convicted of conspiracy to commit an offense, and they move for a new trial. Motion denied.

James R. Glass and John J. Kelly, both of Chicago, Ill., for the United States.

Weymouth Kirkland, of Chicago, Ill., for defendant.

Motion for a New Trial.

EVAN A. EVANS, Acting District Judge. Several grounds are presented as the basis for a new trial. Earnestly argued and supported by a brief evidencing study and thought, the disposition of the motion calls for an expression of the court's reasons for overruling it.

Variance Between Pleading and Proof.

The indictment charges the defendants therein named with having conspired "with divers other persons to said grand jurors unknown," etc. Certain offered, but rejected, evidence would, it is claimed, have shown that the names of such persons were known to the grand jurors. This, it is claimed, was a fatal variance, and numerous cases are cited to support this position. United States v. Riley (C. C.) 74 Fed. 210; Naftzger v. United States, 200 Fed. 501, 118 C. C. A. 598; Cooke v. People, 231 Ill. 9, 82 N. E. 863; State v. Smith, 89 N. J. Law, 52, 97 Atl. 780; Mitchell v. United States, 229 Fed. 357, 143 C. C. A. 477. In opposition, the following may be cited: Jones v. United States, 179 Fed. 584, 593, 103 C. C. A. 142; People v. Smith, 239 Ill. 91, 108, 87 N. E. 885; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, 152.

The two decisions, Jones v. United States, 179 Fed. 584, 103 C. C. A. 142, and People v. Smith, 239 Ill. 91, 87 N. E. 885, respectively, admittedly support the court's ruling, while the decision of Judge Taft in United States v. Riley (C. C.) 74 Fed. 210, cited and chiefly relied upon by defendants, may at least be distinguished by the fact that it was not a case involving a conspiracy prosecution. Ruling Case Law, while citing but one case, announces this rule of law to be as the court applied it. 14 R. C. L. 182, 183.

[1] But, ignoring the cases and such distinction for the moment, I am not impressed with the reasonableness of a rule that, without qualification, recognizes a fatal variance between an indictment which alleges on the part of the grand jury an absence of knowledge of the names of others participating in a conspiracy and proof that certain of such other persons were known to the grand jurors and may have been, in some manner, connected with the conspiracy. Better reasoning, it seems to me, requires me to go back to the constitutional provision to ascertain the requirements of an indictment, and to test the sufficiency of the charge by the essentials therein provided; in other words, determine whether the defendants are informed with such certainty as to the nature and cause of the accusation against them as to permit each, assuming his innocence, to properly prepare for trial. If the accused is so informed, the indictment is sufficient; if not, it fails, not because of variance, but because of the requirements of the Constitution, the Sixth Amendment of which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The rule was laid down in Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704, as follows:

"The true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

It would require no stretch of the imagination to conceive of a charge which, assuming that a defendant is innocent, would be insufficient in view of the therein contained false or inaccurate allegations that another party not indicted is to the grand jury unknown. Likewise it would be equally easy to imagine a case where the name or names of "divers other persons" would not be helpful to the defendants. Testing the indictment by these tests, we find nothing suggestive of deception. There is nothing which would mislead any defendant. Some 31 are named as conspirators. The means are set out with sufficient particularity, and the various overt acts give dates, places, and names with so much particularity that no defendant could possibly claim that he was taken by surprise by any of the testimony offered by the government.

From this indictment it appears that a carload of whisky, containing 1,000 cases, was, pursuant to the conspiracy to which the 31 defendants and others were parties, purchased from the Old Grandad Distillery Company of Louisville, Ky., and by means of a false and forged permit shipped to Chicago, to be there distributed among the smaller bootleggers or dealers, who, in turn, acted as the spokesmen or representatives of still smaller bootleggers. The serial numbers on the various cases of whisky appear, the route which the car took is given, and the date of the arrival of the car in Chicago. The date of the reconsignment of the car at Peoria, Ill., also appears. The false permit which the shipper used to secure the shipment of the whisky was a matter of record. The books and records of the distillery company were accessible to the defendants. In fact, it seems to the court that the allegations were sufficient to apprise each defendant, innocent or guilty, of sufficient information to permit him to meet every issue.

True, the names of Joy, Miller, Fitz Patrick, Frank, and others do not appear as coconspirators. Neither is it charged that those young chauffeurs, who drove the trucks containing the whisky from the cars to the place of destination, were coconspirators. Many others, who at this time might be mentioned, were not named as conspirators; for instance, the railroad detectives, the police officers, present in abundance at the car, certain railroad employees, to say nothing of many others who contributed their cash to make up the $135,000 alleged to be paid to Heitler, Perlman, and Greenberg. Per-

haps some of them were the "divers other persons to the grand jury unknown."

But, conceding for the moment that these parties were coconspirators and that their names were known to the grand jury, was it necessary, in view of what had been set forth in the indictment, to name them as coconspirators, in order that defendants might fully understand the charges which they were to meet. I think not.

But did the grand jury know the names of other conspirators? It may be true that they knew the names of Joy, Miller, Fitz Patrick, and Mickey Frank; but were they in a conspiracy? Or did they merely violate the National Prohibition Act? Vastly different are the two offenses. This was clearly illustrated on the trial. Numerous defendants were dismissed, not because the evidence failed to establish a criminal case against them, but because it failed to establish the offense of conspiracy against them. The jury likewise acquitted six defendants, not necessarily because they were not guilty of some crime, but because they were not in the conspiracy charged in the indictment. In view of the hours which counsel devoted to the argument on this very distinction, it is hardly necessary to review the evidence.

[2] Must this court, then, become a reviewing court to determine what the evidence before the grand jury established? And this brings me to a consideration of the difference between a conspiracy charge and a criminal offense, such as was considered in the opinion in the Scott Case. To establish a conspiracy to violate a certain criminal statute, the evidence must convince a jury that defendants did something other than participate in the substantive offense which is the object of the conspiracy. To illustrate, A., B., and C. may each have purchased this whisky from D., E., and F. and may have carried it from the freight car in which it arrived, yet not have been in the conspiracy to which D., E., and F. were parties. How can the grand jury's conclusion, necessarily based in part upon their personal observation of witnesses, be reviewed? Can their finding be impeached? If so, can it be impeached by the fact that one or two of the many witnesses who testified before the grand jury also testified upon this trial, and gave counsel or the court an impression which may not have been obtained by the grand jury? I think clearly such review would be unwarranted; not only unjustifiable in law, but impossible in fact.

Take, for instance, the witness Joy, whom the defense now claims to have been in the conspiracy (though at the same time denying that their clients, whom Joy's testimony involves, are in the conspiracy). He was the subject of a long, well-prepared, and skillfully directed cross-examination. Under the attack, he was restive, defiant, and bellicose. May not the impression of his testimony and appearance before the grand jury have been entirely different, though his story was substantially the same? That he violated the National Prohibition Act (41 Stat. 305) may be conceded. That his testimony before the grand jury was the same as upon this trial may also be admitted; but it by no means follows that the grand jury believed he was in the con-

spiracy charged in the indictment. And what has been said of Joy applies, of course, with even greater effectiveness to the many others.

[3] While this might well dispose of the matter, still another reason is suggested for adhering to the view which the court took on the trial. This reason applies with force where the number of conspirators runs into the hundreds. There is no requirement in law that all conspirators be joined in any single indictment. Such as may well be tried in one case should only be named as defendants in any one indictment. The present trial convinced the court that 30 defendants is a large number to try at one time.

But the testimony indicated that a jury might (though not necessarily) have found that the number implicated in this conspiracy was several hundred. Having concluded to limit the number to 31, was the grand jury required to investigate and ascertain who the others were and to name them? Must all the facts as to those not in the indictment be investigated, to judicially determine whether each was or was not in the conspiracy, notwithstanding they are to be named in another indictment? Must the grand jury, upon a partial investigation, name some of them as co-conspirators, though not as defendants? Fairness to such "other divers persons" not named as defendants, I think, requires the grand jury to hesitate before naming them in such a manner as to impair their reputation without at the same time affording to each a prompt opportunity to exonerate himself.

While the argument in support of the alleged variance was based upon the offered testimony of Joy and of grand jurors, who, it is claimed, would testify that Joy appeared and gave testimony before them, it seems to me that failure to name others than Joy would be as fatal as failure to name Joy. But counsel has directed his argument to the failure of the grand jury to name Joy as one of the "divers other persons," and it is apparent as to him that defendants were fully advised concerning his story even before the government began its investigation. When the police officers were making their so-called investigation, and were examining various witnesses—in fact, any and all witnesses, excepting Heitler and Perlman and various policemen, charged with participation in this crime—the defendants learned, if they did not already know, that they were charged by Joy, Miller, Frank, and others with having conceived this conspiracy and carried it out substantially as these witnesses stated upon the witness stand. If the purpose of an indictment be to apprise the defendants of the nature and character of the charge, so that each defendant, be he innocent or guilty, may prepare adequately for trial, then the failure of the grand jury to name Joy or any other person was not fatal in this case.

[4] *Did the court err in permitting witnesses to testify on rebuttal and in refusing to grant a day's continuance after the government's testimony closed?* Both because it was rebuttal and because it was within the court's discretion to admit it, though properly a part of the government's evidence in chief, I think no error was committed in receiving testimony offered by the government on rebuttal. The govern-

ment took nearly three weeks in which to introduce its evidence. The defendants made no opening statement of their case at the beginning of the trial, and neither the court nor the prosecution knew what position the defense would take until the government rested. Certain government witnesses testified that the defendants Heitler, Greenberg, and Perlman agreed to and did return a part of the money received from purchasers whose whisky was taken from their trucks in Chicago by certain "highwaymen" on the night the car was unloaded. That three truck loads were held up in the streets in Chicago; that the highwaymen, who the witnesses said were policemen, took two trucks and their loads of whisky—is not disputed. Witnesses, who stated they paid Heitler, Perlman, and Greenberg some $31,000 for this whisky, testified for the government, and said they demanded the return of this money, as they had been guaranteed police and federal government protection, which was explained to mean protection against holdups "other than regular holdups." They further stated that money had been returned to them, or to others who gave them money, for this whisky. The defendants denied returning any money to any one. One witness, on rebuttal, testified that certain sums of money were sent to him in an envelope after a conversation with Heitler and Perlman.

Defendants likewise denied all knowledge of the shipment and of participation in the conspiracy, specifically denying that one Moore was employed by them to sell any part of the carload of whisky. Moore was called on rebuttal to dispute this testimony. Other testimony need not be detailed. Certainly, under the circumstances, a fair exercise of the court's discretion demanded that the ultimate facts, which the parties for weeks had sought to prove or disprove, be illuminated by this persuasive testimony.

[5] As to the request for a continuance for a day, I cannot, in view of the situation disclosed at the trial, doubt the propriety of the ruling. Three witnesses only are claimed as surprise. The first was Moore. The evidence showed defendant Perlman met and talked with Moore, who was avoiding the government. Perlman said he talked with Moore about his testimony before the government saw him. Moore testified to certain conversations with Perlman, and they were denied by Perlman. The defense knew Moore would be called, if he could be located by the government. This was known several days before Moore testified.

Another witness, a garage keeper, was brought into the court, and several defendants asked if they had seen him on the night the whisky was unloaded. This occurred several days before the defendants closed their case. On cross-examination, the defense showed they knew more of this man's history than he knew himself. With many closely typewritten pages before him, counsel for the defense cross-examined him searchingly and particularly in reference to this night's occurrences, showing not only no surprise, but skill and industry on the part of defendants' investigators in preparing for his cross-examination.

The other witness testified as to a conversation with Heitler and Perlman respecting the payment of money and his refusal to accept

checks. The conversation was on a street corner outside a poolroom. No one was present but this witness and the two defendants, Heitler and Perlman. The latter two denied the conversation in toto. The defense here, too, was apprised of the witness' coming appearance several days before he was put on the stand. Notwithstanding this situation, the court did take a short recess, and the defense produced a witness, who left the impression that further delay was unjustifiable.

Did the court err in refusing to give the proposed instruction? The court was favored with some 20 proposed instructions, submitted by various defendants, covering the subject of testimony of accomplices. In fact, the proposed instructions submitted by all of the counsel must have covered 100 pages. Under these circumstances, as well as for other reasons, it became necessary for the court to make its own analysis of the case and submit its views of the law in its own language. Of course, the proposed instructions were helpful; but it was not consistent with my idea of a proper analysis and a concise presentation of the issues to incorporate all of the proposed instructions, even though many of them, standing alone, were unobjectionable.

Complaint is now made, however, because the court refused to give a proposed instruction advising the jury that it should not convict the defendants upon the uncorroborated testimony of accomplices. The instruction as given reads as follows:

"Certain of the government's witnesses have been called accomplices. They are witnesses who admit that they are parties to the crime charged in the indictment. Their testimony should be scrutinized closely, to ascertain whether they are influenced by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party. * * * But the fact that certain witnesses who have testified may be accomplices * * * will not justify you in rejecting their testimony on that ground alone. The government in criminal cases must sometimes offer the testimony of those who were parties to the crime. Innocent individuals may know nothing of the details of the crime, and only the guilty parties can enlighten you about the criminal transaction. * * * The jury should therefore approach his [the accomplice's] testimony with some caution. They are required to scrutinize it closely, not rejecting it, but scrutinize it carefully, and only cautiously accept it. * * *"

[6] The vice of the charge lies in the fact, so it is claimed, that the court did not advise the jury that conviction should not rest upon the unsupported testimony of accomplices. To have given this charge would, I think, have been error. Since the decision in Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, Ann. Cas. 1917B, 1168, courts have generally recognized the rule therein announced that conviction may rest upon the uncorroborated testimony of an accomplice. A few of such cases are herewith collected. Graboyes v. United States, 250 Fed. 793, 163 C. C. A. 125; Kelly v. United States, 258 Fed. 392, 406, 169 C. C. A. 408; Reeder v. United States (C. C. A.) 262 Fed. 36, 42; Ray v. United States (C. C. A.) 265 Fed. 257; Freed v. United States, 266 Fed. 1012, 49 App. D. C. 392; Harrington v. United States (C. C. A.) 267 Fed. 97; Block v. United States (C. C. A.) 267 Fed. 524.

[7] Counsel for defendants contend, however, that the proposed

instruction only goes to the extent of advice from the court. In other words, the proposed instruction did not require the jury to acquit unless the testimony of accomplices was corroborated, but did express the court's views on such testimony. If such proposed instruction was merely intended as an expression of the court's opinion of the weight to be given to testimony of accomplices, it was clearly a matter of judgment on the part of the trial judge whether such expression of opinion should be given or not. Certainly I have no hesitancy in declining to accept any hard and fast rule governing the weight of testimony of certain witnesses. If the trial judge is to express his opinion upon the evidence (and I certainly think he should exercise that privilege whenever he thinks it necessary), he should be guided by the testimony in the instant case rather than by any rule that may be generally applicable. In other words, the testimony of accomplices may be weak. Courts may hesitate about accepting it. But in certain cases the court may be thoroughly convinced that it is the truth. Should he, therefore, notwithstanding his general opinion of this class of testimony, ignore the conclusions reached in the individual case, and advise the jury in a manner contrary to what his judgment tells him is the fact? I have no hesitancy in answering this query in the negative.

Criticism is also made because the court refused to charge the jury as requested by defendants concerning the character and nature of the conspiracy charged in the indictment. In this charge the court was guided by the fact that each and every one of the attorneys, both in argument to the court, and in argument before the jury, stated that there was no question of the existence of the conspiracy, and that the only issue between the government and the defendants was over the identity of the parties to the conspiracy. In other words, while each denied that his client was in the conspiracy, the existence of the conspiracy as charged was conceded. It was with this concession as a background that the court charged the jury as it did in respect to the conspiracy.

Remarks of Counsel.

Numerous statements in the prosecutor's opening argument to the jury, which was decidedly brief, were challenged. At the time the court was under the impression that an experienced counsel was endeavoring to embarrass the speaker, who was inexperienced in presenting a case to the jury. Scarcely a thought was presented without interruptions and challenges. The court unfortunately was occupied in preparing its charge, and perhaps did not hear all of the argument. Only a few of the criticisms will be considered.

[8] It is claimed that government counsel referred to the defendants' alibi as a "faked alibi"; criticism being directed to the word "faked." Webster's International Dictionary defines the word "fake" as "to make; to construct." As used by counsel, it was, I think, understood to mean a made, a manufactured, or false alibi. To characterize it as a false or "faked" alibi was certainly justifiable from the government's point of view, for it was the contention of the govern-

ment that the witnesses, who testified to the facts that established the alibi, were either mistaken or they testified falsely.

[9] Counsel is also charged with having said, speaking of Heitler:

"How much like Shylock he looked. He demanded his pound of flesh and he bled his victims."

Also:

"Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress you how meek and humble he is."

It is claimed this statement and the argument made in support of it was an appeal to prejudice based upon the nationality of Heitler, who counsel stated was a Jew. The court observed that, so far as the comment was directed to the appearance or manner or conduct of Heitler, as shown by the testimony, it was proper; adding, however:

"I wish to say, however, that if any one of you thinks it has any reference to religion in this case, you cannot decide on race or religion. Race or religion has no bearing in this case any more than sympathy or prejudice. As to whether the defendant Heitler impressed you as playing a part or not, that is for you to say, and is a proper statement for counsel to argue."

The attorney also promptly added:

"I wish also to state that there was no idea on my part to bring in anybody's race or religion."

It may be true that the Shylock that Shakespeare immortalized was a Jew, but the character pictured by the master's pen in the Merchant of Venice has been found in all ages, among all races, and in all businesses. Unfortunately, no race has a monopoly of him—no age that does not produce too many of him. Thus it is, when one is selfish, covetous, grasping, when he drives a hard and onesided bargain, he is not infrequently referred to as a Shylock. It was not for the court to determine the wisdom of the reference, or the appropriateness of the characterization. The court was merely to determine whether there was any evidence to justify the argument.

In the present case, witnesses testified that Heitler, Perlman, and Greenberg bought a carload of whisky for $32,000, and sold it to bootleggers for $135,000, requiring the purchasers to pay cash in advance; that they gave no receipts for moneys advanced, and did not bind themselves to deliver any particular grade of whisky, and this all in violation of the law of the land. Nevertheless, when defendant's counsel subsequently insisted that this statement was a reflection upon the defendant Heitler's race and religion, the court specifically charged the jury to disregard the entire statement.

[10] Further objection was made to the statement purporting to be as follows:

"Mike walks to the chair, and you would think that Mike was going to the electric chair; he was so solemn. In answer to the questions of his counsel, he is meek and humble. Why, it is not the same man that threatened Morris Frank with death in the Englewood station. It is not the same king of the underworld who, with a snap of his fingers holds the lives of men in his grasp. No; but he cried."

Objection was made because of its appeal of prejudice, and because the statement was unsupported by the record. There was testimony that Heitler threatened Frank with death, and that it occurred in the Englewood station. There was testimony in the record that Heitler had been convicted and sent to the penitentiary for violation of the so-called Mann Act, or White Slave Law (Comp. St. §§ 8812–8819). There was testimony that he had run various places, and that some at least had been closed up because of their bad repute. The court, nevertheless, ruled in reference to the allegation that Heitler was "king of the underworld":

"I recall no testimony that supports such argument."

And he further stated:

"The statement that he was king of the underworld and that he holds the lives of people in the snap of his fingers is improper."

[11] Counsel is also charged with having said, when referring to Heitler weeping upon the witness stand:

"If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it, asking for mercy."

Whether such statement was made or not, the court cannot say. At any rate, the court did not so understand it at the time. Later, defendant's counsel having referred to it, the court specifically and in its last charge to the jury instructed them as follows:

"During the argument of the attorneys, some reference was made to tears having been shed. I do not believe I understood counsel making the statement at the time. I am not sure, but I want to now, at this time, admonish you that anything outside of this record, outside what was received on this trial, is not proper."

Of course, the foregoing excerpts from the argument of assistant prosecutor do not fairly represent the entire argument. Viewed as an entirety, no impression could possibly have been given the jury that would have influenced it to decide the case other than on the facts. So satisfied were the defendants with the impression which the government prosecutor left that, I am advised, they seriously considered the advisability of waiving any and all argument.

It follows that the motion for a new trial must be and is hereby denied. The court will impose the sentences on Wednesday, May 11th, at 9:30 a. m. The clerk will notify all counsel.

MECHANICAL CONST. CO. v. LOCOMOTIVE STOKER CO.

(District Court, W. D. Pennsylvania. July 5, 1921.)

No. 323.

1. Patents ⊜328—979,849, claims 9 to 12, for distributing plate for automatic stoker, held valid.

The Hanna patent, No. 979,849, claims 9 to 12, for an automatic stoker, the subject-matter of which was a distributing plate containing channels for spreading the fuel over the grate area with uniformity, *held* to disclose a construction which accomplished the purpose desired and by which a new and useful result was obtained so as to be valid.

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

2. Patents ⊂=168(2)—Claims cannot be construed as broad as those which were cancelled,
The claims in the patent as issued cannot be construed to be as broad as those which were canceled after rejection by the patent office.

3. Patents ⊂=328—979,849, claims 9 to 12, for automatic stoker, held infringed.
The Hanna patent, No. 979,849, claims 9 to 12, for an automatic stoker, the essential element of which was a distributing plate having an unobstructed central portion and divergent channels, *held* infringed.

4. Patents ⊂=328—1,130,443, claims 1 to 3 and 9, for automatic stoker, held not infringed.
The Street patent, No. 1,130,443, claims 1 to 3 and 9, for an automatic stoker, one element of which was means for delivering the fuel above the firing door, *held* not infringed by an automatic stoker in which the fuel was delivered through the firing door if those claims are given the limited construction necessary to avoid the prior art.

In Equity. Suit for infringement of patent by the Mechanical Construction Company against the Locomotive Stoker Company, in which defendant by way of counterclaim alleged infringement of a patent by plaintiff. Bill dismissed as to one of plaintiff's patents, decree rendered for plaintiff as to the other patent, and counterclaim dismissed.

Walter F. Murray, of Cincinnati, Ohio, and W. G. Doolittle, of Pittsburgh, Pa., for plaintiff.

Gillson & Gillson, of Chicago, Ill., and Paul Synnestvedt, of Philadephia, Pa., for defendant.

THOMSON, District Judge. The Mechanical Construction Company, a corporation of the state of Ohio, brings this suit against the Locomotive Stoker Company, for infringement of letters patent No. 979,849 for an improvement in an automatic stoker, issued to the plaintiff on December 27, 1910, on an application filed by William T. Hanna. The defendant denies infringement, alleges the invalidity of the patent, and by way of counterclaim alleges infringement by the plaintiff of letters patent No. 1,130,443, issued to the defendant on March 2, 1915, as assignee of Clement F. Street. Plaintiff in reply, denying validity of the Street patent or infringement thereof, prays that the counterclaim be dismissed. Plaintiff's bill was also based on letters patent No. 1,002,513. At the opening of the trial plaintiff's counsel stated that this patent was withdrawn. Defendant's counsel have filed a motion to dismiss as to this patent, which motion is granted, as will later appear in the decree.

[1] The questions involved in the Hanna patent, No. 979,849, are the validity of claims 9, 10, 11, and 12, and their infringement by defendant through its use of the device embodied in Plaintiff's Exhibit 3 and Defendant's Exhibit D. The subject-matter of these claims is a distributing plate for spreading over the grate area with uniformity the fuel which is forcibly injected by steam pressure into the fire box. The immediate problem which Hanna sought to solve was the co-operation of a distributing plate with a steam blast in separating from a moving stream of coal an amount sufficient to keep the rear corners

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

and back sheets of the furnace supplied, and permitting the steam blast to carry a sufficient quantity forward to the sides, and forward ends of the fire box, so that uniformity of distribution will result. Such uniformity is necessary for efficient firing. Hanna accomplished this by the use of a comparatively flat plate, which has in its face divergent channels discharging at opposite sides of the plate, the channels gradually deepening to the discharge end, and turning at the ends at substantially right angles to the longitudinal axis of the base. The deepening of the channels prevents their being clogged or choked with fuel, and their turning at right angles near the discharge end is to insure deflection of the coal to the rear corners. The testimony has satisfied me that this distributor plate as constructed by Hanna is efficient to accomplish the purpose desired. Tests were made by Mr. Fowler on December 4 and 6, 1920, over a run of 102 miles on the Norfolk & Western Railroad, from Roanoke, Va., to Bluefield, W. Va. The train crews and the coal used were the same in each test. An accurate, tabulated account of each trip showing the speed of the engine, pressure of the steam, amount of coal thrown into the fire box by the fireman, the points to which it was thrown, and the times of stopping and starting the engine were kept by Mr. Fowler. The tests showed that on the first trip, with the channels of the distributing plate in their normal condition, the stoker maintained a comparatively even fire through the whole run, no coal being thrown into the fire box by hand, and the fire being hooked by the fireman only a few times. On the second trip the channels on the distributing plate were filled to the level of the surface of the plate, with the result that the fireman hooked the fire 39 times, threw 16 shovelfuls of coal into the back corners, the engine died three times, and the poor distribution of the coal was plainly manifested in the average steam pressure, in the running time, in the difficulty of maintaining steam, and the times of total failure of power. Nor do I think that the value and efficacy of the channels is minimized by the fact that wings are used in the spreading of the coal over the distributing plate. The device illustrated in the patent are wings or guides which are not moved automatically, but may be set to direct the fuel to a selected part of the furnace in order to counteract the presence of clinkers, or otherwise aid in obtaining a uniform fire; while in plaintiff's commercial device the wings move continuously to secure an even distribution of fuel over the distributing plate. But the tests show that the channels are an efficient means by which uniformity of distribution over the grate area is obtained. I do not find anticipation by the defendant. A separate discussion of these several patents is not necessary. Mr. Carter, defendant's expert, in discussing these patents, gave as his opinion that the one most nearly resembling the distributor plate in the Hanna patent is the English patent to Cotton. Defendant's Exhibit Q is a model of the distributing plate of that patent. It appears that the plate is flat, and the action of the fuel over it would be similar to the Hanna plate with the channels filled in. From the location of the plate with reference to the wall, it is evident that the problem of throwing the coal to the rear corners was neither solved nor attempted

by Cotton. While distribution plates were old in the art, plaintiff's device was not merely a change of form, the work of a constructor. The plaintiff's plate, co-operating with a steam blast, resulted in depositing coal in the rear corners and along the rear wall of the furnace, without obstructing the uniform distribution to other parts of the furnace. This was a new mode of operation by which a new and useful result was obtained, and this is invention.

Does the defendant infringe? In the stoker of the defendant, constructed under the Street patent, a distributing mechanism comprising three separate distributors was used, two being located on opposite sides of the central line of the furnace to distribute coal over all parts of the furnace except along the rear wall. This latter function was performed by a central deflector. With this operation, there was a fuel separator by which the fine fuel was passed to the central deflector, and the coarse fuel to the side distributors. With this construction, defendant experimented with a flat plate having a central hollow stud, with radial steam outlets. This method was abandoned. Plaintiff's Exhibit No. 3 is admitted to be one of defendant's distributors as used in its Duplex stoker. In the Hanna type the fuel is introduced through the furnace door, while the defendant feeds through a plurality of openings. The tubular parts of defendant's distributor has sleeves, which pass through round holes in the back head of the boiler. In Hanna there is a rearwardly projecting flat extension, engaging a dovetailed way in the bottom of the furnace door frame.

Fig. 1 HANNA

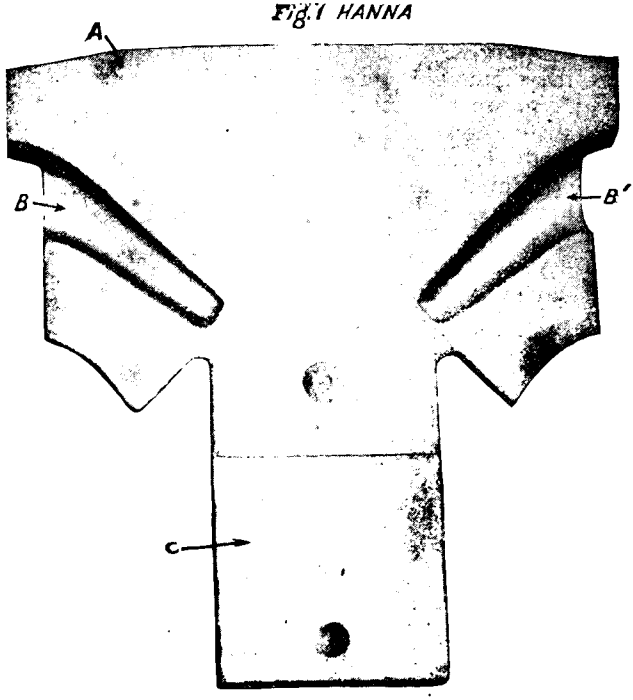
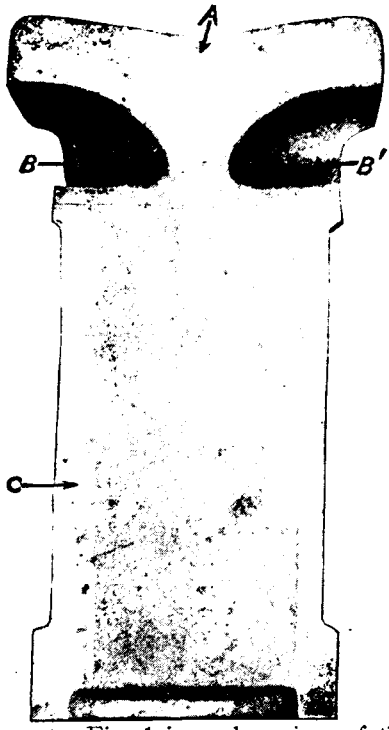
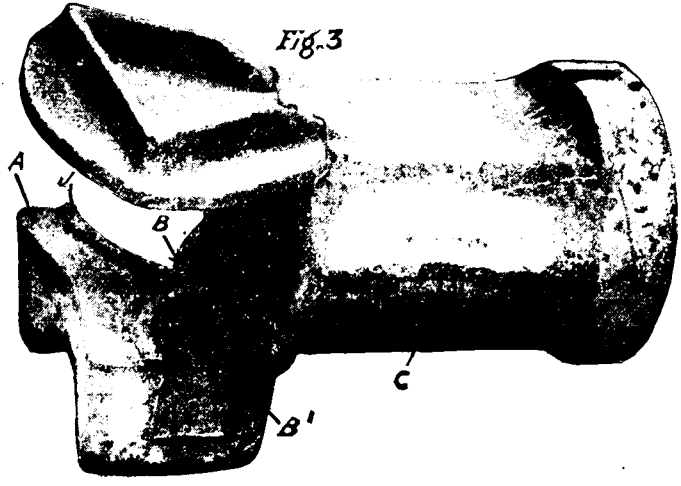


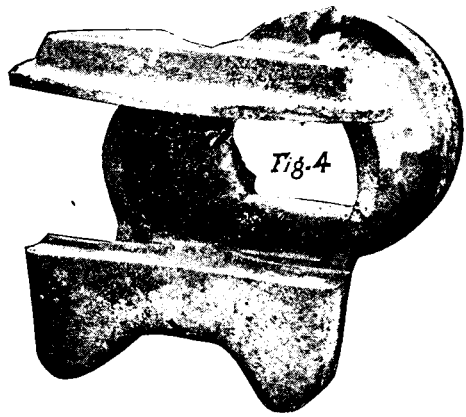
Fig. 2 DUPLEX



In the preceding cuts, Fig. 1 is a plan view of the plaintiff's distributing plate. Fig. 2 is a horizontal sectional view, showing the bottom plate of defendant's Duplex distributor in plan view. The reference numerals *B-B* are divergent channels below the central portion. In each the central portion is wide and unobstructed.

Fig. 3





In the preceding cuts Figs. 3 and 4 are perspective views of the modified form of distributor, which defendant has used from a time shortly prior to the filing of the bill. I am satisfied that the functions performed by the channels are the same in each. In each the channels divert a sufficient amount of coal from the forwardly impelled stream of fuel to suply the rear corners of the back well of the furnace; while the remainder is projected forwardly to the other parts of the furnace. Mr. Fowler's tests showed that when the channels of defendant's distributors were filled the results like those in the Hanna tests were most unsatisfactory.

The form of defendant's distributor, Plaintiff's Exhibit No. 3, and the functions performed are substantially the same as the plaintiff's.

The difference between defendant's distributor, as illustrated in Plaintiff's Exhibit 3 and Defendant's Exhibit D, is that the latter has upon the forward edge of the channels a vertical ridge about one-quarter of an inch in height. The testimony shows that the difference between these two distributors is only one of degree. They have substantially the same construction and the same operation. The change does not operate to escape infringement.

The claims in suit are as follows:

"(9) A distributing plate for blast feed stokers having a wide unobstructed central portion, and a comparatively narrow divergent channel at each side below the central portion of the plate and discharging at the side of the plate.

"(10) A distributing plate for blast feed stokers having an unobstructed central portion and divergent side channels lying below the central portion of the plate and gradually deepening from the receiving to the discharge end, substantially as specified.

"(11) A distributing plate for blast feed stokers having an unobstructed central portion and divergent side channels lying below the central portion of the plate and turned at their outer ends to a direction approximately at right angles to the longitudinal axis of the plate, substantially as specified.

"(12) A distributing plate for blast feed stokers having an unobstructed central portion and divergent side channels lying below the central portion of the plate, gradually deepening from the receiving to the discharge end and turned at their outer ends to a direction approximately at right angles to the longitudinal axis of the plate, substantially as specified."

[2] The scope of these claims must be limited by the prior art, the specifications and drawings, and the record made in the Patent Office in securing their allowance. Certain claims as originally filed were canceled, and the present claims substituted. The construction of these cannot be as broad as the claims canceled. Claim 9, which was canceled, reads as follows:

"(9) A distributing plate for blast feed stokers having an unobstructed central portion lying below the central portion of the plate, substantially as specified."

[3] The words "unobstructed central portion" might mean unobstructed spaces, as between the ridges or obstructions on the Ayres and Ranger patent upon which claim 9 was rejected. I think that the limitation that the central portion is "wide and unobstructed" in claim 9 does not differentiate the claim from the defendant's distributor, in which the central portion is made wide as the plate, in order that coal which passes over the channels meets no obstruction on the plate upon its passage to the forward part of the furnace. Another change in claim 9 over the canceled claim is that the divergent channels are described as "comparatively narrow," and as "discharging at the side of the plate." In the specification the words "comparatively narrow" do not occur, and their meaning is not defined, but may be determined by reference to the drawings. In Fig. 7 the channels, *c-4*, are wider than the rear edge of the central portion, *C*, while the forward edge of the central portion, *C*, is practically twice as wide as the channels. The words of dimension in claim 9 must refer, therefore, to the comparative dimensions of the width of the channel and the forward edge of the central portion, *C*. In defendant's distributors this forward edge of the central portion is perhaps more than twice as wide as its channel. I think, therefore, that the language "comparatively narrow" applies to the channels in the distributors of the defendant. This is in harmony with the purpose of the channels, which is to divert only a small portion of the coal into the rear corners, the evidence showing that only from 10 to 20 per cent. of the fuel is so diverted. I find nothing in the patents cited by the examiner which discloses a distributor plate having a central unobstructed portion and divergent side channels, discharging at the sides of the plate. He may therefore properly claim such a construction in his present claim 9 as would cover defendant's distributor.

Claim 10 differs from the rejected claim 9, as the channels are described as "gradually deepening from the receiving to the discharge end." These words apply directly to defendant's structure.

Claim 11 differs from the rejected claim 9 in that the side channels are described as "turned at their outer ends to a direction approximately at right angles to the longitudinal axis of the plate." This is descriptive of the defendant's distributors.

Claim 12 differs from the rejected claim in that the channels are described as "gradually deepening toward the discharge end" and being "turned at right angles." Both these features are present in defendant's distributors.

The claims in suit I find valid and infringed.

Counterclaim.

Defendant's counterclaim involves the question of validity and infringement of claims 1, 2, 3, and 9 of patent No. 1,130,443, issued March 2, 1915, to Clement F. Street for a mechanical stoker for feeding lump fuel to steam boiler fire boxes. The Mechanical Construction Company denies infringement and alleges the invalidity of the claims of Street, by reason of the prior art. It is conceded that some, but not all, of the mechanisms incorporated in the claims had been employed before in locomotive stokers, but it is claimed that these elements had not been combined or correlated as in the Street stoker; that elevators had been used, but they had not extended through the cab floor; that transfer conduits had been employed, but there had been no delivery to a receptacle below the cab floor; that there was nothing analogous to the Street receptacle, unless it be that of Richards', which was placed, not under the cab floor, but upon the floor of the tender, and into which the fuel was shoveled by hand.

Locomotive stokers were not new when Street entered the field. Three inventors, Richards, Lowe, and Crosby, had run an elevator from the floor of the tender over the cab floor to the firing door. Brewster had elevated the fuel in the tender and carried it forward overhead, and spouted it into a hopper attached to the back head of the boiler, while Prescott had an underfeed stoker transferring the fuel under the cab floor to the opening under the grate. In Hanna's earlier form of stoker (1907) there was a fuel receptacle positioned in a slot, cut into the deck of the fire floor, into which the fireman shoveled the coal, and from which led an elevator into the firing door, the elevator comprising a spiral conveyor and a casing. Street transfers the fuel to a receptacle under the floor, and elevates it through the floor to the feed opening in the back head.

In each of the four claims under the Street patent an element in the stoker apparatus is "a fuel receptacle below the firing floor." In connection with this receptacle, in claim 1 is "an elevator for carrying the fuel from said receptacle to a point above the level of the fuel bed." Claim 2 differs from this only in that it includes "means below the floor for delivering fuel from the tender into the receptacle." Means below the floor for delivering fuel from the tender into a full receptacle below the floor were old, as shown in the patents of Brewster, Prescott, and Burger & Williams, all of which were prior to Street; while the Richards and the Hanna views of 1907 illustrate elevators located in front instead of at the sides of the firing door. Claims 1 and 2 in question do not contain any language which imports that distinction into them. The distinction between Street and Brewster is that the latter located his receptacle below the firing floor of the tender; the bucket conveyor being mounted upon the tender instead of the locomotive as in Street. In view of this disclosure, the validity of claims 1 and 2 is doubtful. It would appear that the elements of claim 1 differ from Richards only in placing a fuel receptacle below the engine frames; yet we are asked to construe the claim so as to cover plaintiff's construction, in which there is no receptacle below the frames,

but a fuel conduit between the frames and the fire floor, through which there is a continuous feed of fuel. This we cannot do. Such receptacle is a prominent element in the claims of Street; a reservoir in which there is a quantity of coal maintained, and in which the buckets operate, taking only a portion of the surplus fuel there deposited. If the validity of claims 1 and 2 were conceded, the receptacle therein described cannot fairly be considered to cover the fuel conduit of Hanna.

Claims 3 and 9 differ from claims 1 and 2 regarding the point at which the fuel is delivered. This point is designated in claims 1 and 2 as "a point above the level of the fuel bed"; in 3 and 9 as "a point above said door"; in claim 3 "a gravity discharge conduit for delivering fuel from said point into the furnace"; in claim 9 "means for delivering the fuel from the casing above the door into the furnace."

While it is true that some of the claims not in suit speak of the discharge of the fuel into the furnace "independently of the firing door," there is nothing in claims 3 and 9 that indicates the deposit of the fuel through the firing door. On the contrary, the teachings of the patent as disclosed by the specifications indicate strongly that the fuel was not in any case to be delivered through the door opening. In the specifications it is said:

"One of the objects of my invention is to provide improved means for feeding lump fuel of the kind described onto different portions of the grate of any steam boiler, whether that of a locomotive or of a marine boiler or of a stationary boiler; said means being independent of the usual firing door, so that hand firing may be carried on, and the fire be raked when necessary, without interference with the automatic feeding of fuel."

Again, the specifications state:

"At the same time there is no interference with the firing door, 6, so that the fireman can attend to the fire and, if necessary, feed fuel into it by hand, as usual."

[4] In the Hanna stoker the fuel is delivered through the door opening. That practice, as it appears, Hanna adopted in 1907, and has used continuously since then. It also appears to be a practice that had been followed in other locomotive stokers, antedating both Street and Hanna. If the words "a point above said door" be construed to read into the Hanna stoker, they read also in the Crosby, No. 787,100, where the coal is delivered by feeding through the upper end of casing *10*, falling thence by gravity to the level of the firing-door opening, and is carried thence through said opening by projector *10*. To differentiate the limitation of claims 3 and 9 of Street, namely, "a point above the level of the firing-door opening," from Crosby, it is necessary to read them with the limitation that the point of delivery is one free of the firing-door opening.

If claims 3 and 9 are to be held as valid, I am of opinion that the Hanna stoker does not infringe them. To summarize, I find claims 9, 10, 11, and 12 of the Hanna patent, No. 979,849, valid and infringed.

I find that the bill of complaint should be dismissed as to letters patent No. 1,002,513, and that a decree should be entered that as to such letters patent the plaintiff, and its successors in title, be concluded from urging against the defendant herein any further claims of infringement

of such letters patent by reason of the manufacture, use, or sale of devices of substantially the character it is now manufacturing.

I find that for reasons set forth in this opinion defendant's counterclaim should be dismissed, and that the defendant should pay the costs.

A decree may be drawn accordingly.

J. & A. FREIBERG CO. v. DAWSON et al.*

(District Court, W. D. Kentucky. May 31, 1920.)

1. **Courts ⇐282(3)—Suit to enjoin enforcement of tax as in violation of federal Constitution within the jurisdiction of federal court.**
   A bill to enjoin enforcement of a state statute imposing a tax is within the jurisdiction of a federal court where it states a case of rights arising under Const. U. S. Amend. 14.

2. **Courts ⇐299—Federal court has jurisdiction when rights under federal Constitution are stated in good faith, though erroneous.**
   Where the bill states a case of rights arising under Const. U. S. Amend. 14, the federal court has jurisdiction if the claim is made in good faith and is not frivolous, though in the end it may turn out to be erroneous.

3. **Courts ⇐102(1)—Suit for injunction held within statute as to hearing applications by three judges.**
   A motion for a preliminary injunction in a suit by an owner of whisky in a bonded warehouse against the owner of the warehouse and the Auditor and Attorney General of the state to enjoin enforcement of a statute imposing a tax is within Judicial Code, § 266 (Comp. St. § 1243), requiring applications for an injunction suspending or restraining the enforcement of state laws to be heard and determined by three judges, etc., where the bill alleges that the Attorney General intends to enforce the penalties imposed for nonpayment of the tax, and the Attorney General does not dispute the allegation, and it seems to be understood by all parties that it is his official duty to do so.

4. **Courts ⇐506—To prevent injunction by federal court suit in state court must be brought to enforce statute attacked in federal court.**
   Under Judicial Code, § 266, as amended by Act March 4, 1913 (Comp. St. § 1243), providing that proceedings to enjoin the enforcement of a state statute shall be stayed if a suit shall have been brought in a state court having jurisdiction thereof to enforce such statute accompanied by a stay of proceedings pending the determination of the suit, the suit in the state court must not only be brought in a court having jurisdiction to enforce the statute, but be brought for the purpose of enforcing it, and a suit in a state court to enjoin enforcement does not satisfy the statute.

5. **Courts ⇐506—Injunction by state court against enforcement of law against plaintiff therein does not prevent injunction by federal court.**
   Judicial Code, § 266, as amended by Act March 4, 1913 (Comp. St. § 1243), providing for a stay of proceedings to enjoin the enforcement of state statutes if a suit shall have been brought in a state court to enforce the statute accompanied by a stay of proceedings, contemplates a stay protecting the plaintiff seeking the injunction in the federal court, and is not satisfied by an injunction of the state court against the enforcement of the law against the plaintiff in the suit in that court.

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* This opinion was adopted, so far as applicable, in the later case of Kentucky Distilleries Co. v. Dawson, in the Eastern District of Kentucky. Appeals in both were decided by the Supreme Court February 28, 1921. 255 U. S. —, 41 Sup. Ct. 272, 65 L. Ed. —.

6. **Injunction ⊂=16—Not granted when there is adequate remedy at law.**
An injunction will not be awarded if there is an adequate remedy at law.

7. **Payment ⊂=88—Payment under protest is voluntary and not recoverable.**
As a general rule payment merely under protest, unless some statute otherwise provides, is voluntary, and a suit for recovery will not lie.

8. **Intoxicating liquors ⊂=94—Party suing to enjoin enforcement of taxing statute held not to have adequate remedy by payment and application for mandamus.**
Under Act Ky. March 12, 1920 (Laws 1920, c. 13), imposing a tax on the business of owning and storing spirits in bonded warehouses and removing them therefrom and providing heavy penalties for nonpayment, and Ky. St. § 162, requiring the State Auditor to issue his warrant for moneys paid into the treasury for taxes when no such taxes were in fact due, an owner of whisky in a bonded warehouse desiring to remove it therefrom has no such adequate remedy by payment of the tax and application for writ of mandamus to compel the issuance of a refunding warrant as defeats the right to an injunction in view of the doubt as to the existence of such remedy and the fact that mandamus is a discretionary writ.

9. **Intoxicating liquors ⊂=94—Party liable to tax held to have no adequate remedy justifying denial of injunction.**
Under Act Ky. March 12, 1920 (Laws 1920, c. 13), imposing a tax on the business of owning and storing spirits in bonded warehouse and removing them therefrom payable on removal and imposing heavy penalties for nonpayment, an owner desiring to remove whisky from a bonded warehouse has no such adequate remedy by payment of the tax to the owner of the warehouse and immediate suit for its recovery or by replevin against the warehouseman as defeats his right to an injunction asked for on the ground that the statute is unconstitutional, as the payment would be voluntary if the statute was unconstitutional.

10. **Intoxicating liquors ⊂=94—Provision of statute imposing penalties held not so clearly separable as to show that there was no irreparable injury.**
Act Ky. March 12, 1920 (Laws 1920, c. 13) § 5, imposing a fine of from $500 to $1,000 per day for nonpayment of the tax imposed by section 1 on the business of owning, storing, and removing spirits in bonded warehouses, is not so clearly separable from the rest of the act as to justify the denial of an injunction on the theory that no irreparable injury is threatened.

11. **Intoxicating liquors ⊂=94—Statute imposing tax payable upon removal of spirits from warehouse held to threaten an irreparable injury.**
Under Act Ky. March 12, 1920 (Laws 1920, c. 13), there is such imminent irreparable injury to an owner of whisky desiring to remove it from a bonded warehouse as justifies an injunction in view of the penalties which would accrue pending a test suit, though no irreparable injury will arise unless the owner brings it on himself by withdrawing the liquor.

12. **Constitutional law ⊂=230(3)—Tax on business of owning and storing spirits in bond does not deny equal protection of the laws.**
Act Ky. March 12, 1920 (Laws 1920, c. 13), imposing a tax on the business of owning and storing spirits in bonded warehouse and removing them therefrom, does not deprive owners of such spirits of equal protection of the laws because those owning and storing spirits in other states do not have to pay the same or an equivalent tax, nor does it make a classification so arbitrary as to be violative of the equal protection clause.

13. **Constitutional law ⊂=284(1)—Enforcement of invalid tax takes property without due process of law.**
To enforce collection of a tax imposed under an invalid law is to take the property of the taxpayer without due process of law.

14. **Intoxicating liquors ⟸94—Penalties imposed for each day's delay in paying a tax held oppressive.**
The penalty of from $500 to $1,000 a day imposed by Act Ky. March 12, 1920 (Laws 1920, c. 13), for nonpayment of the tax thereby imposed on the business of owning and storing spirits in bonded warehouse and removing them therefrom is oppressive in the absence of any provision for an opportunity to test the law, especially as the penalty for willful refusal to pay the tax on 10,000 gallons could not be more than twice as much as it must be for careless neglect to pay on one gallon.

15. **Intoxicating liquors ⟸16—Tax on business of owning, storing, and removing spirits not valid as occupation or excise tax.**
Act Ky. March 12, 1920 (Laws 1920, c. 13), imposing an annual license tax of 50 cents a gallon on the business of owning and storing spirits in bonded warehouse and removing them therefrom, payable upon removal, though construed as imposing only one tax of 50 cents a gallon, and not such tax for each year of storage, is beyond the power of the Legislature under Const. Ky. § 181, authorizing the General Assembly to provide for the payment of license fees on occupations and a special or excise tax, as applied to whisky manufactured and in storage before its adoption, but attempts to impose a property tax in the form of an excise tax.

16. **Licenses ⟸7(1)—Excise tax not invalid because payable upon happening of event or measured by amount of property affected.**
It is no objection to the validity of a tax as an excise that it is payable upon the happening of an event or that it is measured by the amount of property which such event affects.

17. **Licenses ⟸11(1)—Right to own property cannot be subjected to excise tax.**
The mere right to own or hold property cannot be made the subject of excise taxation.

18. **Constitutional law ⟸42—Purchaser of warehouse receipts in no better position than vendor of whisky to attack tax as confiscatory.**
A purchaser of warehouse receipts covering whisky in a bonded warehouse is in no better position than the vendor to attack as confiscatory a tax imposed on the business of owning and storing spirits in bonded warehouses and removing them therefrom, though it is claimed that only a small profit is made by dealers in such certificates.

19. **Constitutional law ⟸48—Reasonable doubts as to facts determining validity to be resolved in favor of law.**
In determining the value of whisky in bond for the purpose of determining whether a statute imposing a tax is confiscatory, the state should be given the benefit of all reasonable doubts, since the unconstitutionality of the act should clearly appear before an injunction can be granted.

20. **Intoxicating liquors ⟸16—Whether tax on spirits in bond confiscatory dependent on market price.**
In determining whether a tax on the business of owning and storing spirits in bonded warehouse and removing them therefrom is confiscatory, and hence unconstitutional, where it appears that whisky is bought and sold only by means of warehouse receipts, the market price or regular selling price of warehouse receipts is the true criterion, and peculiar values of special brands or peculiar hardships or special lack of equity on the part of the person attacking the statute cannot be taken into consideration.

21. **Intoxicating liquors ⟸16—Tax on business of owning, storing, and removing spirits held prohibitive and invalid.**
Act Ky. March 12, 1920 (Laws 1920, c. 13), imposing on the business of owning and storing spirits in bonded warehouses and removing them therefrom a license tax of 50 cents a gallon, is prohibitive and invalid

under the Kentucky Constitution, where whisky in bond at the time of its adoption was worth about $1.25 a gallon, and the value of that in bond in Kentucky was depressed by the tax, while the market price of whisky in other states was advanced thereby.

22. **Courts ⇐102(1)—District Court composed of three judges granting temporary injunction may authorize district judge to grant similar injunctions.**

A District Court composed of three judges granting a temporary injunction against the enforcement of a state statute under Judicial Code, § 266 (Comp. St. § 1243), after a hearing, may authorize the District Judge to issue a similar injunction to any other intervener or plaintiff whose case is not essentially distinguishable from that of the plaintiff in the suit in which the injunction was granted without a further hearing before the three judges.

23. **Injunction ⇐129(1)—Court composed of three judges hearing application for injunction without power to pass on motion to dismiss.**

A court composed of three judges convened under Judicial Code, § 266 (Comp. St. § 1243), to pass upon an application for a temporary injunction against the enforcement of a state statute is called into existence for the sole purpose of hearing and deciding the motion for the injunction, and has no power to either sustain or deny a motion to dismiss the suit.

In Equity. Suit by the J. & A. Freiberg Company against Charles I. Dawson and others. On motion for preliminary injunction. Injunction granted.

Before DENISON, Circuit Judge, and WALTER EVANS and SATER, District Judges.

Levi Cooke, of Washington, D. C., and Trabue, Doolan, Helm & Helm, of Louisville, Ky., for plaintiffs.

Charles I. Dawson, Atty. Gen., for defendants.

PER CURIAM. Section 171 of the Kentucky Constitution provides that taxes "shall be uniform upon all property of the same class subject to taxation." Section 172 says that all property shall be assessed for taxation at its fair cash value. Section 174 directs that all property shall be taxed in proportion to its value, without prejudice to the right to provide for taxation based on income, licenses, or franchises. Section 181a says:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, * * * the various trades, occupations and professions, or a special or excise tax."

Prior to 1917 such license taxes as there were on manufacturing or wholesale dealing in distilled spirits had been by way of an annual tax of a fixed sum. In 1917, in the course of a general revision of the revenue laws of the state, it was provided by chapter 5 of the Acts of 1917 that every corporation or person engaged in the business or occupation of manufacturing distilled spirits, and every owner or proprietor of a bonded warehouse in the state in which such spirits are stored, should, in addition to other taxes, pay a license tax of two cents on every proof gallon liable to federal tax; that every distiller and every bonded warehouseman should make quarterly reports showing the amount of distilled spirits removed from the warehouse by payment of the federal tax or transferred under bond during the quarter, and at the time of making the report pay the tax of two cents per gallon.

The proceeds of the tax were distributed, 20 per cent. to the road fund, 30 per cent. to the school fund, and 50 per cent. to the general fund.

In January, 1920, when the Eighteenth Amendment to the federal Constitution was declared to take effect, there remained in storage in bonded warehouses in Kentucky approximately 50,000,000 gallons of distilled spirits, and there was approximately the same amount (probably somewhat more) in storage in bond in the remainder of the United States. On March 12, 1920, the Governor approved an act of the General Assembly repealing chapter 5 of 1917, and substituting a revision of generally similar purport. The first section thereof, as so revised, is as follows:

"Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whisky or brandy or other species of double stamp spirits, in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the commonwealth of Kentucky." Laws 1920, c. 13.

Section 2 directed that every owner of a bonded warehouse should make to the State Auditor a monthly report, on the 1st of each month, showing the number of proof gallons withdrawn or transferred since the last report. Section 3 directed the warehouseman, at the time of making each monthly report, to pay to the Auditor 50 cents upon each proof gallon which had been removed from the bonded warehouse or transferred under bond out of the state, and further provides:

"And for the purpose of securing the payment of the license taxes herein provided for, the commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehouseman used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the commonwealth."

Section 4 required that every distiller pay this license tax upon the product of his manufacture when removed from his premises, unless then placed in a bonded warehouse; that all distillers shall file a monthly statement with the Auditor showing the amount of spirits so removed and not going into a bonded warehouse, and at the same time pay the specified license tax thereon. Section 5 provides that every person or corporation failing to make reports as directed, and failing to pay the taxes as they become due, shall be guilty of a misdemeanor, and upon conviction be fined not less than $500 nor more than $1,000, and that each day that such taxpayer is in default after the date such report is due "shall be considered and treated as a separate offense." Section 6 gives the proceeds of the tax 65 per cent. to the road fund and 35 per cent. to the general fund. Section 7 declares that the license tax of the statute shall be in lieu of all other license, franchise, or excise taxes now imposed by law on persons or corporations engaged

in business covered by this act, and repeals chapter 5 of 1917. Section 8 recites that, whereas the business covered and licensed by the act is not now an adequate license tax, and whereas liquor in bonded storage is being removed from the bonded warehouses and disposed of without the receipt by the state of adequate license tax, "an emergency is hereby declared to exist, and this act shall take effect from and after the date of its passage and approval by the Governor."

The plaintiff, which is an Ohio corporation, in October, 1916, purchased from the distiller warehouse receipts covering 9,800 proof gallons of whisky, original gauge, and upon the purchase of these certificates became and remained the owner of this whisky, which continued in the distiller's bonded warehouse until January, 1920, when it was transferred to a bonded warehouse operated by the Louisville Public Warehouse Company. Thereby the plaintiff has had, and it has, such constructive possession of the whisky as the federal laws contemplate before the federal tax is paid. In April, 1920, plaintiff desired to have this liquor transferred, under the existing federal regulations which permit such transfer, to another bonded warehouse in the state of Massachusetts, and directed the Louisville Public Warehouse Company to proceed with such transfer, at the same time tendering payment to the warehouse company of all storage charges, ad valorem taxes, and all other payments attending such transfer and claimed to be proper, excepting the 50-cent license fee under the act of 1920. The warehouse company refused to permit such withdrawal and transfer, for the sole reason that the 50-cent tax had not been paid. and claimed a lien upon the whiskey to secure such payment.

Thereupon plaintiff filed this bill against the Warehouse Company and against the State Auditor and the State Attorney General, alleging that the warehouse company was unlawfully refusing to make the transfer, and that the state officers were threatening to enforce this law and the penalties thereof against plaintiff and the warehouse company, and asking that the warehouse company be enjoined from further refusing to make the transfer or from further asserting any lien for this 50-cent tax, that the state officers be enjoined from any step attempting to enforce the act or the lien thereof, and that the Attorney General be enjoined from instituting any action, civil or criminal, to coerce the payment of this tax, or to collect the penalties or fines prescribed in the act. A motion for preliminary injunction was made, and the District Judge, proceeding under section 266 of the Judicial Code (Comp. St. § 1243), caused the motion to be heard before the court as now constituted.

Several questions are involved, and it is not feasible to discuss all of them exhaustively. As to several of them, we state only our conclusions. As to some, we add the reasons which induce the conclusion.

[1, 2] 1. *Jurisdiction of This Court as a Federal Court.*—This is clear: First, because the bill shows diverse citizenship with more than $3,000 involved in money values; and, second, because the bill states a case of rights arising under the Fourteenth Amendment to the federal Constitution. It is well settled that in the latter case the federal court

has jurisdiction if the claim of federal right is made in good faith and is not frivolous, even though in the end it may turn out to be erroneous.

[3] 2. *Case Arising under Section 266, Judicial Code.*—Two state officers are made parties defendant, and an injunction is sought to prevent them from enforcing the law of the state, which law is said to be unconstitutional. The tax law does not seem to impose upon the Auditor any duty of enforcement, nor is it clear that he can do anything which would be harmful enough to call for an advance prohibition. As to the Attorney General, the case is different. While this statute does not require him to act, it seems to be understood by all parties, including the Attorney General himself, that it is his official duty to enforce the law by bringing, on behalf of the state, all actions and by enforcing all penalties which the law provides for. The bill alleges that he intends to enforce these penalties, and he does not dispute this allegation. The matter has proceeded upon the assumption by the district judge of the district and by all parties that the case is one contemplated by section 266; and we see no reason to hesitate on this account.

3. *Abatement under Section 266.*—By the amendment of March 4, 1913, it was provided by way of amendment to this section that proceedings thereunder in any federal court should be stayed pending the determination of the question in the state courts, if—

"a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of the state to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court."

The Attorney General shows, by way of abatement or stay of the present application, that a suit has been brought by another owner of whisky, in a situation analogous to that of plaintiff here, against another warehouseman, the purpose of the suit being to compel the delivery of the whisky to the plaintiff, who had paid the government tax, and against which delivery the warehouseman was urging that it must collect the 50-cent tax under the law now in question. After the defendant had answered and set up this law and claimed that it ought to be entitled to keep the whisky until the validity of the law was determined by some competent court, the plaintiff in that case filed an amended petition asking an injunction against the State Auditor and the State Attorney General to prevent them from enforcing this act. Thereupon an injunction issued in that suit enforcing them "from requiring from the plaintiff, or his agent or distiller in charge, payment of the 50 cent per gallon tax * * * until further orders of the court."

[4] We pass by a serious question as to whether this injunction is valid, and, for present purposes, assume that it is. It does not present such a case as is contemplated by the amendment of March 4, 1913, to section 266 of the Judicial Code. This is for two reasons. The first is that the state court which issued this injunction is not the state court contemplated by the amendment. The action of the federal court is to be superseded or suspended only in case, as we read the statute, "a suit to enforce such statute or order shall have been brought in a court

of the state having jurisdiction thereof under the laws of such state"; and, while it is said that this particular state court has jurisdiction to enforce this law because it is the court in which the state might rightfully bring suit to collect penalties, it is entirely plain that the suit which has been brought was not brought to enforce this law. The Attorney General would escape this conclusion by saying that the clause "to enforce such statute or order" is dependent upon and defines the word "court," and not the word "suit." This construction is not only, as it seems to us, awkward and unnatural, but it leaves the word "thereof" superfluous and without meaning, and leaves the word "suit" going at large without definition. According to this construction, if only the suit is brought in a court which has jurisdiction to enforce this law, it makes no difference what kind of a suit it is or what it is about.

[5] The second reason why the amendment of March 4, 1913, does not apply is that it contemplates a stay which will protect against the enforcement of the law the plaintiff who in the federal court is seeking the injunction. It is manifest that the stay which only prohibits the Attorney General from enforcing the law against another plaintiff in another case cannot protect this plaintiff in this case, and Congress could not have intended to oust the jurisdiction of the federal courts, excepting where the state courts were providing an adequate substitute. The reasons assigned to Congress for the enactment of this amendment, as shown in the report of the House judiciary committee, February 27, 1913, report No. 1584, indicate that it was intended to reach only those cases where the enforcement by the state was through a court action, brought by some administrative body, for specific performance of the law; but, however that may be, and if the amendment might be invoked when its application was based upon some other kind of an action for some other kind of enforcement of a law, there at least must be identity between the party claiming protection in the federal court and the party who is receiving protection in the state court.

Therefore, considering the papers filed by the Attorney General on this subject as a plea in abatement, it must be overruled, and, considering them as answers to plaintiff's motion for an injunction, they are insufficient.

[6] 4. *Jurisdiction of This Court as a Court of Equity.*—Obviously equity has no jurisdiction, except upon the theory that an injunction is necessary; and an injunction will not be awarded if there is an adequate remedy at law. The vital question then is, "Is there an adequate remedy at law?" and to answer this in the affirmative we must know what that remedy is.

[7, 8] (a) It is said that the tax may be paid under protest, and that, if the law turns out to be invalid, it will be the duty of the Auditor to make a state warrant for repayment, and that this duty will be enforced by mandamus proceedings. If this remedy were clear and certain, it might be "adequate";[1] but its existence is at least doubtful.

[1]Dows v. Chicago, 11 Wall. 108, 112, 20 L. Ed. 65; Indiana Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Boise Co. v. Boise City, 213 U. S. 276, 282, 29 Sup. Ct. 426, 53 L. Ed. 796; Singer Co. v. Benedict, 229 U. S. 481, 487, 33 Sup. Ct. 942, 57 L. Ed. 1288.

As a general rule, payment merely under protest, unless some statute expressly provides, is voluntary payment, and suit for recovery will not lie even if there is a defendant who can be sued. This taxing statute does not provide for payment under protest, and does not provide for suing the state to get the money back, even if payment were made to release a levy and so were compulsory. The existence of this remedy can depend only on section 162 of the Kentucky Statutes.

This section authorizes the refunding warrant in cases where a tax which was paid was "not due"; and a later clause makes reference to "the mistaken payment." In a broad sense taxes which are invalid because the taxing act is unconstitutional are "not due"; but the Kentucky Court of Appeals has not yet construed the statute as extending to such a case.[2] It has been held not to reach cases where the assessment, made by some board or assessing officers, was invalid on account of their violation of law, and this holding has been put upon the ground that the Auditor could not review the action of the assessing officers and determine its validity. On the other hand, cases where the question was whether a tax should be paid under one statute or under another or under both have been held within the scope of the section. It has been at least strongly intimated that plaintiff cannot demand this warrant unless he paid the tax under the compulsion of distraint or a right of distraint and under a mistake of law or fact. Taxes paid merely under protest cannot be recovered without express provision of law, since mandamus will lie only to compel performance of a plain duty, and since to require the Auditor at his peril to determine the unconstitutionality of a legislative act is to put upon him an extraordinary burden, we must have grave doubt whether this remedy exists. Certainly the state of the Kentucky decisions does not justify us in saying it is so clear and effective as to be "adequate," in the sense of the fundamental equity requirement. Further, the remedy is by mandamus, a discretionary writ. The plaintiff is entitled to his adequate remedy in the federal court (U. S. Life Ins. Co. v. Cable [C. C. A. 7] 98 Fed. 761, 39 C. C. A. 264), and a federal court will mandamus a state officer only in the clearest case. It seems a paradox that a court should refuse an injunction and thus permit an act to be done, and then issue a mandamus to compel its undoing.

[9] (b) Another suggested remedy is that the plaintiff pay the warehouse company the tax and immediately sue to recover it back. As to this, it could be answered, first, that a lien given by an unconstitutional law is no lien, and hence payment by plaintiff in order to get possession of his property would not be compelled by the lien would be voluntary, and suit to recover it back would be defeated for that reason.[3] It could be answered, second, that as soon as the 1st day of the next month ar-

[2] German v. Coulter, 112 Ky. 577, 66 S. W. 425; Louisville v. Coulter, 112 Ky. 584, 66 S. W. 427; Bosworth v. Metropolitan, 162 Ky. 344, 172 S. W. 661; Louisville v. Bosworth, 169 Ky. 824, 185 S. W. 125; Greene v. Taylor, 184 Ky. 739, 212 S. W. 925; Craig v. Security (March 9, 1920) 189 Ky. 565, 225 S. W. 729.

[3] We assume that, if the law is valid, there is a lien effective against the withdrawing owner, though that is not clear. See infra.

rived and the warehouse company did not pay the tax over to the state, penalties would accrue against the warehouse company at the minimum rate of $500 per day, and the pendency of the lawsuit would be no defense against those penalties. Further, plaintiff, in case of failure, would be liable, perhaps directly to the state, for the same penalties, and at least liable over to the warehouse company for their amount. Still further, the warehouseman's personal responsibility may be insufficient.

(c) The same matter of accruing penalties applies to an action of replevin against the warehouseman, after tender of valid charges and claims, if that action would otherwise be appropriate under the Kentucky practice.

No one of these suggested remedies accompanied by such contingencies is "adequate" (Davis v. Wakelee, 156 U. S. 680, 688, 15 Sup. Ct. 555, 39 L. Ed. 578; Walla Walla v. Walla Walla Co., 172 U. S. 1, 12, 19 Sup. Ct. 77, 43 L. Ed. 341; Union Pacific Co. v. Weld County, 247 U. S. 282, 285, 38 Sup. Ct. 510, 62 L. Ed. 1110.

[10] 5. *If the Plaintiff Is Right upon the Merits, Is There That Imminent Irreparable Injury Which Alone Justifies a Preliminary Injunction?*—This is, in part, the same question as to whether there is an adequate remedy, but it goes further. It is not to be doubted that the extravagant and oppressive penalties which accumulate under the law, so that no one could ever refuse payment during the length of time necessary to carry through a test suit, demonstrate irreparable injury under the rule of Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, and similar cases, except for two considerations which are said to distinguish.

The first is that this section of the statute imposing these penalties may be considered as separable, and, if obnoxious to controlling principles, may be considered as invalid without affecting the rest of the law, whereby a suit for penalties could be defeated. In advance of a decision by the Kentucky courts, we cannot be assured that this provision is separable. It is the only effective means which the state has for enforcing the law and collecting the tax. We cannot see that the state has any compelling lien. Taxes are not payable until the 1st of the month after the liquor is withdrawn from the warehouse, and when the liquor is so withdrawn and removed from the state, as the statute contemplates, no effective lien in favor of the state can remain. In those cases where the warehouseman owns the liquor, the purported lien thereon is plainly ineffective in the tax collection. The effect of the statute might be such, if some difficulties of construction are overlooked, as to give the warehouseman a lien and compel the payment of the tax to pay him before he surrenders the liquor to the owner, but this would not help the state any in collecting from the warehouseman; it would have no weapon, except the penalties, and a lien upon the warehouse which might be of little comparative value.

When we compare the act of 1920 with that of 1917, we find that the earlier one provided that the Auditor should bring suit to collect the tax, with an 8 per cent. penalty and with all other interest and

penalties provided for delinquent taxes in other cases. The revisers omitted these provisions and substituted only the declaration in section 5 that each day of default shall be a separate offense. The legislative intent to regard this extreme penalty as essential is fairly clear. At least we cannot presume that the Kentucky Legislature would have regarded this statute as sufficient and effective, without the penalty section, and in that situation we cannot pronounce that section separable.

[11] The second distinguishing consideration is that no penalties accrue unless the owner withdraws his liquor, and thus there is no irreparable injury unless the owner brings it on himself. Ordinarily a tax becomes due at a fixed date, and thereafter the penalties against the nonpaying owner accrue in spite of anything he can do. In this case, as we later construe the act, nothing accrues until the owner makes the first move; and hence there is superficial force in the consideration urged, but only superficial. It is to say that it is no injury to a property owner to put an intolerable burden upon a certain use by him of his property, because he may, if he will, refrain from that use. This cannot lessen the property owner's right to complain of the burden, when the effect is upon any rightfully contemplated use of his property; much more must this be true when the effect is upon the only substantial use which he can make of it; and thus we observe another form of the proposition, later discussed, that the withdrawal of whisky from the warehouse is not a mere privilege. Plaintiff now desires to ship his whisky to Massachusetts. To do so is, normally, his absolute right. That may be a better sale market or a better storage place. He says that he wishes to bottle, to save the heavy "outage" incident to the expected long storage, and that this is not allowed at defendant's warehouse, but the facilities which he wishes to use are in Massachusetts. To forbid him to make the best rightful use of his property is, in fact, to deprive him of his property; and it is no answer to say that postponement of the right is his only injury. There is no visible end to the postponement. He can never test the question in any other way than by this case until he pays the tax and takes the chance of getting it back. Every other owner is in the same position; and if each must wait for some other owner to determine the question, the supposed test case can never start. In the meantime leakage, evaporation, storage charges, and regular taxes eat up, or drink up, the property.

We think the injury is correctly to be called irreparable; and it is not only imminent, it is present.

[12] 6. *The Alleged Discrimination Against Kentucky Holders.*— We do not see that plaintiff is deprived of the equal protection of the laws merely because those who own and store whisky in other states may not have to pay this tax or an equivalent one, and therefore can take the market away from plaintiff. The Fourteenth Amendment cannot insure that each state shall have a taxing system equivalent to that of every other.

Nor are we prepared to say that the statute depends upon a classification, among those who own property in Kentucky, so arbitrary as to be

violative of the "equal protection" clause of the Fourteenth Amendment. We do not understand that to impose an otherwise proper license or excise tax upon a privilege with regard to one class of property has ever been thought unlawfully discriminatory for the sole reason that similar privileges as to other classes of property were not similarly taxed; nor can it be thought that it is merely and wholly arbitrary to put a license privilege as to whisky in bond in a class by itself.

[13] 7. *Is There Lack of Due Process of Law?* This is only another form of stating the ultimate question. If the law is invalid for any of the reasons alleged, it is obvious that to enforce collection of the tax is to take the plaintiff's property without due process; hence we proceed to the reasons alleged.

[14] 8. *Is the Entire Law Invalid Because of the Excessive Penalties?* The penalties are plainly oppressive, lacking any provision for opportunity to test the law. Giving to plaintiff's property a net value of $1 per gallon ($1.50 less the tax), and taking every day's delay to pay the tax as a separate offense, the property would be exhausted by the minimum penalties before it was time to put in an answer to any test suit. This arbitrary character further appears because the fines for willful refusal to pay on 10,000 gallons cannot be more than twice as much as they must be for the careless neglect to pay on one gallon. We do not see that they are in substance less objectionable than those denounced in Ex parte Young, supra, 209 U. S. 145–147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, and we have already stated our reasons for thinking that the penalty section was inseparable, and that the law would not have been passed without it or some substitute for it. Since it is apparent that there arise questions of law and of fact upon which the owner is entitled to have a judicial inquiry, it would seem that this section makes the whole law invalid; but this point is not expressly made in the bill of complaint, though perhaps included within some general terms therein used, it has not been argued by counsel, and we prefer not to rest our decision upon it, but only to refer to it as confirming us in the conclusion later reached.

9. *Had the Kentucky Legislature Power to Levy Such a Tax?* Taxation is of three kinds—upon persons, upon property, and upon excises. This is plainly not a capitation tax. The Kentucky Constitution requires that property taxes shall be levied pro rata upon all property, and it is conceded that this particular tax cannot be sustained as a property tax. That leaves for consideration only excise taxes.

[15] The Kentucky Constitution gives the Legislature power to "provide for license fees on * * * occupations" (Const. § 181), and this statute declares that it levies an occupation tax. So far as it is levied upon the occupation of manufacturing whisky, it is within the ordinary definitions and pursuant to the long-settled policy of Kentucky; but, so far as it seeks to mark out a separate and distinct occupation or business, the owning and storing and withdrawing of un-

tax-paid whisky, it seems to involve a previously unheard of "occupation," and one which, as applied to this subject, is very difficult to distinguish from the occupation of owning property. However, it is unnecessary to rest any conclusion upon a matter of definition. If the statute is a valid exercise of power under any constitutional grant, it ought not to be condemned merely because it adopted a wrong name for itself.

The same clause of the Constitution which provides for license taxes for occupations continues, "or a special or excise tax." There seems no reason to think that the allowable "special" tax was intended to cover a discriminatory property tax or refers to anything which is not fairly to be defined as an excise tax. The ultimate question, therefore, is whether this statute imposes a valid excise tax.

We first meet the problem whether the law intends to impose a tax of 50 cents per gallon per year so long as the business of storing whisky in bond is continued, or, rather, intends to impose only one 50-cent tax, regardless of the period of storage. In favor of the first view it is to be noted that the first section expressly declares the tax to be an "annual" one; that, save for changing the definition of the business taxed, the insertion of the word "annual" formed the only change made by the revisers, as compared with section 1 of the act of 1917; that the act speaks of "taxes" as though contemplating a plural; and that, although nothing is payable until withdrawal, it would be possible at that time to compute the tax as having been an annual one accruing year by year up to that date.

In favor of the opposite view, it is to be seen that no tax is payable until after a withdrawal or transfer, and that there are express provisions fixing the amount to be paid whenever that time arrives at the sum of 50 cents per gallon. It may be that these conflicting provisions make the statute so unintelligible that it is invalid for that reason, or it may be that it ought to be construed according to the first view. In either of these events, that would be the end of this controversy, since it is entirely clear, and the Attorney General admits, that an annually accruing tax of this amount would be confiscatory and invalid. The Attorney General insists that the latter view above specified is the proper one, and says that this is the view which has been and will be taken by the state officers in enforcing the law. Doubtless he cannot by his position at this time bind the Kentucky courts as to their ultimate decision of this question; but, for the further discussion of the matters before us, we assume, without deciding, that he is right, and that only one 50-cent tax will ever accrue.

[16] It is no objection to the validity of a tax as an excise that it is payable only upon the happening of an event, or that it is measured by that amount of property which that event affects. This principle is illustrated by Raydure v. Board, 183 Ky. 84, 209 S. W. 19, sustaining the validity of an excise tax upon the output of oil wells.

The objection to this tax goes deeper. It provides, in effect, that the owner of property situate in Kentucky and who has not embarked

that property in any business carried on in Kentucky may not have his property, for sale or use or to carry into some other state until he has paid a special tax upon it of a half or a third of its value in addition to all other ordinary and regular taxes. When this law was passed and given immediate effect, there were supposed to be 30,000,000 gallons of whisky in store in bond in the state. Upon this the owners had paid the regular ad valorem tax every year, and had paid or were liable to pay the regular excise tax of two cents per gallon imposed upon the business of manufacture. Upon no principle can the mere allowing of this property to remain in existence, in the only form in which the federal laws allowed it to remain, be considered as a privilege which the Legislature might make conditional upon the payment of a tax for revenue,—which depends upon different principles than does a regulatory or inspection tax under the police power. It is true that the quality somewhat changes with age, and it is not inconceivable that a revenue excise tax might rightly be imposed upon the business of storing whisky for aging purposes, in effect as a branch of the manufacturing business; but it would be distorting this law to attribute to it that purpose. This tax is imposed, not upon the business of storing, but upon the single business of "owning and storing * * * and in removing." The tax is the same whether the storage has been for one day or for a period of years, upon the defendants' construction, which we are now assuming. Out of several successive owners of warehouse receipt who would thus engage in the storing business, all but the last one go free. The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable—i. e., consumption, sale, or keeping it for future consumption or sale. We cannot escape the conviction that it was the real purpose of those who drafted this law to levy a substantial tax upon this great body of property, as property, and that the form of an occupation or excise tax was adopted in order that an object might be accomplished which the Kentucky Constitution forbade. It is a property tax in the clothes of an excise. The whole value of the whisky depends upon the owner's right to get it from the place where the law compelled him to put it, and to tax the right is to tax the value. Chief Justice Marshall said in Brown v. Maryland, 12 Wheat. 419, 444 (6 L. Ed. 678):

"All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In reaching this conclusion, we must give great weight to the fact that the formerly existing law placed an excise tax of 2 cents per gallon upon the entire combination business of manufacturing, with its incidental storing and withdrawing. This was the Legislature's idea of a proper excise tax. After the prohibition amendment and laws had practically stopped the business of manufacturing, and, in common supposition, destroyed the great part of the market for whisky in bond, the Legislature repealed the 2-cent law and substituted this so-called

excise tax of 50 cents, which was to be applied to the mere withdrawal, wholly disconnected from manufacture. If the new tax were to be truly an excise, the circumstances suggested a diminution of the old, rather than an increase of 2,500 per cent.

Another special consideration tends to persuade to the same end. An excise or occupation tax, ordinarily, is imposed not merely upon a privilege which the Legislature may grant or withhold, but upon a privilege which the prospective taxpayer may accept or decline. Not so here. The owners of whisky in bond in Kentucky, when this law was passed, could not refuse to engage in the business of storing it in Kentucky, if they did not wish to pay the tax. The law was given immediate effect, to the effect that and in order that they could not decline. Like the Ancient Mariner's audience, they "cannot choose but" stay; and in substance it was declared that they became on that day subject to pay a tax on account of the business which they had already done, but which, if it were a business, had been free from this tax until that moment.

[17] The principles which limit the definition of a permissible excise tax are discussed in the familiar text-books and digests, and, among many instances, by Chief Justice Fuller in Pollock v. Farmers' Co., 157 U. S. 429, 580, 15 Sup. Ct. 673, 39 L. Ed. 759, et seq., and by Judge O'Rear, for the Kentucky Court of Appeals, in Standard Oil Co. v. Commonwealth, 119 Ky. 75, 79-81, 82 S. W. 1020. The controlling proposition is that the mere right to own and hold property cannot be made the subject of excises. The principle has been applied, for example, to the mere owning of timber (Thompson v. Kreutzer, 112 Miss. 165, 72 South. 891), and to devoting it to a turpentine orchard, the use for which it was most available (Thompson v. McLeod, 112 Miss. 383, 73 South. 193, L. R. A. 1918C, 893, Ann. Cas. 1918A, 674). See the discussion of principles and authorities in these two Mississippi cases. The Corporation Tax Cases (Zonne v. Minneapolis, 220 U. S. 187, 191, 31 Sup. Ct. 361, 55 L. Ed. 428; McCoach v. Minehill, 228 U. S. 295, 302, 33 Sup. Ct. 419, 57 L. Ed. 842; U. S. v. Emery, 237 U. S. 28, 32, 35 Sup. Ct. 499, 59 L. Ed. 825) are analogous. Plaintiff's acts, like those of the Emery corporation, were "limited to the necessary incidents" of ownership. True, in these cases the court was trying to find the legislative intent in using the phrase "doing business," and here we are concerned with the legislative power, but we understand that such power in this case rests upon being "engaged in business"; and thus the two questions come to be the same.

We do not necessarily decide the question whether the tax might be good as an excise as applied to whisky made after the law was passed. Since no license tax is distinctly imposed on manufacturing such whisky as goes into bond, it might be claimed with more or less force that the making, storing, and withdrawing was one connected business; the license tax burden being pending until it attached upon the culminating act, the withdrawal. Nothing is now involved except whisky which had been made and had gone into storage before March 12; and the

business or occupation which justifies the excise must be found in what happened since.

10. *Is the Tax Confiscatory?* The mere fact that an excise tax, levied under the revenue power, operates practically to prohibit the business taxed, has been held not to make the law invalid when an act of Congress was under consideration (McCray v. U. S., 195 U. S. 27, 51, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561), but the power of the Kentucky Legislature under the Kentucky Constitution is more limited. The Attorney General concedes that a tax which operates to prohibit the conduct of an otherwise lawful business is invalid. The plaintiff contends that this invalidity results when the burden, although not completely prohibitive, is so heavy as to take a large part of the profits of the property. While some of the Kentucky cases invalidate excise taxes because prohibitive, yet they do not necessarily depend for their result upon the substantially complete prohibition which existed in those particular cases. Other decisions seem to support the plaintiff's contention. In Owen County v. Cox, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83, it was found that the license tax upon the occupation of operating a four-horse dray was such that the owner "could make little, if anything, more than the amount of the tax." In Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315, 25 L. R. A. (N. S.) 582, the holding was that a license tax which took respectively from 25 to 100 per cent. of the net earnings of those engaged in a business was so far prohibitive as to be beyond the power of the Legislature. In Sallsbury v. Equitable Co., 177 Ky. 348, 197 S. W. 813, L. R. A. 1918A, 1114, a license tax which was found to amount to one-third of the net earnings of the largest business of the class was considered unreasonable, confiscatory, and prohibitive. A number of similar cases are reviewed, and an injunction against the tax was sustained.

Many excise taxes that, as against other business, would seem arbitrary and oppressive, have been sustained as against the liquor business because of its character, but these cases have generally, if not always, involved the exercise of the police power. The present case involves only a tax for revenue. It is further to be noted both that the mere owning of whisky and the withdrawing of it from bond has not been held to be a business obnoxious to any public policy, and also that the recent constitutional and statutory prohibitions of intoxicating liquors as a beverage have gone far to remove the burden of public reprobation from that owning and dealing which the law still permits.

[18] It is plaintiff's contention that, since whisky in bond can be dealt in only through warehouse receipts, the plaintiff, if engaged in any business, is engaged in the purchase and sale of these certificates (although not in Kentucky) with the prospect of making, at the best, only a few cents per gallon, and that the imposition of this tax destroys all of the profits which the average dealer in certificates can make. We do not see the plaintiff is in any better position than his vendor, mediate or immediate, who was the manufacturer, would have been, and the real question is whether one who had manufactured whisky

and who had it on hand in bond when this law was passed can complain of the tax as confiscatory.

[19, 20] Considerable proof has been taken by both parties as to the value of whisky in bond, in order to show what fraction of that value has been taken by the tax. In finding the facts upon that subject which rightfully bear upon this motion, we should give the benefit of reasonable doubts to the state, since the unconstitutionality of the act should clearly appear before there can be an injunction; nor can we consider as controlling the peculiar values which special brands may have on account of special reputation, nor treat the plaintiff in this case any better or any worse than the average of his class, because, with such a question, his peculiar hardships will not avail him nor will his special lack of equity sustain the law. Defendant has proof tending to show that some sales to the retailer of tax-paid whisky are being made at a figure which seems to leave $2 per gallon for the in bond owner, and that, after deducting cost and expenses and this 50-cent tax, there will be a good profit to the manufacturer. We think these instances are rather exceptional, and the computation of costs omits important items. The market price, the regular selling price, of warehouse receipts is the true criterion, because in no other way is whisky in bond bought and sold.

[21] Plaintiff claims this value is not more than $1. Defendant claims it to be $1.50. The facts seem to be that early in 1920 the general price throughout the country was somewhat less than $1; that the imposition of this Kentucky tax tended to depress the price of that stored in Kentucky and to advance that stored elsewhere; that market conditions at about the time of and since the passage of the act have also tended to increase the price; and that the present market price of certificates for whisky in bond in Kentucky is about $1, and that of certificates for storage elsewhere about $1.50. It is obviously true that, if the 50-cent tax were paid by all holders of Kentucky storage, they could not add that amount to their price, because the same act would double the quantity available for the market and depress the price. We think it can fairly be assumed that within a short period after the act was passed, and when it began to take substantial effect, whiskies in bond, in Kentucky, as a class, would have been worth about $1.25, if it were not for this law, and that the tax therefore should be considered as taking about 40 per cent. of that value, and a very large part, if not all, of the normal profits of the manufacturing and storing business.[4]

We have said that this tax was not discriminatory merely because whisky outside of Kentucky is not reached; but this situation has a bearing on the question whether the tax is so oppressive as to be prohibitive under the Kentucky rule. When the federal government imposes an excise tax on whisky, it operates alike upon the manufacturers

[4] On the question of value, it is not irrelevant that a state board, charged with the duty of assessing at the true value for ad valorem taxation, values whisky in bond at 50 cents per gallon.

and owners throughout the country. All can add the tax to their price, and no manufacturer suffers save from the indirect result of a possibly less consumption. It is otherwise when a 40 per cent. tax is laid upon the manufacturers of one state only and their market is a national market. If they add the tax to their selling price, they are out of business, so far as competitive standards control.

In view of these facts and the Kentucky decisions, we believe this tax to be so prohibitive as to be in violation of the Kentucky Constitution.

11. Our conclusion that the tax is invalid is subject to review. No action ought to be permitted by either party, which would make that review unavailable. We think the practical way to prevent the injury to plaintiff arising from perhaps a long suspension of his right to take and have his property free from unlawful burden, and yet to preserve the tax to the state if it shall eventually be found valid, is to provide that the injunction which will permit the plaintiff to take his property out of the state without paying the tax shall be conditional upon the giving of a bond by him. The bond will run to the commonwealth of Kentucky. It will be in the penalty of $8,000, approximately double the amount of the tax. It will be subject to approval, both as to form and as to sufficiency of surety or sureties, by the clerk of this court, after notice to the Attorney General of the application for approval. It will be filed with the clerk and be retained by him until it shall hereafter be ordered by the court either to be canceled or to be delivered to the commonwealth for suit; and it will be conditioned that the plaintiff pay, or cause to be paid, a tax of 50 cents upon each proof gallon taken, or caused to be removed, under protection of the injunction, without payment of the tax, such payment to be made if and when it shall be finally decided in this cause that the tax is valid and should have been paid, or if and when this cause shall finally fail and be dismissed for any reason.

[22] 12. We are informed that other owners of warehouse receipts, situated similarly to plaintiff, desire to, and will, bring similar suits. We think it proper that each such owner should be allowed to intervene in this suit, if plaintiff does not object, or, lacking intervention, that each such suit should be consolidated with this for the general purposes of hearing and trial. It is clear that the right of each intervener or plaintiff to an injunction will be the same as the right of the plaintiff here, unless by reason of some special circumstance. We think the substance and the spirit of section 266 have been met by the hearing which has now been had upon this subject before the court of three judges convened under that section, and that it is not necessary to have a further hearing before such special court upon each application for injunction made by any such intervener or other plaintiff. We therefore approve the issue of preliminary injunction by the District Judge to any such intervener or plaintiff whose case appears to such District Judge not to be essentially distinguishable from that of this plaintiff, such injunction to be upon the same terms and conditions as prescribed herein.

[23] 13. What we have said disposes of the motion for injunction and of the matters urged merely in opposition. The defendant warehouse company and the defendants Auditor and Attorney General have filed motions to dismiss. If these were to be granted, they would result in a final decree. We think the court, as now constituted, has no jurisdiction to make a final decree, but is called into existence for the sole purpose of hearing and deciding the motion for a preliminary injunction. Of course, if we have no power to sustain the motions to dismiss, we have no power to deny them. Accordingly they will stand for hearing before the District Judge in the due course of procedure.

We are aware that upon appeals from orders made under section 266, the Supreme Court has not noticed the distinction between the power to decide the motion for injunction and to make final disposition of the cause, but we know of no express or necessarily implied ruling on the subject. There are some practical reasons for thinking that the court, thus constituted, ought to retain jurisdiction of the whole case until the end; but we cannot find this power in the statute.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. RAILROAD COMMISSION OF GEORGIA et al.

(District Court, N. D. Georgia. June 17, 1921.)

No. 160.

1. **Telegraphs and telephones ⇐33(1)—Notice of rate hearing before state commission waived.**
   On a hearing before a state Railroad Commission between two telephone companies relating to the division of joint tolls, the Commission *held* not without jurisdiction because the notice to the parties did not state the proposed rates and their division as required by statute, where both parties appeared and took part in the hearing without objection, and where each knew in advance the division contended for by the other.

2. **Telegraphs and telephones ⇐33(1)—State Commission held authorized to prescribe division of telephone tolls.**
   A state Railroad Commission, having statutory authority to make joint telephone rates and provide for their division, *held* to have power to prescribe the division of tolls between a company operating general lines and a local company with whose exchange such general lines were connected, on messages going over the lines of both, as "joint tolls," and as a matter of public concern, the division of the tolls having such relation to the rates themselves as might make a change in the latter necessary.

3. **Telegraphs and telephones ⇐33(1)—Statutory authority to regulate rates not affected by contracts.**
   Where a statute gives power to a state commission to regulate telephone rates, they cannot be removed from such power by contracts between parties.

In Equity. Suit by the Southern Bell Telephone & Telegraph Company against the Railroad Commission of Georgia and others. On motion for preliminary injunction. Denied.

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

Hunt Chipley and McDaniel & Black, all of Atlanta, Ga., for petitioner.

J. K. Hines, of Atlanta, Ga., for defendants.

Before KING, Circuit Judge, and CLAYTON and SIBLEY, District Judges.

SIBLEY, District Judge. Against the enforcement of an order of the Railroad Commission of Georgia, which altered the division of telephone tolls as previously fixed by contract between the Southern Bell Telephone & Telegraph Company and Montezuma Telephone Company, an injunction pendente lite is sought by the Bell Company upon the ground that the obligation of the contract is impaired and the property right of contract taken without due process of law, contrary to the Constitution. It is also claimed that the Commission acted without statutory authority and without observance of a statutory requirement that 30 days' notice be given of the making of joint rates and the division thereof.

The Commission was established by an act of October 14, 1879 (Laws 1879, p. 127), with authority over railroads only. As amended in 1889 (Laws 1889, p. 131), the act authorized the Commission (Code 1910, § 2631) to—

"make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates and charges for transportation of passengers and freight * * *" and "from time to time and as often as the circumstances may require, to change and revise such schedules," and (section 2630) "to make just and reasonable joint rates for all connecting railroads doing business in this state, as to all traffic or business passing from one of said roads to another: Provided, however, that before applying joint rates to roads that are not under the management and control of one and the same company, the commissioners shall give thirty days notice to said roads of the joint rate contemplated, and of its division between said roads, and give hearings to roads desiring to object to the same."

An act approved August 23, 1907 (Code 1910, § 2662), provided:

"The powers and duties hereinbefore conferred by law upon the Railroad Commission are hereby extended and enlarged so that its authority and control shall extend to [besides other public service companies named] telephone * * * corporations, companies or persons owning, leasing, or operating public telephone service or telephone lines in this state."

Subsequently to the passage of all these acts, on August 11, 1908, the Bell Company, of the first part, and Montezuma Company, of the second part, entered into an agreement in part as follows:

"Whereas the first party * * * is now engaged in operating telephone exchanges and toll lines, and the second party proposes to operate a telephone exchange within a circle of one-mile radius from a central office in Montezuma, Ga., and desires to connect the same with the lines of the party of the first part as hereinafter provided, it is agreed * * * the second party shall make proper switchboard and other connections for direct communication between the stations on the lines of the first party and the exchange stations and toll stations of the second party. * * * For communications from the second party's exchange to outside points over the lines of the first party, the second party shall observe and shall require its subscribers to observe such regulations as the first party may from time to time make for the use of its lines, and shall itself pay to the first party the regular

tolls of the first party for the time being for all such connections whether from toll stations or subscribers stations, less a discount of 15 per cent. provided such discount shall not exceed ten cents for any one message."

On February 8, 1909, another similar agreement was made having reference to certain toll lines of the Montezuma Company extending to other towns, stipulating:

"* * * For the exchange of business permission is hereby granted to connect the lines covered by this contract with the lines of the party of the first part through the sublicensed exchange of the second party at Montezuma. * * * For connections passing over the lines of both parties each party will take a share of the through tolls pro rata according to the air line distance to point of transfer."

Both contracts were terminable on 30 days' written notice from either party. On June 2, 1909, these contracts were modified so that the Montezuma Company was to have on messages from its exchange 15 per cent., not to exceed 20 cents on any one message, and on messages into the exchange 3 cents each, and on toll line messages 15 per cent., not to exceed 20 cents on any one message, on both outgoing and incoming messages. In 1914, experience showing the substantial correctness of it, 25 per cent. was agreed to be retained by the Montezuma Company on all tolls it took in in lieu of all the above charges. October 8, 1920, the Montezuma Company complained by letter to the Railroad Commission that its increased expenses prevented the handling of the business on this basis longer, that they had declined to sign a new contract on the basis of 25 per cent. of tolls on outgoing messages, and that the Bell Company had cut the compensation to 22½ per cent., and ending:

"We claim that we lose money in handling their business even under the former contract and if your body has authority to take up the matter we would be glad to have you go into the matter of just compensation for our service in handling this business. We feel that we should be paid 25 per cent. on both outgoing and incoming business."

The Railroad Commission sent this letter to the Bell Company, which replied at length, setting forth its contentions. The Commission then set the matter for a hearing 32 days later, giving each side notice of the date.

[1] 1. The proceeding was entirely informal. No notice was formally given by the Commission stating the proposed joint rates and the division of them, as required by the quotation from the act above made. Both parties appeared at the time set. Neither objected to the want of notice. After the chairman of the Commission had expressed the opinion that the Commission could not arbitrate their contract rights, but could only fix future rates, the Bell Company, while taking the position that the Commission was without authority in the premises, announced that it was ready to go into the trial and the hearing was had. The letter of the Montezuma Company to the Commission, sent by the Commission to the Bell Company, contained a statement of the then division of the tolls, of its claims, and of its contention for 25 per cent. on all messages—the proposed division of tolls. This gave all the information that a formal notice would and the 30 days' time was actual-

ly had. The purpose of the required notice was substantially attained, and by proceeding with the hearing without objection the Bell Company waived formal notice, as it might do. Code 1910, § 10. Want of proper notice was not even set up in the original bill, but only by an amendment made at the hearing before us.

[2] 2. But it is claimed that the dispute was not one over which the Commission had power, in that it involved, not a joint rate and its division, but the compensation for a local service rendered by the Montezuma Company to the Bell Company which might be fixed by private contract, and in which the public had no interest. The act of 1907 extending the powers and duties of the Commission to telephone and other companies made applicable to them all the provisions formerly existing as to railroads, so far as they could be applied. It gave the Commission power to regulate telephone rates (City of Dawson v. Dawson Telephone Co., 137 Ga. 62, 72 S. E. 508) and electric power rates (Union Drygoods Co. v. Ga. Public Service Corp., 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358). The quoted provision as to joint railroad rates is therefore to be read, for the purposes of this case, by substituting the words "telephone lines" for railroads and "telephone messages" for passengers and freight. So read, the Commission has power to fix joint telephone rates for connecting lines and the division thereof, and from time to time to revise and alter them. As defined by the Supreme Court of Georgia:

"'A joint rate' * * * is a rate prescribed to be charged for the transportation of goods or passengers over the connecting lines of two or more railroads, and to be divided among them for the service rendered by each respectively." Hill v. Wadley Southern R. R. Co., 128 Ga. 705, 57 S. E. 795.

Both the contracts here involved provide for the physical connection of the lines of the two companies through the Montezuma exchange and the transmission of telephonic messages over the lines of both companies so connected. And this is what was done. The rate charged for the message is a joint rate within the language of the statute and of the definition of the Supreme Court. This is conceded as to the Montezuma Company's toll lines, but denied as to its exchange lines. There is no difference in what is done on each. In each case the message passes from or to the customer of the Montezuma Company to or from one of the Bell Company over the connected lines of both. The only difference is that the toll lines of the Montezuma Company are used presumably only for single messages separately paid for, and the exchange lines are used also for general local telephoning, for which a fixed charge is made. There is no proof that this exchange rate has any connection with the long-distance service, that it was raised, by agreement with the subscribers, when the long-distance service was instituted, or that this service has been included by the Railroad Commission in passing on the local exchange rates. There is nothing to hinder the natural conclusion that, when an exchange line is connected with the line of the Bell Company and so used, the toll collected for the message is a joint toll "charged for the transportation of messages over the connecting lines of two or more telephone companies, and to be

divided between them for the service rendered by each respectively," paraphrasing the language of the court. In the Tap Line Cases it was contended that the connection with the trunk lines of certain short lines fed mostly by particular industries was to be considered as a mere "plant facility" or "switching service," and that they were not entitled to enjoy joint rates. The Interstate Commerce Commission so ruled, but the Supreme Court held that they were co-operating common carriers and deserving of a joint rate adjusted to the service rendered by each. Tap Line Cases, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185. And, though in the division of the joint rate established short-distance hauls were called "switching," and a flat charge of $2 or $3 fixed, the division was held within the power of the Commission. Tap Line Cases, 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651. It is the connected service for a single charge rather than the particular rate fixed or the division established that makes a joint rate. Hill v. Wadley Southern R. R., 128 Ga. 705, 57 S. E. 795.

The division of a joint rate is implied in its fixing. The joint rate is really the combination of the compensations fixed for the participating lines. A reconsideration of the division involves a reconsideration of the elements of it, which may affect ultimately the total. In this case, if no alteration of the agreed division were allowed, the burden of expense might have terminated the service on the part of the Montezuma Company, or even caused the failure of the company. And the allowance to it of a larger share from the present rate might involve the necessity of ultimately raising the rate in order to sufficiently compensate the Bell Company. So, while it might seem that the public had no interest in the mere division of an uncontested rate with the result that when alone attempted it would be without the functions of a rate commission, yet on closer examination it will appear so intimately involved with the rates themselves as to be inseparable from them and so of public concern. That the Commission understood it was passing upon the division of a joint rate is sufficiently shown by the caption of the order and the language of its body. Aside from the challenge of the power to make the order, no question was raised on the hearing of its propriety.

[3] 3. There is a plausible contention that the contracts had been abandoned, but we deal with the case as though they were still of force. The contention that, if the order was within the statutory power as the division of a joint rate, it yet was unconstitutional as impairing the obligation of the contracts and taking property in them without due process of law, cannot be sustained. The Legislature had declared the public telephone business to be one of public concern and subject to regulation prior to the making of these contracts. "One whose rights, such as they are, are subject to state restriction, cannot remove them from that power by making a contract about them. The contract will carry with it the infirmity of its subject-matter. Hudson County Water Co. v. McCarter, 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420,

affirming 142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358, 145 Ga. 658, 89 S. E. 779; City of Dawson v. Dawson Telephone Co., 137 Ga. 62, 72 S. E. 508.

No substantial reason for interference appearing, a preliminary injunction will be refused.

LEIGH ELLIS & CO. v. PAYNE, Agent.

(District Court, N. D. Georgia. June 5, 1921.)

No. 480.

1. **Carriers ⇐160—Limitation in bill of lading valid.**
   A provision in a bill of lading limiting the time of bringing suit for loss or damage to two years and one day after delivery of the property *held* valid and enforceable.
2. **Carriers ⇐160—Statutory extension because of suit dismissed not applicable to limitation in contract with carrier.**
   Park's Ann. Civ. Code Ga. § 4381, providing that a suit in renewal of one dismissed, but which had been brought in time, shall stand on the same footing as to limitations as the original suit, applies only to statutory limitations, and does not extend the time for bringing a suit barred by a limitation in a contract with a carrier.
3. **Carriers ⇐57—Not liable to holder of order bill of lading for shortage in weight of package freight.**
   Under Bills of Lading Act Aug. 29, 1916, § 20 (Comp. St. § 8604jj), where a carrier loads package freight, like cotton in bales, it is required to state in the bill of lading only the number of packages and such marks or discription as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words "subject to correction" does not render the carrier liable to a holder of the bill, under section 22 (section 8604kk), for a shortage in the weight.

At Law. Action by Leigh Ellis & Co. against John Barton Payne, agent. On demurrer to amended petition. Demurrer sustained.

Watkins, Russell & Asbill, of Atlanta, Ga., for plaintiff.

Colquitt & Conyers and Brandon & Hynds, all of Atlanta, Ga., for defendant.

SIBLEY, District Judge. The amended petition, filed January 28, 1921, is admitted by the demurrer as true and makes this case: On March 25, 1918, the Director General of Railroads issued a bill of lading for cotton moving in interstate commerce, "consigned *to order of* Savage Cotton Company, Incorporated. * * * No. of packages, 200. Description of articles and special marks, B/C two hundred, marked M. A. R. S. Car initials, A. C. L. No. 40779 and Wabash No. 71014. Weight (subject to correction) 99,300 lbs."—with freight prepaid in a stated amount. Among the conditions indorsed on the bill and referred to in its face was this:

"Sec. 3. * * * And suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery then within two years and one day after a reasonable time for delivery has elapsed."

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

A similar bill was issued for 100 other bales. Savage Cotton Company sold the cotton, indorsed the bills of lading and attached them to a draft on plaintiff, who paid the draft and took up the bills. The 300 bales of cotton were duly delivered, but were found to weigh 26,839 pounds less than the weights stated in the bills. A claim was made for the shortage, and a suit filed within two years and one day from the delivery, which was dismissed because brought in the wrong venue. Within six months of the dismissal, but more than two years and one day after delivery, this suit was filed in renewal of that.

[1] 1. The suit is barred by the contract limitation. In dealing with a 90-day limitation in a bill of lading for live stock, the Supreme Court, in 1913, said:

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. * * * The provision requiring suits to be brought within ninety days is not unreasonable." M., K. & T. Railroad v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

The ruling was repeated in T. & P. Railroad Co. v. Leatherwood, 250 U. S. 479, 39 Sup. Ct. 517, 63 L. Ed. 1096, as to a six-months limitation in a bill of lading issued before the Act of March 4, 1915. 38 Stat. 1196. That act provided:

"It shall be unlawful for any * * * common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims a shorter period than four months and for the institution of suits than two years." Comp. St. § 8604a.

This act plainly recognizes the propriety in bills of lading of contract limitations for the bringing of suits, and names two years as a reasonable period to be stipulated. There is nothing in the Bills of Lading Act of August 29, 1916, 39 Stat. 538 (Comp. St. §§ 8604aaa–8604w), to the contrary.

The ruling of the Interstate Commerce Commission, in Decker & Sons v. Director General, 55 Interst. Com. R. 453, is not controlling here. Its conclusion that the voluntary payment of meritorious claims, duly presented and held up without action for more than two years, was not improper, did not necessarily require a consideration of the question whether a suit could be then maintained. So its conclusion that *for the future* bills of lading ought to date the limitation on suits from the *rejection of the claim*, though evidently a finding that the dating of it from the time of delivery of the shipment was unreasonable in a sense, did not annul the rights of parties under contracts made in the past. Their rights are rather controlled by the decisions and statutes referred to above.

[2] 2. The statutes of Georgia (Park's Code, § 4381), as of many other states, provide, as an exception to the legal periods of limitation, that a suit in renewal of one dismissed, but which had been brought in time, should stand on the same footing as to limitation as the original

suit. But the plaintiff here is not met with any statute of limitations, state or federal, but only with a contract limitation. The exception of the Georgia statute of limitations is not imported as an exception into the absolute stipulation of a contract. It has been so ruled repeatedly by the Supreme Court of Georgia; Melson v. Phenix Insurance Co., 97 Ga. 722, 25 S. E. 189; Gross v. Globe Insurance Co., 140 Ga. 531, 79 S. E. 138. In Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 391 (19 L. Ed. 257) it is declared:

"The action mentioned in the condition, which must be commenced in the twelve months, is the one which is prosecuted to judgment. The failure of a previous action for any cause cannot alter the case although such previous action was commenced within the period prescribed."

The plaintiff, therefore, derives nothing from his previous ineffectual suit.

3. It is said that the contract limits only suits for the loss of or damage to goods shipped and does not cover the statutory liability here involved, and reference is made to the language of section 1 of the conditions indorsed on the bill. Whatever may be the scope of section 1, the language of section 3, "Suits for loss, damage or delay," is broad enough to include all suits for damages arising out of the contract of shipment, including the damage caused the bona fide holder of an order bill by its misrecitals.

[3] 4. The case also fails on the merits. It is not claimed that the loss in weight was due to any injury to the cotton or to the destruction of any part of it, but the liability asserted is (petition, par. 15):

"That by receiving and issuing bills of lading for a total of 149,025 pounds of cotton, when in truth and in fact the cotton weighed 122,186 pounds, said railroad and the Director General and the United States became bound to the owner and holder of said bills of lading to deliver the amounts of cotton receipted for, which amounts were stated in the two bills of lading hereinbefore referred to."

The claim is based on that part of section 22 of the Bills of Lading Act which relates to "order bills," such as these are:

"Sec. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading * * * for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

It is said the damage here was caused by (1) "the nonreceipt by the carrier of part of the goods," in that 26,000 less pounds of cotton were received by it than were called for by the bill of lading; and (2) by the failure of the sales to "correspond with the description thereof in the bill at the time of its issuance" in the matter of their aggregate weight. It will be noted that the statement of the bills here as to weight is not absolute or positive, but the weight is stated "subject to correction," indicating that it may not be exact and is not represented to be. Now

the liability declared in section 22 must be considered in the light of sections 20 and 21, which define the duties of the carrier in making the bill of lading and the things that must be ascertained by him and stated in the bill. These sections divide goods delivered for shipment into, first, those loaded by the carrier, dealt with in section 20; and, second, freight loaded by the shipper, dealt with in section 21. Each of these classes is again divided into (a) package freight; and (b) bulk freight. As to goods loaded by the shipper, whether package freight or bulk freight, section 22 permits the carrier to describe the goods in the bill of lading merely by the marks on the packages, or to state that the contents and condition of packages are unknown or are said to be of a stated kind or quality, or that they are "shipper's weight, load and count," and if the statements are true they impose no liability on the carrier for failure of the goods to correspond in kind or quality or condition to that indicated by the marks or statements of the consignor; but, if the shipper of *bulk* freight has available weighing facilities, the carrier on written request and reasonable opportunity must ascertain the kind and quantity, and such words as "shipper's weight" inserted in the bill will be treated as void.

In the case at bar there is nothing to indicate that the cotton was loaded by the shipper, so we turn to section 20, dealing with shipments loaded by the carrier:

"Sec. 20. When goods are loaded by a carrier such carrier *shall count* the packages of goods, *if package freight*, and ascertain the kind and quantity *if bulk freight*, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, 'shipper's weight, load and count' or other words of like import, indicating that the goods were loaded by the shipper and the description made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

This section makes it the duty of the carrier in loading *package freight* to *count the packages,* but lays no duty on him to ascertain the kind, quantity, or weight. In loading bulk freight he must ascertain the kind and quantity. The fair implication is that he must state in the bill the number of packages so counted, and the kind and quantity of bulk freight so ascertained. Section 22 imposes a liability for failure in accuracy of the statement so made in an order bill, making them in effect warranties. Section 20 forbids any qualification of the statements as to these matters so required to be made; such qualifications being "as if not inserted therein."

Cotton in permanent bales is package freight. The bales are capable of marking and identification as are other packages. The sole duty laid on the carrier by section 20, in loading the bales, is to count them, and he need state in the bill of lading only the number of packages and such marks or description as will serve to identify the packages meant. Not being bulk freight in the meaning of the section, kind and quantity need not be ascertained and stated. If the description in the bill be enlarged by stating the nature of the contents of the packages, or the weight of them, it is voluntary and gratuitous, and the statement may

be guarded and qualified as the carrier sees fit. Since freight is based on weight, the carrier will generally ascertain the weight also in the case of package freight, and may conveniently state it in the bill as the basis for the freight charge. In doing so the statement may be made as "subject to correction," as in the case at bar; for the prohibition of the statute against a qualification of the statement of the quantity applies only to bulk freight. If the carrier should, in an order bill, state more than the statute requires as to kind or description or quantity, it may be that the liability imposed by section 22 to respond for damage caused would apply. In some state jurisdictions such liability is recognized independently of statute. Thus, where the packages were stated to be "cotton," there was a liability when they were only "motes." C., R. I. & P. Railroad v. Cleveland, 61 Okl. 64, 160 Pac. 328. So where 100 bales were stated to have been shipped, when in fact there were only 96. L. & N. Railroad v. Pferdmenges, 8 Ga. App. 81, 68 S. E. 617. But the ground of liability disappears when the statement is so qualified as to indicate that it is not made absolutely. N., C. & St. L. v. Flournoy, 139 Ga. 582, 77 S. E. 797. The statement here as to the weight of the bales, although it might have imposed liability, if made absolutely, was so qualified as to indicate that it was to be corrected, and the qualification was not forbidden by law. It is appreciated that since cotton is not bought and sold by the package, but by the pound, this conclusion militates greatly against the attainment of one of the aims of the Bills of Lading Act; but the liability cannot be extended beyond the plain words of the act.

The demurrer will be sustained.

ROSSIE v. GARVAN, Alien Property Custodian, et al. (two cases).

(District Court, D. Connecticut. June 3, 1921.)

Nos. 1512, 1513.

1. **Partnership ⇐268—Between citizen of United States and alien enemy dissolved by war.**
   Under the settled law of the United States, which is based on public policy, a partnership between citizens of the United States and citizens or subjects of a foreign country is dissolved by a declaration of war between the two countries, regardless of the fact that it is a partnership of the foreign country, by whose laws war does not effect a dissolution.

2. **War ⇐12—Citizen members of German partnership, dissolved by war, entitled to recover their share of American assets.**
   Where some of the members of a German partnership were German subjects, and others were citizens of the United States, where a branch of the business was conducted, the American members *held* entitled, under Trading with the Enemy Act Oct. 6, 1917, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), to recover their share of the property and assets of the firm in the possession of the Alien Property Custodian and the Treasurer of the United States.

3. **Partnership ⇐305—Partners presumed entitled to share equally in assets on dissolution.**
   In the absence of any provision on the subject in a contract of partnership by which the partners were to share equally in the profits, the

presumption is that they are entitled to share equally in its property and assets on dissolution.

In Equity. Suits by John Rossie and by Ernst Rossie against Francis P. Garvan, Alien Property Custodian, and others. Decrees for complainants.

Frederick H. Wiggin, of New Haven, Conn., and Chauncey B. Garver, of New York City, for plaintiffs.

Allan K. Smith, Asst. U. S. Atty., of Hartford, Conn., and Dean H. Stanley, of Washington, D. C., Sp. Asst. Atty. Gen., for defendants Alien Property Custodian and Treasurer of the United States.

James E. Wheeler, of New Haven, Conn., for defendants Elizabeth Rossie and others.

THOMAS, District Judge. Separate bills in equity were filed in behalf of each plaintiff. By order of court they were consolidated, tried together, and will be decided together. The suits were brought pursuant to the provisions of section 9 of the Trading with the Enemy Act (40 Stat. at Large, c. 106, p. 411 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e]), and are against the Alien Property Custodian, the Treasurer of the United States, and five other defendants. Section 9 provides, inter alia:

"That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States," may, after the performance of certain conditions precedent, all of which have been complied with in these cases, "at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the District in which such claimant resides, * * * to establish the interest, right, title, or debt so claimed."

The plaintiffs are naturalized American citizens living in Mystic, Conn., and have resided continuously in the United States for some years prior to and since naturalization. John Rossie obtained his final papers on June 4, 1912, and Ernst Rossie received his on October 5, 1915. They were members of a partnership which was formed by an agreement written in German, and signed by them at Mystic, Conn., on October 21, 1912; the partnership contract having been previously signed by the other partners, Carl Rossie, Marie Rossie, Kuni Rossie, and Alfred Rossie, in Germany, on October 7 and 8, 1912. The partnership agreement was also signed in Germany by C. Ad. Rossie, but he died before these suits were brought, and under the terms of the contract his widow, Elizabeth Rossie, succeeded to his interest, and so became a member of the partnership in his stead, and is also named as a party defendant, together with the other German partners, all of whom have been at all times German subjects residing in Germany.

It appears, from the terms of the partnership agreement and from other evidence, that each one of the seven members of the partnership agreement was entitled to receive one-seventh of the partnership profits. The partnership was the owner of 400 out of a total of 500

shares of the capital stock of the Rossie Velvet Company, a New Jersey corporation, engaged in the manufacture of velvets at Mystic and Willimantic, Conn. The product manufactured by this corporation was sold in the United States, and none of it was exported to Europe.

The partnership was engaged in the manufacture in Germany of velvets, but the American branch of the business was larger, and its gross sales exceeded those of the German Branch. The partnership also owned three parcels of land in Mystic, Conn., which were, at the time of the trial, of the aggregate value of $13,250. The firm owed no debts at the time of the declaration of war between the United States and Germany.

The parties are agreed, as appears from the pleadings and evidence, that between October 22, 1917, and November 1, 1918, there came into the custody of the Alien Property Custodian, after investigation and determination as prescribed in the Trading with the Enemy Act said 400 shares of the capital stock of the Rossie Velvet Company, said three pieces of real estate in Mystic, and various amounts of cash and Liberty Bonds. The 400 shares of stock of the Rossie Velvet Company were sold at auction by the Alien Property Custodian, so that at the time of trial the Treasurer of the United States held, credited to "Trust No. 2692—Gebruder Rossie," Liberty Bonds of the par value of $655,000, cash amounting to $721,419.89, and the real estate above mentioned, of the value of $13,250.

The prayers for relief in each bill seek to have the Alien Property Custodian and the Treasurer of the United States pay over and deliver to each plaintiff a one-seventh part of said property now held by the Treasurer of the United States, including the interest coupons attached to said Liberty Bonds, or the proceeds of any which may have been collected, and any interest which may have been received on the money collected.

It appeared in evidence, and I find as a fact, that under the German law, if a partnership is organized in Germany and has its principal place of business there, and some of the partners reside in Germany, while others reside in the United States, the partnership was not dissolved by the outbreak of war between Germany and the United States, and that a partnership of this character could, under German law, be dissolved before the date fixed in the agreement for its termination only by a petition to a German Court praying for such dissolution. It further appeared, and I find as a fact, that since the war German courts have, on petition of German citizens, in various instances dissolved such agreements. It also appeared that a partnership is not a legal entity under the German law.

By section 2 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½aa), the word "enemy" shall be deemed to mean:

"Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory," etc.

The words "to trade" shall be deemed to mean:

Under (c): "Enter into, carry on, complete, or perform any contract, agreement or obligation."

Under section 3 (section 3115½b) it is held that it shall be unlawful "for any person in the United States," with certain exceptions, "to trade or attempt to trade" with an enemy or ally of an enemy.

Under section 3(c) it is provided:

"That it shall be unlawful for any person"—with certain exceptions—"to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, * * * or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy."

Under section 8(a)—section 3115½dd—it is provided:

"That any person not an enemy or ally of enemy holding a lawful * * * lien or other right in the nature of security in property of an enemy or ally of enemy which * * * may be disposed of on notice or presentation or demand * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian, * * * and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally."

[1] By the settled law and policy of this country all executory contracts with enemies of the United States, including partnerships, are abrogated by the declaration of war between this country and such enemy. Story on Partnership, § 315; Lindley on Partnership (5th Ed.) 585; Rowley on Partnership, §§ 186, 577; The William Bagaley, 5 Wall. 377, 18 L. Ed. 583. In Griswold v. Waddington, 16 Johns. (N. Y.) 438, Chancellor Kent, in speaking of a partnership which had been entered into between British subjects and American citizens before the declaration of war between their respective nations, said, at page 488:

"It appears to me that the declaration of war did, of itself, work a dissolution of all commercial partnerships, existing at the time, between British subjects and American citizens. By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot in that capacity make a private contract binding upon the other. This conclusion would seem to be an inevitable result from the new relations created by the war. It is a necessary consequence of the other proposition that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation, or dealing between the partners was prohibited, as unlawful? Why preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of it by either, would be a breach of his allegiance to his country? In short, it must be obvious to every one, that a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation."

The Supreme Court of the United States, in holding that the statute of limitations was suspended during the Civil War as against a citizen

of Arkansas, in a cause of action by a citizen of New Hampshire, speaking by Mr. Justice Clifford, in Hanger v. Abbott, 6 Wall. 532, at page 535 (18 L. Ed. 939), said:

"Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties."

And on page 536 of 6 Wall. (18 L. Ed. 939):

"Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress."

See U. S. v. Grossmayer, 9 Wall. 72, 19 L. Ed. 627; Insurance Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453.

This is the rule adopted by the English courts, and recent expression of it may be found in Stevenson & Co., Ltd., v. Aktiengesellschaft for Cartonnagen Industrie, [1918] App. C. 239; Zinc Corporation v. Hirsch, [1916] 1 K. B. 541; Ertel Bieber & Co. v. Rio Tinto Co., [1918] App. C. 260.

Reference to the recent case of Mayer v. Garvan, Alien Property Custodian, et al. (D. C.) 270 Fed. 229, is decisive of the proposition under discussion, as well as of the issues in these cases, for the facts there were similar to the facts here, and Judge Bingham not only followed the rule laid down in the cases above cited, but answered the contention made by the defendant, which is the same contention as is made here.

The government contends that the rule of law under discussion is of no force here, because the partnership was organized under German law, had its principal place of business in Germany, and the American assets were held for the benefit of the partnership, and hence the partnership contract was a German contract, and that, under the German law, war did not dissolve the partnership, even though some of the partners were subjects of enemy nations. It is a sufficient answer to these contentions to say that, even though the premises of the proposition be true, the conclusion stated does not necessarily follow, and Judge Bingham answers the government's contention in the Mayer Case, supra, on page 237, in the following language:

"The parties, on entering into the contract of partnership which provided for the establishment of an American house, must have understood that if the continuation of the contract, so far as it related to the American partner and the business conducted here, was, in case of war, a violation of the laws of this country, it could not be enforced here as an operative agreement. But whatever they thought about it and notwithstanding the partnership was not dissolved under the German law by the outbreak of war, it was under the law of the United States, for its laws do not sanction the continuation of business relations between its citizens and citizens of a nation with which it is at war. The Kensington, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190, and cases above cited."

It is a controlling principle of private international law that the law of the place where a contract is made will not be applied by the courts

of this country, when to do so would violate a rule of policy as declared by our own courts and our own Legislatures. The rules governing the relations between our citizens and those of a state with which we are at war are in a peculiar degree dictated by public policy, and with such rules the law of the enemy country cannot be permitted to interfere. Our policy has been developed in the cases cited, but it is more strongly shown by the act of Congress under which these suits were brought, the provisions of which, heretofore referred to, show that it is unlawful to trade with or even to send a letter to an enemy or to an ally of an enemy. As Chancellor Kent holds, the declaration of war makes the continuation of a partnership a practical impossibility. That our courts will not apply a foreign law, when to do so will violate our own policy, was held in The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; Mayer v. Garvan et al., supra.

The same rule pertains in England and it was clearly set forth in Ertel Bieber Co. v. Rio Tinto Co., [1918] App. Cas. 260, where the question was raised as to the rights, during the World War, of an English firm under an executory contract claimed to have been made in Germany and to be performed in Germany. On page 293 the court said that the German Courts—

"might decide that the existence of the suspensory clause and the continuance of the contract after the war were not against German public policy. But they could not determine in such a way as to bind an Englishman in an English Court that such a clause with these effects was not against English public policy and therefore binding on an English subject."

On page 302, Lord Parker said:

"If the policy of our law renders it unlawful for a subject of the crown to contract with a foreigner that if war break out between this country and the state of which the foreigner is a subject the latter shall be idemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction and stipulation expressly or impliedly that the contract shall be governed by a foreign law. The late Mr. Westlake sums up the law on this point in the following proposition (Private International Law [4th Ed.] § 215): 'Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law.'"

And on page 303:

"The force majeure clause in the contract in question, even if valid according to German law must be held void in the courts of this country, as contravening a general rule of public policy."

The government relies upon King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128. There it was held that a contract of limited partnership made in a foreign country, valid under its laws and not repugnant to the law and policy of New York, is enforceable in the courts of New York. It was further held that some of the dealings in New York state of a special partnership located in Cuba were governed by the Cuban law. But these conclusions were based expressly on the fact that the rule in Cuba was not contrary to the law and policy of the

state of New York. Indeed, the court said of the foreign law there under discussion, on page 31 of 69 N. Y. (25 Am. Rep. 128):

"It much resembles our own statute for the formation of limited partnerships, and, with some difference in detail, it aims at the same beneficial result, which ours has in view."

Hence the conclusion is imperative that the argument there relied upon is not applicable to the instant case. The claim that the partnership under consideration was an "enemy" within the meaning of section 2 of the act is disposed of by the holding, above stated, that the firm or partnership was dissolved by operation of law upon the declaration of war with Germany.

[2, 3] The partnership having been dissolved then the question remains whether the plaintiffs are entitled to the relief prayed for and may recover each a one-seventh share of the assets of the former firm which assets are now in the hands of the Treasurer of the United States. The partnership agreement shows that each partner was entitled to a one-seventh share in the profits of the enterprise and it appeared in evidence that each of the five German partners had a one-seventh "interest in the partnership," thus leaving two-sevenths to be equally divided between these two plaintiffs. Inasmuch as the partnership agreement does not expressly state how the assets, other than profits, shall be divided upon dissolution, we are compelled to look to the general law of partnership to determine how the assets shall be divided in case of dissolution, when the agreement itself is silent in respect thereto, and under that law the presumption is that the partners share equally. Lindley on Partnership, p. 349; Farrar v. Boswick (1836) 1 Moody & Robinson, 527; Jackson v. Crapp, 32 Ind. 422. In Peacock v. Peacock, 16 Vesey, 49, it was held that—

"As no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in anything."

From the evidence I find that the firm has no debts. It appears that all the German partners have been made parties defendant at the suggestion of counsel for the government, and that, pursuant to order of notice made by this court, they have all been served with notice of the pendency of these suits, and have, through counsel, entered their appearance in court, and filed their consents to the entry of the decree prayed for. Such being the fact, the Alien Property Custodian and the Treasurer of the United States will be fully protected by a judgment in favor of the plaintiffs. The German partners will be bound by such judgment, and no other rights are involved.

The real estate in Mystic, Conn., may be transferred to the plaintiffs, an undivided one-half share to each, and one-half of the value of said real estate, as found above, less the value of an undivided one-seventh thereof, to wit, $4,732.14, may be charged against the share of each plaintiff, to be delivered to him in accordance with this opinion. As to the cash and Liberty Bond, counsel agreed, in case judgment should be rendered for plaintiffs, that one-seventh of the property, constituting the trust in the hands of the Treasurer of the United

States, should be turned over to each plaintiff, and that this should include, as to each, one-seventh of all the income derived from the property constituting said trust, "No. 2692—Gebruder Rossie," to the date of delivery.

Judgment for each plaintiff in accordance with this opinion.

Decree accordingly.

CORVALLIS CREAMERY CO. v. VAN WINKLE, Atty. Gen. of State of Oregon, et al.

(District Court, D. Oregon. July 5, 1921.)

No. 8559.

1. **Constitutional law ⟸81—Scope of police powers of states.**
   Any legislation which has for its purpose the conservation of the health, comfort, safety, and welfare of society and by its terms is reasonably conducive thereto, and not merely an arbitrary fiat, is a legitimate exercise of the police power.

2. **Constitutional law ⟸70(3)—Expediency of legislation not questionable by courts.**
   The courts cannot declare invalid legislation professedly enacted in the exercise of the police power unless, looking through mere forms and at the substance, it clearly has no real or substantial relation to the object, but is a clear unmistakable infringement of rights secured by fundamental law.

3. **Constitutional law ⟸81—All contracts and rights subject to police regulation.**
   All contracts and all rights of property are subject to police regulation.

4. **Food ⟸1—Statute prohibiting use of misleading names or words in connection with substitute dairy products valid.**
   Laws Or. 1921, p. 307, prohibiting the use by any person, firm, or corporation dealing in substitute dairy products as a part of a trade or corporate name, or in description of the product, or on labels, packages, or containers, or in advertising matter, of the words "milk," "butter," "cream," "creamery," "churn," "cheese," "cow," or "dairy," *held* within the police power of the state and valid.

In Equity. Suit by the Corvallis Creamery Company against I. H. Van Winkle, Attorney General, and C. L. Hawley, Dairy and Food Commissioner, of the State of Oregon. On motion to dismiss bill. Motion granted.

The Corvallis Creamery Company was regularly incorporated in June, 1906, under the general incorporation laws of the state, with its corporate name as above designated. For many years it has been engaged within the state in the manufacture and sale of unadulterated dairy butter and other dairy products, and has developed a lucrative business in dairy products. Plaintiff is now dealing also as a wholesaler in nut margarine, a product of the Nucoa Butter Company, a New Jersey corporation, which manufactures its stock in San Francisco, Cal., and sells to plaintiff. The product is packed in individual cartons, containing one pound net, which have printed thereon the following words and phrases, namely: "One pound net. Nucoa Nut Margarine. Cocoa-Nut Brand. For Table Use. Free from Animal Fats. Oleomargarine. Contains 1/10 of 1% Benzoate Soda. The Nucoa Butter Company. Reg. U. S. Pat. Office. We brand this product oleomargarine to comply with

the law, but it is absolutely free from animal fats. The Nucoa Butter Company, San Francisco, California."

In selling the product, plaintiff makes both sale and delivery in the original boxes as received from the manufacturer, and in quantities not less than ten pounds. These boxes have stamped or printed thereon the following words: "Nucoa Nut Margarine. Cocoa-Nut Brand. The Nucoa Butter Company. Registered U. S. Pat. Office. Ingredients: Cocoanut Oil 76%, peanut oil 5%, caseine 2½%, salt 2½%, moisture 14%. Oleomargarine. Factory No. 2, First District, California. This product contains no animal fats, therefore not subject to Bureau of Animal Industry inspection. Nucoa Butter Company."

The plaintiff complains that the Legislative Assembly of the state has passed an act, penal in its nature, which by its first section provides: "That it shall be unlawful for any person, firm, corporation or association engaged in the business, in whole or in part, of manufacturing, selling, offering for sale, advertising or otherwise dealing in or with any product used or intended or designed to be used as a substitute for milk, butter, cheese or any other pure dairy product, to use as a part of his, their or its trade or corporate name, or as a name or description of his, their or its product, or to use in or on his, their or its labels, packages, containers or advertising matter or sales literature thereto relating, any of the following names: 'Milk,' 'butter,' 'cream,' 'creamery,' 'churn,' 'cheese,' 'cow,' or 'dairy,' nor shall any pictorial or other representations resembling any or all of the foregoing be used in or on the labels, packages, containers, advertising matter or literature referred to: Provided, however, that nothing in this act shall apply to products manufactured in this state for the purpose of shipping out of the state, and not offered for sale in this state, and that it shall not be unlawful to use the word 'milk' when immediately preceded by the word 'imitation' when displayed with equal prominence; and provided further, that this act shall not be construed to forbid a true statement of or concerning the ingredients or composition of any such product or of the contents of any such package or container, when such statement is not misleading or in any way deceptive, or to forbid a caution against the use of such product as a substitute for a genuine dairy product." Laws 1921, p. 307.

Among other things, it is alleged that plaintiff has among its customers in Oregon corporations which have and use as a part of their corporate names, respectively, the words "milk," "butter," "cream," "creamery," and "dairy," and that defendants threaten with prosecution all such who deal in nut margarine, the product of the Nucoa Butter Company, because, it is asserted, they are operating in violation of statute regulating the use of such words. The purpose of the suit is to enjoin the defendants from thus interfering with the business of plaintiff; and the sufficiency of the complaint is questioned by a motion to dismiss.

Wood, Montague & Matthiessen, of Portland, Or., for plaintiff.

Wilson & Guthrie, of Portland, Or., and Willis Moore, Asst. Atty. Gen. of Oregon, for defendants.

WOLVERTON, District Judge (after stating the facts as above). [1] The constitutionality and validity of the statute are challenged by the proceeding. It is submitted whether the statute evidences a legitimate exercise of the police power. The police power, as is well understood, has relation to the promotion of the health, comfort, safety, and welfare of society. Any legislation which has for its purpose the conservation of any one of these objects, and by its terms is reasonably conducive thereto, and not merely an arbitrary fiat, must be considered to be a legitimate exercise of the power. Purity Extract Co. v. Lynch, 226 U. S. 192, 202, 33 Sup. Ct. 44, 57 L. Ed. 84.

[2] The legislative judgment as to the necessity or expediency of the legislation adopted is entitled to have its due scope and potency, not to be interfered with by the judicial department of the government. Indeed, the courts cannot interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted, professedly to conserve the public morals, health, or welfare of society, has no real or substantial relation to the object, but is a clear, unmistakable infringement of rights secured by the fundamental law. Booth v. Illinois, 184 U. S. 425, 429, 22 Sup. Ct. 425, 46 L. Ed. 623.

"It is plainly not enough," says the court, in Price v. Illinois, 238 U. S. 446, 452, 35 Sup. Ct. 892, 894 (59 L. Ed. 1400), "that the subject should be regarded as debatable. If it be debatable, the Legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the Legislature has decided."

See, also, Hebe Co. v. Shaw, 248 U. S. 297, 303, 39 Sup. Ct. 125, 63 L. Ed. 255.

[3] All contracts and all rights of property are subject to police regulation. Lorntsen v. Union Fisherman's Co., 71 Or. 540, 545, 143 Pac. 621.

Neither the "contract" clause of the Constitution nor the "due process" clause thereof "has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community"; and "all contract and property rights are held subject to its fair exercise." Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558, 34 Sup. Ct. 364, 368 (58 L. Ed. 721).

Congress has by its legislation expressly recognized state authority through its legislative function to exercise its police powers respecting all articles known as oleomargarine, imitation, process, or adulterated butter, or any substance in the semblance of butter, or not the usual product of the dairy, and not made exclusively of pure or unadulterated milk or cream, to the same extent and in the same manner as though such articles or substances had been produced in such state, and such articles and substances are not exempt therefrom by reason of being introduced therein in original packages or otherwise. 3 Fed. Stat. Ann. (2d Ed.) 353 (Comp. St. § 8740). And while Congress itself has primarily dealt with the product known as oleomargarine, and the manner in which it shall be handled in trade, the state has heretofore denounced the act of selling as butter any article, product, or compound made wholly or partly out of any fat, oil, or compound thereof, not directly or wholly produced from pure, unadulterated milk or cream of the same, which has been or is colored to imitate yellow butter produced from pure unadulterated milk or cream of the same. Oregon Laws, § 8725; 1915 Laws of Oregon, c. 343, § 72. The state has also dealt with the subject of food and articles which enter into the composition thereof, and the misbranding of the same, to protect the public from having foisted upon it adulteration, or food containing poisonous or deleterious substances. Section 8687, Oregon Laws; 1915 Laws of Oregon, c. 343, § 35.

[4] But, notwithstanding these regulations, the Legislative Assembly has obviously deemed it wise to enact further legislation to prevent, as the title of the act signifies, the use of the words "milk," "butter," "cream," "creamery," "churn," "cheese," "cow," or "dairy," or pictorial or other representations thereof, by manufacturers, vendors, dealers, or advertisers of products intended, used, or devised as substitutes for pure dairy products.

The single question presented is whether the act constitutes a reasonable exercise of the police power; or, putting it conversely, whether it is merely arbitrary denunciation of an act or supposed practice without any reasonable basis for its promulgation as a law or regulation. The act can be sustained only upon the ground that it is reasonably calculated in some way to promote the health, comfort, safety, or welfare of society.

Concretely, the act denounces the use by any person, firm, or corporation dealing in any product used or designed to be used as a substitute for milk, butter, and the like as a part of his or their trade or corporate name, or as a name or description of his or their product, or to use in his or their labels, packages, containers, or advertising matter or sales literature any of the words or names indicated both in the title and in the act.

The act has three aspects; that is, it is directed to the use of these words (1) in the trade or corporate name, (2) as descriptive of the product, and (3) to the use of such words upon labels, containers, or in advertising matter.

It will not be gainsaid that the pure dairy product is one of the most wholesome and nutritious of all food products, and it enters largely into the food consumption of the world. No other substance from which butter, so denominated, is manufactured contains exactly the same food or nutritive elements or ingredients as does the pure dairy product. This affords some reason, at least, why the public should be protected to the utmost against the imposition upon it of other articles of manufacture of inferior food properties under the guise of butter, cheese, and the like manufactured from pure dairy products. Experience has taught us that the strenuous competition in trade circles affords an inducement, in some directions at least, to disregard the strict observance of fair exposition of products in the market, and goods of inferior grade are often so represented as to be obtruded upon the public as goods of a better or superior or different quality. Food products are no exception to the practice. This reaches the health and general weal or welfare of the community, and the public is entitled to be protected against the foisting upon it, through any means, of any inferior or different product as and for a pure dairy product. This must be conceded.

Now, the circumstances are, as presented by the present controversy, that plaintiff was incorporated prior to the adoption of the act in question, that it has in its corporate name the word "creamery," and that it is dealing in a product known in the trade as "Nucoa Butter Margarine," a product of the Nucoa Butter Company, manufactured in San Francisco, principally of cocoanut oil and peanut oil, and that, at

the same time it is engaged in the manufacture and sale of dairy products.

The effect of the act, if it is to be upheld, is to deprive the plaintiff of either the right to use the word "creamery" in its corporate name or the right to deal in the product of the Nucoa Butter Company. It must abandon either the word "creamery" in its corporate name or its traffic in the Nucoa Butter Company's product. As is said by counsel in their brief:

"The statute does not in any way prohibit those dealing in dairy products from also dealing in oleomargarine."

But it does prohibit the dealing in both if the corporate name is descriptive of the dairy product in the manner inhibited.

It is urged with much force that the statute prohibits the use of the proscribed terms without regard to whether or not as used they tend or may tend to deceive, and this irrespective of any such intention or apparent intention on the part of those using them. This is the crux of the controversy.

As I have shown, the statute not only inhibits the use of the proscribed words in the corporate name, but also in the description of the substitute products and in advertising matter pertaining thereto. So that the statute really has a wider scope than the circumstances of this case portend. It must therefore be sustained as a whole or invalidated as a whole. Extending to the Legislature its proper function of judging for itself the necessity and exigency for adopting the measure, I am unable to say that it is without sufficient reason to support it, or that it is void as an arbitrary fiat of supposed legislative power. The act must therefore be held to be valid. The authorities heretofore cited lead to this conclusion.

The bill of complaint will be dismissed, at plaintiff's cost.

Ex parte BERGDOLL.

(District Court, D. Kansas, First Division. April 4, 1921.)

No. 2154.

1. **Army and navy ⊂=20—Notice by mail to delinquent draft registrant held sufficient.**

Under Selective Draft Regulations, § 133, requiring the Adjutant General of a state, on receipt of a report from a local board that a registrant was delinquent in failing to appear for examination when ordered, to forthwith notify such delinquent to report to him at a time designated, not less than 10 days from the date of the notice, and that on failure to report he would be in the military service from that date, the mailing of such notice to the registrant at the address given by him *held* sufficient; personal service, in view of all the conditions, not being required.

2. **Army and navy ⊂=20—Notice to delinquent draft registrant sufficient.**

That the time designated in such notice for the delinquent to report was not 10 full days after the date of the notice, where before that time

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

the order was in due form suspended and a second notice given, extending the time, *held* not to prevent the induction of the registrant into the service on his failure to report within the extended time.

Habeas Corpus. On petition of Erwin R. Bergdoll for a writ to obtain release from confinement under sentence of a general court-martial. Denied.

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

Fred Robertson, U. S. Atty., and L. S. Harvey, Asst. U. S. Atty., both of Kansas City, Kan., for respondent.

POLLOCK, District Judge. Erwin R. Bergdoll, petitioner, confined in the disciplinary barracks, Ft. Leavenworth, this district, under sentence and judgment of a general court-martial for a term of four years, files and presents his petition for writ of habeas corpus to obtain his release from such confinement. To this petition the commandant of the prison has filed his response, which has been duly traversed. On issue so joined evidence dehors the record of the court-martial proceeding has been taken, filed, and ordered made a part of the record of this case, and the matter now stands fully presented in oral argument and on written and printed briefs and arguments for decision.

The facts disclosed by the record, briefly stated, are in substance as follows:

Petitioner, then a citizen of Pennsylvania within the selective draft age, received his questionnaire, answered, and returned it to the local board. On this questionnaire he was classified by the local board 1–A and notified to appear for physical examination. In response to this notice he personally appeared with friends at the home of the chairman of the local board the night before the day he was to be examined, in an effort to be excused from taking the examination. Being unsuccessful in this, he absconded and remained absent and unfound by the authorities for a space of more than two years. Meanwhile he was reported to the Adjutant General of the state of Pennsylvania as delinquent on form No. 1013 S. S. R. On April 29, 1918, he was by the Adjutant General notified to report to him for instructions on May 9, 1918. This notice was given on form No. 1014 S. S. R., and was sent through the mails properly addressed to petitioner at his post office address as by him given the selective draft officials.

In response to this notice the wife of the petitioner addressed a letter to the Adjutant General, claiming petitioner had appeared at the office of the local board and made a claim for deferred classification. The Adjutant General, treating this letter as a response from petitioner himself, on May 2, 1918, suspended the operation of his former order of April 29th and gave petitioner until May 19, 1918, to report to him for instructions. This order was given on form No. 1015 S. S. R. and was properly addressed and mailed to the post office address of petitioner as by him theretofore given to the selective draft authorities.

Petitioner, having absconded, and failing to appear in response to this order of May 19th, was reported absent without leave, and without intent on his part to return or appear in obedience to the law and

orders given him, and was declared a deserter. Thereafter, in the month of August, 1920, petitioner gave himself up to the authorities, was charged and tried before a general court-martial under the Fifty-Eighth Article of War for the crime of desertion (Comp. St. § 2308a), was convicted, and sentenced to confinement in the disciplinary barracks for a term of four years, where, being confined, he has applied for his release from custody on writ of habeas corpus.

The response of the petitioner made by the commandant of the prison admits the detention of petitioner and pleads justification of such detention under the verdict and sentence of the general court-martial which tried him for desertion from the army.

Filed with the petition for the writ is a copy of the proceedings had on the court-martial trial of petitioner, from which it is asserted in the petition the verdict, sentence, and judgment of the court-martial is absolutely void and without jurisdiction for the following reasons, to wit:

(a) It is not shown affirmatively, positively, and unequivocally by said record of proceedings and trial that the alleged court-martial was convened in a territorial department pertaining to and connected with the army of the United States.

(b) It is not shown affirmatively, positively, and unequivocally by said record of proceedings and trial that the alleged members constituting the alleged court-martial as named, and as present and sitting, were officers in the military service of the United States.

(c) It is not shown affirmatively, positively, and unequivocally by said record of proceedings and trial that the convening order, attempting to appoint and convene said alleged court-martial was issued personally by a commanding officer who was in the military service of the United States and who was in command of a territorial department of the army of the United States.

(d) It is not shown affirmatively, positively, and unequivocally by said record of proceedings and trial that the convening order, attempting to appoint and convene said alleged court-martial, was issued in the name and by the authority of a commanding officer who was in the military service of the United States and who was in command of a territorial department of the army of the United States.

(e) It is not shown affirmatively, positively, and unequivocally by said record of proceedings and trial that the individual who is purported to have actually issued the convening order, nor the individual who is purported to have attested the copy of said convening order in the said record of proceedings and trial as "official," either was an officer in the military service of the United States.

The order for the detail of the court-martial reads as follows:

Headquarters Eastern Department, Governors Island, New York.

July 1, 1920.

Special Orders: No. 154.

Extract.

* * * * * * * * * * * * *

5. A general court-martial is appointed to meet at Governors Island, New York, on Tuesday, the 6th day of July, 1920, at 10:00 o'clock a. m., or as soon as practicable thereafter, for the trial of such persons as may be properly brought before it.

Detail for the Court:

1. Colonel William H. Allairs, Infantry,
2. Colonel William T. Wilder, Infantry,
3. Colonel Samuel G. Jones, Cavalry,

4. Major John L. Bond, Infantry,
5. Major Robert S. Knox, Infantry,
6. Major William A. Carleton, Infantry,
7. Major Robert G. Rutherford, Jr., Infantry,

Captain Robert E. Hannay, Jr., Judge Advocate,
Judge Advocate
First Lieutenant Thomas L. Hofferman, Infantry,
Assistant Judge Advocate,
Captain John M. Weir, Infantry, Defense Counsel.

A greater number of officers cannot be assembled without manifest injur. to the service.

The President is authorized to employ a reporter.

(250.42 J. A.)

By command of Major General Bullard:

William Weigel, Colonel, General Staff,
Chief of Staff.

Official:

A. C. Tipton, Adjutant General, Acting Adjutant.

Headquarters Eastern Department, Governors Island, N. Y.
July 30, 1920.

Special Orders: No. 178.

1. Lieutenant Colonel Charles C. Creason, Judge Advocate, is detailed judge advocate of the general court-martial appointed by paragraph 5, Special Orders No. 154, these headquarters, July 1, 1920, vice Captain Robert E. Hannay, Jr., Judge Advocate, relieved as Judge Advocate and appointed Assistant Judge Advocate of the same court, for the trial of Erwin Rudolph Bergdoll, draft registrant, only. (250.42 J. A.)

By command of Major General Bullard:

William Weigel, Colonel, General Staff,
Chief of Staff.

Official:

Ralph Harrison, Adjutant General, Adjutant.

Headquarters Eastern Department, Governors Island, N. Y.
August 9, 1920.

Special Orders: No. 186.

Extract.

Par. 5. Major Rinaldo R. Wood, Infantry, and Captain Clifford Bluemel, Infantry, are detailed additional members of the general court-martial appointed to meet at Governors Island, N. Y., by par. 5, Special Orders No. 154, these headquarters, July 1, 1920, for the trial of Erwin Rudolph Bergdoll draft registrant, only. (250.42 J. A.)

By command of Major General Bullard:

William Weigel, Colonel, General Staff,
Chief of Staff.

Official:

Ralph Harrison, Adjutant General, Adjutant.

The charge and specifications on which petitioner was tried by general court-martial, as shown by the record, read as follows:

"Charge: Violation of the Fifty-Eighth Article of War.

"Specification: In that Erwin Rudolph Bergdoll (alias Irwin Rudolph Bergdoll), of Broomall, county of Delaware, state of Pennsylvania, last-known residence and designated address, Broomall, Marple, Pennsylvania, being subject to military service under the Selective Service Act of May 10, 1917, with supplementary and amendatory acts, resolutions and regulations, having been duly registered, on or about the 5th day of June, 1917, under said Selective Service

Law, at precinct of Marple, county of Delaware, state of Pennsylvania, and thereafter being included among those registrants to be classified and arranged by local board for division No. 3 for the county of Delaware, state of Pennsylvania, at borough hall, Ridley Park, Pennsylvania; and thereafter being given order No. 1553, Serial No. 409; and thereafter, on or about the 17th day of January, 1918, questionnaire being returned and submitted to said local board for Division No. 3, by said Bergdoll; and thereafter, on or about the 1st day of February, 1918, said Bergdoll being classified by said local board in class 1–A; and thereafter, on or about the 9th day of April, 1918, said classification being posted in the office of said local board, notice of same mailed to said Bergdoll, and the record of said Bergdoll forwarded to the district board; and thereafter, on or about the 11th day of April, 1918, said district board also classified said Bergdoll in class 1–A; and thereafter, on or about the 15th day of April, A. D. 1918, said Bergdoll being mailed a notice to appear for physical examination; and thereafter, on or about the 24th day of April, A. D. 1918, said local board for division No. 3, Delaware county, Pennsylvania, certifying to the Adjutant General of the state of Pennsylvania that said Bergdoll had failed to report for said physical examination; and thereafter, on or about the 29th day of April, 1910, said Bergdoll being sent notice by mail, on form 1014, delinquent order No. 20863, by the Adjutant General of the state of Pennsylvania to report by mail, telegraph, or in person to the office of the Adjutant General of said state of Pennsylvania not later than 1:00 p. m., on May 9, 1918, and that unless orders rescinding such order were issued that from and after that date he would be in the military service of the United States, and thereafter, on or about the 3d day of May, 1918, said Bergdoll being sent notice by mail, on form 1915, by said Adjutant General of the state of Pennsylvania that the order inducting him into the military service, contained in said delinquent order No. 20863, theretofore mailed on said April 29, 1918, was suspended until 1:00 p. m., on the 19th day of May, 1918, that pending the latter date he would immediately report to his local board, that if he did not do so, then and there, after the date last specified, he would be in the military service of the United States and subject to military laws and thereafter, said Bergdoll failing and neglecting to so report to said local board; said Erwin Rudolph Bergdoll (alias Irwin Rudolph Bergdoll) did then and there, on or about the said 19th day of May, 1918, willfully, knowingly, unlawfully, and with intent to evade such military service, fail and neglect so to report under such induction orders and, being then and there duly inducted into the said military service of the United States, did then and there, thereby, desert the said service of the said United States, and did remain absent in desertion until he surrendered to the military authorities of the said United States at Governors Island, New York, on or about the 21st day of July, 1920.

"[Signed] James B. Ettridge, Captain, Quartermaster Corps."

The Fifty-Eighth Article of War, under which this charge was made and petitioner tried, convicted, and sentenced, reads as follows:

"*Desertion.*—Any person subject to miltary law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct."

Conceding the claim of the petitioner to be a correct statement of the law that a court-martial is a court of special and limited jurisdiction, hence the record made in said court, when called in question, must affirmatively show on its face the jurisdiction and power of the court to proceed to trial and judgment, as has been many times decided (Kempe's Lessee v. Kennedy, 5 Cranch. 174, 3 L. Ed. 70; Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221; Walker v. Turner, 9 Wheat.

541, 6 L. Ed. 155; Grignon's Lessee v. Astor, 2 How. 319, 11 L. Ed. 283; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Runkle v. United States, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167), and this notwithstanding the recent decision by the Supreme Court in William J. Givens, Appellant, v. Fred G. Zerbst, Warden, 255 U. S. 11, 41 Sup. Ct. 227, 65 L. Ed. ——, promulgated January 31, 1921; yet, taking the record as above stated, and the complete record of the proceedings on the trial of petitioner before the general court-martial, on the one hand, and the law under which courts-martial are and throughout the entire history of our country have been established and conducted, including such general rules and orders of the heads of the Department of War as form part of the law of the land, because of such orders courts take judicial notice (see Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415), on the other hand, and I am of the opinion the record of the trial before the court-martial as disclosed by the copy filed in this case does show on its face that court was lawfully created, organized, and acted in accordance with the established principles of the military law of the land on the trial of petitioner in this case; that the charge of desertion as prepared and presented to the court against petitioner is sufficient to have conferred jurisdiction on that court to hear and determine it, and therefore, on any such ground, the verdict and sentence of the court is not void as by petitioner contended, but, on the contrary, is valid and binding, and does authorize and empower the commandant of the disciplinary barracks to hold petitioner in custody, and on any such ground the writ prayed is denied.

However, at the oral argument, and in the briefs, petitioner relies upon another ground for the granting of the writ of more serious difficulty, namely, that petitioner, at the time he was charged, tried, convicted, and sentenced by the judgment of the general court-martial, was not a part of the military forces of our country, but, on the contrary, was a civilian citizen, who had never been inducted into the military forces of the country as a soldier; hence was not subject to be charged and tried before a military court for the crime of desertion for which he stands convicted. In consequence, he contends his conviction and sentence is null and void, and he is entitled to the writ prayed.

While this ground for the granting of the writ was not asserted or relied upon in the original petition filed by petitioner, and is found alone pleaded in the unverified amendment to the petition, and, as therein asserted, the ultimate fact relied upon is not squarely stated or pleaded, but is raised only in relation to the form and manner in which the notices of the orders made upon petitioner are by the record of the court-martial trial shown to have been given petitioner; and the further claim, invalidity of the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), yet, as the amendment to the petition has been responded to without objection by the government, and as the ultimate fact of whether petitioner was subject to military law because lawfully inducted into the military forces has been

presented, argued, and submitted without objection, for the purpose of this hearing I shall treat that question as having been directly raised.

The grounds upon which it is asserted by the amendment to the petition the judgment of the court martial is null and void read as follows:

"(a) It affirmatively appears from said record that the time set in the alleged notice to petitioner to report to the Adjutant General of Pennsylvania was less than 10 days from the date of the alleged notice; (b) it affirmatively appears from said record that petitioner was never personally served with a notice to report to the Adjutant General of Pennsylvania and that he never actually received any such notice."

The sections of the Selective Service Rules thought applicable to the facts of this case are, as follows:

"Section 132. *Adjutant General to Number 'Delinquent Orders' Serially and to Keep a File of Such Orders.*

"The orders hereinafter prescribed to be given by Adjutants General to delinquents are all to be written on postal card forms. Adjutants General shall keep copies of all such orders, which shall be serially numbered and the number of each such order entered on the original and copy thereof under the caption 'Delinquent Order No. ———' in the upper left-hand corner of the card."

"Section 133. *Adjutant General to Order Delinquents to Report.*

"Upon receipt of form 1013, the Adjutant General of the state shall forthwith notify (form 1014) the persons named therein to report to him for instructions by mail, telegraph, or in person not later than a day and a hour to be specified by such Adjutant General in such notice, which day and hour shall not be less than 10 days from the date of the notice.

"The day and hour shall be specified by the Adjutant General of the state as the day and hour from and after which such registrants shall be in the military service of the United States, unless, upon the registrant reporting as ordered, the Adjutant General shall stay or rescind such order into military service.

"If the order into military service is not stayed or rescinded by the Adjutant General by a subsequent order in writing prior to the arrival of the day and hour so specified, then from and after the day and hour so specified such person shall be in the military service of the United States, and after the arrival of such day and hour the Adjutant General of the state has no power to stay or rescind such order."

"Section 5. *Forms are Part of Regulations.*

"All forms the use of which is prescribed in these Rules and Regulations, and all forms which were prescribed by pre-existing Rules and Regulations and were in use before and at the date of these Rules and Regulations, the continued use of which is either evpressly or impliedly required by these Rules and Regulations, together with the particular rules, instructions and directions contained in all such forms, are a part of these Rules and Regulations."

"Section 286. *Notice to delinquents to report to Adjutant General of State.*

"Delinquent Order No. ———.

"Office of the Adjutant General,
"State of ———,
"Date ———.

"You have been registered under the Selective Service Law and have been given due and lawful notice to present to your local board any reason why you should not be presently inducted into the military service of the United States. You have failed to present any such reason. You are therefore hereby directed to report by mail, telegraph, or in person, at your own expense, to this office for instructions not later than ——— on the ——— day of ———, 19 —. Unless upon your so reporting to this office, orders rescinding the pres-

ent order are issued, then from and after the date just specified you shall be in the military service of the United States.

"————, Adjutant General."

"Form 1014–PMGO
"See Sec. 133 S. S. R.
"Reserve of Form 1014.
"Penalty for private use, $300.
"War Department, Adjutant General of the State of ———.
"Official Business.

"————.
"————.
"————."

"In order that the local boards may be advised of the action of the state Adjutant General when the delinquent order provided for in section 133 S. S. R. is mailed, that section is amended by adding the following words to the first paragraph thereof: 'A copy of form 1014 showing the name of the registrant under words "delinquent order No." should also be sent at the same time to his local board for its information.'"

"Section 6. *Registrants and Others Charged with Knowledge of These Rules and Regulations.*

"These Rules and Regulations have the force and effect of law, and all registrants, and all persons required by the Selective Service Law and these rules and regulations to be registered, and all persons claiming or to claim any right or privilege in respect of any registrant are charged with knowledge of the provisions hereof. Failure by any registrant, or by any person required to be registered, to perform any duty prescribed by the Selective Service Law, or by these Rules and Regulations, whether or not the time of the performance of such duty is required by these Rules and Regulations to be posted or entered in the records of the local or district board, and whether or not formal notice is required by rules and regulations to be given (such as registering), is a misdemeanor, punishable by imprisonment for one year, and may result in loss of valuable rights and privileges and immediate induction into the military service; and such failure shall also be considered as a waiver of any right or privilege which might have existed in favor of such person if he had performed such duty."

"Note 1. Registrants who change their places of abode and post office addresses must communicate the same to the local boards with which they are registered. Since registrants are bound by law to keep themselves advised of all proceedings in respect to themselves, failure so to do may result in their losing rights to claim exemption or discharge or in subjecting them to penalties. (Telegram 10948, Nov. 29, 1917.)" (Note to Sec. 92, S. S. R.)

The specific objections so taken by petitioner in the amendment to his petition rest upon the following facts:

(1) The notice to petitioner to report to the Adjutant General of Pennsylvania for instructions as contained in form No. 1014 S. S. R. is shown to have been prepared and mailed on April 29, 1918, and the order therein contained was to report on May 9th; hence it is claimed 10 clear days to report were not given as by the law commanded.

(2) As the Selective Service Rules at the date orders 1014 and 1015 S. S. R. were attempted to be given petitioner did not provide in what manner the same should be served upon him, it is contended by petitioner the law required such service to have been personally made or actually given. That constructive service by mail, as was attempted in this case, was not sufficient, and for this reason petitioner was never lawfully inducted into the military service or became subject to be tried by general court-martial for the offense of desertion.

On this head it may be said: Nothing can be more certainly true

than the fact, if found to exist, if petitioner never became a member of the military forces of his country under the Selective Service Act, he could not desert therefrom. "Res ipsa loquitur."

[1] However, a study of the Selective Service Act and the rules promulgated by the President by authority thereof for its enforcement, as above set forth, having in mind the magnitude of the task undertaken, the necessity for speedy action, and the desire of all loyal citizens to accomplish results, convinces my mind it was intended by the law-making power constructive service by the use of the postal service department of the government in the giving of notice by the administrative boards and officers charged with and engaged in the enforcement of the act should be deemed in law sufficient, and that actual personal notice of service of such formal orders as forms 1014 and 1015 S. S. R. is not required by the act. The case of Farley v. Ratliff (C. C. A.) 267 Fed. 682, is strongly relied upon by petitioner as holding a contrary doctrine. However this may be, I am constrained to the view, as expressed above, the law-making power did not contemplate actual personal notice should be required, but, on the contrary, constructive service through the postal department of the government should be held sufficient.

As the orders required by law to be given essential to the induction of petitioner into the service of his country as a soldier, under the act and rules made in pursuance thereof, are shown to have been duly made and mailed to him at his post office address as by him given to the authorities, I am convinced the same must be presumed to have been by him received, in the absence, at least, of any positive showing to the contrary. See Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Schutz v. Jordan, 141 U. S. 219, 11 Sup. Ct. 906, 35 L. Ed. 705; Ex parte Blazekovic (D. C.) 248 Fed. 327.

[2] It is the further contention of the petitioner the 10 days' notice required by the rules to be given of the order on form 1014 S. S. R. was not given him, but 9 days' notice only was given. Conceding this to be true, as within said 9 days said order in due form of law was suspended by the Adjutant General and 10 additional days' time was granted petitioner in which to report, or 19 days in all, no wrong was done him in this respect. And more especially must this be true when, as conceded in this case, petitioner was willfully absent from his usual place of abode, with the intent and purpose in mind of evading his duties as a loyal citizen and the enforcement of the law against him.

As the Selective Draft Act has been presented to, and its constitutional validity upheld by, the Supreme Court, nothing on this head need be said.

As above considered, I have viewed this case in the light of the record as made in the military court alone, on petitioner's trial therein, without regard to the evidence de hors that record offered and received on the hearing of this case. If, however, in the light of the recent decision of the Supreme Court in Givens v. Zerbst, Warden, supra, such extraneous evidence should be considered, in that event, there can be no doubt whatever but that petitioner did receive actual personal notice of the orders inducting him into service; and further

many matters of which the military court and this court take judicial notice as part of the law of the land are shown to have actual existence in fact.

It follows the sentence of the court-martial in valid, and must be upheld and enforced, and the writ prayed must be denied.

It is so ordered.

BROWN et al. v. PENNSYLVANIA CANAL CO. et al.

(District Court, E. D. Pennsylvania. July 6, 1921.)

No. 677.

Corporations ⊜482(8)—Proceeds on foreclosure distributed severally to bondholders, and where bondholders do not appear, part apportioned to their bonds not found cannot be claimed by other bondholders.

Where, in a suit by a bondholder to enforce a mortgage, in which all other bondholders were permitted to intervene, on recovery, the total amount due to all bondholders was paid into court, such fund is not a common fund, but belongs to the bondholders severally in proportion to their holdings, and where the holders of some of the bonds have not appeared and the bonds have not been found, the other bondholders have no claim to the part of the fund apportioned to them.

In Equity. Suit by Alice Francis Brown and others against the Pennsylvania Canal Company and others. On report of master on petition for supplementary decree of distribution. Report not confirmed, and petition denied.

See, also, 244 Fed. 980.

Thomas Raeburn White, of Philadelphia, Pa., for certain bondholders.

DICKINSON, District Judge. The point involved is disclosed by an outline statement of the fact situation. The cause of action upon which the judgment in this case was recovered fully appears in the cases reported in 229 Fed. 444 and 235 Fed. 669, 149 C. C. A. 89.

The foundation of the plaintiff's claim was that she held the bonds of the Pennsylvania Canal Company, secured by a mortgage of the canal property of the obligor. The sum recovered was for her benefit, but all the other bondholders in like situation with her were brought in as parties to the proceeding by leave given to them to intervene. The total sum due to all the bondholders was paid in full, and distribution has been made to all those who appeared to make proof of their holdings. Before suit brought the practical situation was that for a number of years the bonds were regarded as of no value. No interest had been paid, and as a consequence holders lost sight of the fact that they were holders, and the obligor lost touch with the obligees. The result of the litigation which produced the moneys now in court, of course, revived the interest of the holders of the bonds, with the result that all of them have appeared to make proof of their holdings, with the exception of the holders of 32 of the bonds. The holders of these bonds are as yet unknown. The master appointed by the court has made every

possible effort to locate these bonds, with the result that the finding is justified that neither the bonds themselves nor the persons to whom they belong can be found, and that every effort to find them has been exhausted.

This fact situation is made the basis for the present application, which is that the moneys found to belong to these unknown holders be distributed to and among the bondholders who have appeared. The learned master recommends favorable action upon the petition, and has accompanied his recommendation with a discussion of the considerations which have moved him to make the recommendation he has made.

If the present motion presented the case, such as the master has viewed it to be, of a fund upon which a number of persons had a common claim, we would be in full accord with all of the conclusions reached by him. They are in effect, first, that the court having control of a fund, with the duty to make distribution, possesses the power to call upon all persons having claims upon the fund to present and make proof of their claims within a required time, or be thereafter debarred from making such claims, and then at the expiration of the time to make distribution of the fund to and among those who had proven their right thereto. Such a situation is frequently presented. We have it in the common case of the distribution of the moneys in the hands of an executor or administrator, representing the balance of a decedent's estate for distribution as shown by his account filed.

Another illustration is of a fund raised by execution process, upon which there are common claimants, because of a lien or otherwise, upon the property which has by execution been converted into money. There are many such illustrations. The power of the court is clear enough, because it is one of necessity. The duty of the court to exercise this power in the case of such a common fund is likewise sufficiently clear.

We are not convinced, however, that the present fund is of the kind or character to which these principles of law apply. The possession of the fund here is merely incidental to, and in a sense an accident of, the original proceeding. This was essentially a suit by the original plaintiff against the defendants named, in which she recovered a judgment. The proceeding, being in equity, was unhampered by the forms and restrictions to which it would have been subjected as a suit at law. It was in consequence expanded, so that other suitors, circumstanced as was the plaintiff, might be joined with her in that suit and recover the judgment to which each was entitled. The decree would necessarily have taken the form of a money decree, or essentially a judgment in favor of each of the plaintiffs to whom an award would have been made, and the amount of the award would have been controlled by the extent of the bond holdings of each. It would have been in essence a judgment of each bondholder against the defendants.

The accidental circumstance of which we speak was the fact that the defendants, in satisfaction of all the judgments against them, paid the total sum into court. The legal situation is precisely the same as if the money in court had been raised by execution process. A further

legal consequence is that each plaintiff was entitled to take out of court the sum to which he or she was entitled, and incidentally this was measured by each plaintiff's proportionate holdings of the bonds. In this sense each bondholder was entitled to a share in the fund, but accurately speaking each plaintiff did not share in a common fund, but each was entitled to receive the amount of the judgment each respectively had recovered. The share of each was not strictly a share in the fund, but was measured by what was the arithmetical equivalent of such share.

It follows that the legal situation presented is this: A large number of creditors have each secured judgments against common defendants. The defendants, in satisfaction of the judgments, have paid into court a total sum, which is the aggregate amount of all the judgments. Some of the plaintiffs have come forward to demand and receive that part of the fund which represents their judgments. Others of the plaintiffs have not appeared. The question presented, then, is: What right have those who have appeared and who have received payment of their judgments to demand the moneys which belong to those who have not appeared? We are unable to see that any such right exists. The only plausible basis for it is that the plaintiffs who have appeared, having judgment against the defendants, have a right to satisfaction out of any property of the defendants.

The answer to this is that the moneys in court are not the moneys of the defendants, but of the missing bondholders. American v. Grand Rivers (C. C.) 159 Fed. 775, sustains this distinction. The fund there was the property of the defendants, against which the plaintiffs had a claim in common. Here, as before stated, the moneys belong to the holders of the bonds. The only sense in which it is a common fund is as a convenient mode of expression to convey the thought that each plaintiff has a like claim to his or her part of the fund. The claims are like rather than common. It may well be that the effect of the failure of the parties to whom the remnant of the moneys in court belong to appear will be its practical escheat to the United States, because this practical result will follow from the requirement that, after a given time, all funds in the registry of the court be turned into the treasury of the United States.

The feeling on the part of the bondholders who have appeared that their claims upon these moneys is a better claim than that of the United States is a natural feeling, and there are obvious considerations which give encouragement to it. The fact, several times emphasized, remains, however, that the moneys which are in court were awarded, not to them, but to other bondholders who have not appeared. The absentees may at any time present themselves, although their appearance has become now barely more than a possibility. If and when they do appear, the moneys belonging to them should be here for them. If they never appear, the claim of the United States to the money is as well founded as that of any one else, and is a better claim by reason of the fact that no one else has any claim.

The effort which the master has made to find the owners of all bonds has met with much, although only partial, success. The labor

connected with it has been great, and has extended over a long time, and the calls upon his attention have been many and frequent. This phase of the case was not in contemplation at the time his compensation was originally fixed. It is not only just and fair, but it is necessary, that the fund should bear the cost and expense of the efforts made to find its owners, included in which is fair compensation to the master for the very faithful and efficient work which he has performed. This compensation is now fixed at $2,500, which is taxed as part of the costs which this fund should bear, and a decree may be drawn awarding this to the master.

The petition for a decree awarding the fund in court to the petitioners is denied, as is also the motion to confirm the report of the master, and exceptions are allowed to the petitioners.

UNITED STATES v. ONE CADILLAC TOURING CAR.

(District Court, E. D. Michigan, S. D. August 15, 1921.)

No. 6460.

1. **Intoxicating liquors ⇐255—Vehicle used in illegal transportation may not be sold by government prior to conviction of person arrested.**
   Under National Prohibition Act, providing that in case of illegal transportation of liquor the officer shall seize the liquor, take the vehicle, and arrest the person in charge of it, the vehicle to be returned to the owner on execution of bond, and that on conviction of the person arrested the court may order the sale of the vehicle, an automobile may not be sold because of being used in illegal transportation of liquor before the driver transporting the liquor is convicted.

2. **Intoxicating liquors ⇐247—Vehicle used in illegal transportation not forfeited as a common nuisance; "kept."**
   Under National Prohibition Act, § 21, providing that "any * * * vehicle * * * where intoxicating liquor * * * is manufactured, sold, kept or bartered * * * in violation of this title * * * is declared to be common nuisance," and is forfeited, an automobile used in the illegal transportation of liquor is not forfeited as a common nuisance, where it was not alleged that the intoxicating liquor was manufactured, sold, or bartered in the automobile or kept therein and for such purpose; "kept" meaning the keeping for sale or other commercial purpose.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Keep.]

3. **Intoxicating liquors ⇐255—Vehicle used in illegal transportation not to be released during period of time trial can be had.**
   Where an automobile was used in the illegal transportation of liquor, and was seized, but released to the owner on giving bond, since the automobile may not be forfeited until the driver is convicted of the offense of illegally transporting liquor, the automobile cannot be released, and the bond canceled until the expiration of the time within which the trial can be had.

Forfeiture Proceeding. Libel by the United States of America against one Cadillac touring car. Petition by claimant for the release of seized automobile denied without prejudice.

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

John E. Kinnane, U. S. Dist. Atty., and Fred L. Eaton, Asst. U. S. Dist. Atty., both of Detroit, Mich.

Henry Glicman, of Detroit, Mich., for claimant.

TUTTLE, District Judge. [1] The government, through the district attorney, filed a libel against the automobile involved in this proceeding, alleging that it was forfeited to the United States under the National Prohibition Act (41 Stat. 305) by reason of the violation of the provisions thereof, in that said automobile had been used in transporting certain intoxicating liquors without a permit therefor having been obtained from the Commissioner of Internal Revenue. The automobile had previously been seized by federal officials, the driver thereof arrested, and said automobile thereafter returned to the claimant on his execution of the required bond, all in accordance with the provisions of section 26 of the National Prohibition Act. Act Oct. 28, 1919, c. 85, 41 Statutes at Large, 305. This section provides as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale 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 proceeding 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. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts."

After the arrest of the persons in charge of the car at the time of its seizure, and before their trial on the charge of violation of the

prohibition statute, they were released on bail and subsequently violated such bail and their bail bonds were declared forfeited. The owner of the automobile, the claimant here, was not arrested and claims that he had no notice that it was being used for any illegal purpose. Notwithstanding this claim, this court has found, after a hearing in open court at which claimant testified in his own behalf, that he did have such notice. The court is satisfied that, so far as the good faith of the claimant is concerned, the latter has not sustained the burden imposed upon him of showing good cause why a sale of this automobile should not be ordered, provided that such sale is otherwise warranted by law.

Claimant has filed a petition praying for the release of the car and the cancellation of the bond already referred to. The principal ground on which he bases his petition is that there has been no conviction of any person for the illegal transportation of intoxicating liquor in said car, and that consequently, by the terms of section 26, hereinbefore quoted, this court is without power to order said car confiscated and sold.

It will be noted that the section of the statute under consideration provides, first, that, when an officer of the law discovers a person transporting intoxicating liquor in an automobile or other vehicle "in violation of the law," he shall seize the liquor which is being transported "contrary to law." It is next provided that, when intoxicating liquor transported or possessed "illegally" shall be seized by an officer, he shall take possession of the vehicle and shall arrest any person in charge thereof. Such officer shall at once proceed against the person so arrested, and the vehicle shall be returned to the owner upon his execution of a proper bond conditioned to return the property to the officer "on the day of trial," to abide the judgment of the court. Finally, it is provided that "upon conviction of the person so arrested" the court shall order a public sale of the property so seized, unless good cause to the contrary is shown by the owner. This being a special statutory proceeding, the procedure thus prescribed must, of course, be strictly followed. It seems clear that the section in question contemplates and requires, as a prerequisite to the sale of the property seized, a judicial determination that such property has been used in violation of the law. Considering, then, the reference to the "person" discovered in the act of violating the law, to the "person in charge" who is to be arrested, to the "person arrested" who is to be prosecuted, to the "day of trial," and to the order of sale which is to be made by the court "upon conviction of the person so arrested," I reach the conclusion that the statute requires as a jurisdictional basis for the sale in question a conviction of the person so arrested, and that until such conviction the court cannot order such sale by virtue of any authority conferred by said section. United States v. Slusser (D. C.) 270 Fed. 818; United States v. Stephens Automobile (D. C.) 272 Fed. 188.

[2] The contention of the government that the automobile is subject to forfeiture as a common nuisance under the provisions of section 21 of the National Prohibition Act, providing that "any room, house,

building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title * * * is hereby declared to be a common nuisance," is clearly without merit, as it does not appear, and is not alleged by the government, that intoxicating liquor was manufactured, sold, or bartered in said automobile, or kept therein for such a purpose, and the word "kept," as used in section 21 just quoted, refers to keeping for sale or for other commercial purpose. Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. —, 10 A. L. R. 1548, decided by United States Supreme Court November 8, 1920.

[3] No other provision of law is called to my attention or has been discovered by me which would warrant the present sale of the automobile involved herein. On the other hand, I know of no authority which would justify me in releasing such automobile and canceling the bond of the claimant during the period of time within which the trial of the person arrested in connection with this seizure can be had.

An order will be entered denying the prayers of both the libel and the petition filed herein, without prejudice to the right to a renewal thereof on a sufficient showing of such a change in circumstances as would warrant proper relief.

UNITED STATES v. ONE HUDSON TOURING CAR.

(District Court, E. D. Michigan, S. D. August 26, 1921.)

No. 6406.

1. Customs duties ⟸130—Good faith or innocence of owner of automobile seized does not prevent forfeiture.
   The good faith or entire innocence of the owner of an automobile seized for violation of the revenue laws furnishes no reason why such automobile should not be forfeited to the United States and sold in accordance with the applicable statutes; the question of good faith being immaterial in libel proceedings to enforce such forfeiture and sale.

2. Customs duties ⟸2—Provisions in customs laws for seizure of vehicles used in unlawful importation repealed by Volstead Act.
   The provisions of the customs laws (Rev. St. §§ 923, 3062 [Comp. St. §§ 1549, 5764]), providing that every vehicle carrying merchandise subject to duty or unlawfully imported shall be subject to seizure and forfeiture, etc., have been repealed, in so far as they related to intoxicating liquors imported into the United States for beverage purposes, by the National Prohibition Act, popularly known as the Volstead Act, which covers the subject-matter fully in title 2, § 25.

In Equity. Libel by the United States against one Hudson touring car. Libel dismissed.

John E. Kinnane, U. S. Atty., of Detroit, Mich.
Kerr & Lacey, of Detroit, Mich., for intervening libelant.

TUTTLE, District Judge. This is a libel filed by the United States, through the United States attorney for this district, against a certain

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

automobile alleged therein to have been seized by United States customs officials, on the ground that it was used in importing into this country certain whisky clandestinely and secretly, concealed in said automobile, without the payment of the customs duty thereon to the United States and without an entry thereof being made at the United States customs house, with intent to defraud the United States. The libel prays that said automobile be declared forfeited to the United States and sold or disposed of under the directions of this court, pursuant to the provisions of sections 923 and 3062 of the United States Revised Statutes (Comp. St. §§ 1549, 5764).

The Federal Insurance Company has filed an intervening libel, from which it appears that the automobile mentioned was stolen from its owner shortly prior to its use and seizure as aforesaid; that it had previously been insured by the owner against theft, with said company as insurer thereof; and that the latter subsequent to the theft paid the amount of such insurance to such owner and received from him an assignment of his right, title, and interest in said automobile. The intervening libel prays that the libel filed by the government against the automobile be dismissed, and that an order be entered directing that such automobile be delivered to the intervening libelant as the present owner thereof.

[1] It is now settled that the good faith or even the entire innocence of an owner of an automobile seized for violation of the revenue laws furnishes no reason why such automobile should not be forfeited to the United States and sold in accordance with the applicable statutes, and the question as to such good faith is immaterial in libel proceedings to enforce such forfeiture and sale. Grant Co. v. United States, 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. ——. If, therefore, that were the only objection available and the only question involved herein, it would be necessary to deny the prayer of the intervening libelant.

[2] A more serious question presents itself, which is whether the provisions of the customs laws, under which this automobile was seized and is sought to be thus forfeited, have been repealed, in so far as they relate to intoxicating liquors imported into the United States for beverage purposes, by the National Prohibition Act, popularly known as the Volstead Act (41 Stat. 305). As already noted, the statutory provisions relied on by the government in its libel herein are sections 923 and 3062 of the United States Revised Statutes. Section 3062 provides that every vehicle carrying merchandise which is subject to duty, or has been unlawfully imported into the United States, shall be subject to seizure and forfeiture. Section 923 prescribes the procedure to be followed in enforcing such forfeiture.

As the grounds on which the libel of the government is based are that the automobile seized was used in bringing into this country, with intent to defraud the government, intoxicating liquor on which the proper customs duty had not been paid, and of which the requisite customs entry had not been made, it is necessary to inquire whether the payment of any such duty or the making of any such entry was

required by law. When the various federal statutes, including those here involved, governing the enforcement of the customs laws were passed by Congress, the importation of intoxicating liquors for beverage purposes into the United States was lawful and the only object of such statutes was to protect the revenue by providing a method for the collection of the duties imposed upon merchandise, including such intoxicating liquors, so imported.

The enactment of the Volstead Act marked a complete departure by the government from its former policy with respect to the importation of intoxicating liquors for beverage purposes. By that act such importation for such purposes was absolutely forbidden. It is clear, therefore, that thereafter there could be no intoxicating liquors imported for beverage purposes on which any customs duty could be paid or of which any customs entry could be made. It follows that any statute then in force providing for such payment or entry, together with any statutes imposing, or prescribing the mode of enforcing, penalties for the failure to make any such payment or entry, were thus repealed by necessary implication. United States v. Yuginovich, 255 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. —— (decided by United States Supreme Court June 1, 1921); Reed v. Thurmond, 269 Fed. 252 (C. C. A. 4).

Furthermore, aside from the effect of the Volstead Act, and even if the customs laws regulating the importation of intoxicating liquors for beverage purposes were not repealed by that act, the same result would follow from the inconsistency between such customs laws and the Eighteenth Amendment to the federal Constitution, prohibiting the importation of intoxicating liquors into the United States for beverage purposes. Regardless of any other consideration, as the laws referred to impliedly recognize and assume the legality of such importation when accompanied by compliance with the regulations thereby prescribed, every such statute, if attempted to be applied to the importation of beverage intoxicating liquors, is clearly unconstitutional and void.

It may be proper, also, to point out that, if it should be, as it is not, contended that section 3062 of the Revised Statutes is broad enough in its terms to be applicable to any unlawful importation of intoxicating liquor, and therefore can be invoked for the forfeiture of an automobile used in violation of the Volstead Act, the fallacy of any argument along that line is made apparent by consideration of the fact that title 2, section 25, of the Volstead Act, fully and comprehensively prescribes the procedure applicable to the seizure and disposition of a vehicle used in violation of that act. This section of the statute, therefore, completely covers the ground of the analogous section of the customs statute heretofore referred to, which is thus superseded to that extent and repealed.

As the statutes upon which the libel herein is based are not now in force to the extent that they relate to the importation of intoxicating liquors except for nonbeverage purposes, it would be necessary, under familiar rules of pleading, if the government wished to invoke such

statutes in such a case as the one at bar, that its indictment or libel should negative the exception mentioned. Its failure to do so in the instant case must be taken as indicating that the intoxicating liquors referred to therein were imported for beverage purposes, and the libel is considered on that assumption.

For the reasons stated, the libel must be dismissed, and an order will be entered in conformity with the terms of this opinion.

BRISCOE v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. July 14, 1921.)

No. 7772.

1. **Evidence ⟸75—Facts must be determined on assumption that all available evidence was presented.**
When it is to the interest of a party to make the existence of any fact clear, it is fair to assume that such party has offered all the evidence within reach, and the fact must be determined on that assumption.

2. **Death ⟸95(3)—Damages to family measured by duty to support.**
Damages for wrongful death, recoverable on behalf of the wife and children of deceased, are measured by the amount from his earnings which he was under legal duty to contribute to their support, and not by the amount he actually contributed during his lifetime.

At Law. Action by Catherine Briscoe against the Philadelphia & Reading Railway Company. On motion by defendant for new trial. Denied.

Julian A. Pilgram, of Pottsville, Pa., and John C. Oldmixon and Frank F. Davis, both of New York City, for plaintiff.

William Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This motion has two aspects. In one it is in arrest of judgment, based upon the asserted absence of any evidence in support of it. In the other, it is an appeal to the court to exercise its discretion in supervising the estimate of damages made by the jury.

[1] 1. The first point made is that plaintiff failed to offer any evidence which could support a finding that the plaintiff's decedent met his death in the smash-up caused by the collision of two trains of the defendant. The vindication of the submission of this question to the jury and its verdict thereon exists, if at all, in the evidence directed to this fact feature of the case. We will not incumber the record with a recapitulation of it, but content ourselves with the statement of our continued belief in its sufficiency to support the verdict. This necessarily implies the duty of the court to submit it. The comment of the court upon this phase of the evidence was provoked by the fear that the jury might possibly determine the question, not by the evidence presented, but by the suspicion that the plaintiff was holding something back. When it is to the interest of a party to make

the existence of any fact clear, we are still of the opinion that it is fair to assume that such party has offered all the evidence within reach. If it is sufficient, the finding should be made. If the finding cannot be made, the party must accept the consequences. In the absence of anything to so indicate, there is no presumption of bad faith in producing evidence.

[2] 2. The second point made is an averred failure to establish a family relationship. It is not meant by this that no such legal relationship was shown. The point made is that the plaintiff's decedent had, for reasons into which it is unnecessary to go, contributed less money for the support of his family than his earning power would have warranted. The question is best discussed in the abstract. In doing so we will give to the defendant the benefit of the strongest possible fact situation, making clear, however, that this particular husband and father is not of this supposititious type. There are in the world husbands and fathers who are in no real sense deserving of the name. The treatment to which they subject their families may be such as that the wives and children would be better off with them dead than living. If one of them is killed through the actionable negligence of a third person, how far is the right of recovery controlled by the condition of the family skeleton? The probable earnings of the decedent, based upon his capacity and past performances, is a pertinent, because necessary, inquiry. This measures the money value of the life destroyed. How much of this measures the loss of his widow and children? The answer is: As much as they as wife and children, as reasonably estimated, had the right to receive from him. The capitalized sum which represents this is not measured by either the conjugal affection or philoprogenitiveness of the decedent. Nor is it affected, nor can it be, by the possibility or probability that he might seek relief from the legal obligation to which he is subject. How could such an issue be tried?

This doctrine is in no respect in conflict with Gulf v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785. The doctrine we invoke implies that a legal obligation to contribute, resting upon a proven ability to contribute, justifies a finding of reasonable expectation as the basis for an admeasurement of pecuniary loss. The facts of the case, to which the comments of Mr. Justice Lurton were directed, were that a married daughter, living independently of her father, who had neither contributed nor was expected to contribute to her support, was not entitled, as a matter of right, to share equally with the minor children, who were wholly dependent upon their father, in the sum awarded for the father's death. The sum awarded was not to be distributed on the basis of an equal distributive share in his estate, but upon the basis of the pecuniary loss which each one, to whom a right of action was given, had suffered.

3. The third complaint goes to the finding of negligence, or rather to the comments of the trial judge thereon. There is no practical value in this complaint. A verdict based upon a finding of no negligence is no more than a theoretical possibility. Assuming that it had been rendered, the verdict would have been set aside. There would

be a better and stronger basis for a complaint that the trial judge had not directed the jury to find negligence.

4. The final complaint is of the assessment of damages. It is really a restatement of the second complaint in another form. It is not averred that $15,000 is too high an estimate, based upon the capacity and past earnings of the decedent. The complaint is that it is an overestimate of decedent's proven actual contributions to the support of his family, capitalized on a proper basis. For this, as the limit of award, we are referred as authority to Chesapeake v. Kelly, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367; Chesapeake v. Gainey, 241 U. S. 494, 36 Sup. Ct. 633, 60 L. Ed. 1124.

The discussion of the subject of damages, the benefit of which we are there given, is directed to a wholly different point. Whether the jury may apportion the loss among all those who have the right to share therein is not in question. The doing so was encouraged by the trial judge. There was a reason for making the suggestion. What influence, if any, it might have upon the verdict, and whether it would benefit one party or the other, was a question. The trial judge submitted the suggestion to counsel before making. Both parties were willing to have the suggestion made. The apportionment made is open to a possible criticism. All other things being equal, the logical basis of apportionment would be the ages of the recipients, taken inversely, as, in each instance, the expectation of life would overrun the time of majority. All other things, however, may not be equal, as, for illustration, a sum of money set aside for a very young child might well show accumulations and yet an equal fund be wholly exhausted, interest and principal, in meeting the living and educational expenses of one who was older. It cannot, therefore, be positively asserted that the equal division made by the jury was arbitrary.

In discussing the main point raised, we would not wish to be understood as making the findings of fact from the standpoint of which we have discussed the question. The only fact in evidence in any real sense was the contributions which the decedent had made to the support of his family. All else was implied in questions addressed to witnesses, the answers to some of which were negative and to others excluded.

The motion for a new trial is denied.

McNICHOL v. CONSUMERS' POWER CO.

(District Court, E. D. Michigan, N. D. August 17, 1921.)

1. Dismissal and nonsuit ⊂=5—Plaintiff can take nonsuit before verdict.

Under Michigan practice, plaintiff has, in the absence of statute to the contrary, an absolute right to take a nonsuit at any time before verdict.

2. Courts ⊂=351½—Plaintiff entitled to take voluntary nonsuit in federal court in Michigan.

In an action at law in a federal court sitting within the state of Michigan, plaintiff is entitled to the same right to take a voluntary

nonsuit at any time before verdict that he is entitled to under Michigan practice.

3. **Courts ⇐366(1)—Construction of state statute by state court followed by District Court of United States.**
The construction and application of a state statute by the court of last resort of such state will be followed and adopted by the District Court of the United States in giving effect to its terms.

4. **Dismissal and nonsuit ⇐6—Defendant, despite examination of plaintiff's witness, had not "entered on defense," and plaintiff could take nonsuit.**
Where, after opening statement by counsel for both parties, six witnesses were sworn in behalf of plaintiff, and examined and cross-examined by counsel for plaintiff and defendant, respectively, defendant at such stage of the trial had not "entered upon" its "defense to the action in open court," within the meaning of Compiled Laws Mich. 1915, § 14566, and plaintiff was entitled to submit to a voluntary nonsuit.

At Law. Action by Effie R. McNichol against the Consumers' Power Company. On motion for new trial. Order that plaintiff is entitled to submit to voluntary nonsuit directed.

Coumans & Gaffney, of Bay City, Mich., for plaintiff.
Bernard J. Onen, of Battle Creek, Mich., for defendant.

TUTTLE, District Judge. This is a motion for a new trial. The sole question involved is whether, under the circumstances disclosed, the plaintiff is entitled to a voluntary nonsuit.

The action is trespass on the case for damages. On the trial in open court, after opening statements by counsel for both parties, six witnesses were sworn on behalf of the plaintiff, and examined and cross-examined by counsel for plaintiff and defendant, respectively. Thereupon, without resting her case, the plaintiff moved for a voluntary nonsuit. By affidavit filed in the cause, it appears that defendant had incurred considerable expense in preparing for the trial, and had subpœnaed a number of witnesses, who were in court ready to be sworn upon said trial. No witness, however, had been actually sworn on behalf of defendant. Whether, under these circumstances, plaintiff was entitled to submit to a voluntary nonsuit, is the question presented for decision.

[1] Under the practice in force in the courts of record of the state of Michigan, plaintiff has, in the absence of a statute to the contrary, an absolute right to take a nonsuit at any time before verdict. Mintz v. Soule, 200 Mich. 9, 166 N. W. 491.

[2] A plaintiff is entitled to the same right in an action at law in a federal court sitting within the state of Michigan. Barrett v. Virginian Railway Company, 250 U. S. 473, 39 Sup. Ct. 540, 63 L. Ed. 1092. As was said by the United States Supreme Court in the case last cited, settling this question, on which there had previously been considerable conflict between the decisions of various Circuit Courts of Appeals:

"At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict, if not, indeed, before judgment. * * * The right is substantial. When and how it may be asserted, we think, are questions relating directly to practice and mode of proceeding within the intendment of the Conformity Act."

The only applicable statutory provision invoked by either party or known to this court is section 1 of Act 200 of the Michigan Public Acts of 1915, being section 14566 of the Michigan Compiled Laws of 1915, providing as follows:

"In any civil action hereafter commenced in this state, whenever the defendant shall have entered upon his defense to the action in open court, the plaintiff shall not be allowed to discontinue his suit or submit to a nonsuit without the consent of the defendant."

[3] Under familiar principles, the construction and application of this state statute by the court of last resort of such state will be followed and adopted by this court in giving effect to its terms. The only decision of the Michigan Supreme Court relating to this statute appears to be that in the case of Mintz v. Soule, supra. On the trial in that case the plaintiff produced and examined one witness, and, there being no cross-examination, rested. Defendants offered no testimony, but, after resting, moved for a directed verdict. After an argument, but before a decision, upon this motion, plaintiff requested leave to submit to a nonsuit, which was allowed by the trial court, on the ground that defendants had not entered upon their defense in open court, within the meaning of the statute just referred to. In affirming the judgment, the Michigan Supreme Court said:

"The statute in question was designed to prevent a plaintiff from discontinuing his suit or submitting to a nonsuit without the consent of the defendant, where the defendant, who had been to the expense and trouble of procuring witnesses, had entered upon his defense in open court by putting in his testimony upon the merits, and * * * the act was not intended to apply to those cases where no witnesses were procured, no defense made on the facts, and only legal questions are raised. At common law the plaintiff might submit to a nonsuit at any time before verdict. Deneen v. Railway Co., 150 Mich. 235; Davis v. Railway, 162 Mich. 240. This practice has been sanctioned by long usage and is a protection against defeat through surprise and disappointment in proofs. This court entertains the view that it was not the legislative intent to modify this practice, so long in vogue, except as herein pointed out."

It is true that the defendant in the instant case had incurred "the expense and trouble of procuring witnesses," but that this is not the proper test by which to judge the applicability of this statute is made clear by a consideration of the fact that the preparation of a defense based upon questions of law is quite as likely to entail such expense and trouble. The ultimate question presented is, of course, whether defendant had entered upon its defense in open court.

It will be observed that the state Supreme Court, in the language just quoted from its opinion in the case last cited, refers to such defense as consisting of "putting in his testimony upon the merits," and the court distinctly expresses its opinion that this statute was not intended to be applicable, "except as herein pointed out."

[4] While the question is not free from doubt, after careful consideration thereof, in the light of this expression of the views of the Michigan Supreme Court upon the subject, I reach the conclusion that it must be held that defendant had not "entered upon" its "defense to

the action in open court," within the meaning of this statute, and that therefore plaintiff is entitled to submit to the voluntary nonsuit sought.

An order will be entered accordingly, with costs of the suit and of the trial to be taxed in favor of the defendant against the plaintiff.

COCA-COLA CO. v. BROWN & ALLEN.

(District Court, N. D. Georgia. July 22, 1921.)

1. Courts ⇐328(3)—Value of good will; element of value involved for jurisdictional purposes.

In a suit to enjoin an alleged unfair trade practice affecting the value of complainant's good will, such value may be considered in determining the amount involved for jurisdictional purposes.

2. Trade-marks and trade-names and unfair competition ⇐68—Unfair trade practice may be enjoined.

Complainant, which makes and sells a well-known syrup for soda fountains, to be diluted with carbonated water and sold to the public as a drink, *held* entitled to an injunction to restrain defendants, who operate a soda fountain, from diluting complainant's syrup and adding other ingredients before placing it in their fountain, and drawing and selling the mixture as complainant's drink.

In Equity. Suit by the Coca-Cola Company against Brown & Allen. On motion for preliminary injunction. Granted.

Candler, Thomson & Hirsch, of Atlanta, Ga., for complainant.
Brewster, Howell & Heyman, of Atlanta, Ga., for defendant.

SIBLEY, District Judge. The Coca-Cola Company is the manufacturer of a syrup known as Coca-Cola, which it sells to soda founts to be diluted with carbonated water and sold as a drink to the public. To create a public demand it spends annually much money in advertising, and has a large and well-established patronage for its drink so sold. Brown & Allen, operating a soda fount, purchase Coca-Cola from the Coca-Cola Company and dispense it. An injunction pendente lite is now sought against an alleged unfair practice of Brown & Allen.

[1] 1. Jurisdiction is contested because an insufficient amount is said to be involved. It may be that the damages recoverable from Brown & Allen are less than $3,000, or even that none are recoverable because incapable of estimation; but the wrong alleged affects the value of petitioner's good will in business, which may be greatly injured by a continuance of the practice attacked. The value of this good will, which greatly exceeds $3,000, may be looked to in determining the amount involved, and the jurisdiction is thereby sustained. Frontera Transp. Co. v. Abaunza (C. C. A.) 271 Fed. 199.

[2] 2. The evidence authorizes a finding that, while filling glasses for Coca-Cola, the defendants at their fount, in the presence of the customer, draw into the glass an amount of syrup resembling in consistency and color petitioner's product, and then add the usual amount of carbonated water and such flavors as the customer may order. The

syrup so drawn is Coca-Cola, to which water, sugar, and caramel have been added before putting it in the fount. The water, of course, increases the amount of syrup and weakens it. The sugar, however, serves to restore its consistency and the caramel its color; they being used for this purpose in making the original syrup. Analyses indicate that the adulteration results in making about two gallons out of one. Thus, if the usual amount of syrup is drawn for a customer, his drink really contains but one-half the peculiar constituents of Coca-Cola, and is somewhat altered, perhaps, in taste.

It is contended that this is not only a fraud upon the public, but reflects itself also as one upon the petitioner, because the customer, in the language of the street, will conclude that "Coca-Cola is no good any more," and its popularity will be destroyed. On the other hand, it is said that the syrup was sold to be diluted, and the time and manner of its dilution is immaterial, and that by treating it as they do defendants please their customers and act within their rights.

No statute is involved. No contract restricting the manner of use or sale of the syrup is shown. No mark, of course, is upon the wares sold at the fount, and petitioner's trade-mark is, therefore, not involved. It is not an ordinary case of unfair competition, where one substitutes a spurious and imitative article and sells it as another's product. Indeed, it is said there can be no competition between a wholesaler and a retailer (Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. [N. S.] 477), and in point of fact the defendants are using and selling the petitioner's very product. But the genuine article has been altered by dilution and by disturbance of the proportions of its ingredients, and so sold. Counsel have found no authority respecting the right of a purchaser in bulk from the wholesaler to dilute or adulterate the article purchased and sell it as the product of the maker.

Without doubt the retailer here, because of the nature of the business and the way in which the syrup is ordinarily used therein, may dilute Coca-Cola syrup in offering it for sale. It is never drunk otherwise than diluted. He may also sweeten it by adding sugar, if that is desired by his customer, or he may similarly add anything else the customer desires. He may even develop a peculiar and popular mixture, which may make his Coca-Colas known and sought as such. But can he, with no claim made to the public of a distinctive mixture, and relying solely on the reputation of Coca-Cola as developed by its maker, deceptively dilute and cheapen it for the additional profit to be thus made? Such conduct is immediately a fraud on the purchasing public. It is also a fraud of which the maker may complain, because it tends to disrupt that connection between him and the purchasing public, built up at large expense and through a long time, which the law recognizes and protects as a good will, indirect and intangible though the connection be.

There seems to be nothing in the way of defendants selling weak Coca-Colas, or sweet ones, if they will; but it ought to be openly done. The syrup drawn in the customer's presence on his call for Coca-Cola

ought to be the unadulterated article. That it is such is the fair intendment of the transaction. The customer understands the syrup drawn to be what he calls for. What is afterwards added by way of dilution or spiking he sees, and is not deceived by it. If defendants should put one-half quantity in the glass, instead of half strength, in serving Coca-Cola, it would be at once seen. The conclusion is inescapable that the dilution was made before the syrup was drawn, and concealed as to consistency and color by sugar and caramel, in order to deceive the purchaser as to its strength, and not in order to make weak or sweet Coca-Colas. Against the continuance of this practice petitioner is entitled to protection. If it is not done to deceive, defendants can have no objection to stopping it.

An injunction pendente lite will be ordered against drawing from the fount for mixture and sale as Coca-Cola on calls therefor any other than the unaltered and unadulterated syrup made by petitioner and known as Coca-Cola.

KEVER v. PHILADELPHIA & READING COAL & IRON CO.

(District Court, E. D. Pennsylvania. July 14, 1921.)

No. 8368.

Action ⇐45(3)—Statement of claim for negligence held sufficient.

The statement of claim in an action based on negligent injury *held* not insufficient because of allegations that the acts or omissions of defendant constituted actionable negligence at common law and also under state statutes.

At Law. Action by Katherine Kever against the Philadelphia & Reading Coal & Iron Company. On motion to strike from record plaintiff's statement of claim. Denied.

See, also, 241 Fed. 883.

Julian A. Pilgram, of Pottsville, Pa., and John C. Oldmixon and Frank F. Davis, both of New York City, for plaintiff.

William Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Whatever may be said of the form of this motion, it is in effect a challenge of the plaintiff's cause of action, or more particularly a denial of the right of the plaintiff to pursue her claim as she has set it forth. In every inquiry, juridical or otherwise, two elements are ever-present and should be kept distinct. One is substance; the other, form. The more the inquiry partakes of what is called the "scientific method," the more emphasis is placed upon form. What is commonly termed an informal inquiry directs itself to substance. There is always danger that the more orderly investigation will be diverted wholly to matters of form. This is popularly supposed to be the vice of legal proceedings. The criticism may be well or ill founded. The logical mind is perturbed because it feels its attention

diverted by an ill-ordered statement, out of which it must extract the question presented, and there is justification for asking that the statement be recast, so that the question arising may be disclosed. On the other hand, it is easy to descend into mere carping criticism, which is directed to the merest formalities.

The vice in the statement of a cause of action often subsists in the failure to distinguish between ultimate facts and those which are merely evidential, and the failure to confine the statement to the former, except so far as the latter may be called for to put the defendant on notice. The latter then really serves the purpose of a bill of particulars rather than forms part of the statement of the cause of action. The present case affords us a good illustration of the truth of this observation. The basis in one sense of the cause of action is the averred negligence of the defendant. Expressed in another way, it is the damage suffered by the plaintiff, which is asserted to be a legal injury, because due to the negligence of the defendant. Such a statement sets forth a legal cause of action. In what is this negligence averred to consist? This the defendant has the right to know. Such averments are in an essential sense averments of evidential facts. If, for illustration, the statement of the particular fact disclosed the negligent act to have been that of a fellow servant, in some jurisdictions this would constitute no good legal cause of action. It would be so under the common law of Pennsylvania. If, however, a statute provided that one who at common law would be a fellow servant became a vice principal, if the employment was that of mining, then the inclusion of this added statement would disclose a good cause of action.

To extend the illustration somewhat, a statement of claim might base the right of recovery upon the obligation of duty on the part of an employer to exercise due care to provide the employee with a reasonably safe place in which to work. This principle has its limitations, and the particular facts might not subject the employer to the consequences of negligence, as negligence would be defined at common law. A statute, however, might set up an artificial standard of negligence, in the absence of required safety appliances or guards to dangerous machines. A statement of claim which based the plaintiff's right of recovery upon negligence at common law, and because of disobedience to the commands of each of these statutes, would not be setting up three separate, in the sense of different, independent, and inconsistent, causes of action. At the most, it would be setting up one and the same cause of action by a declaration in three counts. What the statement really would be is the statement of a cause of action based upon the negligence of the defendant, with notice that the plaintiff would offer evidence of negligence at common law and under each of the quoted statutes.

If the same question now sought to be raised were raised at the trial, in the form of a complaint of the absence of these particular facts, it could be raised only as a question of evidence, and would be determined by the finding of whether the defendant had been given sufficient notice

to warn it of what was to be combatted. The present motion is based upon the thought that the statement of claim is open to the objection of what would have been multiplicity in a bill of complaint before the adoption of the new Equity Rules. We do not so read the statement of claim. There is but one cause of action.

There is no conflict in this with the ruling in Stoker v. Phila. & R. R. Co., 254 Pa. 494, 99 Atl. 28. There the plaintiff had averred two separate and distinct causes of action, involving the question of the jurisdiction of the court. One was a cause of action existing at common law, of which the court had jurisdiction under the law of the state. The other was a cause of action arising wholly out of an act of Congress, the right to assert jurisdiction over which was given by Congress to the state courts concurrently with the courts of the United States. Here the cause of action is one and the same. It is based upon actionable negligence, with notice that evidence would be offered to show such negligence as defined at common law, or under one or the other of the cited statutes, or, indeed, as negligence under every one of these definitions.

Without further amplification of the thought in following which the motion is denied, we dismiss it, with leave to defendant to answer over.

PROVIDENCE STOCK CO. v. ADELPHIA HOTEL CO.

(District Court, E. D. Pennsylvania. July 6, 1921.)

No. 6754.

Innkeepers ⇐11(8)—Bound to exercise ordinary care in conveying property of guest.

Liability of a hotel company, which in accordance with its practice of furnishing conveyance for baggage of guests to and from its hotel, delivered a trunk of plaintiff for carriage to a person who stole it, *held* dependent on whether or not it exercised ordinary care.

At Law. Action by the Providence Stock Company against the Adelphia Hotel Company. On motion by defendant for new trial. Overruled.

Charles J. Biddle, of Philadelphia, Pa., for plaintiff.
Ralph B. Evans, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Counsel for defendant now presses upon our attention only two reasons for a new trial:

1. The court instructed the jury that the defendant was liable only for the lack of ordinary care of the property of the plaintiff. This reduced the responsibility of the defendant to the legal minimum, if the defendant is to be regarded as a caretaker. Counsel for defendant complain of this and assert that the trial judge should have instructed the jury that the defendant was answerable only for gross negligence. The distinction when applied to a caretaker is not altogether clear, because, unless the caretaker is wholly exculpated, he cannot be held

to a measure of care more favorable to him than the lowest measure applicable and such ordinary care is.

The case of Scott v. Bank, 72 Pa. 471, 13 Am. Rep. 711, is not in conflict with the instructions given to the jury, for the court there refused to hold the defendant to a degree of care which would have been beyond the ordinary.

Hirsh v. Anderson, 58 Pa. Super. Ct. 387, is more nearly in point, but the determination of this case is again not in conflict with the instructions given to the jury in the instant case, because the Hirsh Case was specifically ruled upon its special facts. The trial court held the defendant there to the measure of ordinary care. The appellate court ruled that under the special circumstances the defendant was liable only for gross negligence.

The distinction, as counsel for defendant states it, between the absence of ordinary care and gross negligence, is not entirely clear, because the two things differ only in phraseology, or the one merges into the other, inasmuch as the absence of ordinary care would be gross negligence. This is not the distinction made in the cited case. There the trial judge instructed the jury that the defendant was bound to take the same care of the property of the plaintiff as a reasonably prudent and cautious man would take of his own property. No exception was taken to this instruction. On the motion for a new trial the trial court disposed of the motion on the theory that the defendant was liable as an insurer; it being admitted there was otherwise no liability.

Inasmuch as the relation of hotel keeper and guest had not been established, the appellate court found that there was no such relation, but that the defendant was a mere gratuitous bailee, and that no evidence had been submitted to the jury upon which the judgment entered could be safely based. It is significant that the judgment was reversed without a venire.

The rule of ordinary care does not necessarily mean the kind of care which a man takes of his own property, but it means ordinary care under the circumstances. If, as in the Hirsh Case, a person sends a trunk or other luggage to a hotel to there await his coming, and the trunk is stored in the place provided by the hotel for that purpose, and the only evidence in the case is that the trunk was rifled of some of its contents, these facts present no evidence from which any failure to exercise ordinary care or other breach of duty on the part of the hotel proprietor can be found.

In the instant case, however, there is much more than this. The defendant company made it its practice and business for the convenience of the owners of luggage and the advantage of the hotel to proffer the facilities provided by the hotel for the conveyance of the luggage of those arriving and those departing from the hotel. The hotel delivered the plaintiff's trunk to a man selected by the hotel. This man stole it. If he was an employee of the hotel, the defendant would have been liable beyond dispute. If the carrier had been in the recognized business of carrying trunks, there would have been no evidence of lack of ordinary care in delivering the trunk to him.

The question was whether in the exercise of ordinary care the trunk would have been delivered to a total stranger, thus giving him an opportunity to make off with it. Without further elaboration of the question, we remain of opinion that the instructions given were as favorable to the defendant as it had a right to expect.

2. The second reason pressed is the failure of the court to affirm the defendant's sixth point. The point could not have been safely affirmed categorically as written. The point was answered and substantially affirmed in the general charge. The jury were instructed that the burden of proof to show what had been lost was upon the plaintiff. The jury were further instructed that the plaintiff had failed to carry this burden with respect to a part of the claim made. This was because, although there was evidence of what had been put into the trunk, there was also evidence that some part of this particular line had been sold, and there was no evidence of what had been sold.

With respect to the part of the claim for which the plaintiff recovered, there was direct and clear-cut evidence in the testimony of the salesman who had taken the trunk to the defendant's hotel.

The rule for a new trial is denied, and plaintiff may move for judgment on the verdict. To give definiteness of date, no judgment is now entered, but it may be entered by the clerk upon præcipe.

HURLEY v. PUSEY & JONES CO.

(District Court, D. Delaware. June 18, 1921.)

No. 426.

Courts ⇐343—Third persons, whose rights cannot be affected, not entitled to intervene.

In a suit by the assignee of certificates of stock of a corporation to compel issuance by the corporation of new certificates in his name, where the extent of his ownership or interest in the assigned shares is not in issue, but his claim is based solely on the assignment of the legal title, the rights of third persons, claiming an interest in the stock subject to his interest, cannot be affected by the finding or decree of the court, and they are not entitled to intervene under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii).

In Equity. Suit by John A. Hurley against the Pusey & Jones Company. On objections to petitions of intervention of Jesse S. Phillips and Thomas B. Donaldson. Objections sustained.

William S. Hilles, of Wilmington, Del., for complainant.

Robert Penington and George N. Davis, both of Wilmington, Del., for defendant.

Hartwell Cabell, of New York City, for interveners.

MORRIS, District Judge. This is a suit to compel the defendant, the Pusey & Jones Company, a Delaware corporation, to issue in the name of and to deliver to the complainant, John A. Hurley, of New York, certificates for 15,000 shares of its preferred capital stock in lieu

of certificates for a like number of shares issued in the name of another person, assigned in blank, and delivered by the complainant to the defendant with a demand for transfer.

The insurance commissioner of the state of Pennsylvania and the superintendent of insurance of the state of New York seek to intervene as parties defendant, and in support of their applications allege that the complainant is not the absolute owner of the shares but a pledgee only, and that they, the petitioners, each have equitable rights in the shares subordinate to the rights of the complainant. The application to intervene is opposed by the complainant. The bill of complaint, as I understand it, does not base the claim for a new certificate upon the nature or extent of complainant's rights in the shares, but upon his lawful possession of the old certificates and the unqualified assignment. Neither the lawfulness of complainant's possession nor the validity of the assignment is attacked. The petitioners do not charge or show that their alleged rights will in any way be placed in jeopardy by the complainant's having a certificate in his own name.

Assuming, but not deciding, or even intimating, that a person may be made a party defendant on his own motion, the complainant objecting (Ehrenstrom v. Phillips, 9 Del. Ch. 74, 77 Atl. 80), and that the petitions disclose the petitioners to have some rights or interest in the shares, I am of the opinion that it does not appear that the petitioners have "an interest in the litigation," within the contemplation of equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), and that, consequently, a right to intervene has not been shown. As I see it, interest in this litigation on the part of the petitioners can exist only if their rights may be affected by the decree, or by the finding of facts upon which any decree proper to be entered herein may be based. That, ordinarily a person holding certificates of stock, with an unqualified assignment and power of attorney in blank, is entitled upon demand to a new certificate in accordance with the assignment and power of attorney, even though he is in fact only a pledgee, and not the absolute owner of the shares, seems well settled. Athol Savings Bank v. Bennett, 203 Mass. 480, 89 N. E. 632; Machen on Corporations, § 997 et seq.; Fletcher's Cyc. on Corp. § 3911.

Nothing has been shown to take this case out of the general rule. At the argument the petitioners did not deny, but conceded, that the complainant, even if only a pledgee, is entitled to a decree directing the issuance of a new certificate as prayed in the bill of complaint. Furthermore, the right of the complainant to the decree sought depends, as I understand it, not upon the nature and extent of his interest in the shares, but solely upon the lawfulness of his possession of the old certificates and upon the tenor and validity of the assignment. Consequently the extent and nature of complainant's rights in the shares represented by the certificates demanded is not in issue.

It follows that the petitioners' rights, if any, cannot be affected, either by the finding of fact or the decree in this litigation.

An order in conformity herewith may be submitted.

WASSELL v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. July 19, 1921.)

No. 2211.

Internal revenue ⇐28—Court cannot enjoin collection of tax.

A federal trial court, having no jurisdiction to enjoin collection of an internal revenue tax, will not make a finding that what is called a tax in an act of Congress is not in fact a tax, but an imposition which Congress was without power to make, and enforcement of which may be enjoined.

In Equity. Suit by Thomas Wassell against Ephraim Lederer, Collector of Internal Revenue, to restrain the levy of a tax under section 35 of the National Prohibition Act. On motion to dismiss bill. Motion granted.

John O. Ulrich, of Tamaqua, Pa., for plaintiff.

T. Henry Walnut, Asst. U. S. Atty., and Chas. D. McAvoy, U. S. Atty., both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The real question involved is whether the plaintiff has any enforceable right of action. The purpose of the bill is stated and the real cause of action implied by the averment of paragraph 3:

"That this suit is instituted to prevent" the "collector of internal revenue from collecting and attempting to collect from the plaintiff internal revenue tax levied under and by virtue of the act of Congress of October 28, 1919."

This averment sounds the death knell of the complaint. The power we are asked to exercise is the very power which, under the policy of law relating to internal revenue, the courts are not to exercise. The plaintiff asks that the hand of the tax gatherer be controlled, because payment of the tax should not be exacted. The plaintiff may possess the substantial right which he invokes, but he has mistaken his remedy. The remedy provided by Congress in the case of a tax, the payment of which is unlawfully exacted, is in the given right of action to the taxpayer to recover the sum unlawfully exacted. The taxpayer is not permitted to stay all the operations of government until his rights are determined.

This principle of the policy of the law, as prescribed by Congress, is doubtless accepted by the plaintiff. His real position we assume is that the principle is without application, because the exaction here is not the payment of a tax, but of a fine or penalty imposed in and under the guise of a tax. As pointed out and ruled in other cases, this distinction involves the finding of a fact which we are unwilling to make. Congress has called the payment imposed a tax, and has directed it to be levied and collected as such. It is, as we view it, beyond the province of a trial court to make the finding that Congress is not exercising the power which it declares itself to be exercising, but another power which it does not lawfully possess. We recognize the soundness of the distinction upon which the plaintiff stands. If the Constitution of any state or nation denies to its legislative branch the power

to do a certain thing, the exercise of the power will be halted by the courts, in spite of the fact, if such be the fact, that the Legislature is asserting the denied power through the pretense of calling it by the name of another power which the Legislature may lawfully exercise.

It will be admitted, we assume, that Congress possesses a lawful power to levy and collect an excise tax. It would likewise be denied, we assume, that Congress possessed any lawful power to prohibit an act, impose a penalty for the commission of the prohibited act, and enforce the collection of the fine, without the guilt of the defendant having been first determined. The courts are intrusted with the power and charged with the duty of protecting individuals in all their constitutional rights. The view we take, however, is that it is the orderly and preferred mode of judicial procedure to leave to a court of final jurisdiction the duty and responsibility of finding the fact upon which the distinction made rests.

We accordingly refuse to make the finding that the tax imposed is not a tax, and this carries the consequence that the bill of complaint be dismissed. It is so dismissed, with an exception allowed to the plaintiff.

In re ROEPER.

(District Court, D. Delaware. June 22, 1921.)

No. 1295.

Aliens ⇐62—Refusal to bear arms bar to naturalization.

Under Naturalization Act, § 4(3), as amended (Comp. St. § 4352[3]), requiring an alien, before admission to citizenship, to declare on oath in open court that he "will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same," an alien, who states that he would not willingly serve in the field in the military forces in case of war, cannot take such oath without mental reservations and is not eligible to citizenship.

In the matter of the petition of William Henry Bernhard Roeper, for admission to citizenship. Petition denied.

John C. F. Gordon, Chief Naturalization Examiner, of Philadelphia, Pa., for the United States.

MORRIS, District Judge. William Henry Bernhard Roeper has filed a petition for admission to citizenship. At the final hearing in open court he testified, in substance, that he has conscientious scruples against the shedding of human blood, even in warfare, and that, if admitted to citizenship, he would not be willing to serve in the field in the military forces of the United States, if called upon to do so. The government opposes his admission. May he be naturalized?

The United States is a body politic. As such it has the unquestioned right to determine for itself the terms and conditions under which an alien may be admitted to membership—that is, citizenship—in that

body. Those terms were fixed and defined by the Act of Congress of June 29, 1906 (34 Stat. 596). Section 4 of that act in part provides:

"Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." Comp. St. § 4352.

That section makes clear that citizenship is not merely a privilege, but an obligation as well, that in return for the rights of citizenship certain duties are imposed upon the naturalized alien, points out what those duties are, and exacts an oath that they will be performed. The duties so imposed upon persons becoming citizens through naturalization are to—

"support and defend the Constitution and laws of the United States * * * and bear true faith and allegiance to the same."

The duties so prescribed by Congress in plain and unambiguous language may not be lessened or diminished by the courts. They may make no exception to the absolute and unqualified provisions of the oath of allegiance. The oath to support and defend the Constitution of the United States embraces every method of support and defense which the government may lawfully prescribe. That it may prescribe support and defense by active military service is obvious from the constitutional provisions vesting Congress with the power—

"to declare war; * * * to raise and support armies; * * * to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. * * *" Const. art. 1, § 8.

Furthermore, the Supreme Court in the Selective Draft Law Cases, 245 U. S. 366, 378, 38 Sup. Ct. 159, 161 (62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856) said:

"It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need."

If individuals enter into a state of society, and especially if that government be in form a republic, the laws of that society must be the supreme regulator of their civil conduct. Story on Constitution, § 340. As it is manifest that the petitioner cannot, without reservations, mental or otherwise, take the oath of allegiance, such oath should not be administered or accepted.

Hence the prayer of his petition must be denied, and the petition dismissed.

In re MITCHELL MOTOR & SERVICE CO., Inc.

(District Court, W. D. Washington, N. D. March 25, 1921.)

No. 6455.

Bankruptcy ⇐184(1)—Chattel mortgages by bankrupt held valid.

Chattel mortgages given by a bankrupt to secure present loans on automobiles definitely described and specifically identified by number, duly recorded, and which contain no authority to the mortgagor to sell the mortgaged property, *held* valid against the trustee under the law of Washington in the absence of any evidence that sales made of some of the cars by bankrupt were acquiesced in or known to the mortgagee, or other evidence of fraud or collusion.

In the matter of the Mitchell Motor & Service Company, Inc., bankrupt. Petition for review of order of referee. Denied.

Shank, Belt & Fairbrook, of Seattle, Wash., for claimant State Bank of Seattle.

Gates & Helsell, of Seattle, Wash., for trustee.

NETERER, District Judge. On May 27, 1920, June 16, 1920, June 24, 1920, and June 25, 1920, the bankrupt borrowed from the State Bank of Seattle on the respective dates $9,342.53, $5,089.45, $2,735.10, and $2,272.69, and executed its promissory notes for the respective sums on the respective dates, and executed a chattel mortgage upon motor vehicles of the bankrupt, each mortgage covering separate vehicles, which are definitely described and specifically identified by number. The mortgages were duly filed, recorded, and properly indexed in the auditor's office of the proper county. Rem. & Bal. Code, § 3662. The validity of the mortgage is determined by the state law as construed by the state Supreme Court. Re Harnden (D. C.) 200 Fed. 175. There was no provision in the mortgage for an accounting, nor any authority granted to the mortgagee in the mortgage or otherwise to sell. The motor vehicles included in the mortgages were exposed for sale in the salesroom of the bankrupt, and the bankrupt did sell some of the vehicles without the permission or knowledge of the bank, and without applying the proceeds to the payment of the debt. The bank filed four separate claims with the trustee to which objections are urged by the trustee, alleging the chattel mortgages to be void as to creditors; the ground urged being that the mortgagor was permitted to have possession of the property with full power to dispose of the same. The referee held against the contention of the trustee, and the matter is before the court on a petition for review. The status of the mortgages on the motor vehicles by reason of the definite and specific description and identity does not bear the relation of a shifting stock within the statute and decisions of the state requiring provision for an accounting and application of proceeds to the satisfaction of the mortgage. Keyes v. Sabin, 101 Wash. 618, 172 Pac. 835; Miller v. Scarbrough, 108 Wash. 646, 185 Pac. 625.

The mortgage being valid and recorded, if it is avoided, it must be because of subsequent conduct of the parties. The property included in

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this mortgage is not of the same class as "a stock of merchandise" (In re Nat. Bk., 135 Fed. 62, 67 C. C. A. 536, 14 Am. Bankr. Rep. 180), or "stock or material" of a shipbuilding concern (In re Marine Const. & Dry Dock Co., 144 Fed. 649, 75 C. C. A. 451, 16 Am. Bankr. Rep. 325), or a "stock consisting of wines, liquors, and cigars" (In re Noethen, 201 Fed. 97, 119 C. C. A. 435, 29 Am. Bankr. Rep. 234), or "merchandise and other property" (Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425, 13 Am. Bankr. Rep. 177), or upon "all its property at its designated place of business" (Peterson v. Sabin, 214 Fed. 234, 130 C. C. A. 608, 32 Am. Bankr. Rep. 599). The transaction upon its face bears the stamp of good faith, and can only be condemned when it is not carried out in good faith. In re Allen McLean (D. C.) 270 Fed. 348, December 15, 1920, this court. From an examination of the testimony in this case I cannot say that the bank with knowledge permitted the application of proceeds of sale to other sources than its indebtedness, nor ratified any act of the bankrupt in disposing of mortgaged property without its consent. While mortgagees should not be protected when fraud is established or for lack of vigilance from which collusion must be inferred, there is no fraud or collusion established. The market overt doctrine has not application here. Black Diamond v. Johnson, 104 Wash. 550, 177 Pac. 340, 3 A. L. R. 235. Nor do the facts in Re Hallbauer, 275 Fed. 126, 46 Am. Bankr. Rep. 132, apply.

The petition for review is denied.

LIPKE v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. July 7, 1921.)

No. 2303.

Constitutional law ⟸45—Imposition called tax by Congress will be held such by trial court.

A trial court will not assume to determine that an imposition levied by act of Congress, which denominates it a tax, is not a tax, but a penalty.

In Equity. Suit by Ernest Lipke against Ephraim Lederer, Collector of Internal Revenue. On motion for preliminary injunction and motion to dismiss bill. Motion to dismiss granted.

Francis J. Maneely and Lincoln L. Eyre, both of Philadelphia, Pa., for plaintiff.

Chas. D. McAvoy, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The main question raised is the same as that raised in the case of Ketterer v. Lederer, 269 Fed. 153, before ruled. An excise tax was levied and assessed, and the effort is being made to collect it. The legal justness of the tax levy is denied. The defendant has the opportunity given in all tax cases to dispute the legality of the tax levy, by paying the tax and bringing an action to recover the sum paid. This course has not been followed, but the pres-

ent plaintiff asks to have the collection of the tax restrained. The acts of Congress deny this right to the plaintiff, if what is sought to be collected as a tax is a tax. The plaintiff asserts this is not a tax, but is a penalty for an alleged crime, payment of which is sought to be exacted under the guise of a tax.

Broadly stated, the question then becomes this: Whether a trial court should find that Congress was doing one thing, notwithstanding the Congressional declaration that it was doing something else. This question has already been ruled, so far as we are concerned, by a refusal to make such a finding.

The question is now presented from a somewhat different angle. An excise or internal revenue tax, as it is called, is really a license fee, or, in other words, it is a contribution to the public exchequer for the privilege of following some occupation, calling, business, or profession. The point made is that the right to do the business to which this levy pertains is denied by the very act which directs the levy. This is true; but none the less there is nothing in this which of itself would deny the power of Congress to levy an excise tax, based upon the fact that the taxpayer had followed a particular business, the tax being levied at the close of the period. The exaction of an excise tax covering a time past would not be affected by the further fact that the business, in respect to which the tax had been assessed, was thereafter and in the future forbidden.

As yet the present plaintiff has been convicted of no offense. In consequence he has not incurred any imposed penalty for such offense, and the penalty cannot be imposed, through the subterfuge of calling it a tax. All this is clear enough. On the other hand, the possession of the power to levy and assess excise taxes cannot be denied to Congress. The real question is: Which is being done?

A somewhat analogous dilemma is presented by those cases in which Congress has no lawful power to prohibit, but does have a lawful power to tax. A tax which is prohibitive is laid. Congress has both prohibited and taxed. What it did, however, it declared the levying of a tax. For a trial court to find the fact to be otherwise might result in embarrassment to the government. The question is properly one to be referred to an appellate court of general jurisdiction.

The motion to dismiss is based upon a state of facts not in controversy, and is granted. This carries with it a denial of the other motions. Exceptions allowed to plaintiff.

In re JUPP.

(District Court, W. D. Washington, N. D. January 25, 1921.)

Aliens ⊂=62—Naturalization; seaman on cable supply ship not one on "merchant vessel."

Within the meaning of Naturalization Act June 29, 1906, § 4, subd. 7, as amended by Act May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352, subd. 7), authorizing naturalization without previous five years' residence of any alien "who has served * * * for three years on

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board of merchant or fishing vessels of the United States," etc., a "merchant vessel" is a ship that is engaged in the carrying trade in connection with trade and commerce, and does not include a vessel owned by a cable company and used as a supply ship in connection with repair work on its cable lines.

Naturalization Petition. In the matter of the application for citizenship of Francis McLean Jupp. Application denied.

John Speed Smith, of Seattle, Wash., Chief Naturalization Examiner.

NETERER, District Judge. Applicant applies for citizenship under seventh subdivision of Act of May 9, 1918, amending section 4, Act of June 29, 1906 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352, subd. 7):

"Any alien * * * of the age of twenty one years and upward, * * * who has served for three years on board * * * of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service * * * or within six months after an honorable discharge or separation therefrom, * * * may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States. * * *"

The applicant has been in the service of the cable ship Restorer, of more than 20 tons burden, owned by the MacKay-Bennett Company, since May 30, 1916. The ship is used as a supply ship for the cable lines belonging to the owners of the ship. The vessel has been stationed in this jurisdiction and has American register since 1914. The captain, chief engineer, and second mate are aliens. The applicant contends that the vessel is a merchant vessel of American register, and that he is entitled to the benefit of this statutory provision. This ship clearly is not engaged in the business of transporting commodities for trade or commerce, or for use in the general trade. Its business is purely for cable repair work for the MacKay-Bennett Company. "Merchant" is defined by Webster:

"One who carries on trade, or traffic; who buys goods to sell again; any one who is engaged in the purchase and sale of goods; a trafficker; a trader." Hein v. O'Connor (Tex. App.) 15 S. W. 414; Torrey v. Shawano Co., 79 Wis. 152, 48 N. W. 246.

"A merchant * * * is a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery." White v. Commonwealth, 78 Va. 484.

The term "merchant" embraces all who buy and sell any species of movable goods for gain or profit. Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123.

A merchant ship must be a ship that is engaged in a carrying trade in connection with trade and commerce, and not merely engaged in the transportation of such goods as may be necessary for repairs of cable lines of a privately owned concern, and which goods are not designed for the general trade.

The applicant is not within the provisions of the statute.

LEWIS v. McCARTHY et al.

(District Court, D. Massachusetts. June 15, 1921.)

No. 1992.

1. **Intoxicating liquors ⇐256—Prohibition enforcement officers are not officers of the court, who can be summarily ordered to return seized automobile.**

The prohibition enforcement officers are not officers of the court, and therefore the court cannot in summary proceedings order them to return an automobile seized while being used for the transportation of intoxicating liquor, since the court's power in such proceedings exists only over its officers.

2. **Intoxicating liquors ⇐246—Automobile used by chauffeur for unlawful transportation without owner's knowledge may be forfeited.**

An automobile used by the owner's chauffeur for the illegal transportation of intoxicating liquor may be subject to forfeiture on conviction of the chauffeur, even though the owner did not participate in or know of the illegal use.

Petition by Carrie G. Lewis against William J. McCarthy and others for the return of an automobile. Petition dismissed.

William R. Scharton, of Boston, Mass., for petitioner.
The United States Attorney, for defendants.

MORTON, District Judge. This is a petition for the return of an automobile, the property of the petitioner, which is held by the respondents as prohibition enforcement officers. They have moved to dismiss. The case stated in the petition is as follows: The petitioner is the owner of the automobile. On the occasion in question it was taken and used without her knowledge or consent by her chauffeur. He was arrested by a Boston police officer for operating it while under the influence of liquor, and a complaint for that offense is pending against him in the state court. While the petition does not so allege, I infer that there was liquor in the automobile, which was being illegally transported by the chauffeur, because the petition recites that he got liquor and was arraigned before a United States commissioner on the charge of illegal transportation. No proceedings have been instituted for the forfeiture of the automobile; but the case is still pending against the chauffeur for violation of the Volstead Act (41 Stat. 305).

[1, 2] Under the circumstances, the court has no power, in summary proceedings such as these, to order the return of the automobile. Such power exists only over officers of the court, which the defendants are not. In re Chin K Shue (D. C.) 199 Fed. 282 (D. C. Mass.); U. S. v. Hee (D. C.) 219 Fed. 1019. Moreover, under Grant v. U. S., 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. —, if the chauffeur shall be convicted the automobile may be subjcet to forfeiture, even though the owner of it did not participate in or know of the illegal use. Cf. The Little Charles, 1 Brock. 347, at 354, Fed. Cas. No. 15,612, an interesting case of forfeiture under an embargo act.

Petition dismissed.

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

PAYNE, Director General of Railroads, v. CONNOR.

(Circuit Court of Appeals, First Circuit. August 2, 1921.)

No. 1507.

1. **Master and servant ⟸276(1)—Evidence held to warrant recovery for brakeman's injuries.**
In an action for injuries to a brakeman, struck by cars behind which he was passing when they were put in motion by other cars bumping against them, evidence *held* sufficient to warrant findings that the railroad company failed to equip the standing cars with sufficient and adequate brakes, in violation of the Safety Appliance Act (Comp. St. §§ 8605–8623); that it was negligent in kicking cars unattended at the rate of 10 or 15 miles an hour against the standing cars, and in not providing rules limiting the speed; that plaintiff was not negligent in crossing the track, and did not assume the risk; that the injury was due to defendant's negligence in kicking the cars against the standing cars; and that the failure to sufficiently and adequately equip the standing cars with brakes also contributed to the injury.

2. **Master and servant ⟸204(2), 228(2)—Contributory negligence and assumption of risk immaterial, when brakes are insufficient.**
Under Act April 22, 1908, §§ 3, 4 (Comp. St. §§ 8659, 8660), Act April 14, 1910, § 2 (Comp. St. § 8618), and Act March 2, 1893, § 8, a railroad company's duty to equip and maintain cars with sufficient and adequate brakes was an absolute one, and if it failed to do so an injured brakeman's contributory negligence or assumption of risk was immaterial.

3. **Master and servant ⟸288(3)—Brakeman's assumption of risk for jury.**
A railway brakeman, passing behind cars standing in the yards, did not as a matter of law assume the risk of injury from other cars being kicked against them, where there was evidence that it was an unusual occurrence and a departure from the ordinary conduct of the business to kick cars at such a rate of speed as was used.

4. **Trial ⟸260(1)—Refusal of instructions already given not error.**
The refusal of requested instructions which had already been given in the charge, or the substance of which had been previously given, was not error.

5. **Master and servant ⟸285(7)—Proximate cause of brakeman's injury held for jury.**
In an action for injuries to a brakeman, struck by cars behind which he was passing when they were put in motion by other cars kicked against them, where there was evidence that the brakes on the standing cars were not in good order, it was a question for the jury whether this alleged violation of the Safety Appliance Act (Comp. St. §§ 8605–8623), was a contributing cause of the injury.

6. **Master and servant ⟸270(5)—Evidence as to stopping cars with brakes before injury held admissible.**
In an action for injuries to a brakeman, struck by cars put in motion by others kicked against them, where it was claimed that the brakes on the standing cars were not in good order, evidence that when they were kicked, a few minutes before the accident, a brakeman riding thereon undertook to stop them where he was directed, but that because of the condition of the brakes they went several car lengths beyond where he wanted, and reasonably expected, to stop them was admissible.

7. **Appeal and error ⟸1048(5)—Question held harmless, in view of answer.**
In a brakeman's action for injuries, in which it was claimed that the brakes on cars put in motion when struck by others were defective, a question asked a conductor as to whether such cars did not go further than he intended them to go, when kicked shortly before the accident,

was harmless, where he answered that he had no particular place in mind where the cars should stop.

8. **Appeal and error ⟸231(7)—When mistake in question not called to counsel's attention, objection not available on appeal.**
Where the inadvertent reference to a railroad for which a witness was working at the time of the trial, in a question concerning his knowledge of the ordinary speed at which cars were dropped or kicked, and the distance loaded standing cars would move when struck by cars kicked against them, was not called specifically to the attention of counsel, the objection is not available on appeal.

9. **Appeal and error ⟸1033(3)—Evidence held more favorable to defendant than plaintiff, and not prejudicial.**
In an action for injuries to a brakeman, struck by cars set in motion when others were kicked against them, the testimony of a witness concerning the ordinary speed at which cars were kicked, and the distance loaded standing cars would move when others were kicked against them, *held* more favorable to defendant than to plaintiff, and not prejudicial to defendant, especially where it was cumulative.

10. **Witnesses ⟸285(4)—Wages of brakemen at time of trial held properly proved on redirect examination in brakeman's action for injuries.**
In a brakeman's action for injuries, where defendant on plaintiff's cross-examination brought out the facts that at the time of the injury he was receiving $25.90 a week for seven days of work, and at the time of the trial was receiving $23 a week for six days of work in a drug store, evidence on redirect examination that at the time of the trial brakemen were making $6.48 a day was properly admitted, to show the wages he would have received in his usual employment, but for the injury.

11. **Evidence ⟸314(1)—Testimony concerning wages of brakemen not hearsay, when witness testifies from personal knowledge.**
In a brakeman's action for injuries, though he was not working as a brakeman at the time of the trial, his testimony as to the then wages of brakemen was not objectionable as hearsay, where he was apparently testifying from personal knowledge.

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Action by John H. Connor against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles B. Carter, of Lewiston, Me. (White, Carter & Skelton, of Lewiston, Me., on the brief), for plaintiff in error.

William H. Gulliver, of Portland, Me., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a writ of error from a judgment in favor of the plaintiff in an action brought by John H. Connor in the District Court for the District of Maine under the federal Employers' Liability Act (Comp. St. §§ 8657–8665) and the Safety Appliance Act (Comp. St. §§ 8605–8623), for injuries sustained by him June 23, 1918, while in the employ of the Portland Terminal Company, a railroad engaged in interstate traffic and under the control and management of John Barton Payne as Agent and Director General.

The declaration contained one count, and alleged that the defendant at the time of the injury was a common carrier engaged in interstate

commerce, and that the plaintiff was in its employ as a brakeman in interstate commerce; that the defendant failed to furnish the plaintiff a safe place in which to perform his work, and to provide reasonable and sufficient rules and regulations for the conduct of its business; that it was guilty of negligence in shunting with too great force and speed certain of its cars upon three still cars standing on the main turnout in its yard without warning the plaintiff, and in failing to securely set the brakes on the still cars; and that it failed to equip and maintain said still cars with suitable brakes and appliances, as required by the Safety Appliance Act. The defendant pleaded the general issue, with a brief statement in which it admitted that the plaintiff and defendant were engaged in interstate commerce at the time of the injury, and alleged that the plaintiff was not in the exercise of due care and that he assumed the risk.

In its assignment of errors the defendant complains that the court erred (1) in not directing a verdict in its favor, on the ground (a) that the plaintiff assumed the risk, and (b) that there was no evidence from which it could be found that the defendant was in default under the Safety Appliance Act, or that it was guilty of negligence; (2) that the court erred in charging the jury on the question of assumption of risk, in that it did not further tell them that if the plaintiff knew, or in the exercise of reasonable care should have known, that the defendant was kicking the cars negligently—too fast, etc.—he assumed the risk; (3) that it erred in refusing to give the defendant's second, third, fourth, and fifth requested instructions; (4) in admitting the testimony of Vanier and Cannon as to whether either of them stopped the cars where they intended to; (5) in admitting the testimony of Rainy (a) as to what he had observed in switching operations on the Grand Trunk; (b) as to what is the ordinary rate of speed upon that road; (c) in the reception of his testimony as to how far three loaded cars, if properly braked, would be moved if three or four cars were kicked down upon them at the rate of 4 to 6 miles an hour; and (d) because said witness was not qualified as an expert; and (6) that the court erred in admitting the testimony of Connor as to what pay a brakeman in the defendant's employ received at the time of the trial.

The railroad yard in which the plaintiff was employed consisted of a number of tracks, including a main line and various cross-overs. It was a place where freight trains were reclassified and made up. The tracks in this locality run substantially east and west. There were various buildings about the yard, among which were the yardmaster's office and a lobby, where the employees changed their clothing. North of the yard and adjoining it was a highway known as Commercial street. Emery street ends at the edge of a cliff overlooking Commercial street and the yard, and at the foot of that street a flight of steps descends to Commercial street at a point near the yardmaster's office. The employees of the defendant living in that part of the city of Portland were accustomed to use these steps in going to and from their work in the yard, and to the yardmaster's office and the lobby, and to cross the tracks there in going to and from the repair shops and roundhouse. In the course of the work of shifting cars and making up trains on the

morning of the accident, three loaded box cars were kicked down upon the main turnout; and stopped so that the east end of the easterly car was about opposite the office. Later in the progress of the work four more loaded cars were kicked in upon the main turnout and allowed to run into the three still cars; there being no one on the four cars to brake them down. At or about the time the four cars struck the still cars, the plaintiff and his conductor, Dougal, their work being about finished, came from the east, riding upon an engine used in their work, and on reaching a position a short distance easterly of the east end of the still cars they stepped off, intending to go to the office or lobby, the conductor leading the way, and crossed the track on which the still cars were and about 8 feet easterly thereof. The conductor passed safely over the track, although he was struck after he had passed beyond the northerly rail; but the plaintiff, who was a short distance behind him, was struck and knocked down by the three cars, which had been suddenly put in motion by being struck by the four kicked cars, and one of his legs was broken and he suffered permanent injuries.

The evidence tended to show that at the time the three cars were kicked from the west down the main turnout a brakeman by the name of Vanier was aboard them; that he had been instructed by his conductor to ride them down on that line and to stop them at a point so that there would be room to receive four other cars, which he was to kick in upon that line, and leave a clearance between the four cars and cars that might pass on adjacent lines; that Vanier, in the performance of his duty, undertook to brake down the cars to meet this requirement, but the brake on first car was worthless, that on the next would not hold, and that after reaching the third car and braking it he succeeded in stopping the three cars some three car lengths beyond where he had undertaken to stop them; that the rate of speed at which the four cars were kicked upon the three still cars was from 10 to 15 miles an hour; that, although the defendant had no rules limiting the speed at which cars should be kicked, but left it to the discretion of the conductor, the usual and reasonable speed was from 4 to 6 miles an hour; that cars like the three cars, if adequately braked, when struck by cars moving at the rate of 4 to 6 miles an hour, if moved at all, would not be moved more than 2 or 3 feet, but that in this case they were driven back with a jump and continued on for three or more car lengths; and that the main turnout in this locality had a slight grade to the east. A rule of the company provided that—

"Cars left on side tracks must be properly secured by brakes being set, and, when necessary, trigged. Standing on grade, all cars must be coupled. They must not obstruct the use of other tracks, or in any way endanger the safety of passing trains," etc.

The evidence further tended to show that there was danger that cars left standing on the main turnout unbraked would, on account of the grade, run easterly, and, if the turnout switch was open, go onto the main line. There was evidence that neither the plaintiff nor his conductor heard or saw the oncoming four cars, and that the smoke of their engine was likely to obscure the sight of the oncoming cars, had

they looked in that direction; that there was much noise in the yard; and that the oncoming cars on the downgrade would move with comparatively little, if any, noise.

[1] From the evidence we think reasonable men might find (1) that the defendant failed to equip the three standing cars with sufficient and adequate brakes, and in so doing acted in violation of the Safety Appliance Act; (2) that it was negligent in kicking the four cars unattended at the rate of 10 or 15 miles an hour upon the still cars, and in not providing rules limiting the speed at which such work should be done; (3) that the plaintiff was not in fault in undertaking to cross the track at the time and in the manner he did and did not assume the risk; (4) that his injury was due to the defendant's fault in negligently kicking the four cars into the still cars; and (5) that the failure of the defendant to sufficiently and adequately equip the three still cars with brakes also contributed to his injury.

[2] As there was evidence from which the jury could have found that the brakes upon the three cars were insufficient, and that their insufficiency contributed to the plaintiff's injury, the plaintiff was entitled to have his case submitted to the jury on that ground alone. In such case the questions of contributory negligence and assumption of risk would be immaterial. 35 Stat. at Large, p. 66, c. 149, §§ 3 and 4 (Comp. St. §§ 8659, 8660); 36 Stat. at Large, p. 298, c. 160, § 2 (Comp. St. § 8618); 27 Stat. at Large, p. 532, c. 197, § 8. The defendant's duty to equip and maintain its cars with sufficient and adequate brakes was an absolute one. C., B. & Q. Ry. v. United States, 220 U. S. 559, 570, 31 Sup. Ct. 612, 55 L. Ed. 582; Norfolk & W. Ry. Co. v. United States, 177 Fed. 623, 101 C. C. A. 249.

[3] But if it be assumed that the insufficient brakes upon the cars in no way contributed to the plaintiff's injury, and that the sole cause was the excessive speed at which they were kicked upon the still cars, it cannot be said, as a matter of law, that the plaintiff assumed the risk of injury from such a source of danger, for the evidence shows that the act of kicking cars at such a rate of speed into still cars was an unusual occurrence, a departure from the ordinary conduct of the business, so that the question, in any view of the case, was one for the jury to pass upon.

On the question of assumption of risk the court charged the jury that—

"Under the federal Employers' Liability Act, the plaintiff assumes the ordinary risks * * * of his employment, and such extraordinary risks as he knew or in the exercise of due care should know. He does not assume the risk of any negligence on the part of the defendant, its officers, agents, employés, or servants, of which he does not know or which in the exercise of reasonable care he could not have known."

And it explained specifically and in detail the meaning of the rule as applied to the evidence in the case. To this no exception was taken. At the close of the charge the defendant submitted five requests for instructions. The first was:

"That a servant assumes the extraordinary risks incident to his employment or the risks caused by the master's negligence, which are obvious or fully known and appreciated by him."

It may be doubted whether extraordinary or unusual risks are incidents of a servant's employment; but, whether they are or not, this request was given in the language requested. The remaining requests were denied, except so far as they were given in substance in the charge.

The second request raised one of the questions which we have previously considered on the motion to direct a verdict and needs no further consideration.

[4] The third request presents two questions: The first is that the alleged violation of the Safety Appliance Act, if proved, was no part of the cause of the injury and damage complained of. This question has previously been disposed of. The second is that the jury should have been instructed that the plaintiff—

"assumed the ordinary risks incident to his employment and the risks caused by the master's negligence which are obvious and fully known and appreciated by him."

This instruction had already been given in the charge.

[5] The fourth request was that the proximate cause of the plaintiff's injury was the force which was applied to the still cars, which hit the plaintiff and knocked him down, and that this force "was the moving cars which were running east toward the three stationary cars," and therefore "the alleged violation of the Safety Appliance Act, so called, is no part of the causation of the injury alleged in this action." As previously pointed out, the proximate cause of the injury was, on the evidence, a question for the jury, and the court rightly refused to rule, as a matter of law, that the failure of the defendant to have the still cars equipped with suitable brakes was not a contributing cause.

The fifth request was:

"That, even if the defendant were guilty of negligence, yet if the injury was one the danger of which was or should have been obvious or fully known and appreciated by the plaintiff, then the plaintiff is barred from recovery, because he assumed the risk of all damage growing out of such danger."

The defendant takes nothing by this exception, as this request had in substance previously been given.

[6, 7] One Vanier was called as a witness for the plaintiff. He was the employee who, on the morning of the accident, rode down the three cars and undertook to stop them as directed by his conductor, Cannon. He testified that his crew hauled in about ten cars over the main line, took the cross-over leading to the main turnout, and kicked the three cars down (that is easterly on the down grade); that they did this five or ten minutes before the accident; that he rode down on the head car; that his conductor, Cannon, told him that after doing certain work he would be back and kick four more cars down upon him; that he was to ride the three cars down, and put on the brakes when he thought they were down far enough, so that the track would hold four additional cars; that when he started to apply the brake on the head car it would not work and was worthless; that he set the brake on the second car as tight as he could, but the cars did not stop; that he ran to the third car and put on that brake, which finally stopped the cars; that they stopped about opposite the yard office, but had gone three, four, or five

car lengths beyond where he wanted them. This evidence was admitted over the defendant's exception.

Cannon, the conductor, was called by the defendant. He testified on direct examination that he had control of the switching movements of his crew, and that when he came back onto the main turnout he kicked the four cars upon the three that had been sent down that line; that he pulled the pin for the purpose of kicking the four cars; and that when he pulled the pin the easterly end of the four cars from the three standing cars was about seven car lengths. And on cross-examination he testified that he told Vanier to ride down the three cars, so that the line would hold three or more cars that he was going to kick down upon them; that he "only intended to have seven cars at that time on the main turnout." He was then asked the following question: "Now, sir, as a matter of fact did not those three cars go further than you intended them to go?" and, subject to defendant's objection and exception answered: "I had no particular place in mind where the cars should stop." In answer to further questions he stated that it was for him to determine where cars should be stopped.

We think it was competent for Vanier to testify where he was directed to stop the cars, that he undertook to stop them as directed, and that they went down the line three or more car lengths beyond where he undertook and reasonably expected to stop them, and that this is all the testimony comes to. The question put to Cannon was of the same character, and in any view of the matter, when considered in connection with his answer, was not harmful. This disposes of the fourth assignment of error.

[8, 9] One Rainy was called as a witness for the plaintiff. At the time of the trial he was a yard conductor in the Grand Trunk yard at East Deering and Portland. At the time of the accident he was employed by the defendant in yard No. 8, where the accident occurred. He had worked there about six years, and was fully acquainted with the tracks in that yard and the method of conducting the business. He was questioned particularly with reference to the method of doing the business in that yard, the grade of the main turnout, and the necessity of having the cars braked on that line. In the course of his examination he was asked what, in his observation of switching operations on the Grand Trunk, where loaded cars were standing, was the ordinary speed that cars were dropped or kicked down upon them, and, subject to a general exception, answered that it was from 4 to 6 miles, and that if three or four loaded cars were kicked down at the rate of 4 to 6 miles an hour upon three or four other loaded cars, the standing cars, if properly braked, would move ahead about 5 feet, which question was also excepted to generally. Objection is now made to the question on the ground that it related to operations on the Grand Trunk. It is obvious from the testimony that the reference to the Grand Trunk was an inadvertence, and being a matter of this character, and not having been called specifically to the attention of counsel, the defendant should not be allowed to avail itself of this objection. Furthermore, the evidence shows that the witness, on account of his knowledge of the particular location, the method of doing work in the defendant's yard and his gen-

eral experience in that line of work, was competent to testify as to the distance cars would be shunted when struck in the manner set out in the above question. The evidence was cumulative, and, if anything, more favorable to the defendant than to the plaintiff, and we do not regard the defendant as prejudiced by its introduction.

[10, 11] On cross-examination of the plaintiff it appeared that at the time of the trial, which took place some two years after the accident, he was working in a drug store, and was receiving $23 a week for six days of work, and that at the time he was injured he was receiving $25.90 a week for seven days of work, or a little less per day than he was receiving at the time of the trial. On redirect examination he was asked what a brakeman for the defendant was then receiving per day, and testified, subject to exception, "$6.48 a day." We think the defendant's counsel, by pursuing the line of cross-examination that he did, laid the ground and rendered it competent for the plaintiff to show what wage, at the time of the trial, he would have received in his usual employment, had it not been for his injury due to the defendant's fault. It is also objected that the evidence was hearsay, but there is nothing in the record to show that this is so. He apparently was testifying from personal knowledge.

The judgment of the District Court is affirmed, with costs in this court to the defendant in error.

ANAHEIM SUGAR CO. v. T. W. JENKINS & CO.*

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3510.

1. **Sales ⟸181(11)—Evidence held sufficient to sustain verdict for breach of contract to supply plaintiff's requirements.**
   In an action by a wholesale grocery company against a sugar manufacturer for breach of a contract for the sale of plaintiff's "August requirements" of sugar, evidence concerning plaintiff's requirements *held* sufficient to sustain a verdict in its favor.

2. **Sales ⟸421—Instructions as to circumstances justifying recovery on contract to supply party's requirements held not erroneous.**
   In an action by a wholesale grocery company against a sugar manufacturer for breach of a contract to supply the wholesale company's "August requirements," instructions stating the circumstances under which there could be a recovery on such a contract *held* to give the manufacturer no just cause to complain.

3. **Trial ⟸296(9)—Instruction that question of right to recover was for jury held not erroneous in connection with preceding clause.**
   A statement, in an instruction in an action for breach of contract, that the question whether or not plaintiff was to recover was with the jury, and not with the court, was not erroneous, when read in connection with the clause immediately preceding, in which the court stated that the fact that he had charged concerning damages should not be taken by the jury as an intimation of the court's opinion that plaintiff was entitled to recover damages.

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

*Rehearing denied October 10, 1921.

4. Trial ⇐296(9)—Instruction that appellate court had held contract valid not erroneous.

In an action for breach of a contract of sale of plaintiff's "August requirements" of sugar, a statement in the charge that the Circuit Court of Appeals had held the contract valid was not erroneous, in view of other instructions.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by T. W. Jenkins & Co. against the Anaheim Sugar Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also (D. C.) 237 Fed. 278; 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918E, 293.

The case is here for the second time—the first occasion having been a writ of error bringing up the ruling of the trial court sustaining a demurrer to the complaint. 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918E, 293. The complaint was based upon a contract entered into between the defendant in error, a wholesale grocery corporation of Portland, Or., and the plaintiff in error, a sugar manufacturing corporation in Southern California, which contract reads:

"San Francisco, Calif., June 13, 1914.

"A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of the second part, to wit:

"Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at $4.20 per bag, less 2% cash 8 days, f. o. b. San Francisco, August shipment.

"It being understood and agreed that party of the first part guarantees the price up to time of arrival against decline only to the basis of the C. & H. and Western Sugar Refining Co.

Anaheim Sugar Company,
"Per Ariss, Campbell & Gault, Agts.,
"Party of 1st Part.
"T. W. Jenkins & Company,
"Party of 2d Part."

The complaint alleges, among other things, that the price agreed upon for the sugar was 10 per cent. less than the then prevailing market price at San Francisco, and was so fixed by the defendant company in consideration of the plaintiff "agreeing with the defendant that it would purchase exclusively from defendant all fine granulated beet sugar required in its business during the month of August, 1914, and, relying upon defendant's agreement to sell to plaintiff all fine granulated beet sugar required by it in its business during the said month of August, plaintiff made no other arrangement for the purchase of its August requirements, and did not purchase any fine granulated beet sugar from any person or persons other than defendant above named."

The complaint then alleges that during the month of August, 1914, the plaintiff required in its business and ordered of defendant 4,800 bags of fine granulated beet sugar, and that there was shipped and delivered from time to time during that month by the defendant to the plaintiff 600 bags of such sugar and no more—the defendant refusing the plaintiff's demand for the other 4,200 bags. The complaint also alleges that at the time the contract was entered into the plaintiff was, and for many years before that had been, engaged in the wholesale grocery business at Portland, in pursuance of which it had in the states of Washington, Oregon, and California, and other places, many thousands of customers to whom it sold sugar, among other articles, and that its ordinary requirements during the month of August of each year, including that of 1914, of sugar of the kind and character specified in the contract, was in excess of 4,800 bags, and that, relying upon the contract sued on, the plaintiff contracted with its customers to deliver to them 4,800 bags of the sugar the defendant company had agreed to furnish the plaintiff, and that by reason

of the defendant company's refusal to comply with its contract the plaintiff was damaged in the sum of $13,020. The complaint also alleges that the defendant company knew at the time of entering into the contract the manner in which the plaintiff conducted its business.

The answer of the defendant put in issue the averments of the complaint regarding the quantity of sugar required by the plaintiff, and also the alleged knowledge of the defendant of the plaintiff's previous requirements and methods of doing business, and set up as separate defenses that the plaintiff had purchased from the defendant, at divers times during the period of approximately two years preceding the making of the contract, quantities of beet sugar averaging only about 333 bags per month, and that at the time of the making of the contract the defendant company had no knowledge of the plaintiff's normal or other requirements than such as was derived from those previous dealings; that the plaintiff's normal requirements of August did not exceed 600 bags, but that the plaintiff sought to take advantage of the sharp advance in sugar brought about by the late war, and therefore ordered sugar largely in excess of its normal needs; that the plaintiff was itself uncertain as to its August requirements, and in fact notified the defendant, on or about August 18, 1914, that its August requirements might reach 50,000 bags; that at the time of the making of the contract the plaintiff informed the defendant that it did not itself know what its requirements would be for August, 1914, as its requirements were not capable of approximate estimate in advance, for the reason that its needs would depend upon the condition of the market at the time and upon its ability to secure orders from its customers at prices in excess of the contract prices.

The verdict returned by the jury in the plaintiff's favor was for $8,190, for which judgment was entered, with interest and costs, against the defendant.

Donald Barker and Wm. H. Neblett, both of Los Angeles, Cal., for plaintiff in error.

Roscoe C. Nelson and Beach & Simon, all of Portland, Or., and Allen & Weyl, of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). In sustaining the validity of the contract sued on, this court said when the case was last here:

"The difference between a contract which does not obligate a buyer to take any specified quantity of the seller's product and one where in consideration of the seller's promise to sell the buyer promises to buy all the produce it may require for its own use for a definite period of time is substantial. In the one instance there would be no consideration, while in the other there would be a mutual obligation to perform, which is a consideration for the promise of each. A mere option to buy is readily distinguishable from an agreement to buy all to be required. Suppose, for instance, the plaintiff herein had bought sugar from any other sugar dealer for sale to its customers during August, it must be that, if loss had occurred, action in damages for breach of contract would have been sustainable, and damages could have been ascertained by extrinsic evidence. Failure in the contract to fix any requirements on the part of the Jenkins Company for August, 1914, does not seem to us to call for a nullification of the contract upon the ground of want of mutuality. The complaint charges that the contract was made with the knowledge on the part of the defendant of how plaintiff's business was conducted, and that plaintiff made contracts with customers for sale and delivery of sugar to be acquired under the contract with defendant, and knowing what the probable requirements of plaintiff would be. We think that upon demurrer the presumption is that the parties made their agreement with regard to the knowledge as alleged, and that the defendant intended to sell and deliver the quantity of sugar which the plaintiff needed for its August business."

And, furthermore, that—

"By the terms of the contract temptation to cut down requirements because of falling market was reduced, in that it was expressly agreed that the Anaheim Sugar Company, manufacturer, guaranteed the price up to time of refusal against decline only to the base of price charged by the manufacturer to certain buyers." 247 Fed. 958, 960, 961, 160 C. C. A. 658, 661, 662 (L. R. A. 1918E, 293).

[1] There was testimony tending to show that the defendant in error was a large dealer in sugar—the record showing that its sales during the month of August, 1911, amounted to $25,868.66, as compared with $35,527.19 for August, 1914, during the latter half of which latter month such sales were, according to the record, largely stimulated by war conditions. And that the defendant in error was in truth a large dealer in the commodity in question, whose custom was therefore desirable, further clearly appears from the testimony of the agent of the plaintiff in error, who entered into the contract in question on its behalf—the witness Ariss—who expressly admitted his knowledge of that fact, for which obvious reason he was, according to his own testimony, anxious to obtain a contract obligating the defendant in error to buy from the plaintiff in error exclusively. Admittedly, just what the requirements of the defendant in error would be neither party to the contract knew. Regarding the August, 1914, requirements, we excerpt a few lines from the testimony of Ariss:

"Q. Now, the expression 'August requirement' and 'August shipment,' as used in this contract and used in the trade generally at that time, you understood that to mean orders taken for delivery in August, either within the month of August or two or three days before that time? A. Yes, anything for delivery in August.

"Q. Do you recall, Mr. Ariss, that the instant they started to give you orders for shipments under this contract, just about the 1st of August, do you remember their telling you that they were ready to start shipments and would want the sugar almost at once? A. Yes; I recall that they ordered out 600 to 800 bags about the 1st of August, and before there had been a rise in the market. I do not remember what time in August the heavy advance occurred in the price of sugar. It was along some time after the 10th, I think. I think they did before the 10th of August specify the delivery of additional quantities, or ask for the delivery of additional quantities. I believe the amount of sugar actually delivered to them by the Anaheim Sugar Company for August was 600 bags."

There is no ground for holding the evidence insufficient to sustain the verdict.

[2] The plaintiff in error assigns as error the instructions given by the trial court, as also its refusal to give certain requested instructions. In substance those given and complained of were, that this court had sustained the validity of the contract sued on (which it obviously did, in the decision heretofore cited); that it was not necessary for the plaintiff to establish that the extent of its requirements for August, 1914, was susceptible of exact prophecy at the date of the contract, but that it must show by a preponderance of the evidence that its business was an established and substantial one; that the sale of sugar was a clearly marked and indispensable feature of its business; that it had a reasonably established and dependable list of customers who looked to it

regularly for all or part of their sugar supply, and that within reasonable limitations it was possible at the date of the contract for the parties to it by fair inquiry to approximate the quantity which would probably be needed by the plaintiff, and that in so doing account should be taken of the season of the year, the preceding history and scope of the plaintiff's business, and its normal growth; that the world war and other unlooked-for influences should be excluded from such consideration, and, excluding those things, if a fair approximation of what was required could be arrived at by the parties the contract was enforceable; that the contract did not mean that the defendant was obliged to deliver to the plaintiff all that the latter might require in the sense of all that it might want or desire because of a radical advance in market price or for any other cause not fairly within the contemplation of the parties when the contract was executed; that the word "requirements" meant the amount of sugar which plaintiff would ordinarily and in the regular conduct of its business need to supply the ordinary demands of an established trade in the month of August, 1914, making due allowance for the season (unless the same was abnormal), making allowance also for a healthy normal growth (if the jury believed the business was a healthy and growing one), and which they believed was contemplated by the parties at the time of the execution of the contract; that it was incumbent upon the plaintiff to prove by a preponderance of the evidence that when the contract was entered into both parties to it had knowledge of what the plaintiff's probable normal requirements for fine granulated best sugar would be in the month of August, 1914, and that the contract was entered into in contemplation of that knowledge, in the absence of which knowledge on the part of both parties to the contract the verdict should be for the defendant; that the knowledge so required by both parties to the contract must have been based upon a then existing knowledge of both parties as to previous requirements of the plaintiff for sugar "for corresponding period of time prior thereto with a fair allowance for a normal increase in the volume of the plaintiff's business in said commodity over the volume of business therein for such previous corresponding periods, or to have been based upon a knowledge communicated at or prior to the time of the making of said contract to the defendant by the plaintiff of the plaintiff's probable normal August, 1914, requirements of such sugar, and that the information so communicated to the defendant must have been based upon the plaintiff's previous requirements of the same commodity for corresponding periods prior thereto, with a fair allowance for a normal increase in the volume of the plaintiff's business in said commodity over the volume thereof for such previous corresponding periods"; that mere guesses or expectations of the quantities of plaintiff's probable normal August, 1914, requirements, if not based upon and derived from knowledge of previous actual requirements by the plaintiff for corresponding periods prior thereto, and upon a fair allowance for a normal increase in the volume of plaintiff's business in said commodity over the volumes for such previous corresponding periods would not be sufficient to render the alleged contract involved definite, certain, and

binding; that the probable normal requirements of the plaintiff did not mean its possible requirements, nor could the August requirements be measured exactly by August requirements of previous years, and that in determining what the August requirements were, the jury should take into consideration anything in the record tending to show what the normal conditions for August were, which the parties contemplated at the time of entering into the contract; that if the plaintiff's requirements were increased by the advance in price, and that if such advance in price was unusual and abnormal, the defendant was not obliged to supply any quantity of sugar ordered by the plaintiff because of such stimulated demand; that the law does not permit a contract to be used for speculation or for any other than ordinary and regular business purposes, and that if the plaintiff attempted to use the contract for the purpose of speculation in a rising market, such attempt would be a fraud upon the defendant and the defendant would be entitled to refuse to be bound further by the contract; that it was the duty of both parties to it to deal fairly and in good faith with each other.

In our opinion the plaintiff in error has no just cause to complain of the instructions so given.

[3, 4] The clause in the instructions of the court also assigned as error, reading, "The question of whether or not the plaintiff is to recover is with you and not with me," is to be read in connection with the clause immediately preceding it, reading, "The fact that I instruct you concerning damages shall not be taken by you as any intimation that I am of the opinion that the plaintiff is entitled to recover damages," and as so read it is manifest that the assignment of error is not well taken. The latter observation is equally applicable to the assignment that the court erred in telling the jury in effect that this court had held the contract sued on valid.

In so far as the requested instructions were pertinent and proper, we think they were covered by the instructions given.

The judgment is affirmed.

THE KOREA MARU.*

TOYO KISEN KAISHA et al. v. WILLITS et al.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3610.

1. **Shipping ⇐141(1)—Stipulation in bill of lading held not to absolve carrier from liability for negligence.**
   In view of Comp. St. §§ 8029, 8030, stipulation in bill of lading reading, "Leakage of contents at owner's risk," does not absolve the carrier from liability arising from negligence or want of the exercise of due diligence in properly stowing cargo.
2. **Shipping ⇐132(5)—Evidence held to prove negligent stowage.**
   In action for damages sustained through partial loss by leakage from containers of cargo consisting of cocoanut oil shipped from Manila to San Francisco during the month of July, evidence *held* to establish neg-

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

*Rehearing denied October 10, 1921.

ligence in stowage, in that the tank in which the cocoanut oil had been placed was not a suitable or proper place in which to stow the oil for carriage during such season of the year, was wholly without ventilation, and that by reason of its proximity to the engine room and emergency escapes extending through it, the heat in the tank was rendered excessive, which affected the oil and caused the leakage.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Edward E. Cushman, Judge.

Libel by Charles D. Willits and I. L. Patterson, copartners doing business under the firm name of Willits & Patterson, against the Toyo Kisen Kaisha, a corporation, as claimant of the Japanese steamship Korea Maru, her engines, boilers, boats, tackle, apparel, and furniture, and the United States Fidelity & Guaranty Company, her stipulator. Judgment for libelants, and defendants appeal. Affirmed.

Knight, Boland, Hutchinson & Christin and F. Eldred Boland, all of San Francisco, Cal., for appellants.

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

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

WOLVERTON, District Judge. Appellees are libelants, and are suing for damages which it is alleged they sustained through partial loss, by leakage from containers, of cargo consisting of cocoanut oil shipped from Manila to San Francisco on the steamer Korea Maru; Toyo Kisen Kaisha, claimant. The leakage is attributed to improper stowage. The shipment consisted of 542 barrels of cocoanut oil, 440 of which were stowed in what is known as No. 5 tank, and the balance, 102 barrels, in No. 7 hold. The barrels were of Douglas fir, possibly some of oak, and glued on the inside. There is some difference in the testimony as to their condition when the shipment was made. Some witnesses describe them as stained from oil seepage, and even leaking at the time they were taken aboard; but the better opinion is that they were in good condition, sound and tight, and showed no leakage at the time. The shipment was completed on July 7, 1917, and on the next day, the sailing date, the thermometer stood at 87 degrees; the season being the warmest of the year. It is stipulated that the oil at the time was in a liquid state, owing to the temperature. The weather continued very warm during the voyage, or the greater part of it, at least. When the oil was discharged at San Francisco, it was found that many of the barrels were in bad condition, some having the hoops off, and others with the staves and heads stove in, and in consequence a large quantity of the oil had escaped, and much of it had run out through the scuppers into the bilges, and was pumped into the sea. The leakage was much greater in No. 5 tank than in No. 7 hold.

T. Ota, the ship's captain, says that, upon arrival in San Francisco, the condition of the barrels in No. 5 was bad, "but on account of the thinness of the wood which made the barrels, the contents was all

perforated through the wood all over the barrels," and he further says the condition of the cargo in No. 7 hold was good; the inquiry being touching the oil shipment. The statement is inferentially corroborated by a letter written by U. Kondo, the chief officer of the ship.

W. E. Boyer, libelants' salesman, relates that the cargo that came out of No. 5 tank was in very bad condition; that the barrels were "leaking very badly," but that the barrels from No. 7 "were in good condition."

William F. Dunn, who was at the time in charge of the stevedoring for the Toyo Kisen Kaisha ships, testifies to the same purpose. On the other hand, three stevedores were called who testified that the condition of the barrels that came out of each of the holds was practically the same. We are impressed, however, as was the court below, that the stonger case is with the libelants on the disputed fact.

No. 5 tank, indicated on the blueprint plans of the ship as No. 5 orlop, is situated abaft and adjoining the engine room, and above the thrust recess. It is a part of No. 5 hold, but is partitioned off from it, so that it constitutes an entirely separate room or hold for the storage of cargo. The hatch opening for No. 5 hold extends over No. 5 tank, and the only access thereto for the deposit of cargo is through the extended hatchway above. The thrust recess is used in connection with the engine room, and is really a part of it. Passing up through No. 5 tank from the thrust recess are two emergency escapes, square in form, one on each side, to permit the men in the engine room to pass out that way to the upper decks in case their egress is otherwise cut off. These escapes are provided with doors or openings into No. 5 tank. They serve, not as ventilators for conducting air from the outside into No. 5 tank, or the thrust recess, or the engine room, but for giving vent outward from the engine room. The tank is separated from the thrust recess by a steel floor, and from the engine room by a steel bulkhead, with wood planking on the tank side, intended to give ventilation about the cargo in the tank.

Upon either side of No. 5 tank, and between it and the skin of the ship, are fresh-water tanks. These extend below the bottom of No. 5. The testimony tends to show that the only ventilation from the outside was through ventilators, extending into No. 5 hold and into the shaft alleys below, which extend into the thrust recess, for supplying fresh air to the men in the engine room. Ventilation carried into No. 5 hold could only affect No. 5 tank by contact with the steel partition between the hold and the tank. No. 7 hold is abaft No. 5 hold, with No. 6 intervening, and is provided with ventilators from the outside. The sole cargo in No. 5 tank consisted of oil in barrels. These barrels were deposited on their sides in three tiers, with dunnage about them to hold them in place. When the stowage was completed, hatch boards were placed over the tank, and other cargo, to the depth of about seven feet, was stowed upon and above the hatch boards. The barrels of oil in No. 7 hold were stowed in one tier at the bottom of the hold.

It is contended that No. 5 tank was not a suitable or proper place in which to stow the oil for carriage, especially in that season of the year;

that the tank was wholly without ventilation, and that, by reason of its proximity to the engine room, and the emergency escapes extending through it, the heat in the tank was rendered excessive, which affected the oil and caused the leakage complained of.

It can scarcely be questioned that there was no ventilation in No. 5 tank, except through the emergency escapes, and this was an "uptake," not an intake. The air passing from the engine room would naturally be heated more or less, and would have a tendency to raise the temperature in the tank rather than lower it. If the doors were open from the escape into the tank, the effect would be to further increase the temperature therein. The doors, however, were probably closed. The proximity of the engine room to the tank, with the steel bulkhead between, would also have some effect in raising the temperature. There is some testimony to the effect that, after the ship is at sea for a time, the fresh water being drawn out of the tanks is replaced with condensed water, which would be hot. If this were the case, the temperature in No. 5 tank would also be affected thereby. Some opinion estimates have been made respecting the degree of heat in the engine room while the ship was in motion—the estimates running from 90 to 115 degrees; it being thought that the heat in No. 5 tank would be from 15 to 20 degrees less.

Cocoanut oil congeals to a solid at 65 degrees, and liquefies fully at 75. When in a liquid state, its effect on wooden containers is to drive out the moisture and cause the wood to shrink, and the consensus of opinion is that the higher the temperature the greater will be the shrinkage, and that the effect is to allow the oil to escape more freely.

It is reasonably deducible, as a conclusion from the fact that the oil carried in No. 7 hold came through without considerable loss by reason of leakage from the containers, and that the loss from leakage was great in No. 5 tank, that the tank was not a suitable or proper place for the stowage of the oil in that season of the year. This conclusion is fortified by the testimony of Boyer, to the effect that his firm has imported cocoanut oil in barrels of like kind to those used on this occasion, and that the oil came through in good order and condition. Among three ships he names is the Melville Dollar, whereby the shipment was made between June 19th and July 31st.

[1] It is stipulated that the oil was received for shipment in good order. The bills of lading contain the exception, "Leakage of contents at owner's risk." This, however, does not absolve the carrier from liability arising from negligence, or want of the exercise of due diligence, in properly stowing cargo. Sections 8029, 8030, U. S. Compiled Statutes 1918; The Manitoba (D. C.) 104 Fed. 145; The Jeanie, 236 Fed. 463, 149 C. C. A. 515; The San Guglielmo (D. C.) 241 Fed. 968; Doherr v. Houston (D. C.) 123 Fed. 334. Such was the rule prior to the Harter Act (Comp. St. §§ 8029–8035)—that the carrier could not shield himself from negligence or inattention by exception in the bill of lading. Transportation Co. v. Downer, 11 Wall. 129, 133, 20 L. Ed. 160. See, also, Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

[2] It is, however, admitted that the exception casts upon the libelants the burden of establishing negligence or want of diligence in stowage which conduces, as the proximate cause, to the injury complained of. This burden, we are impressed, has been met, notwithstanding the propensity of the oil in liquid state to deteriorate the containers.

We conclude, therefore, that the loss of the oil, except the normal amount incident to such shipments, is due to negligent stowage on the part of the ship.

Affirmed.

MON SINGH v. WHITE, Commissioner of Immigration.*

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3577

1. **Aliens ⇐54—Deportation proceedings held not barred by Immigration Act enacted subsequent to alien's entrance.**

Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), providing that deportation may be had at any time within three years after entry of any alien who shall have entered the United States by land at any other than a designated port of entry, or who enters without inspection, being retroactive to include aliens who entered before the passage of the act, and the third proviso of such section, declaring the provisions thereof, "with the exception hereinbefore noted," applicable to the classes of aliens therein mentioned, irrespective of the time of their entry, having no relation to the classes of aliens mentioned in such section, the time for deportation of whom after entry is fixed, a proceeding for the deportation of an alien likely to become a public charge at the time of his entry, who entered without inspection prior to the passage of such act, is not barred by section 38 (section 4289¼u) thereof, providing that nothing contained in the act shall be construed to affect any prosecution except as mentioned in the third proviso of section 19, provided such proceedings were commenced within the time limit fixed by the act.

2. **Aliens ⇐54—Court bound by conclusions of Secretary of Labor in deportation proceedings, where evidence is conflicting as to identity of alien sought to be deported.**

In a proceeding for the deportation of an alien, who entered the United States without inspection, where the testimony of the Immigration Inspector, before whom the hearing was had, and of a companion, who was with such alien at the time he entered the United States, and other evidence, was conflicting as to his physical characteristics, but was competent, in view of the practice before an inspector of immigration, and tended to identify the alien as the man wanted, the record was one for the exercise of independent judgment by the Secretary of Labor, by whose conclusions the court is bound.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Petition for writ of habeas corpus by Mon Singh, sometimes referred to as Man Singh, against Edward White, as Commissioner of Immigration, Port of San Francisco. From a judgment against petitioner, he appeals. Affirmed.

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*Rehearing denied October 10, 1921.

George A. McGowan, of San Francisco, Cal., for appellant.

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

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

WOLVERTON, District Judge. The appellant, Mon Singh, was arrested on a warrant issued by the honorable Secretary of Labor, of date September 18, 1917, charging "that he was a person likely to become a public charge at the time of his entry into the United States, and that he entered without inspection"; the date of the entry being on or about November 1, 1915. A hearing was had before an immigration inspector in October and November, 1917, at which appellant was at all times represented by counsel, which resulted in an order of the Secretary of Labor directing his deportation. Thereupon appellant petitioned the court below that a writ of habeas corpus issue and that he be discharged from custody of the officer holding him for deportation. The petition, upon demurrer, was held insufficient, and the appeal is from the judgment which followed.

[1] It will be noted that the date of petitioner's entry was on or about November 1, 1915, which was prior to the passage of the Immigration Act of February 5, 1917 (39 Stat. 874), and the question is suggested whether the proceeding is not barred by section 38 of the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼u). Section 19 (section 4289¼jj) provides that deportation may be had, at any time within three years after entry, of any alien who shall have entered the United States by land at any place other than one designated as a port of entry, or "who enters without inspection." Section 38 provides:

"That nothing contained in this act shall be construed to affect any prosecution * * * except as mentioned in the third proviso of section 19 hereof."

That proviso is as follows:

"Provided further, that the provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States."

But this proviso can have no relation to the classes of aliens mentioned in section 19, the time for deportation of whom after entry is fixed. Consequently the third proviso cannot affect the petitioner here. Moreover, this court has recently held that section 19 is retroactive, to include aliens who entered before the passage of the act. Ng Fung Ho v. White (C. C. A.) 266 Fed. 765. And that will apply, of course, provided the proceedings for deportation are commenced within the time limit fixed by the act.

[2] The only other question material is whether, under the evidence, there is sufficient identification of the petitioner to warrant the Secretary of Labor in finding that he is the person who entered without inspection. Dovan Singh, alias Pahn Singh, was examined before an immigration inspector at Los Angeles, Cal., and his testimony

thus taken was read in evidence. He relates that Man Singh conducted him and one Takur Singh across the Mexican border into the United States on November 7, 1915. His description of Man Singh is as follows:

"He is a man about 45 years old, height about 5' 9", weighs about 180 lbs., wears his hair long and has a turban, but ties his hair up on his head, has a long beard, parted in the middle, sometimes he wears it straight down, sometimes he ties it up. He has a few smallpox pits on his face and forehead. He walks with a sort of a limp, on the side of his heel, on the right foot."

Plumly, the inspector before whom the hearing was had, describes the petitioner as:

"Age—47 years.
"Height—5 ft. 9¾ in.
"Complexion—Dark.
"Eyes—Deep-set; brown.
"Weight—169 lbs. (Has large frame, but is lean and hard after his summer's work; could easily weigh 180 to 185 lbs.)
"Hair—Black; slightly gray. Wears hair long, with a white turban; hair is tied up on head.
"Beard—Black, tinged with gray; is now short.
"Marks—Prominent snag tooth on right side, upper jaw, projecting over two others. Walks without limp. Small pit marks on face and forehead; pit marks on nose.
"Cheek bones are rather high."

Another description is given of petitioner which comes through correspondence with the inspector in charge at Los Angeles, and which was procured, from some source which does not appear, at the time of the issuance of a previous warrant looking to the deportation of petitioner. In this is shown the following:

"Prominent snag tooth on left side, upper jaw, seemingly projecting over two others. Walks with a slight limp."

No reference is made to "pit marks" on face. The limp seems to have been wanting at the time of the examination, although Edward L. Peery, city marshal at Payson, Utah, who has known petitioner since March or April, 1917, relates that he has noticed him limp, and that he seemed to favor his right foot or leg. Several who had known him previous to the examination testified that he did not walk with a limp. In his summary of the testimony, Plumly, the immigration inspector before whom the hearing took place, has this to say:

"The alien arrested tallies with the descriptive statements of the man wanted, except that now he does not walk with a perceptible limp, and his snag (or hood) tooth is on the right side, instead of the left."

The petitioner claimed at the hearing that his name was not Man or Mon Singh, but that it was Ram Singh, and among other things he testified that he came to the United States, landing at San Francisco from ship Manchuria, about the 14th or 15th of April, 1910, under the name of Ram Singh. Reference to the records shows that two Hindus entered ex Steamship Manchuria April 15, 1910, namely,

Mahan Singh, laborer, age 30, and Ram Singh, age 25, laborer. Neither of these men in age tallies with petitioner, who gave his age as 47. It further appears that petitioner, in September, 1917, declared his intention to become a citizen, representing that he landed at San Francisco March 5, 1908. So that petitioner's story of himself is a vacillating one.

An alibi was attempted to be established on the part of petitioner; but this, in the view of the inspector, failed. There is here a clear controversy in the testimony. Recurring to the description, it will be noted that Dovan Singh makes no reference to the snag tooth, but does speak of the limp and "pit marks" on the face. The description given when previous warrant was applied for places the snag tooth on the left side, shows the limp, but makes no reference to "pit marks" on the face. The man examined had a snag (or hood) tooth, located on the right side, upper jaw; was "pit-marked" about the face, but walked with no perceptible limp.

The circumstances are peculiar, and how the evidence is to be reconciled is not for us to say. It is obvious that the evidence offered and admitted was competent in character, in view of the practice before an inspector of immigration, and tends in some degree to identify petitioner as the man wanted. The case is not one of a total absence of competent testimony, nor one where but one conclusion may be drawn. We are impressed that the record is one for the exercise of independent judgment by the Secretary of Labor, and the court is bound by his conclusions. We are the more reconciled to this conclusion in view of the fact that since the order of deportation was issued the petitioner has admitted to the inspector that his true name is Man Singh, pronounced Mun (or Mohn) Singh.

Judgment affirmed.

ARIZONA & N. M. RY. CO. v. FOLEY.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3649.

Master and servant ⊂=69—Under statute, brakeman held entitled for eight hours to contract wages for ten hours.

Under Adamson Act, §§ 3, 4 (Comp. St. §§ 8680c, 8680d), providing that, during a certain period, wages of railway employees should not be reduced below the existing standard day's wage, and that time in excess of eight hours should be paid for pro rata, where a contract in force when the act took effect provided for a ten-hour day, and provided that the rates of wages prescribed should not be taken as a basis for the purpose of figuring a schedule under an eight-hour day, if subsequently adopted, there was no fixed schedule of rates between the parties, and a brakeman was entitled for an eight-hour day to as much as he had been receiving for a ten-hour day.

In Error to the District Court of the United States for the District of Arizona; Edward S. Farrington, Judge.

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

Action by H. E. Foley against the Arizona & New Mexico Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The pleadings and the agreed statement of facts upon which the case was submitted disclose the following:

The defendant in the court below (plaintiff in error here) operates a railroad 111 miles in length, extending from Clifton, Ariz., to Lordsburg, N. M. The plaintiff in the action (defendant in error here) was a brakeman in its employ from August 6, 1916, to April 27, 1917, during which time he was a member of the Brotherhood of Railroad Trainmen.

Prior to the employment of the defendant in error there was a contract of employment, with a schedule of wages agreed upon between the plaintiff in error and the conductors and brakemen in its employ, and the Brotherhood of Railroad Trainmen, which became effective April 1, 1911, referred to in the agreed statement of facts as Schedule A.

March 29, 1916, the Brotherhood of Railroad Trainmen, comprising the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Engineers and the Brotherhood of Trainmen, being national associations of engineers, firemen, conductors, and brakemen, engaged in railway service in the United States, submitted to the railway employers of the United States a certain "schedule of demands to govern" the respective parties thereto, which is referred to in the agreed statement of facts as Schedule B.

During the month of June, 1916, while there was pending negotiations between the railway employees of the United States and the Brotherhood of Trainmen, the train employees of the plaintiff in error presented for its consideration a proposed new wage schedule "upon the eight-hour and time and one-half overtime basis, among which schedules and demands was one made in behalf of conductors and brakemen of" the plaintiff in error, section 1 of article 1 of which is as follows:

"Rates of pay in passenger service will be: Conductors, $182.00 per calendar month. Brakemen, $117.00 per calendar month. Eight hours to constitute a day. Overtime 1½ times pro rata rate. One crew to be paid for the calendar days, provided they lose no time on their own account. Extra service to be paid for proportionately.

"Rates of pay in freight work and mixed service will be: Conductors, $140.00 per month. Brakemen, $107.00 per month. Twenty-six (26) days to constitute a month's work. Eight hours (8) to constitute a day. Overtime after eight hours at 1½ the pro rata rate.

"The senior crew to be paid for twenty-six (26) days each month. (Overtime not to apply as part of the month's work.) Extra crews to be paid proportionately for amount and class of service performed."

That proposed schedule is referred to in the agreed statement as Schedule C.

The agreed statement shows that the plaintiff in error and its railway employees, including its conductors and brakemen, "were not desirous of entering into the national controversy then in progress between said National Brotherhoods of Trainmen and said railway employers of the United States as aforesaid, and to that end and for the purpose of comprising and settling the demands of defendant's employees, and in particular of its conductors and brakemen, pending the settlement of said controversy between said National Brotherhoods of Trainmen and said railway employers of the United States, entered into and adopted certain schedules and contracts of employment to govern between the employees of this defendant and this defendant, among which was that certain schedule and contract of employment between this defendant and its conductors and brakemen" specifically set out, including this:

"The following rates of pay and regulations will govern the employment and compensation of conductors and brakemen in the service of the Arizona & New Mexico Railway Company, and will be in effect from June 16, 1916. No revision or abrogation of this contract or agreement will be made with-

out at least thirty days' notice in writing. All rates of pay, rules, and regulations previously in effect are null and void.

"Article I.

"1. Rates of pay in passenger service will be: Conductors, $210.00 per calendar month. Brakemen, $150.00 per calendar month. Ten hours or less to constitute a day. Overtime pro rata.

"2. Rates of pay in freight work or mixed service will be: Conductors. $169.00 per month. Brakemen, $136.50 per month. Twenty-six days to constitute a month's work. Ten hours (10) or less to constitute a day. Overtime after ten hours pro rata."

The last-mentioned contract and schedule is referred to in the agreed statement of facts as Schedule D. The agreed statement of facts declares:

"That at the time of the formation and adoption of said Schedule D, effective June 16, 1916, it was appreciated by this company and its trainmen that the question of the national adoption on the part of the railroad brotherhoods of trainmen and the railway employees of the United States of an eight-hour day and time and one-half overtime basis for wages, was not settled, and that the matter was then an open question likely to be determined either by adoption or by rejection or by compromise and that inasmuch as the trainmen and employees of this defendant company, are and then were members of and affiliated with said National Brotherhood of Trainmen, in the event the eight-hour day and time and one-half overtime basis of wage schedule was either adopted or a compromise effected thereon, a further adjustment of wages would be necessary between this defendant and its trainmen upon said Schedule D, in conformity with the conclusion and agreement if reached between the said National Brotherhoods of Trainmen and said railway employers of the United States. Recognizing this contingency an express written agreement was executed between this company and its trainmen, in words and figures as follows, to wit:

" 'Agreement between the Train and Engine Men of the Arizona & New Mexico Railway Company and the Engine Men of the Coronado Railroad:

" 'In signing up the agreement between the train and engine men which is effective under date of June 16, 1916, it is mutually agreed between the parties to this agreement, namely, the Arizona & New Mexico Railway Company, the Coronado Railroad, the engine men of the Coronado Railroad, and the train and engine employees of the Arizona & New Mexico Railway, that in case, in the future, the employees ask for a new schedule based on either an eight-hour day or time and one-half for overtime, or both of these provisions, that the new schedule under date of June 16, 1916. will not be used as a basis on which to figure out rates of pay or working conditions, and that for the purpose of figuring a schedule under such eight-hour day or time and one-half for overtime, this schedule of June 16, 1916, will not be considered as having been in effect.' ".

The latter quoted agreement between the train and engine men of the plaintiff in error is referred to in the agreed statement as Schedule E, and the agreed statement of facts expressly states that the agreement between the train and engine men effective under date of June 16, 1916, referred to in Schedule E, is the agreement set forth in the aforesaid Schedule D.

The agreed statement of facts further declares that "the aforesaid agreements, excepting in so far as one may be affected by others, were in full force and effect at the time the Adamson Act became effective"; that the plaintiff in the case (defendant in error) entered into the employment of the plaintiff in error August 6, 1916, and continued in such employment to April 27, 1917, and that from August 6, 1916, to and including December 31, 1916, he was paid and receipted in full for all services performed by him under the provisions of Schedule D; that subsequent to the passage of the Adamson Act (Comp. St. §§ 8680a–8680d) the train employees of the plaintiff in error, including the defendant in error, insisted on Schedule D being "so changed as to apply to such schedule the eight-hour provisions of such Adamson Act, and that they be paid by such Schedule D on an eight-hour basis, with overtime in excess of eight hours at the same rate, but that defendant declined

so to do and thereafter paid such employees, including plaintiff, for such train service compensation computed on the basis of an application of the Adamson Act and its provisions to the compensation provided in Schedule A except in cases where by using the provisions of Schedule D without applying the Adamson Act, a greater compensation would result to such employees, including plaintiff, in which cases such compensation was computed and payments made in accordance with Schedule D, without applying the Adamson Act to plaintiff and other train employees."

The agreed statement of facts further shows that if, under the facts therein stated, it was the duty of the plaintiff in error to pay the defendant in error under Schedule A with the Adamson Act applied thereto, he would have earned and been entitled to receive for his services $573.52; that if under such facts it was the duty of the company to pay the defendant in error under Schedule D with the Adamson Act applied thereto he would have earned and been entitled to receive $717.52; that if under such facts it was the duty of the company to pay the defendant in error under Schedule D he would have earned and have been entitled to receive for his services $645.75.

H. A. Elliott, of Clifton, Ariz., and E. W. Lewis, of Phœnix, Ariz., for plaintiff in error.

L. Kearney, of Clifton, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The court below applied the Adamson Act to Schedule D and the agreement upon which it was based, and entered judgment accordingly, whereas the plaintiff in error insists that the provisions of that act are properly applicable only to the contract set forth in Schedule A.

The argument in support of the latter contention is that the agreement embodied in Schedule D was a contract between the plaintiff in error and its employees, to which none of the national organizations of railroad workers were a party; that by the supplemental agreement, designated in the agreed statement of facts as Schedule E, it was expressly stipulated by the parties to the contract embodied in Schedule D that the latter contract should not be used as a basis for fixing rates of pay or working conditions, and that thereby the preceding Schedule A was revived.

This is, in our opinion, a complete non sequitur. The necessary result of the plaintiff in error's argument, as well as from the agreed facts of the case, is, it seems to us, that as between the parties to the present case there existed at the time of the approval of the Adamson Act in September, 1916 (39 Stat. 721), no fixed schedule of rates as between these parties. The Adamson Act, the validity of which was sustained by the Supreme Court in the case of Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, the provisions of which act became effective January 1, 1917, however, declared that pending the report of the commission provided for therein, and for a period of 30 days thereafter, the compensation of railway employees subject to the act, for a standard workday (specified and declared in its first section), should not be reduced below the existing standard day's wage, and that for all necessary time in excess of eight hours such employees should be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

The agreed statement of facts shows that the defendant in error was paid by the plaintiff in error to and including December 31, 1916, at the rates specified in Schedule D. Such was the compensation under which he was actually working at the time the Adamson Act became effective, to wit, January 1, 1917, and we agree with the court below that for the nearly four months that the defendant in error continued in such employment he was entitled to be paid by virtue of sections 3 and 4 of the Adamson Act for an eight-hour day as much as he was then receiving for a ten-hour day—that act being expressly made applicable to a class which included the defendant in error.

For the reasons stated, we think the judgment must be, and it therefore is, affirmed.

CRITTENDEN et al. v. DORN et al.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3423.

1. **Records ⟸2, 18(2)—McEnerney Act held valid, and actions thereunder proceedings in rem.**
   The McEnerney Act of California, providing for the establishment and quieting of title to real property in case of the loss or destruction of public records, is valid, and actions thereby authorized are proceedings in rem.

2. **Records ⟸18(8)—Affidavit by plaintiff's president stating source of title held sufficient under statute.**
   In an action to establish title to land, the record of which had been destroyed by fire, an affidavit by plaintiff's president, stating the source of its title, its possession thereunder, that before purchasing the property, and before giving certain mortgages, it caused the title to be examined, and was informed that it had title in fee, that there were no subsisting mortgages, deeds of trust, or liens, except certain described mortgages, that it had never made any conveyance thereof, or of any interest therein, that it did not know and had never been informed of any person claiming any interest or lien, and that no notice of ownership or claim to the property had been filed, *held* to comply with the requirements of section 5 of the McEnerney Act of California.

3. **Records ⟸18(10)—Judgment held conclusive as to sufficiency of affidavit as to lost instruments on collateral attack.**
   The affidavit required by section 5 of the McEnerney Act of California, in actions thereunder to establish title to land, the record of which has been destroyed by fire, is not jurisdictional, and the judgment in favor of plaintiff is conclusive of the sufficiency of the affidavit, when collaterally attacked.

4. **Records ⟸18(10)—Judgment held conclusive against person not in being.**
   As actions under the McEnerney Act of California are proceedings in rem, and as section 11 expressly declares that the judgment shall be binding on every person, who at the time of the commencement of the action had or claimed any estate, right, etc., and every person claiming under him, the judgment in such an action was conclusive against one claiming an interest under a trust, though he was not in esse at the time of the entry of the judgment.

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

5. Adverse possession ⇐106(4)—Gives fee-simple title against persons against whom statute runs.

Adverse possession under Civ. Code Cal. § 1007, and Code Civ. Proc. §§ 322, 323, vests the possessor with title in fee simple against all claimants against whom the statute runs.

6. Limitation of actions ⇐174(2)—Possession adverse to trustee bars those represented by him.

Title by prescription, good against a trustee, was good against all persons represented by him, though they were minors during the period of prescription.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by Lorraine de la Montanya Crittenden and others against Narcissus Augustus Dorn and others. From a decree dismissing the suit, plaintiffs appeal. Affirmed.

Frank R. Wehe, Carlo S. Morbio, and Bert Schlesinger, all of San Francisco, Cal., for appellants.

A. E. Cooley and Ralph H. Lachmund, both of San Francisco, Cal., for appellee Mysell-Rollins Bank Note Co.

H. W. Hutton, of San Francisco, Cal., for appellee Lilly Croome.

R. M. J. Armstrong and Donzel Stoney, both of San Francisco, Cal., for appellees German Savings & Loan Society and others.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The nature of this case is such that to an intelligent understanding of it a somewhat full statement of the facts and proceedings is essential. It grew out of a certain deed of trust, of date September 12, 1900, by James de la Montanya, of San Francisco, therein designated as trustor, by which he conveyed to D. S. Dorn, of the same city, in trust, certain specifically described real property, the first of which was a lot on Clay street in San Francisco, and being the property in contest between the parties to the present appeal; the second specifically described parcel, referred to as the outside lands, and being designated in the record as the Point Lobos property; and the third parcel being situate in Alameda county, and referred to in the record as the Oakland property.

The deed provided in effect in the first and second clauses thereof that the trustee should take possession of the property, collect the rents, issues, and profits thereof, and pay out of the income or its accumulations or conversions the expenses of the trust, costs of maintenance, rebuilding, or construction, and all expenses incidental to the trust, and by its third subdivision provided that, after making such payments and setting aside as much as he should consider necessary for any of the purposes authorized by the deed, the trustee should pay to the trustor the net income of the property or such part thereof as the latter might require and apply for during his life, "for the purpose of supporting said James de la Montanya, and for the maintenance and education of Lorraine de la Montanya, the minor daugh-

ter, and Jacques de la Montanya, the minor son," of the trustor. The fourth paragraph is as follows:

"In case the said James de la Montanya shall die before Lorraine de la Montanya and Jacques de la Montanya, or both of them, or either of them, then the said party of the second part, trustee herein, and upon the happening of that event, shall thereafter pay so much of the said net income of the property hereinbefore described, or hereafter held by the trust hereby created, as he in his judgment shall deem necessary for the support and proper education of said Lorraine de la Montanya during her minority, and the said Jacques de la Montanya during his minority, or in case one of them is dead, to the survivor of them during such survivor's minority. As soon as Lorraine de la Montanya shall have attained her majority, in case she lives that long, then the said trustee shall pay one-half of the net income as herein defined thereafter accruing to the said Lorraine de la Montanya, and as soon as the said Jacques de la Montanya shall have attained his majority then the said trustee shall pay to the said Jacques de la Montanya one-half of the net income derived as herein defined thereafter accruing to the said Jacques de la Montanya. In case the said Lorraine de la Montanya or Jacques de la Montanya shall either of them die before arriving at the age of majority and without issue, then and in that case, when the survivor arrives at the age of majority, said trustee shall thereupon pay all of the net income as herein defined thereafter accruing to the said survivor. In case of the death of Lorraine de la Montanya after the death of James de la Montanya, leaving issue surviving her, then and in that case the income hereby directed to be paid to the said Lorraine de la Montanya, or such part thereof as the said trustee may deem necessary, shall be expended for the support, maintenance, and education of said issue during the minority of said issue, and as each of said issue attains his or her respective majority, the trustee shall pay to each of said issue such part of the income of said deceased parent as is equal to the quotient of the entire income of such parent divided by the number of such children, or, if there is but one child, the entire share of the income of such parent; but in case she so dies without issue, such income accruing after the said majority of said Jacques de la Montanya shall be payable to Jacques de la Montanya, if he is alive. In case of the death of Jacques de la Montanya after the death of James de la Montanya, leaving him issue surviving, then and in that case the income hereby directed to be paid to the said Jacques de la Montanya, or such part thereof as the said trustee may deem necessary, shall be expended for the support, maintenance, and education of said issue during the minority of said issue, and as each of said issue attains his or her respective majority the trustee shall pay to each of said issue such part of the income of said deceased parent as is equal to the quotient of the entire income of such parent divided by the number of such children, or if there is but one child the entire share of the income of such parent, but in case he so dies without issue such income accruing after the majority of said Lorraine de la Montanya shall be payable to Lorraine de la Montanya if she is alive. Upon the death of the survivor of Lorraine de la Montanya and Jacques de la Montanya, James de la Montanya being dead, then this trust shall therewith instantly terminate, and all of the property held under and by virtue of the trust hereby created, without any act or acts on the part of the trustee herein made, or any other person, shall immediately vest in fee simple, one-half in the heirs of the body of Lorraine de la Montanya, if she leaves any, and one-half in the heirs of the body of Jacques de la Montanya, if he leaves any; but if either of them shall die without issue, then in the heirs of the body of the other, and if both of them should die without issue, then the said property shall vest in equal proportions in the heirs at law of James de la Montanya, the father of the party of the first part herein."

The fifth pargraph declares the intent and purpose of the instrument to be to restrain the trustor and his two named children from

transferring or in any way disposing of any interest in the trust property, to the end that the trust "shall be irrevocable and not to be terminated, except on the happenings of the contingencies herein expressed." The ninth paragraph declares the trust property to be the separate property of the trustor, having been acquired by inheritance from his father, and such was also the evidence in the case.

After the execution of the deed of trust, the wife of the trustor (who subsequently became Mrs. Terbush, and as Lorraine Wright Terbush intervened in the present suit) executed to D. S. Dorn, the trustee named in the deed, and the beneficiaries of the trust, a deed quitclaiming any interest she might have in the trust property, which deed was put of record where the property is situated. At the time of the execution of that quitclaim deed a divorce suit was pending between her and her husband. It appears from the testimony of Mrs. Terbush that she, through her attorney in that suit, sought from her husband a property settlement in the sum of $100,000, but upon the suggestion of Mr. D. S. Dorn, and in consideration of the provision made in the trust deed for her children, she consented to accepted $24,000 instead.

The record shows that, Dorn having, on the 27th day of October, 1902, resigned his position as trustee under the deed, the trustor filed in the superior court of the city and county of San Francisco a petition for the appointment of William M. Madden to fill the vacancy in the trusteeship, which was so decreed by a judgment entered by Judge Carroll Cook, of that court, October 30, 1902, and by which it was—

"ordered, adjudged, and decreed that the said William M. Madden had the same powers and authority as trustee under said deed and declaration of trust as said D. S. Dorn had and exercised thereunder, and that D. S. Dorn execute and deliver to William M. Madden a good and sufficient deed and conveyance, conveying to him as such trustee the property in said deed and declaration of trust described."

On the same day, to wit, October 30, 1902, Dorn executed to Madden the deed so directed, which recited, among other things, the execution of the trust deed to himself and its record, his acceptance of the trust and subsequent resignation thereof, the proceeding in the superior court resulting in the appointment of Madden as trustee in his stead, Madden's acceptance of the appointment, and that in conformity with the decree of Judge Cook, "and for the purpose of carrying into effect the terms and conditions and objects set forth in said deed and declaration of trust," the party of the first part (Dorn) individually and as trustee granted the property to Wm. M. Madden, his successor and assigns. The deed was witnessed by Charles S. Heggerty, Madden's acceptance of the trust was indorsed thereon, and it was recorded in the recorder's office of both the city and county of San Francisco and Alameda county. Mr. Heggerty was, according to the record, the attorney for the trustor, requested Madden's appointment as trustee, and was a member of the law firm of Knight & Heggerty, which firm subsequently brought for the trustor a suit in the same court for the cancellation of the trust. The persons named as defendants in the latter suit were Sara Jane de la Montanya, who was

the grandmother of the two minors, Sara Jane de la Montanya Dorn, her daughter, William M. Madden as trustee, N. A. Dorn, who was the husband of Sara J. de la Montanya Dorn, and the two minors, Lorraine de la Montanya and Jacques de la Montanya.

The real ground upon which that suit was made to rest was the alleged fact that the said D. A. Dorn, who drew the deed of trust, inadvertently omitted from it a clause giving to the trustor the right to revoke and cancel the trust at any time; the purpose of the suit being to effect that object by means of a decree of the court based upon that alleged fact. And such was the decree of the court entered by Judge Hebbard on the 20th day of September, 1904. The record shows that the judgment roll in that suit was destroyed by the great fire that occurred in San Francisco in April of 1906, but that the decree in the suit was entered in the judgment book, which was not destroyed, from which record this recital of the pleadings and appearances in the suit appears upon its face:

"The above-entitled cause came on regularly for trial upon the calendar of the court upon the amended complaint of the plaintiff and the answers of the defendants; Messrs. Knight & Heggerty appearing and acting as the attorneys for the plaintiff, Messrs. Dorn, Savage & Dorn appearing and acting as the attorneys for the defendants N. A. Dorn, Sara Jane de la Montanya (widow), Sara Jane de la Montanya Dorn (her daughter), Lorraine de la Montanya and Jacques de la Montanya, minors, appearing herein by and through their general guardian, Sara Jane de la Montanya, by her attorneys, Messrs. Dorn, Savage & Dorn, and Wm. M. Madden, Esq., defendant, trustee, appearing in person."

The record shows that N. A. Dorn and D. S. Dorn were members of the firm of Dorn, Savage & Dorn. The decree recites upon its face the introduction of evidence in the case, and decrees that the trustor executed the deed with the intention and belief that the deed in express terms declared that the trust thereby created should exist only for a period "during which certain then threatened and thereafter commenced litigation between the plaintiff, James de la Montanya, and his wife, Lorraine Spencer de la Montanya, involving their marriage, divorce, and property rights, should be pending, and until such litigation would be finally determined," whereupon the trust would expire and the real property therein described should be reconveyed to him by the trustee, D. S. Dorn, upon the final determination of the litigation, and that it was the intention of the trustor, the complainant in the suit, to rescind the power and revoke the trust created by the deed, and that the power of revocation was omitted from the instrument by the mistake of the complainant and the mutual mistake of the parties to the deed of trust; that the instrument was executed by mistake, and did not truly express the intention of the parties thereto, and should be revised and reformed, so as to express their true intention; that the litigation between the complainant and his wife was finally terminated August 4, 1902, and that the purpose and object for which the trust was created had ceased to exist, and that the complainant did upon the final determination of the litigation exercise the power to revoke and did revoke the trust—the decree directing the defendant to the suit, William M. Madden, individually and as trustee under the

deed of trust, to execute to the complainant a good and sufficient conveyance of the property in question, which, according to the record, Madden did on the 15th day of February, 1905; the latter deed, which was recorded at Madden's request, reciting the making of the original trust deed of September 12, 1900, its record in San Francisco and Alameda counties, the decree of October 30, 1902, accepting the resignation of Dorn and appointing Madden trustee in his stead, the record of that decree, the execution of the deed from Dorn to Madden on October 30, 1902, its record in the counties in which the property was situated, the commencement of the suit in which the Hebbard judgment was entered September 20, 1904, and its record in the counties in which the property was situated.

James de la Montanya, the creator of the trust and owner of all of the property described in the deed, died June 17, 1912. Subsequently, to wit, February 3, 1914, his son, Jacques de la Montanya, commenced the present suit in the court below to obtain a decree restoring the trust upon the alleged ground that the Hebbard decree was procured by fraud. His sister, Lorraine de la Montanya, thereafter, with her husband, Crittenden, intervened in the suit, as did the minor son of the complainant, Jacques de la Montanya, through his guardian; that minor having been born August 12, 1912, and therefore subsequent to the transactions and decree complained of. The record shows that in the course of the proceedings in the court below the trust was by decree restored as to the Point Lobos and Alameda properties, but the litigation continued between the respective claimants as respects the Clay street property, and the present appeal is limited to that.

The record shows that that property was, subsequent to the Hebbard decree, sold by James de la Montanya for value to one Henderson, who subsequently, and on April 2, 1906, sold it to the present appellee for $150,000. It appears that prior to its purchase the appellee was in possession of the property as lessee of Henderson, and that prior to its purchase that company had the title to the property examined and that it was approved.

Almost immediately after the purchase, the great fire of 1906 destroyed the buildings that were upon the lot and almost all of the public records of the city and county of San Francisco. That great calamity was the cause of the enactment of what is known as the McEnerney Act of the Legislature of California, which statute, as well as the statute of limitations of the state, the court below concluded entitled the appellee, under the proofs in the case, to a dismissal of the suit, regardless of the question whether or not the Hebbard decree was obtained by fraud. After a very careful examination of the record, and of the elaborate and able briefs of counsel, we are of the same opinion.

The McEnerney Act was passed at a special session of the Legislature of California, called (at least in part) to meet the necessity of restoring the record title to lands in San Francisco. It is entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," and its first and second sections are as follows:

"Section 1. Whenever the public records in the office of a county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part, by flood, fire or earthquake, any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property in such county, may bring and maintain an action in rem against all the world, in the superior court for the county in which such real property is situate, to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

"Sec. 2. The action shall be commenced by the filing of a verified complaint, in which the party so commencing the same shall be named as plaintiff, and the defendants shall be described as 'all persons claiming any interest in, or lien upon the real property herein described, or any part thereof,' and shall contain a statement of the facts enumerated in section one of this act, a particular description of such real property, and a specification of the estate, title, or interest of the plaintiff therein."

St. 1906, p. 78.

Subsequent sections provide for the issuance and publication of summons; the required period of publication being at least once a week for two months. As the sufficiency of the affidavit required by the act to be filed at the time of the filing of the complaint is questioned by the appellants, we insert also the provision of the statute concerning its requirements:

"Sec. 5. At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interest therein, and, if so, when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability. Such affidavit shall constitute a part of the judgment roll. If the plaintiff be a corporation, the affidavit shall be made by an officer thereof. If the plaintiff be a person under guardianship the affidavit shall be made by his guardian."

The record shows that such an action was brought by the Mysell-Rollins Bank Note Company in the superior court of the city and county of San Francisco against all persons claiming any interest in or any lien upon the property here in question, and against all the world, to establish its title to the said property, and that on October 16, 1908, a decree was entered therein so establishing it.

[1] That the McEnerney Act is a valid enactment, and that actions thereby authorized are proceedings in rem, has been distinctly adjudged by the Supreme Court of the United States, by this court, and by the Supreme Court of California. American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82; American Land Co. v. Zeiss, 191 Fed. 125, 111 C. C. A. 605; Berton v. All Persons, etc., 176 Cal. 610, 616, 170 Pac. 151; Soher v. Cabaniss, 161 Cal. 548, 549, 119 Pac. 911; Dowling v. Spring Valley Water Co., 174 Cal. 218, 162 Pac. 894. See,

also, Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

[2] The objection urged by the appellants to the affidavit filed in the action brought by the Mysell-Rollins Bank Note Company we think not well taken. The statutory requirements regarding that matter have already been set out. Mysell's affidavit states in substance that he was at the time president of the bank note company and had knowledge of all the facts, and made the affidavit for and on its behalf; that the plaintiff claimed to be and was the sole owner in fee, and was in the actual and peaceable possession of the property, which the affidavit specifically described; that the plaintiff acquired the fee-simple title thereto April 2, 1906, under the name of the Mysell-Rollins Company, from James W. Henderson and his wife, Amelia J. Henderson, and their son, George Y. Henderson, by deed of that date, which deed was recorded April 5, 1906, in Book 2 of Deeds, page 29, in the office of the recorder of the city and county of San Francisco, Cal., under which deed the plaintiff took actual, peaceable, and exclusive possession of the property, which title and possession the plaintiff had ever since held; that at the time the plaintiff obtained title and possession of the lot the latter had upon it a four-story brick building, all of which was occupied at the time of the plaintiff's purchase by the grantors of the plaintiff by and through their tenants; that at the time the plaintiff obtained title to and possession of the property the said tenants of the said grantors attorned to the plaintiff and recognized it as the owner of the property and of every part thereof; that thereafter the said property was occupied by the plaintiff and its tenants, who paid rent to it and recognized it as such owner down to the 18th day of April, 1906, at which time the building was entirely destroyed by fire; that in the month of June, 1906, the plaintiff caused to be erected on the lot a one-story frame building, which frame building had ever since been occupied by the plaintiff and its tenants, who recognized the plaintiff as the owner of the property, and who paid rent therefor to the plaintiff; that at the time of the plaintiff's purchase it caused the title to the property to be examined by Messrs. Sooy & Dorn, attorneys at law, who thereafter informed the plaintiff that its deed conveyed the absolute fee-simple title to the property; that the plaintiff claimed to be and was the sole owner in fee of the property and in the actual, open, peaceable, and exclusive possession thereof, and had been ever since April 2, 1906, never having made any conveyance thereof or of any interest therein; that there was no subsisting mortgage, deed of trust, or other lien on the property or any part thereof, except the lien of taxes for the fiscal year commencing July 1, 1907, and except the lien of a certain mortgage made by the Mysell-Rollins Company, then the Mysell-Rollins Bank Note Company, to the Hibernia Savings & Loan Society, dated April 2, 1906, and recorded April 5, 1906, in Book 2 of Mortgages, page 71, in the office of the recorder of the city and county of San Francisco, which mortgage was executed by the plaintiff to that bank as security for the payment of the plaintiff's promissory note of even date in the sum of $100,000,

with interest as specified in the note, and except a mortgage made by the Mysell-Rollins Company, then the Mysell-Rollins Bank Note Company, to the same bank, dated November 9, 1906, and recorded November 13, 1906, in Book 17 of Mortgages, page 188, in the same recorder's office which last-mentioned mortgage was executed as security for the payment of the plaintiff's promissory note in the sum of $5,000, and except a deed of trust made by the Mysell-Rollins Company, then the Mysell-Rollins Bank Note Company, by W. C. Mysell, president, to the American National Bank, dated April 5, 1906, and recorded January 21, 1907, in Book 51 of Deeds, page 71, in the office of the same recorder, which deed of trust was executed to secure the payment of a promissory note made by the same plaintiff to the American National Bank in the sum of $20,000; that the plaintiff did not know and never has been informed of any other person who claims or who might claim any interest in or lien upon any portion of the said property adversely to the plaintiff, except the two banks mentioned, the only interest of which banks in the said property being that above specified, the address of each of said banks being also stated in the affidavit; that immediately before the execution of the said deed of trust to the American National Bank, the plaintiff caused all papers and proceedings recorded in the public offices of the city and county of San Francisco affecting the plaintiff's title to the said property to be examined by counsel learned in the law, who reported to the plaintiff that it was the sole owner in fee of the said property free and clear of all incumbrances except the lien of the said mortgages to the Hibernia Savings & Loan Society; that immediately before the commencement of the action the plaintiff caused the records of the said city and county to be examined by the City Abstract Company, a corporation engaged in the business of searching records in the said city and county of San Francisco, for the purpose of ascertaining whether any papers had been placed of record, or any proceedings had been commenced affecting the plaintiff's title, since the time when such title had been examined immediately prior to the execution of the said deed of trust, which abstract company reported that since that date no papers had been recorded and no proceeding commenced affecting said title; that there were no incumbrances or liens on the said property except the lien of the said mortgages to the Hibernia Savings & Loan Society and the said deed of trust to the American National Bank; that no notice of ownership or claim to the said property or any part thereof had been filed by any person under the act of the Legislature of California approved March 23, 1907.

[3] It is sufficiently obvious, we think, without going into specific details, that the affidavit made in support of the action brought by the appellee under the McEnerney Act fully complied with the requirements of section 5 of that act. To which may be added as a further answer to the objection made to the sufficiency of the affidavit, that the judgment in favor of the plaintiff in the action brought by the Mysell Company to establish its title to the property, when collaterally attacked, as is the case here, is conclusive—the affidavit not being jurisdictional. See American Land Co. v. Zeiss, 191 Fed. 125, 130, 111 C. C. A. 605.

[4] It is urged that the decree based upon the McEnerney Act could not affect the intervener Jacques de la Montanya, for the reason that he was not then in esse, having been born subsequent to its entry. Section 11 of that act declares:

"The judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action."

In Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829, the Supreme Court of the state had under consideration the question of the validity of the "Torrens Law" (St. Cal. 1897, p. 138), purporting to establish a system for the registration of title to lands. In describing that law the court said:

"As a foundation for the system, it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court. The title thus established is to be certified by the county recorder, and the certificate is made conclusive evidence of title in the person therein named as the owner."

And the court declared the proceeding to be "in all important particulars of similar character to that provided by the act of 1906, known as the 'McEnerney Act.' St. 1906, p. 78." In sustaining the validity of the Torrens Law the court said (151 Cal. 46, 90 Pac. 131 [121 Am. St. Rep. 90, 12 Ann. Cas. 829]):

"The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this whenever it may be considered necessary or likely to promote the general welfare"—citing Arndt v. Griggs, 134 U. S. 321, 10 Sup. Ct. 557, 33 L. Ed. 918; People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

The same court having adjudged the proceeding authorized by the McEnerney Act to be a proceeding in rem, as have the federal courts, and that statute itself expressly declaring that a judgment entered in such a proceeding "shall be binding and conclusive upon every person who at the time of the commencement of the action had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action," we do not see how it can be properly held that the intervener Jacques de la Montanya, claiming as he does under parties to that action then living, is not bound by the decree.

In a case entitled Estate of Daughaday, 168 Cal. 61, 72, 141 Pac. 929, 933, that court thus declared the effect of such a decree as we have here:

"It was shown in this case, as above pointed out, that contestant established title to herself in this very land by a decree in an action which she brought under the McEnerney Act. Stats. 1906 (Ex. Sess.) p. 78. That decree has become final and is as binding upon the Daughaday beneficiaries as upon all the rest of the world. It does not appear, and it matters not, whether that decree was based wholly or not at all upon the evidence of the decree of distribution in the estate of Timothy Guy Phelps. If it were obtained wholly upon the evidence afforded by that decree of distribution, and if that distribution itself had been secured by fraud, nevertheless it would amount to nothing more than the introduction of fraudulent evidence in the trial of a cause, which fact would not militate in the slightest against the validity of the decree, nor be a ground for setting it aside. Bell v. Thompson, 147 Cal. 689, 82 Pac. 327."

And Chief Justice Beatty, when upon the supreme bench of Nevada and speaking for that court in the case of State of Nevada v. C. P. R. Co., 10 Nev. 47, 80, said:

"A judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. It differs from a judgment in personam in this: That the latter judgment is, in form as well as substance, between the parties claiming the right; that it is so inter partes appears by the record itself. It is binding upon the parties appearing to be such by the record, and those claiming under or by them. A judgment in rem is founded on a proceeding, not as against the person as such, but against the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of a thing itself, and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be."

A case much in point in principle is that of McArthur v. Allen (C. C.) 3 Fed. 313, growing out of the will of Gov. McArthur, by which certain lands of the testator were devised to the executors of the will for the time being, with directions to collect and apply the rents as provided in the will, until his children shall all be dead and the youngest grandchild should have attained the age of 21 years; the lands to be thereupon conveyed to his then living grandchildren in equal shares per capita, but if any grandchild should have died leaving children the share of such grandchild was to go to his or her children per stirpes—the final provision of the will on that subject being:

"And in such final distribution of my lands it is my direction that deeds of partition shall be made to and in the name of those who shall be thus entitled thereto, and in the name and for the use of no other person whatsoever, *which deeds shall be executed by my executors for the time being;* and to enable my executors the more effectually to execute the powers and duties by this will devolved upon them, and to protect my said children and grandchildren against fraud and imposition, *I hereby devise* to my said executors, and the successors of them, all my said lands so directed to be leased and finally divided as above, *and to their heirs*, in trust, for the uses and purposes and objects expressed in this my will, and the performance of which is herein above directed and prescribed, to have and to hold the title thereof till such final division and partition thereof, and no longer."

One of the sons of the testator, named Allen C. McArthur, contested the will on the ground that the testator lacked the requisite testamentary capacity, and after a trial the jury found against the will and the court entered a decree accordingly. Years afterward the children of Allen C. McArthur (who was the complainant in the bill to set the will aside), and all of whom were born after the will was set aside, filed a bill

alleging that the complainant, Allen C. McArthur, in the bill so filed, was the last born of the grandchildren, and that he arrived at the age of 21 on the 4th day of March, 1875, and that the children of the testator were all dead; that upon the death of the testator his children ignored the will and the rights of the grandchildren under it, and proceeded to appropriate to themselves all the lands in question by a proceeding in partition in a certain named court—the prayer of the bill being that the defendants thereto be required to account for the rents and profits of the lands, that it be decreed that they held their respective titles in trust for the grand and great-grand children of the testator according to the provisions of the will, and that partition be made among those parties according to their several rights and for general relief. The defendants relied upon the validity of the proceeding regarding the will, and also set up that they were bona fide purchasers without notice of any infirmity in that proceeding. One of the two objections made by the complainants to the record of the will case was that it could not affect after-born grandchildren; and it is upon that point that the decision of the learned judge is, in our opinion, particularly applicable in principle to the contention that the after-born intervener in the present case could not be bound by the decree under the McEnerney Act establishing the title to the property.

The statute under which the McArthur will was set aside was as follows:

"That if any person interested shall, within two years after probate had, appear, and, by bill in chancery, contest the validity of the will, an issue shall be made up, whether the writing produced be the last will of the testator or testatrix or not, which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court the power of granting a new trial, as in other cases; but if no person appear in that time the probate shall be forever binding; saving also to infants, married women, and persons absent from the state, or of insane mind, or in captivity, the like period after the removing of their respective disabilities." 3 Chase's St. 1788.

The court said:

"The requirement that the proceeding shall be instituted 'within two years after probate had' is imperative and unqualified, except by the savings specified. It is also declared that the verdict 'shall be final between the parties,' subject to the limitations expressed, which have no application here. It is clearly implied that those not then in esse, and who hence cannot be parties, are barred and concluded as effectually as those who are living. What is expressed and what is implied in a statute are alike parts of it. U. S. v. Babbit, 1 Black, 55–61.

"There is no saving as to after-born children, and we cannot recognize their right to interfere, as they are seeking to do in this case, without interpolating into the statute what it does not contain. If the result be not as we have suggested, cases may be readily imagined where there might be successive births through many years, and each child when born would have a right to renew the litigation touching the validity of the decree annulling a will. This would be an intolerable evil. It cannot be supposed the Legislature intended such a solecism. In this case, according to the theory of the bill, the right of the youngest complainant accrued more than 35 years after the will was set aside. Such a construction of the statute would open Pandora's box, without a single good amid the thronging evils that would some forth from it.

" 'There are, strictly speaking, no parties' in such cases. Runyon v. Price, 15 Ohio St. 1–6. Every one interested, if he choose to do so, may make him-

self a party to the record. Nothing is in question but the legal status of the will. That instrument is the res of the controversy, and in the absence of fraud all persons concerned, whether formally before the court as parties or not, are necessarily alike concluded by the verdict. Substantially this is a proceeding in rem, and the court cannot take jurisdiction of the subject-matter by fractions. The will is indivisible, and the verdict of a jury establishes it as a whole or wholly sets it aside. To save the right of action to one is, therefore, necessarily to save it to all. The case belongs to that class of actions where the law is compelled either to hold the rights of all parties to be saved or all to be barred.' Bradford v. Andrews, 20 Ohio St. 208–219.

"The judgment of the probate court touching a will is, until reversed, conclusive upon all collateral issues. Brown v. Burdick, 25 Ohio St. 260–266. 'The rights of necessity form a part of our law.' Respublica v. Sparhawk, 1 Dall. 383. That those who are formal parties and those who are not are alike bound by the decree is conclusively shown by the well-considered cases of Singleton v. Singleton, 8 B. Monroe. 340; Hunt v. Acre, 28 Ala. 580; Scott v. Calvit, 3 How. (Miss.) 148; Jacobs v. Pulliam, 3 J. J. Marshall, 200; Hodges v. Bauchman, 8 Yerg. 186; Wells' Will, 5 Littell, 273. These references are sufficient for the purposes of this opinion.

"It is a settled rule of law that where there are contingent limitations and executory devises to persons not in being, a suit may proceed against those in being holding the prior estate, and that a judgment or decree against the latter binds the former in all respects as if they were in esse and parties to the suit. Especially is this so when the former are before the court by representation—that is, where the rights and interests which those not in esse would have if then in esse are the same with those of parties in being and before the court. Gifford v. Hort, 1 Sch. & Lef. 408; Story's Eq. Pl. §§ 145, 792; Mead v. Mitchell, 17 N. Y. 210; Baylor's Lessee v. Dejarnette, 13 Grat. 152; Falkner v. Davis, 18 Grat. 651; Powell v. Wright, 7 Beav. 444–449; Lorrillard v. Costar, 5 Paige, 172; Palmer v. Flower, 1 Moaks, 664; Bossuet v. Moxon, 13 Moaks, 716; Wills v. Slade, 6 Vesey, 498; Lloyd v. Johns, 9 Vesey, 37–52.

"The rule springs from necessity. It involves the welfare of society, and rests on a solid foundation of reason and justice. If it were otherwise the long delay attending the settlement of rights of property in such cases would always be attended with inconvenience, and, not unfrequently, would bring in its train ruinous consequences."

[5] Respecting title by prescription, which was also pleaded by the defendants to the suit by setting up the exclusive and adverse possession of the property by the Mysell Company under the deed from Henderson from the time of its execution, and the payment of all taxes thereon, it is well settled that such adverse possession under section 1007 of the Civil Code, and sections 322 and 323 of the Code of Civil Procedure of California, vests such possessor with a title in fee simple against all claimants against whom the statute runs. Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Baker v. Clark, 128 Cal. 181, 60 Pac. 677; Woodward v. Faris, 109 Cal. 12, 41 Pac. 781.

[6] It is insisted, however, that the statute did not run against the complainant Jacques de la Montanya or his intervener son, on account of their minority. The answer to the contention is that, conceding that the trust was not annulled by the Hebbard decree, the title by prescription was undoubtedly good against the trustee, and therefore, in our opinion, good against all persons represented by him. In the case of Meeks v. Olpherts, 100 U. S. 564, 569 (25 L. Ed. 735), the Supreme Court, speaking through Mr. Justice Miller, in holding that, where by

the law of California an action is barred against the administrator of the estate of a deceased person, it bars all the heirs of the decedent, said:

"Whatever doubt may have existed at one time on the subject, there remains none at the present day that, whenever the right of action in the trustees is barred by the statute of limitations, the right of cestui que trust thus represented is also barred. This doctrine is clearly stated in Hill on Trustees, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American. Among those specially applicable to this case are Smilie v. Biffle, 2 Pa. St. 52; Couch's Heirs v. Couch's Administrator, 9 B. Mon. (Ky.) 160; Rosson v. Anderson, Id. 423; Darnall v. Adams, 13 B. Mon. (Ky.) 273.

"In the first of these cases, land was devised to executors, with a power of sale, which was imperfectly executed by one of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the statute of limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in Lewellen v. Mackworth, 2 Eq. Cas. Abr. 579, the court says: 'Therefore, where cestui que trust and trustees are both out of possession, for the time limited, the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land, to take the rents, issues, and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life with power to sell the fee simple and appropriate the interest of the purchase money to her use and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect, the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of 21 years. He, therefore, held adversely to both cestui que trust and trustee, and consequently obtained by the statute of limitations an indefeasible title, which cannot now be disturbed or gainsaid.'

"In the case of Rosson v. Anderson, supra, the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor. One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the statute of limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors, and, as more than five years had elapsed after they had qualified as such, the statute was a bar against them, and as they would have been barred by the statute, so was the heir, though a minor when the cause of action accrued.

"In Darnall v. Adams, supra, which concerned a devise of slaves, the same court held that the disability of coverture in the devisee could not prevent the running of the statute of limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which bars the executor. Coleman v. Walker, 3 Metc. (Ky.) 65, and Edwards v. Woolfolk's Administrator, 17 B. Mon. (Ky.) 376, are cases which assert the same doctrine, and in the latter the principle is fully and ably discussed and its soundness well maintained.

"A very strong case of the same character is that of Croxall v. Sherrard, 5 Wall. 268, where a remainderman was held barred by the statute of limitations of New Jersey, on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainderman brought suit immediately on the death of his ancestor. This was, however, based on the peculiar wording of that statute.

"In Cunningham v. Ashley, 45 Cal. 485, it was held that an administrator, who is a party to a suit which involves the title of his intestate to real es-

tate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action."

See, also, Patchett v. Pacific Coast Railway Co., 100 Cal. 505, 35 Pac. 73; Watkins v. Specht, 47 Tenn. (7 Cold.) 585; Herndon v. Pratt, 59 N. C. 327; 25 Cyc. 1010; 2 Corpus Juris, 226.

The decree is affirmed.

PHILADELPHIA & R. R. CO. v. BERG.*

(Circuit Court of Appeals, Third Circuit. June 28, 1921.)

No. 2627.

1. **Master and servant ⟸264(12)—Evidence of defective eyebolt held to support allegation of negligence in providing "tackle."**
   In an action for personal injury by a seaman on a barge, an allegation in the statement of claim, that the defendant was negligent, "in that no suitable tackle was provided * * * for the carrying on of the work required of this plaintiff on the said barge," *held* supported by evidence that an eyebolt in the deck in which the hook of a snatch block in use in hauling another barge alongside was inserted was so bent that only the point of the hook was engaged, causing the hook to break under the strain; such hook being a part of the "tackle," within the meaning of that word as used in the statement.

2. **Trial ⟸309—Inspection by jury may be determinative.**
   On the question of the cause of the breaking of a hook, held by an eyebolt, where the jury had the hook and eyebolt before it, together with testimony that the eyebolt was in such bent position that only the point of the hook could be inserted therein, the issue is not wholly dependent on the oral testimony, but may be determined by the jury from their inspection.

3. **Admiralty ⟸2—District Court has jurisdiction at law of action for maritime tort.**
   Under Judicial Code, § 256, subd. 3 (Comp. St. § 1233, subd. 3), giving to the District Courts exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," a District Court has jurisdiction on its law side of an action for a maritime tort, where the jurisdictional requisites of citizenship and amount are present, the liability and damages to be measured by the rules applicable to admiralty cases.

Woolley, Circuit Judge, dissenting in part.

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

Action at law by Carl A. Berg against the Philadelphia & Reading Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 266 Fed. 591.

William Clarke Mason, of Philadelphia, Pa., for plaintiff in error.

Silas B. Axtell, of New York City (Carl G. Kirsch, of Philadelphia, Pa., of counsel), for defendant in error.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 50, 65 L. Ed. —.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This suit was brought by Carl A. Berg, plaintiff below, a seaman on the barge Wiconisco, owned and operated by the Philadelphia & Reading Railway Company, to recover in a common-law action damages for injuries received by him. The barge was lying in New York Harbor. She had a donkey engine below her decks at the bow, over which was a steam winch being operated at the time of the accident to pull another barge alongside of her on the starboard side. The rope leading from the other barge came in at the starboard chock of the Wiconisco and passed through a 14-inch snatch-block to the starboard niggerhead around which it was wound. This snatchblock was of proper size and hooked in an eyebolt attached to the deck 3 feet 10 inches from the starboard drum. The top of the eyebolt, when standing straight up, was about 7½ inches high above the deck. In that position the hook of the block could easily enter the eye, but the eyebolt was bent so far forward that only the end of the hook of the block could enter the eyebolt. This caused a great strain on the hook, the tendency of which was to straighten it out and break it, and this is what happened when a heavy strain came upon it. When the hook broke, something, presumably the block, struck plaintiff's leg, producing a compound fracture, "crushing and pulverizing both bones for a distance of about 3 inches, the approximate thickness of the block." The cause was tried to a jury, which returned a verdict for the plaintiff, and the defendant sued out a writ of error, on which he is before this court.

The several assignments of error raise the following questions:

[1] 1. The plaintiff failed to prove the cause of action alleged in his statement.

It is a fundamental principle of universal application, both in law and equity, that the proofs must correspond with the allegations. The purpose of the rule is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue, so that he will not be misled and be surprised at the trial. Jones v. Morehead, 68 U. S. (1 Wall.) 155, 165, 17 L. Ed. 662; Nash v. Towne, 72 U. S. (5 Wall.) 689, 698, 18 L. Ed. 527. Did the statement in this case comply with that requirement? The plaintiff alleged in the "sixth" paragraph of the statement that his injuries were received as a result of the negligence of the defendant—

"in failing to provide a block and tackle and the attachments and fittings thereof for use on the donkey engine of a sufficient size, adequate strength and quality for the uses and purposes to which it was necessarily put, and in that no suitable tackle was provided by the said defendant, its agents, servants, and employees, for the carrying on of the work required of this plaintiff on board the said barge."

The specific defect in the barge or its equipment which, the evidence tends to show, caused the injury complained of, was an eyebolt, which was so bent over that the hook of the block could not enter it, so as to be seated and rest in its normal position. The end only of the hook could enter the eye, and as a consequence when power was applied an

unusual leverage and strain was exerted upon the neck or curve of the hook. The defendant contends that the allegations in the statement charging negligence were not sufficiently definite to apprise it of what it had to meet, and accordingly it moved for a nonsuit on this ground, among others. The court overruled the motion, and on motion for a new trial said:

"I think the eyebolt, without which the block and tackle used on the donkey engine could not have been employed in hauling the other barge, is included within the 'attachments and fittings,' and that the evidence that the eyebolt was so bent as not to permit the seating of the hook to its position was sufficiently set out in the allegation of lack of sufficient size and quality."

If the eyebolt is included within the "attachments and fittings," the question arises: Of what are they "attachments and fittings"? What is the antecedent of the word "thereof"? The defendant says that "the allegation in the statement of claim would seem to refer to the failure to furnish proper appliance in the form of a hook, block, and tackle"; that is, the defendant is charged with failing to provide proper "attachments and fittings" for the block and tackle. The plaintiff contends that the eyebolt is part of the ship, but is included in the equipment that goes with the winch. Grammatically the antecedent of the word "thereof" is "block and tackle." In other words, plaintiff charges that defendant failed to provide a block and tackle having attachments and fittings for use on the donkey engine, etc. Neither the block and tackle nor the attachments, supposed to include the eyebolt, as we understand it, were used literally "on the donkey engine," but in connection with it "for the uses and purposes to which it was necessarily put."

If this allegation of negligence stood alone, it must be admitted that it is vague and indefinite. But there is a second charge of negligence, which is separate and distinct from the first and additional to it. It is separated from the first by a comma and the conjunction "and," which is followed by the phrase "in that," whose function is to designate the particular additional negligence charged, which is that "no suitable tackle was provided by the said defendant * * * for carrying on of the work required of this plaintiff on board the said barge." "Tackle" here is broader than as used in the first allegation, and includes any and all of the equipment or outfit used by the plaintiff in carrying on his work at the time of the accident on the barge. "Tackle" is defined by the Standard Dictionary as:

"A mechanism of ropes, pulley blocks, hooks, etc., for raising and lowering heavy weights"; "the instruments collectively for carrying on any specific work or undertaking; gear; tools; outfit; equipment."

It is defined by the Century Dictionary and Cyclopedia as:

"A mechanism or apparatus in general for applying the power of purchase in manipulation, shifting, raising or lowering objects or materials; the windlass and its appurtenances, as used for hoisting ore from small depths; equipment or gear in general; a combination of appliances."

Hawkins' Mechanical Dictionary defines "tackle" as:

"The instruments, taken as a whole, for carrying on a work; tools; outfit; equipment."

"Tackle," as used here, included the eyebolt as a part of the equipment used by defendant in carrying on the work of drawing the other barge alongside the Wiconisco at the time of the injury to the plaintiff, and as the defendant had in its possession the hook, eyebolt, and barge, and in its employ the associates of the plaintiff engaged in the work with him, and thus doubtless knew or had the means of knowing the nature of the accident it was called upon to defend, we feel that, while the statement as such was not a model to be followed and was poor pleading, yet the defendant knew what it had to meet and was not surprised at the trial, and, if it was not, the learned trial judge properly refused to direct a verdict. Nash v. Towne, supra; Washington, etc., R. Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101. Furthermore, if the defendant did not know what particular piece or part of the tackle, then and there used in the work, was meant, it could have ascertained it by a bill of particulars.

[2] 2. The plaintiff was guilty of contributory negligence and could not recover.

The questions of whether or not the eyebolt was defective, and, if it was, whether or not that defect caused the hook to break, which resulted in the plaintiff's injury, as well as the question of contributory negligence of the plaintiff, were submitted to the jury. The defendant contends that there was no testimony from which the jury could draw the conclusion that the condition of the eyebolt could have caused the hook to break, and that even if the eyebolt was bent over, so that only the end of the hook could enter it, and the hook was not seated in its normal position in the eye, the testimony does not justify the conclusion that the hook would have broken more easily in that position than if it had entered the eye fully and properly to its normal position.

This contention does not take into consideration the "real evidence" in the case. The jury had before it the hook, and the testimony as to how it was fastened in the eyebolt, and could readily draw its own conclusion. In addition to the usual methods of establishing facts by direct or positive evidence and circumstantial evidence, there is that of "self-perception or self-observation." We have three classes of evidence: (1) Direct or testimonial evidence; (2) indirect or circumstantial evidence; (3) autoptic preference, or real evidence. Greenleaf on Evidence (16th Ed.) vol. 1, § 13a; Wigmore on Evidence, § 1150 et seq.

"In a great measure proof of this means (autoptic preference or real evidence) may be more potent than by any other evidence." The Modern Law of Evidence by Chamberlayne, § 3588.

"Inspection is like admission, in that, while not testimony, it is an instrument for dispensing with testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance." Gaunt v. State, 50 N. J. Law, 490, 495, 14 Atl. 600, 603.

The jury had the hook and eyebolt before it, and, being composed of men of common sense and experience, could determine for itself whether or not it was broken because it could not fully and properly enter the eye. It was thus not wholly dependent upon what was *said* about the hook and eyebolt.

[3] 3. The court was without jurisdiction to try this case on its law side.

Plaintiff here is seeking to enforce a maritime right by means of a common-law remedy in the United States District Court. Can a United States District Court take jurisdiction on its law side of a cause of action within its admiralty jurisdiction? This principle of law arises out of the Constitution and the laws of the United States. Artcle 3 of the Constitution of the United States provides in section 1 that—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

It provides in section 2 that—

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Article 1, § 8, subd. 18, confers upon Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

In furtherance of these constitutional powers, the Congress, by section 9 of the Judiciary Act of 1789 (1 Stat. 76, 77), and continued by section 24, subd. 3, and section 256, subd. 3, of the Judicial Code (Comp. St. §§ 991, 1233), gave the District Courts of the United States exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." In giving exclusive original cognizance of all civil causes of admiralty, the Congress at the same time and by the same law saved the right of a common-law remedy, where the common law is competent to give it. Whether the action is tried at common law or in admiralty, the liability of the defendant is measured by the maritime law and not by the common law. Southern Pacific Railroad v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Chelentis v. Luckenback S. S. Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145.

Whether a suitor has a common-law remedy on the law side of the District Court in an admiralty action depends upon the meaning of the words "common-law remedy." The defendant contends that, as there is no common-law jurisdiction in the federal District Court, that court is not competent to give a common-law remedy, and therefore the only remedy in admiralty cognizable by the District Court is on its admiralty side. While it is true that all remedies of the District Court are statutory, it is equally true that its original jurisdiction extends to "all suits of a civil nature, at common law or in equity," brought by certain parties and for certain amounts, showing that, while its jurisdiction is statutory, it extends by express provision of statute to matters at common law and in equity. While its jurisdiction embraces causes of admiralty, there is saved to suitors the right of a common-law

remedy, where the common law is competent to give it. The plaintiff is seeking to enforce his maritime right, not in a common-law court, but in a court without common-law jurisdiction, by means of a common-law remedy. The common-law remedy which the District Court affords is that of trial by jury, and such a remedy is saved to him by the clause conferring on the District Court exclusive admiralty jurisdiction. Section 256, Judicial Code. In the Chelentis Case, supra, the Supreme Court said, in drawing the distinction between rights and damages:

"Plainly, we think, under the saving clause, a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law."

A remedy recognized at common law, competent to be given by the District Court on its law side, is an action triable to a jury for damages measured by the rules of admiralty.

The cause of action before us arising in admiralty was a tort, and of such torts the District Court on its admiralty side has jurisdiction. With reference to such torts, the law saves to suitors the right of a common-law remedy when the common law is competent to give it. The common-law remedy in tort is saved to suitors in the District Court when the jurisdictional requisites of citizenship and amount are present. They are present in this case, and the law allows the plaintiff to elect which remedy he will pursue, and he has elected to pursue his common-law remedy for damages in tort, measured by the rules applicable to admiralty cases. The Supreme Court of the United States has not passed upon this specific question, but the right to try on the law site of the District Court a cause arising in admiralty has been recognized in the Circuit Court of Appeals for the Second Circuit. Erickson v. Roebling's Sons Co., 261 Fed. 986; Hanrahan v. Pacific Transport Co., 262 Fed. 951; Storgard v. France & Canada S. S. Corporation, 263 Fed. 545.

We do not find error in this case, and therefore the judgment of the District Court will be affirmed.

WOOLLEY, Circuit Judge (dissenting). Being impressed with the office of pleadings in actions at law, I am constrained to dissent on the ground that (as I read the record) the plaintiff declared on one cause of action, and, over objections seasonably made, was allowed to recover on another cause of action.

I concur on the jurisdictional question.

MINNESOTA & ONTARIO PAPER CO. v. EIBEL PROCESS CO.

(Circuit Court of Appeals, First Circuit. June 29, 1921.)

No. 1504.

1. Patents ⇐328—845,222, for improvement in Fourdrinier machines, held invalid and not infringed.
The Eibel patent, No. 845,222, for an improvement in Fourdrinier machines for making paper, claims 7 and 8, *held* void for lack of invention. Claims 1, 2, 3, and 12, if construed to cover any elevation of the breast roll of the paper-making wire appreciably greater than that shown by the prior art, are void for indefiniteness and as differentiated from the prior art only by a mere change in degree. If construed in accordance with the natural import of the language, as requiring such a pitch of the paper-making wire as will alone, through gravity, without regard to the head in the flow box, bring about speed equality between the stock and the wire, and practically eliminate the drag of the wire, it discloses no useful invention, since no such pitch has ever been used or claimed to be useful in practice. If conceded validity, as so construed, *held* not infringed.

2. Patents ⇐19—Mere change in degree not patentable.
A patent on a mere difference in degree in the use of a principle shown in the prior art is invalid.

3. Patents ⇐52—Incidental, but known, benefits of prior art practice not patentable.
The principle which gives a patentee the benefit of advantages of his invention, which he did not discover, also applies to prior art uses.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in Equity by the Eibel Process Company against the Minnesota & Ontario Paper Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 267 Fed. 847.

Amasa C. Paul, of Minneapolis, Minn., and Livingston Gifford, of New York City (Nathan Heard, of Boston, Mass., and Richard Paul and Maurice M. Moore, both of Minneapolis, Minn., on the brief), for appellant.

Harrison F. Lyman and Frederick P. Fish, both of Boston, Mass. (Guy Cunningham, of Boston, Mass., on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. [1] The District Court held claims 1, 2, 3, 7, 8, and 12 of the Eibel patent, No. 845,222, dated February 26, 1907, valid and infringed. 267 Fed. 847. The patent is on its face for an "improvement in Fourdrinier machines."

For generations the Fourdrinier has been the best known and most commonly used paper-making machine. It consists, in its first section, of an endless wire sieve, passing over a series of rolls at a constant speed. At the wet or breast-roll end of this running wire sieve there is discharged from a flow box through a slice a stream of paper-

making stock, consisting of wood pulp, sometimes with added mineral matter, mingled with from 135 to 200 times its weight in water. The stock has the appearance of diluted milk. The wire mesh over which the stock travels has also a sidewise shaking motion to assist in the proper felting and interlocking of the fibers. The stock is carried along on this wire about 29 or 30 feet, draining off its water as it goes, until it reaches the couch rolls at the farther end of the wire, where it is pressed into the form of a uniformly distributed wet pulp or web strong enough to hold together. It is then carried through a series of pressing and drying rolls and calendars, which constitute the drying end of the machine. About 20 feet from the breast roll are placed suction boxes in contact with the under surface of the wire, operating by means of a partial vacuum to assist in the extraction of excess water remaining in the pulp and to compact the sheet by atmospheric pressure.

The foregoing is but a meager description of the first part of a large and complicated machine upon which paper stock goes in highly diluted liquid form, is subjected to draining, shaking, meshing, pressing, and heating processes, until it emerges as a smooth fabric—news print.

These Fourdrinier machines are expensive, costing about $100,000 each. As matter of economy, they run continuously, day and night. Speed—which means quantity—and quality of paper have been for decades the constant quest of paper makers. In operation it is manifest that, as the stock drains, meshes, and settles upon the wire, it must at some point be brought to speed equality with the wire. It is agreed that this point of speed equality is, normally, about 9 or 10 feet from the breast roll.

The evidence shows, and it is obvious, that if, as the bulk of the water drains out of the stock, there be too great difference between the speed of the wire and the speed of the stock, a commotion of ripples and waves will result, which may, and frequently does, cause wrinkles and other defects in the paper. Moreover, if the forming fabric breaks, because of too high speed or other cause, the machine has to be stopped, and continuous and economical production is prevented.

The evidence also shows, and it is manifest, that the successful operation of such a machine involves constant study and adjustment of numerous factors, such as the speed of the wire, the weight of paper desired, the quality of the stock (described as quick or slow, accordingly as the fibers part with the water quickly or slowly, as well as containing a varying amount of water ranging from 135 to 200 times the weight of the fibrous matter), the amount of head in the flow box, as well as the grade of the wire carrier.

There are three factors, all or any two of which may be used, in any preferred relative proportions, to bring about the necessitated speed equality between the stock and the wire, 9 or 10 feet from the breast roll:

(1) Initial speed due to the head in the flow box from which the stock comes upon the wire. Heads in common use run from 2 to 10

inches. Obviously, the greater the head the greater the initial velocity of the stock.

(2) The wire itself may be pitched downhill, so as to give an increasing speed by gravity; it may be level; or it may be tipped the other way, so as to require the stock to run uphill. These factors, described as two, are really only one—head and downhill pitch being nothing but gravity; or, as the plaintiff's expert put it, the lower the head the more pitch is required.

(3) The third factor is described as "the drag of the wire," meaning the acceleration between a lower initial speed, at which the stock is assumed to start upon the wire, caused by the friction or adherence of the stock to the wire, in bringing the speed of the stock up to equality with the movement of the wire, on which it must ride as a pulpy fabric before it reaches the couch roll.

The plaintiff's general contention is that, before Eibel made in 1907 his alleged invention, Fourdrinier machines running faster than 450 to 500 feet a minute caused irregularity, or "wildness," in the paper, because at high speeds there was too great a difference between the stock speed and the wire speed to be overcome by the drag, resulting in carrying the under part of the liquid stock faster than the upper part, thus causing excessive and injurious waves and ripples. It is contended that Eibel conceived a notion, described as "a brilliant discovery," of calling in gravity, applied by pitching the wire, to supplement drag as a means of speeding up the stock on the wire, thus obtaining a better quality of paper, and also enabling the wire itself to be speeded up beyond what had hitherto been regarded as the normal speed, so as to get a larger output. Eibel applies his alleged invention by blocking up the breast end of the machine, or by raising the breast end of the wire by a worm screw, or by any other suitable method. The infringement charged against the defendant is that it is operating its machines with the breast end of the machines, or at any rate the breast end of the wires, raised 12 to 15 inches above the level.

The defendant contends that the patent involves no invention; that Eibel's adjustment of the machines differs merely in degree from practices shown in the prior art; and that, if the patent can under any construction be held valid, the defendant does not infringe.

Turning now to the patent, which must be somewhat fully stated: It is termed, as noted above, "improvement in Fourdrinier machines." In the specification it is said:

"This invention relates to Fourdrinier machines, and has for its object to construct and arrange the machine whereby it may be run at a very much higher speed than heretofore, and produce a more uniform sheet of paper which is strong, even, and well formed. My invention is embodied, essentially, in the first part or element of the machine having the Fourdrinier wire, or paper-making wire, and *consists in causing the stock to travel by gravity in the direction of movement of the making wire and approximately as fast as the making wire moves, thereby resulting in a 'gravity feed' for the machine.* The stock may be and preferably is caused to travel more rapidly than the normal or usual speed of the making wire for a certain grade of stock, and means are provided for increasing the speed of the machine, so as to cause the making wire to move at a higher rate of speed than usual, being substan-

tially equal to the speed of the rapidly moving stock. To accomplish this result in a simple manner, the breast-roll end of the paper-making wire is maintained at a substantial elevation above the level, thereby providing a continuous downwardly moving paper-making wire, *and the declination thus given to the wire is such that the stock is caused to travel by gravity in the direction of the movement of the wire and substantially as fast as the wire moves.* The declination of the paper-making wire may be adjustable, or the speed of the wire may be variable, or both the declination and speed of the wire may be adjustable, in order that *the velocity produced by gravity in the stock on the declining wire will approximately equal the speed of the wire.* By this arrangement the speed of the machine may be increased to such an extent as to bring the speed of the making wire up to the maximum velocity of the rapidly moving stock and a strong, even, and well-formed sheet produced which is more uniform than usual."

The drawing in the patent shows the wire elevated at the breast roll approximately 14 inches, by means of a screw; but the specification expressly says that any other suitable means may be employed for this purpose.

Eibel continues:

"The Fourdrinier wire has usually been arranged to move in a horizontal plane, although I am aware that means have been provided for adjusting the breast-roll end of the wire to different elevations, usually below the level, to provide for running with different grades of stock—as, for instance, with quick stock and slow stock; but so far as I am aware the making wire has always had to perform the work of drawing along the stock, and as the wire moved much faster than the stock, the stock waved or rippled badly near the breast-roll end of the wire, which gradually diminished until an equilibrium was established, and a smooth, even, and glassy surface presented, and not until the waving or rippling ceased did the fibers lay down uniformly and produce a well-formed sheet of paper."

But he states:

"In accordance with my invention, I operate entirely above the level *to cause the stock to travel by gravity at a velocity approximately equal to the speed of the making wire,* which I believe to be a new principle of operation. The breast-roll end of the making-wire *a* is maintained at a substantial elevation above the level, so that the wire declines. *The declination of the wire is sufficient to enable the stock by gravity to move at a rapid rate of speed, which speed is substantially equal to the speed of the making wire,* so that the waves or ripples are eliminated."

He adds that the pitch may be continuous from the breast roll to the guide roll, or only from the breast roll to the suction boxes, preferably the former. Also:

"The elevation above the level at which the breast-roll end of the making wire is maintained will vary according to the grade of stock; but *in any event it will be substantial, so as to cause the stock to move rapidly by gravity.*"

"For the purpose of increasing the speed of the machine to the maximum I maintain the breast-roll end of the making wire at a high elevation above the level, *so that the stock travels by gravity much faster than the making wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such extent as to bring the rate of speed of the making wire up to the speed of the rapidly moving stock,* and as a result the capacity of the machine is largely increased. I find in practice that, by providing a gravity feed operating substantially as herein described, the stock runs smoothly and evenly, without waving or rippling, and the fibers are thereby permitted to settle with great uniformity as regards their distribution over

the wire, so that the paper in addition to being well formed, is very uniform. Furthermore, *as the stock is moving with the paper-making wire instead of being moved by the wire, or essentially by the wire,* the formation of the paper will begin at the start, and will continue to the end of the travel of the stock with the wire. Furthermore, by making the sheet of paper uniform over all, less sulfite or strengthening material is required. Furthermore, as the stock carries less water when arriving at the suction boxes, the amount of suction ordinarily required may be reduced, thereby reducing the friction due to the making wire passing over the suction boxes, and hence increasing the life of the wire."

The claims in suit are as follows:

"1. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a substantial elevation above the level, *whereby the stock is caused to travel by gravity, rapidly, in the direction of movement of the wire, and at a speed approximately equal to the speed of the wire,* substantially as described.

"2. A Fourdrinier machine having the breast-roll end of the paper-making wire maintained at a high elevation, *whereby the stock is caused to travel by gravity faster than the normal speed of the wire* for a certain grade of stock, and having means for increasing the speed of the machine *to cause the wire to travel at substantially the same rate of speed as the rapidly-moving stock, substantially as described.*

"3. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, the breast-roll end of the wire being maintained at a substantial elevation above the level, whereby the stock *is caused to travel by gravity, rapidly, in the direction of movement of the wire and at a speed approximately equal to the speed of the wire,* substantially as described."

"7. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the suction boxes supported at a corresponding declination, substantially as described.

"8. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the several suction boxes arranged at different elevations, substantially as described."

"12. In a Fourdrinier machine, a downwardly-moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the velocity of the wire in the same direction that waves and ripples on the stock are substantially avoided, and the fibers deposited with substantial uniformity on the wire, substantially as described."

No reference is made in the patent to head as a speed-producing factor. Gravity, due to pitch and not to head, and the drag of the wire, are the only speed-producing forces recognized by the patent, at any rate directly. In 18 different places in the specification and 12 claims, Eibel refers to gravity as the force causing the stock to move approximately or substantially as fast as the wire moves. We have italicized such references in the portions of the patent quoted above.

The parties are in sharp and irreconcilable conflict as to the construction to be put upon the claims in suit. The plaintiff construes claims 1, 2, 3, and 12 as process claims, and contends that the words "substantial elevation" in claims 1 and 3 and "high elevation" in claim 2 cover any elevation of the breast roll of the paper-making wire appreciably greater than that shown in the prior art, contended to be any elevation exceeding 5, or at any rate 6, inches. Plaintiff's expert testifies that a 5-inch pitch would not necessarily be the Eibel invention, "but it might be on the border line"; that he hardly thinks a 4-inch pitch would involve the Eibel invention. It is therefore conceded by

the plaintiff that the prior art shows pitches of 3 or 4, and perhaps 5, inches. Consequently plaintiff contends that the words "substantial elevation" and "high elevation," in these claims, cover all pitches an inch or more in excess of the pitches shown in the prior art.

The defendant contends that, so construed, the so-called process claims are void for indefiniteness, and as differentiated from the prior art only by a mere change in degree; also that the claims, fairly construed, limit or define the words "substantial elevation" and "high elevation" by the later language of the claims, which, construed with the specification, means that the pitch must be enough so that gravity alone will bring the stock up to the speed of the wire. It is difficult to read the patent otherwise. As already noted, the patent is silent as to head. As the uncontradicted evidence shows that pitch adequate to eliminate drag is, even with a 2-inch head, not less than 48 inches, and that the defendant's alleged infringement consists only in using a pitch not exceeding 15, or at most 18, inches, the defendant contends that, if the patent as fairly construed can be held valid, there is no infringement.

Such pitches as 40 to 54 inches have never been used. It is not now claimed that Eibel discovered that such pitches are useful, or that their use would be Eibel's invention. If, therefore, the patent describes such pitches, it describes something not claimed as an invention, as well as something not infringed. If Eibel did not mean such pitch as would practically eliminate drag, in 18 places the language used requires a strained and unnatural construction.

The plaintiff—at any rate by implication—concedes that the first three claims which cover the essence of the alleged invention can be sustained only as process claims. It is noteworthy that no such word as "process" or "method" is found in these claims or in the specification. But it is not, and cannot be, contended that Eibel invented a new machine. As pointed out by Judge Warrington, in the English decision holding the corresponding English patent invalid (European Eibel Co., Ltd., v. Edward Lloyd, Ltd., Illustrated Official Journal [Patents], June 21, 1911, pp. 349, 356):

"The patentee proposes no alteration in the machine itself; the machine remains identically what it was before. He does not produce a new machine; all he suggests is what he considers a novel and useful mode of employing the old machine to produce the same article."

The plaintiff does contend that claims 7 and 8, referring to adjusting the suction boxes, so as to correspond with the pitch or declination of the wire are machine or machine improvement claims. But, apart from prior use, it is difficult to believe that such rearrangement of suction boxes as to enable them to perform their accustomed function of extracting water from the stock moving over the wire above, can be anything other than an ordinary mechanical adjustment. We cannot believe that claims 7 and 8, in and of themselves, involve any invention. At any rate, prior use at the Northern Paper Company as early as 1904 effectually disposes of these claims.

Referring, then, to claims 1, 2, 3 and 12, all of them deal with the

old Fourdrinier machine so adjusted that the breast-roll end of the paper-making wire will have a "substantial elevation." The insertion of iron or wooden blocks under that end of the machine, or the raising of the wire by a worm screw, or by any other common device for lifting that part of the old machine, is the only change required by the alleged invention. In a word, the plaintiff contends that the user of a Fourdrinier machine, who blocks up the breast-roll end of the machine, say 5, 6, or more inches, is an infringer upon the Eibel patent.

There is obvious difficulty in construing these claims as process claims. They are not so phrased. It is elementary that the patentee can have nothing beyond what he has particularly pointed out and distinctly claimed, so that those familiar with the art may correctly draw the line between public right and private monopoly. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235. Eibel says, in effect:

"I claim a Fourdrinier machine adjusted at such a pitch, downhill, that the stock will run as fast as the wire."

He does not say:

"I claim a new process of making paper on a Fourdrinier machine, described as follows," etc.

We find no case which flatly holds that a patentee who, in his specification and claims, refers to a machine, and nowhere claims a patent on a process, has been held entitled to have his patent construed as covering a process.

In American Tube Works v. Bridgewater Iron Co., 132 Fed. 16, 65 C. C. A. 636, an opinion in this court by Circuit Justice Holmes, sitting with Judges Putnam and Aldrich, the following is stated:

"The patent to Adams stated its claim thus: 'What I do claim (as a new article of manufacture) is a tube or cylinder cast out of copper and free from blow holes and other similar defects when produced as herein stated.' We assume that Adams had invented a new and valuable process, which it is unnecessary to describe, but by which he produced a much larger percentage of sound copper tubes than it had been possible to produce before. *But he took his patent for the product, and he must stand upon his claim as it was made.*" (Italics ours.)

See, also, Boston Elastic Fabrics Co. v. East Hampton Rubber-Thread Co., 3 Fed. Cas. 945, No. 1,676; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650.

The case of Breuchaud v. Mutual Life Ins. Co., 166 Fed. 753, 756, 92 C. C. A. 433, 436, cited by the plaintiff as authority for its proposition that, "it is immaterial whether they [the claims] are phrased in terms of process or of machine," falls far short of being an authority for so broad and far-reaching a proposition.

Claims 1 and 2 in the Breuchaud patent, held to be process claims, plainly describe a method or process for the construction of subbases for old walls. In claim 1 the word "method" is used and the method described. In claim 2 the phrase "while they are driving" was said by the court to indicate a process. Claims 3 and 4, which were for the product of the process, were held void.

We refer to the difficulty on this point, in order to make it clear that we do not, by implication, adopt the plaintiff's rule of construction. We are not now prepared to hold that claims 1, 2, 3, and 12 of the Eibel patent do "particularly point out and distinctly claim" (Rev. Stat. § 4888 [Comp. St. § 9432]) alleged new processes.

There is much reference in plaintiff's brief to "the Eibel principle." Of course there can be no valid patent on a mere "principle." Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650; Walker, Patents (5th Ed.) § 7.

But, if we assume this first doubtful proposition determined in the plaintiff's favor, there are other difficulties in the way of sustaining the patent that we find insuperable.

On the plaintiff's construction of the first three vital claims it is necessary to construe the words "substantial elevation," in claims 1 and 3, and "high elevation," in claim 2, so as to avoid the otherwise fatal objection of indefiniteness. What do the words "substantial elevation" and "high elevation" mean?

[2] Now, as already stated, the plaintiff admits that the prior art shows elevations of 4, and perhaps 5, inches in the breast-roll end. The plaintiff is therefore necessitated to contend that the words "substantial elevation" and "high elevation" mean something in appreciable excess of the prior art elevation. The result is that, in effect, the plaintiff claims that, if the prior art shows pitches of 4 inches, then 5 inches is Eibel's invention; that, if the prior art shows 5 inches, then 6 inches is Eibel's invention. Obviously, this construction puts upon the reader of the patent, in construing the words "substantial elevation" and "high elevation," the burden of knowing what pitches had been used in the prior art. Concededly a patent on a mere difference of degree in the use of a principle shown in the prior art is invalid. And so are all the authorities. Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Grant v. Walter, 148 U. S. 547, 553, 13 Sup. Ct. 699, 37 L. Ed. 552; Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647; Market Street Railway Co. v. Rowley, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. Ed. 284; Fox v. Perkins, 52 Fed. 205, 3 C. C. A. 32; Galvin v. City of Grand Rapids, 53 C. C. A. 165, 115 Fed. 511; Eames v. Worcester Poly. Institute, 123 Fed. 67, 60 C. C. A. 37.

We think it very clear that, adopting for the moment the plaintiff's own construction of these claims as covering a process, and as covering any pitch in the Fourdrinier machine appreciably greater than the 4 or 5 inches shown in the prior art, the claims cover nothing but a difference in degree.

This conclusion will be made plainer if we illustrate the operation of gravity through the two different methods of pitch and head in producing speed on the wire. The evidence shows, and it is plain on elementary principles, that pitch and head are nothing but gravity applied to the liquid stock in two slightly different ways. The uncontradicted expert evidence shows that, ignoring friction—

"* * * the speed of flow attained by water in running down hill is the same as the speed or velocity under which water will be discharged from an orifice under a hydraulic head equal to the vertical height of the hill."

A table based on data taken from an Engineer's Hand Book in common use and printed in defendant's brief will conveniently illustrate this aspect of the problem:

		Initial Speed.	3" Pitch.	6" Pitch.	9" Pitch.	12" Pitch.	15" Pitch.
0	Head	00	138.6	195.6	240.6	276.6	308.4
3"	"	240.6	276.6	308.4	340.2	366.6	391.0
6"	"	340.2	366.6	391.0	417.0	438.0.	459.0
8"	"	391.0	417.0	438.6	459.0	481.8	500.4
10"	"	438.6	459.0	481.8	500.4	518.4	538.8

The figures in the first column of this table indicate the initial speed at which the liquid stock will enter upon the wire under the various designated heads in the flow box. The figures in the other columns show the speed that the stock will attain at a point 9 or 10 feet from the flow box, where, normally, there should be equality of speed between the wire and the stock.

Although the plaintiff's patent makes no reference to head as a speed-producing or gravity-using factor, we assume, as plaintiff's counsel contends, that the machine would hardly be expected to operate without any head at all.

Plaintiff contends that heads from 2 to 8 inches are to be regarded as normal. Many illustrations given by the plaintiff's expert are based on a head of 2¼ inches. Compare also Judge Mayer's opinion in Eibel Process Co. v. Remington-Martin Co., 234 Fed. 628, 148 C. C. A. 390. On the plaintiff's proposition, therefore, a 3-inch head could not be regarded as abnormal.

Referring, then, to the table, it will be observed that, assuming the stock projected upon the wire from a 3-inch head, the initial speed will be 240.6 feet per minute; that the speed acquired in traversing one-third of the distance from the flow box towards the guide roll will, through the effect of different pitches and a 3-inch head, be as follows:

3" Pitch.	6" Pitch.	9" Pitch.	12" Pitch.	15" Pitch.
276.6	308.4	340.2	366.6	391

Further analyzing, it appears that the 3-inch pitch, admitted to be prior art, adds to the initial speed produced by a 3-inch head 36 feet; that a 6-inch pitch, claimed to embody Eibel's invention, gives at the same point on the wire a further additional speed of only 31.8 feet; that the increased pitch from 6 to 9 inches increases the speed from 308.4 feet to 340.2 feet, or 31.8 feet, and so on.

Now, in the typical case of alleged infringement, the wire on the defendant's machine was said to be moving at a rate of 585 feet per minute. With a machine so operated, and assuming a 3-inch head and a 3-inch pitch, both prior art, the speed induced by gravity from both head and pitch would be 276.6 feet, leaving to be made up by the drag of the wire 308.4 feet. But if, instead of a 3-inch pitch, a 6-inch pitch be used (an alleged infringement) with the same head, gravity from such head and such pitch would produce a speed of 308.4, leaving to be made up by the drag of the wire 276.6. The contention, then, is that, by increasing pitch-induced gravity speed by 31.8 feet, the plaintiff's

patent monopoly is invaded. Otherwise stated, reducing the speed induced by the wire from 308.4 feet to 276.6 feet involves infringement.

Other interesting facts appear from this table. For instance, the initial speed of a 6-inch head upon a level wire, 340.2 feet (prior art), is exactly the same as the speed produced one-third of the way down the wire by a 3-inch head, plus a 9-inch pitch, alleged to infringe.

Again, an 8-inch head with a 3-inch pitch (prior art) gives the same result one-third of the way down the wire (417 feet) as a 6-inch head with a 9-inch pitch, claimed to be Eibel's invention.

Again, a 6-inch head with a 3-inch pitch, admittedly prior art, gives the same speed (366.6 feet) one-third of the way down the wire as a 3-inch head with a 12-inch pitch, claimed to embody Eibel's invention.

It will be observed that these equivalent results arise from the fact that 1 inch of head is equal to 3 inches of pitch, because only one-third of the pitch is really operative, as equality of speed between the wire and the stock is attained when the stock has passed only one-third the distance down the wire.

These comparisons sufficiently illustrate in figures the interchangeability of head and pitch as means of using gravity as a speed producer. The record shows instances of actual experience in using decreased pitch with increased head resulting in equal or greater operating speeds. The plaintiff's expert testified that, so far as speed equality is concerned, the same results can be secured from either head or pitch. And it was speed that Eibel was chiefly seeking. Judge Hale puts it:

"It is to be noted that Eibel's one object was to arrange a process by which the machine could be run at a much higher speed than heretofore." 267 Fed. 855.

But Eibel claims gravity as a speed producer only when applied through pitch.

For present purposes, the computations in this table, which were elaborately illustrated by charts put in evidence through the defendant's experts, are undisputed. The differences in the methods used by the plaintiff's and the defendant's experts in applying the tables found in engineers' books of recognized authority are negligible. It follows irrefutably that, for most purposes now under discussion, head and pitch are interchangeable methods of applying the same force, viz. gravity as a speed producer on the liquid stock upon the wire screen. It also follows, and is admitted by the plaintiff, that all of the pitches used by the defendant or by the licensees under the plaintiff's patent fell far short of eliminating drag as a speed-producing factor. Indeed, in the uses complained of by the plaintiff as infringing, drag remains a force nearly equal to, if not greater than, gravity due to pitch as a speed producer.

While there are trifling conflicts in the evidence as to the adjustment and operation of the defendant's alleged infringing machines, the present point may be sufficiently illustrated by assuming that these machines were adjusted and operated in accordance with the plaintiff's testimony, with a 7-inch head, a 14 to 15 inch pitch; that the speed of the wire was 550 feet per minute; that the speed equality between the wire and

stock was reached at the normal point 9–10 feet from the slice. So operated, the expert testimony shows the following results:

Total velocity of wire	550	feet
Velocity of stock due to head	350	"
Additional velocity due to pitch	130	"
Balance of velocity due to drag	70	"
Percentage of total velocity due to pitch about	24	
Percentage of velocity due to head	63	
Percentage of velocity due to drag	13	

If we consider defendant's machines as operated according to the defendant's testimony, at a speed of 585 feet, with 6-inch head and a pitch of 13½ inches, we get the following:

Velocity of wire,	585	feet
Velocity due to head,	330	"
Additional velocity due to pitch	118	"
Balance of velocity due to drag of wire	137	"
Percentage of total velocity due to pitch, about	20+	
Percentage of velocity due to head	56.6	
Percentage of velocity due to drag	23+	

On this showing, even if the patent is valid, there is no infringement, except on the theory that the patent covers any substantial use of pitch to decrease the drag on the wire. If the patent means, as the Court of Appeals for the Second Circuit apparently held in the Remington-Martin Case, 234 Fed. 624, 148 C. C. A. 390, that pitch adequate to bring the stock to speed equality is Eibel, there is no infringement. It would take a 48-inch pitch with a 2-inch head to relieve the wire of all drag. Even if the patent means that pitch must be the predominating force, there is no infringement; the defendant's predominating force is head.

The question of the amount of pitch covered by the Eibel patent is no mere academic problem. It is vital, and of money importance in this litigation. No decree for an accounting adequate to guide a master can be framed without deciding whether a 6-inch pitch is Eibel's or the public's. After the filing of the bill on January 1, 1917, defendant reduced the pitch on its No. 2 machine from 14 or 16 inches to 6 or 6½ inches, and has so operated it during most of these four intervening years. Judge Hale, at the suggestion of plaintiff's counsel, did not decide whether or not the use of the smaller pitch in the No. 2 machine is or is not an infringement. 267 Fed. 855. But it must be determined in this case whether such use is an infringement—to be paid for—or the use of a common right. Plaintiff's contention that this pitch "is fairly close to the border line" and that the defendant "could have avoided any possibility of infringement by putting the wire flat" is unsound. Defendant was not required to avoid mere possibilities of infringement; it was entitled to all uses of its own machine not particularly pointed out and distinctly claimed in Eibel's patent. It will not do to assert, as plaintiff does, that 12-inch pitches are substantial, and that 3 or 4 inch pitches (prior art) are negligible, leaving intervening pitches in limbo; a line must be drawn available practically, if not mathematically. This case is thus plainly distinguished from such

cases as Vacuum Cleaner Co. v. A. Rot. Valve Co. (D. C.) 227 Fed. 998, and 239 Fed. 544, 152 C. C. A. 421, and Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, and other cases cited by plaintiff on the question of indefiniteness; in all those cases a practically definite limit was stated. In the Eibel patent we find no such limit.

The position learned counsel for the plaintiff are forced to take on this point but illustrates in striking form the otherwise perfectly clear proposition that the Eibel patent is nothing but an attempt to monopolize a difference in degree; that it is only a claim of an improvement in the method of adjusting and operating the machine so indefinite that its own proponents cannot state its limit.

The defendant's experiment in operating this No. 2 machine with the pitch reduced from 14 or 16 inches to 6 or 6½ inches further illustrates the fact that the whole problem is not only one of degree, but of constant adjustment of the operating forces in the machine to different qualities of stock. It appears that this No. 2 machine, operated for a long period with a 6-inch pitch, has produced substantially as much paper, of a stronger fabric, and with less operating trouble, than its duplicate No. 1 machine with about a 13½-inch pitch. The evidence does indicate that the paper produced on the No. 2 machine looks a little "wilder"; but, tested by the tests alleged to be more important, it is contended to be at least as good paper as that produced on the No. 1 machine. Both machines were operated with substantially the same head, although at times the head of the No. 2 machine is said to have been a little higher.

In the light of this evidence, we find it impossible to hold that the difference between a 6-inch pitch and a 14 to 16 inch pitch causes, other operating conditions being perhaps slightly varied, the production of anything other than a slight difference in the look or quality of the paper. At any rate, it does not clearly appear that the additional pitch of 6 or 7 inches, contended by the plaintiff to be a substantial pitch, is an important, or even material, factor in enabling the machine to be operated at a greater speed or with the production of a superior quality of paper.

But whether a pitch of 14 inches does or does not produce more or better paper than a pitch of 6 inches, we think it clear that paper makers are entitled to interchange pitch with head or with drag, and to vary pitch or head in accordance with such judgment as, dealing with any quality of stock or any capacity of machine, they form, through the experimental processes constantly used by operators, in so adjusting their machinery as to produce the largest amount and the highest quality of paper.

We have not found it necessary to review in detail the great mass of evidence concerning prior uses, for, in the view we take of the case, the plaintiff's own admissions as to the nature and extent of 4 or 5 inch prior uses conclude the point in the defendant's favor.

Plaintiff's expert testifies that he hardly thinks—

"that 4 inches could be considered as a substantial pitch. Q. Why not? A. Because Eibel in his specification attempts to differentiate the pitch he has in mind from what had been previously used when he specified that it is to be substantial."

We cannot accept the theory underlying this testimony. It amounts to saying that a 5-inch pitch is not "substantial," merely because the witness had discovered that 4-inch pitches had been in common use before Eibel. But it is plain that the difference between no pitch and a 4-inch pitch is as great as the difference between a 4-inch pitch and an 8-inch pitch.

The plaintiff suggests, not apparently with much confidence, that this court ought to follow the decision of the Court of Appeals for the Second Circuit in the Remington-Martin Case, 234 Fed. 624, 148 C. C. A. 390. We recognize fully the great weight which attaches to a decision by that learned court, and the importance of the principle that there ought not to be conflicting decisions by different Courts of Appeal relative to the validity of the same patent. Nevertheless, the record before us is so different from that which was before the court in the Second Circuit that we do not think that we can properly follow that decision. It is our duty to decide the issues of law and fact as presented by this record. There is before us a large mass of convincing evidence as to prior use which was not in the Remington-Martin suit. We also have the assistance of elaborate expert testimony, illuminating some vital aspects of the problem, not put before that court. The defendant produced no experts in the Remington-Martin Case. The court was therefore left to accept the theories of plaintiff's expert.

We must limit ourselves to generalizations; an elaborate and detailed comparison of the two records would unduly prolong a discussion already sufficiently extended. It may, however, be appropriately noted that the defendant contends, not without plausibility, that the decision of the Court of Appeals for the Second Circuit, construed in connection with the record now before this court, makes that decision an authority for the defendant and not for the plaintiff.

It seems to be clear from Judge Mayer's opinion (234 Fed. 624, 148 C. C. A. 390) that infringement was not contested in that court. The defendant in that court apparently relied upon the finding as to prior use by Judge Ray in the District Court, 226 Fed. 772, as follows:

"In short, I find from the testimony, which is not impeached, or discredited, or really contradicted, that everything this defendant is doing was done, and well known and understood with many paper makers, before Eibel's alleged date of invention."

The defendant now contends that the conclusion of the court above, reversing Judge Ray, is grounded on a misapprehension as to the date concerning which one or more of the defendant's witnesses was testifying as to paper-making conditions. However, that may be, it is clear that there is nowhere in the opinion of Judge Mayer any discussion of the importance of drawing a sharp line between the degrees of pitch shown in the prior art and that which is alleged to be covered by the Eibel invention. On the contrary, that court says:

"The pitch of the wire and the wire speed must be so correlated that gravity *will accelerate the stock to speed equality with the wire.*" (Italics ours.)

This language construed in connection with the context shows that the court was referring to speed equality due to pitch and not to head. The statement, therefore, is at least not inconsistent with the defendant's contention that that court construed the claims as calling for an amount of pitch which would eliminate drag. If such be the meaning of that opinion, then, as the evidence before us shows conclusively that none of the pitches used by either plaintiff or defendant even approximate an elimination of drag as a speed-producing force, it becomes apparent that the view of that court is, on the essence of the problem, not inconsistent with the conclusion to which we have come.

The fact that Judge Ray, on a record dealing much less adequately with prior use than does the record before us, reached the same conclusion that we have reached on that point, is not without significance.

Our general views as to the indefiniteness of the claims are also accordant with those expressed by the English court. European Eibel Co. v. Lloyd, The Illustrated Official Journal, vol. 28, June 21, 1911.

It is thus apparent that prior decisions, fairly analyzed and construed in the light of the record before us, offer no support to the plaintiff's contention. If they make either way, they make for the defendant.

Again, the plaintiff urges here the consideration given great weight in the Remington-Martin Case, as well as by the District Court in this case, the alleged commercial success of the Eibel patent.

It is contended that Eibel's invention was at once adopted by substantially the whole art; that, using it, Fourdrinier machines have been able to increase their speed from 25 per cent. to 30 per cent.; that at the time of the trial of this case machines licensed under the Eibel patent were producing daily about 3,400 tons, or substantially two-thirds of all the news print manufactured in the country.

We recognize, of course, the importance of practical commercial success in cases in which that principle may be properly invoked. It has been termed a "hazardous rule." Nat. Sweeper Co. v. Bissell, etc., Co., 249 Fed. 196, 161 C. C. A. 232; Nat. Machine Corp. v. Benthall Co., 241 Fed. 72, 154 C. C. A. 72; Harvey Hubbell, Inc., v. Gen. Elec. Co. (C. C. A.) 267 Fed. 564. It is no safe criterion of patentable novelty. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

But the plaintiff has, perhaps not unnaturally, very much exaggerated this aspect of the record. It appears that of the licensees producing 3,400 tons a day, five of the largest, having a daily production of about 2,200 tons a day, are stockholders in the plaintiff company. It is obvious that to the extent that they are such stockholders their royalties are but payments to themselves. It is also clear that, with the prestige which would result from the ownership and use of this patent by five leading paper concerns, commercial success with other manufacturers would be almost assured. Compare Harvey Hubbell, Inc., v. Gen. Elec. Co., supra. On this showing, which we infer was not before the court

in the Remington-Martin Case, no very great weight can be attached to the extent of the commercial use attained.

As to plaintiff's contention that Eibel's invention has increased the average speed of Fourdrinier machines 25 per cent. to 30 per cent., we think this claim is not borne out on fair analysis of the whole record. Undoubtedly, since 1907 there has been a considerable increase in the average speed attained by Fourdrinier machines. The record as a whole warrants the contention that some part of that increase is due to the adoption of increased pitch, and that Eibel's disclosure of the advantages of increased pitches has had some practical and beneficial effect in the art of paper making. But pitch is only one factor leading to this result. The fair inference from the record is that increased heads have also become common during the same period; that the machinery manufacturers are putting out heavier machines, capable of standing higher power and increased speed; that careful study has been made of the quality of the stock, and improvements made in adapting the quality of the stock to more rapid movement. In a word, the art has progressed. An increased pitch—the factor stressed by Eibel—is only one of the large number of factors tending to increased output, without serious impairment of quality. Paper makers must always struggle with variable elements; they must have freedom in adjusting their machines as skill and experience direct.

The plaintiff seeks to avoid the effect of the admitted prior use of pitches, which we must and do find to have been substantial, by contending that such pitches were adopted for drainage purposes only; that they were applied in ignorance of the alleged new principle discovered by Eibel. So contending, plaintiff's argument falls little short of claiming an absolute monopoly for Eibel of the use of gravity through pitch. But long before Eibel people knew that water would run down hill and that the steeper the hill the faster the water would run. Moreover, drainage depends in part upon speed, and paper makers must have observed the relation, whether running the stock uphill or downhill.

[3] The plaintiff invokes the doctrine that accidental and unappreciated results and functions in prior uses are not anticipation, citing as the leading case on this point Tilghman v. Proctor, 102 U. S. 707, 711, 26 L. Ed. 279. Other cases cited are: Tannage Patent Co. v. Donallan (C. C.) 93 Fed. 811; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 441, 86 C. C. A. 469; Pittsburgh Reduction Co. v. Cowles Electric Co. (C. C.) 55 Fed. 301, 307; Wickelman v. A. B. Dick Co., 88 Fed. 264, 266, 31 C. C. A. 530; Anthracite Separator Co. v. Pollock (C. C.) 175 Fed. 108, 111; Taylor Burner Co. v. Diamond (C. C.) 72 Fed. 182, 185; Byerley v. Barber Asphalt Paving Co. (D. C.) 230 Fed. 995, 997; German-American Filter Co. v. Erdrich (C. C.) 98 Fed. 300; Pittsburgh, etc., Co. v. Seaman-Sleeth Co., 248 Fed. 705, 709, 160 C. C. A. 605.

Accepting fully the doctrine, we think it is not applicable to the situation here disclosed. Plaintiff's own expert admits that "the effect of gravity was always there, regardless of how small the pitch was."

Compare Brown v. Piper, 91 U. S. 37, 41, 23 L. Ed. 200; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 555, 18 Sup. Ct. 707, 42 L. Ed. 1136; Risdon Iron Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899.

It is incredible that a skillful operator of one of these great machines would have used a 3 or 4 inch pitch, with or without a substantial head, without paying some attention to the increased speed of the stock thereby induced. We agree with the contention of defendant's counsel that intelligent men in charge of such a machine could not operate it without discovering that commotion, ripples, and "wildness" in the paper would result, if the wire traveled at a speed relatively much faster than the speed attained by the stock through head and pitch, one or both. But the direct and affirmative evidence shows that there was prior appreciation of the principle which Eibel now claims as his own discovery.

Patentees frequently obtain advantages in their patents which they did not discover. The principle applies to prior art uses. Compare New York Scaffolding Co. v. Chain Belt Co., 254 U. S. 32, 37, 41 Sup. Ct. 21, 23, 65 L. Ed. ——, where Mr. Justice McKenna said:

"We yield to the assertion of counsel that he [the patentee of the patent in suit] cannot be deprived of an advantage because he did not discern it, but the same concession must be given to Murray [a prior patentee]. He [Murray] was entitled to all of the benefit that he claimed for his device, *or that can be given to it by formal changes.*" (Italics ours.)

See, also, Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; Penn. R. R. v. Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070.

It is true that to change the pitch of the machine was a somewhat troublesome and cumbrous undertaking, such that an operator would not as matter of common and daily occurrence experiment with varying pitches; but it is also true, as pointed out above, that head was, for most purposes sought to be attained by the alleged Eibel invention, the equivalent of pitch, and that the record shows that operators were frequently experimenting with different heads. They must, therefore, have observed the action of the stock on the wire at different rates of gravity-induced speed.

Even if, as the plaintiff contends, gravity applied through pitch gives a smoother and more even movement, and thus produces a better quality of paper, than when applied by head, yet, so far as relative velocity with the movement of the wire is concerned, the results would be the same. At most, the distinction between a head-induced speed and a pitch-induced speed was one of slight degree in the amount of commotion arising in the flowing and draining stock.

Besides, as already sufficiently indicated, Eibel does not claim a patent on the distinction between pitch-induced speed and head-induced speed. He ignores the existence of head-induced speed.

Summarizing our conclusions: If we construe the language of the patent according to its natural import, as claiming pitch sufficient to

eliminate drag, there was no useful invention, and no infringement, even if there was invention; if we construe the claims as plaintiff would have them construed, they cover merely a degree, and are void for indefiniteness.

The result is that the decree below must be reversed, the money paid the plaintiff pendente lite must be repaid, and the bill dismissed, with costs to the defendant in this court.

It is ordered that the money paid by the appellant to the appellee pendente lite under order of this court of May 28, 1917, be repaid by the appellee to the appellant; the decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill, with costs; and the appellant recovers its costs of appeal from both the interlocutory and the final decrees.

UNITED STATES DRAINAGE & IRRIGATION CO. v. CITY OF MEDFORD.

(Circuit Court of Appeals, First Circuit. July 1, 1921.)

No. 1500.

1. **Judgment ⇐660—Res judicata as to question erroneously decided, when suit brought on different cause of action.**
   The judgment in a suit against a city for breach of contract, in which it was decided, even though erroneously, that the contracts were void as obligations of the city, is res judicata on that question in a suit to hold the city liable as trustee for assessments collected on account of the work covered by the contracts.

2. **Municipal corporations ⇐623(2)—Contract binding on city not essential to abatement by board of health or condition precedent to assessment.**
   Under Rev. Laws Mass. c. 75, §§ 75–84, relative to the abatement of nuisances, consisting of land which is wet, rotten, or spongy, or covered with stagnant water, by the board of health of the city or town, contracts with the party doing the work, binding on the city, are not essential to the action of the board in abating the nuisances, and are not conditions precedent to the assessments of a tax for the expense of doing the work, as ascertained by the decision of the board.

3. **Municipal corporations ⇐623(2)—City held bound to assess cost of abatement and collect tax and liable as trustee for amounts collected.**
   Under Rev. Laws Mass. c. 75, §§ 75–84, relative to the abatement of certain nuisances by the board of health of the city or town, it is the duty of the city through its tax assessors to assess a tax upon property specially benefited, based upon the expense and apportionment as determined by the board, and to collect the taxes and hold and pay them to the party entitled, and it is liable as trustee to a company employed by the board to do the work for assessments collected and still in its hands, or returned to the property owners.

4. **Municipal corporations ⇐623(2)—Portion of cost may be assessed against specially benefited property owned by city and not devoted to public use.**
   Under Rev. Laws Mass. c. 75, §§ 75–84, relative to the abatement of certain nuisances, an assessment of benefits may be made against specially benefited property owned by the city and not devoted to public uses.

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

5. Municipal corporations ⇐623(2)—Statute held not to prevent assessment of portion of cost of abatement against specially benefited property of city.

St. Mass. 1915, c. 237, § 18, providing that land taken or purchased by a city for unpaid taxes shall not, after foreclosure of the right of redemption, be assessed for taxes, does not apply to an assessment against property of the city specially benefited by the abatement of a nuisance, under Rev. Laws, c. 75, § 75 et seq., where the tax was assessed before the statute was enacted, and it does not appear how the city acquired its title.

6. Municipal corporations ⇐838(1)—Provision of city charter as to expenditures without appropriation held inapplicable to abatement of nuisance.

Medford City Charter, § 30, prohibiting expenditures until the board of aldermen has voted an appropriation, does not apply to the abatement of a nuisance by the board of health of the city, under Rev. Laws, c. 75, § 75 et seq., where the expenditure does not exceed $2,000.

7. Election of remedies ⇐12—Action against city for breach of contract not binding on city held not to preclude suit to hold city as trustee.

That one employed by a city board of health to abate a nuisance, under Rev. Laws Mass. c. 75, § 75 et seq., brought suit against the city for breach of the contracts, which were not binding obligations of the city, was not such an election of remedies as prevented it from holding the city liable as trustee of the assessments collected by it to pay for the work, as it merely misconceived its rights.

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

Suit by the United States Drainage & Irrigation Company against the City of Medford. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

James M. Head, of Boston, Mass., for appellant.

A. Chesley York, City Sol., of Medford, Mass., for appellee.

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

BINGHAM, Circuit Judge. This is a proceeding in equity brought by the United States Drainage & Irrigation Company, a New York corporation, against the city of Medford, a Massachusetts municipal corporation, to charge the latter as trustee of sums of money assessed against and collected by the city from certain individual owners of property, and of liens imposed under assessments upon land owned by the city, but not used for public purposes; said lands having been adjudged to have been benefited by the abatement of nuisances which the board of health of the city had ordered abated under the authority conferred upon it by Revised Laws of Massachusetts, c. 75, §§ 75 to 82. The situation out of which the action arises is as follows:

In the spring of 1913 ten petitions were presented to the board of health of the city, each alleging that the land therein described was wet, rotten, spongy, and covered with stagnant water, was offensive to the residents in its vicinity, injurious to the public health and the health of the petitioners, and constituted a nuisance, and praying that it should be abated as provided in the statute above referred to. June 11, 1913, the requisite orders of notice were issued on each petition for a hearing

June 20, 1913, and were duly served. A view of the premises was taken, and on the day appointed a hearing was had. It was adjudged that the lands described in nine of the petitions were nuisances to the respective petitioners and the public, and that these petitions should be granted; that the expense of abating each nuisance would not exceed $2,000; that the nuisances should be abated by the board, by entering upon each parcel of land described and making such excavations, etc., as might be necessary to abate the nuisances; and that the expense should be apportioned among the persons benefited, naming them, giving percentages and stating the estimated benefits in dollars and cents accruing to each of the estates in the nine areas containing the nuisances.

After the adjudication, the board, on July 19, 1913, entered into nine contracts with the plaintiff, by which it agreed to do the work on the nine areas complained of and as designated on a map of the same, for which it was to receive the sum of $15 per acre (the number of acres in each area being agreed upon), payment to be made upon the completion of the work in a given area, and, if not paid within 60 days thereafter, interest was to be charged at the rate of 6 per cent.

After the completion of the work the board made a return of its proceedings, and the assessors of the city assessed the expense against the owners of the several tracts according to their respective shares therein, as determined by the board. The total amount assessed against the owners in the nine areas was $8,480.27. The state of Massachusetts owned about two acres of land in one of the districts, against which an assessment was made for $33.90. The plaintiff makes no claim to the sum assessed against the land of the state. The city was the owner of land from which it derived no revenue, and which was not used for any municipal purpose, against which an assessment was made for $3,365.66. The city collected and received from the individual owners whose lands were assessed $4,998.55, which, excluding the sum of $33.90 assessed against the land of the state, covered all the sums assessed against the individual owners within $82.26.

Subsequent to the decision of the Supreme Court of Massachusetts of January 5, 1917, reported in 225 Mass. at page 467, 114 N. E. at page 734 (hereinafter considered), and prior to the commencement of this suit the city paid back to certain individual owners $3,098.71, and now has in its hands collected from this source $1,899.84. This suit was brought April 23, 1918. At that time a considerable number of the 98 parcels of land owned by individuals, and against which assessments were made, had been transferred.

No appeal was taken by any of the landowners from the decision of the board declaring the lands nuisances, or in determining the expense and apportioning the same between the owners of the various parcels of land, and no proceeding was brought to quash or test the validity of any of the assessments.

The nine contracts for doing the work were in writing, and were signed by the plaintiff and the board, but were not approved by the mayor of the city. After the plaintiff had completed the work of abating the nuisances, the defendant refused to pay the price fixed by the contracts. April 2, 1914, the plaintiff brought suit in the state court

against the city to recover damages for breach of the contracts, and, on January 4, 1917, the Supreme Court of the state (225 Mass. 467, 114 N. E. 734) held that the contracts as obligations of the city were void, none of them having been approved by the mayor as required by the city charter. St. 1903, c. 345, § 39, as amended by St. 1906, c. 252, § 5. The theory upon which the Massachusetts court seems to have proceeded in reaching this conclusion was that the board of health was a department of the city, and was "acting for the city" and as its agent, in so far as it attempted to bind the city by the contracts. For reasons hereafter stated it is not now open to the plaintiff to question whether this was a correct interpretation of the matter.

The present proceeding was begun April 23, 1918, in the United States District Court for Massachusetts and a decree was entered dismissing the bill. It was there held: (1) That it had been adjudged in the suit in the state court that the contracts as between the city and the plaintiff were void, not having been approved by the mayor; and (2) that contracts obligating the city to pay for the work in each area were conditions precedent to the assessment of the expense upon the owners of the lands therein, and, being void, the assessments were illegal.

[1] As it was actually litigated and determined in the prior action in the state court that the contracts, as obligations of the city, were void—the board in making them having acted as agents of the city and without the approval of the mayor—that question, if erroneously decided, as plaintiff contends (Brimmer v. City of Boston, 102 Mass. 19), is res adjudicata as between the parties to this suit, though it be for a different cause of action (Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 27, 42 L. Ed. 355). It is there said:

> "The general principle * * * is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See, also, Sutton v. Wentworth, 247 Fed. 493, 501, 160 C. C. A. 3.

But, notwithstanding this is so, the plaintiff's right to maintain this proceeding is not necessarily precluded, for whether contracts obligating the city to pay for the work were prerequisites to the assessment of the expense upon the owners of the property benefited depended upon the requirements of the statute under which the board of health acted in abating the nuisances and determining the benefits—a question not raised or litigated in the prior action. It may be conceded that, where a statutory body is authorized to lay out and execute certain public work and charge the expense to the property owners benefited, it should proceed according to the provisions of law conferring the power attempted to be exercised and, in particular, that it should take all the initial steps which the law prescribes as necessary, and that, if it fails to do what the law intended to be done for the protection of the citizen and the prevention of the imposition of an undue burden upon his property, such omission is not to be regarded as a mere informality

or irregularity, for these requirements of law are mandatory. Bowditch v. Boston, 168 Mass. 239, 243, 46 N. E. 1026. Many statutes authorizing such work lay down various requirements, such as the making of a contract for doing the work or requiring that the contract be given to the lowest bidder and other similar provisions. And many cases have been called to our attention construing statutes containing provisions requiring the work to be let by contract, in which it was held that a valid contract to do the work was a condition precedent to a legal assessment. Warren v. Street Commissioners, 181 Mass. 6, 62 N. E. 951; Maloy v. Hall, 190 Mass. 277, 76 N. E. 452; Poth v. New York, 151 N. Y. 16, 45 N. E. 372; Allen v. City of Davenport, 132 Fed. 209, 65 C. C. A. 641. But where, under a statute, it is left to the discretion of the body authorized to exercise the authority to say how the work shall be done, it would seem that the landowner could not complain that his rights had not been properly protected if the work was not done under a contract, or assert that a contract for doing the work was a condition precedent to the assessment of the benefits conferred. In 1 Page & Jones, Taxation by Assessment, § 482, it is said:

"In the absence of a statute requiring the letting of contracts for the construction of public improvements, a city may construct a part of a street itself, and let contracts for the construction of the rest of the street."

It therefore becomes necessary, in the consideration of questions of this character, to ascertain what requirements the particular statute, under which the work is done, contains for the landowner's protection.

[2] Chapter 75 of the Revised Laws of Massachusetts, under which the board of health of the city acted, provides in section 75 that land in the condition of that set out in the above petitions shall be deemed a nuisance, which the board of health of the city where it lies, upon petition and a hearing, may abate, if the expense of abatement will not exceed $2,000, without a previous appropriation therefor. Section 76 provides that whoever is injured by the nuisance may, by petition describing the premises and nature of the nuisance, apply to the board for its abatement, when the board are to view the premises and examine into the nature and cause of the nuisance. By section 77 the board, having examined the premises and being of the opinion that the petition should be granted, are directed to appoint a time and place for hearing and give notice thereof to certain parties therein named. By section 78 the notice is required to be in writing and the method of serving it is prescribed. In section 79 it is provided:

"Sec. 79. At the time and place appointed therefor, the board shall hear the parties, and thereafter may, in its discretion, cause such nuisance to be abated by entering upon any land and by making such excavations, embankments, and drains therein and under and across any streets and ways, as may be necessary; and shall also determine in what manner and at whose expense the improvements shall be kept in repair, shall estimate and award the damage sustained by, and the benefit accruing to, any person by reason of such improvements, and what proportion of the expense of making and keeping the same in repair shall be borne by the city or town and by the person benefited thereby. The board shall forthwith give notice of its decision, in the manner required in the preceding section, to the parties to whom notice is required to be given by section seventy-seven and to the assessors of said

city or town. The expense of making and keeping such improvements in repair shall be assessed by the assessors upon the persons benefited thereby, as ascertained by said decision, shall be included in their taxes, shall be a lien upon the land benefited thereby and shall be collected in the same manner as other taxes upon land."

Section 80 allows an appeal by any party aggrieved by the decision of the board that the land is a nuisance to the superior court within a limited time. Section 81 gives a party aggrieved by the decision of the board in the award of damages or in the determination of the benefits accrued or in the apportionment of the expense a right to apply for a jury trial within a limited time. By section 82 the board is required, within thirty days after abating the nuisance, to make return of its doings to the city clerk for record. By sections 83 and 84 authority is given to the superior court or the county commissioners, when the board refuses or neglects to proceed on the petition or neglects or refuses to pass proper orders abating the nuisance.

It is apparent from the language of section 79 that contracts between the plaintiff and the board binding upon the city were not essential to the action of the board in entering upon the land and doing the work of abating the nuisances, but that it was left entirely discretionary with it as to how it would proceed in doing the work and that contracts therefor were not required. The tax was to be assessed upon the expense of doing the work as determined by the board, and the assessors were to ascertain the expense from the return of the board. In the final clause of section 79 it is provided that "the expense of making * * * such improvements * * * shall be assessed by the assessors upon the persons benefited thereby, as ascertained by said decision"—the decision of the board determining the expense and apportioning it among the owners benefited.

As we are of the opinion that contracts between the plaintiff and the board, binding upon the city, were not called for by the statute, they could not be regarded as conditions precedent to the assessments of the tax, and, as no other objection has been raised by the city to the validity of the proceedings by the board leading up to the assessments, we proceed to consider the question whether the city may properly be charged as trustee of the sums collected from the various individual landowners, and as trustee of the liens imposed to secure the benefits apportioned and assessed against the lands held by the city, but not devoted to municipal uses.

[3-6] It is apparent that, by the letter of the statute, the duty is imposed upon the city, through its tax assessors, to assess a tax against the owners of property specially benefited, based upon the expense and apportionment thereof as determined by the board; that it imposes a lien on individual and city property to satisfy the tax, provided the latter class of property is subject to a tax to pay the benefits conferred upon it; and that it makes it the duty of the city to collect the taxes through voluntary payments or by methods provided by law, and to hold and pay the same to the party entitled thereto. New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96; 138 O. 147. In that case, under the provisions of the statute there in question, it was

held that the city, as trustee, was liable even for the assessment of benefits to its streets, parks and other public places. While we recognize that in Massachusetts (Worcester County v. Worcester, 116 Mass. 193) a different rule prevails as to the assessment of benefits to property of a municipality devoted to public uses, we see no reason why assessments against a city for special benefits to property owned by it and not devoted to public uses should not be valid and the city required to pay them. In fact section 79 provides that the expense of making the improvements, even though the city owns no lands that are especially benefited, may be apportioned to the city, and this being so and the city being liable to contribute to such expense, there would seem to be no reason why it should not also be required to pay for benefits conferred upon particular property owned by it and not devoted to public uses. St. Mass. 1915, c. 237, § 18, providing that land taken or purchased by a city or town for unpaid taxes shall not, after foreclosure of the right of redemption, be assessed for taxes, is without application in this case as it does not appear how the city acquired its title to the lands in question and the statute was enacted after the tax was assessed, if not for other reasons. Boston Seamen's Friend Society v. Boston, 116 Mass. 181, 17 Am. Rep. 153; 28 Cyc. 1131. The provision in section 30 of the charter of the city of Medford, which declares that "no expenditure shall be made and no liability incurred by or in behalf of the city until the board of aldermen has duly voted an appropriation sufficient to meet such expenditure or liability," is also without application in a proceeding under chapter 75, where the expenditure does not exceed $2,000.

The defendant makes the further contention that inasmuch as it has paid back to certain individual owners sums which it had collected from them, it should be excused from accounting for such sums as trustee. It bases this contention largely upon the ground that the assessments from which these sums were derived were illegal, as the contracts for doing the work were not approved by the mayor. But as we have held that a contract for doing the work was not a prerequisite to an assessment of the tax, this contention is without foundation.

[7] The plaintiff did not preclude itself from maintaining the present action, under the doctrine of election of remedies, by bringing the action against the city on the supposed contracts. In bringing that action it misconceived its rights. It thought that it had contract rights with the city, when it had none. Having misconceived its rights, it is not now precluded from adopting a suitable remedy to enforce its real rights. It is not a case where the aggrieved party has two remedies, by which he may enforce inconsistent rights growing out of the same transaction, and, being cognizant of his legal rights and such facts as will enable him to make an intelligent choice, brings his action by one of the methods. Noyes v. Edgerly, 71 N. H. 500, 504, 53 Atl. 311, and cases there cited.

The defendant should be required to account for the sum collected and now in its hands, for the sum collected and thereafter paid back in violation of its trust, and for the sum it should have realized on

the balance of the assessments, and pay to the plaintiff therefrom the sum due it, with interest at 6 per cent. from the time it reasonably should have collected said sums and paid the plaintiff.

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.

LOEWENTHAL v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1921.)

No. 3449.

1. **Indictment and information ⊂=203—Judgment not reversible where sentence is supported under one good count of indictment.**
   Where the sentence imposed on a defendant convicted on a number of counts is less than might have been imposed under any one of the counts, the judgment is not subject to reversal for insufficiency of the indictment, if any one count is good.

2. **Indictment and information ⊂=129(1)—Poisons ⊂=9—Indictment under Narcotic Act held sufficient and counts not duplicitous.**
   An indictment charging defendant in separate counts with violation of Harrison Narcotic Act Dec. 17, 1914, §§ 1, 2 (Comp. St. §§ 6287g, 6287h), in selling and dispensing morphine sulphate both as a physician and as a dealer, *held* sufficient and the counts not duplicitous nor inconsistent.

3. **Criminal law ⊂=878(4)—Acquittal on one count held not inconsistent with conviction on another.**
   An acquittal on a count charging defendant with having unlawfully obtained, as a registered physician, morphine for the purpose of sale as a dealer, *held* not inconsistent with his conviction on another count charging him with the sale of some of such morphine as a dealer without having registered as such and without taking orders on the required forms.

4. **Criminal law ⊂=1036(8), 1044, 1054(3)—Sufficiency of evidence not reviewable where question not raised below.**
   Where there was no motion by defendant for directed verdict, nor request for instructions, nor exceptions to instructions given, the sufficiency of the evidence is not reviewable as matter of right in the appellate court.

5. **Criminal law ⊂=972—Motion in arrest lies only for error on face of record.**
   A motion in arrest of judgment lies only for error on the face of the record, which does not include the evidence or charge.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

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

See, also, 257 Fed. 444.

W. H. Boyd and Cary R. Alburn, both of Cleveland, Ohio (Cary R. Alburn and James Metzenbaum, both of Cleveland, Ohio, on the brief), for plaintiff in error.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for the United States.

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

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error, who was a practicing physician at Cleveland, Ohio, was charged under an indictment containing 34 counts with violating the so-called Harrison Narcotic Act Dec. 17, 1914, c. 1, 38 Stat. 785, Comp. Stat. § 6287g et seq. At the close of the trial the court withdrew 8 counts from the jury's consideration, submitting the remaining 26 counts. There were verdict and judgment of conviction as to 8 of the counts, viz. Nos. 6, 7, 17, 18, 25, 26, 27 and 28, and acquittal as to the remaining counts. In each of these eight counts defendant is charged with violating the act, either as a dealer or as a physician, in selling, dispensing, or distributing morphine sulphate. Section 1 of the act, so far as pertinent and applying it concretely to the case presented, in effect requires every person who dispenses, sells, or distributes morphine sulphate to register with the collector of internal revenue of his district and to pay a certain annual tax. Except in the case of a registered physician, when administering or dispensing the drug in good faith to a patient, in the course of medical treatment, section 2 of the act makes it unlawful to sell, barter, exchange, or give away the drug, unless in pursuance of a written order of the person to whom the drug is sold or given, on a form to be issued for the purpose by the Commissioner of Internal Revenue. When, however, a registered physician dispenses or distributes the drug to a patient in the course of his professional practice only, the requirement of form order does not apply, provided he keeps a record of the transaction, showing certain details required by subdivision (a) of section 2, which record, however, need not include cases where the drug is dispensed to a patient on whom the physician is in personal attendance. Of the counts on which conviction was had, Nos. 6, 7, and 27 (which were under section 2 of the act) charged that defendant was a practicing physician, and that he unlawfully, etc., sold, bartered, exchanged, and gave away morphine sulphate to Arthur Alexander, Nathan Alexander, and Frank Lawrence, respectively, not in pursuance of written order from the respective vendees; counts 17, 18, and 26 (under section 1) charged the selling of morphine by defendant as a dealer to Arthur Alexander, Nathan Alexander, and Frank Lawrence, respectively, without having registered as such dealer, and without having paid the statutory tax. Counts 25 and 28 charged defendant with dispensing and distributing morphine to Sarah Roberts and Frank Lawrence, respectively, without keeping the statutory record of the drugs so dispensed and distributed; defendant being then and there a practicing physician and the distributees not being patients upon whom defendant was in personal attendance. The questions presented relate to the sufficiency of the indictment, alleged inconsistency in the verdict, the admission of testimony, and the sufficiency of the evidence.

1. *The Sufficiency of the Indictment.*—A demurrer directed against each count in the indictment, on the ground that the allegations were insufficient to constitute an offense against the law of the United States, was overruled. There was motion in arrest of judgment directed against this action. There was also motion to quash, likewise over-

ruled, which applied to but three of the counts on which conviction was had, viz. Nos. 17, 18, and 26. The grounds of the motion to quash were, first, duplicity; and second, that each of the counts is vague and indefinite, because failing to show whether defendant was charged with being a dealer without having registered and paid the tax, or merely with making a single sale without having so registered and paid.

[1] The judgment upon conviction was unitary, and covered conviction under each and all of the eight counts, and the punishment imposed was less than might have been imposed under any one of the counts. The judgment is therefore not subject to reversal, if any of the counts on which conviction was had is good and sufficient to support the judgment. Claasen v. United States, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173; Pierce v. United States, 252 U. S. 252, 253, 40 Sup. Ct. 205, 64 L. Ed. 542.

Under the Anti-Narcotic Act, defendant, if registered and taxed as a physician, was not required to take a written order, or to keep a record of morphine administered by him to a patient as an element of a good-faith medical treatment; but, although registered and taxed as a physician, and only as a physician, he could not lawfully sell, bargain, or give away morphine without at least taking a written order therefor. As said in Jin Fuey Moy v. United States, 254 U. S. 189, 194, 41 Sup. Ct. 98, 100 (65 L. Ed. ——):

"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."

And see Webb v. United States, 249 U. S. 96, 99, 39 Sup. Ct. 217, 63 L. Ed. 497.[1]

[2] Turning to the four Alexander counts, and counts 26 and 27, which are two of the Lawrence counts: In our opinion neither counts 6, 7, nor 27 are demurrable as failing to state acts constituting an offense. We think they fully define an offense under the act, and gave defendant sufficient notice of the offense charged to enable him to prepare his defense and to protect himself against a subsequent prosecution for the same offense. This is the test of the sufficiency of the counts. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Daniels v. United States, C. C. A. 6, 196 Fed. 459, 465, 116 C. C. A. 233. Each of these three counts charged that defendant—

"did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away derivatives * * * of opium, to wit, [a certain number of grains of morphine sulphate.] to * * * not in pursuance of a written order from the said * * * on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States under the provisions of [the Harrison Narcotic Act]."

[1] All italics in this opinion are ours.

Section 2 of the act, in its opening paragraph, expressly makes it unlawful for "*any person*" to "sell, barter, exchange or give away" the forbidden narcotics except on a written form order; and if the drug in question was actually sold by the defendant not "within the appropriate bounds" of his professional practice, but only for the purpose of satisfying the cravings of morphine addicts, as the government contends was the case, the fact that defendant was registered as a physician would not relieve him from the obligation to take the form order. True, subdivision (a) of section 2 excepts from the latter's operation the "dispensing or distribution" of the drug to a patient by a registered physician in the course of his professional practice only.

But were we to assume that had the counts charged such dispensing to a patient by a registered physician an allegation that such dispensing was not in the course of defendant's normal practice would have been necessary, yet the express allegation that defendant, who was stated to be merely a practicing (not a registered) physician, did unlawfully, etc., *sell*, etc., the morphine, is on its face and without more normally inconsistent with a dispensing by a registered physician in the course of professional practice only. In the Jin Fuey Moy Case, supra, the indictment in fact negatived the dispensing in the course of professional practice only; but there seems to have been specific occasion therefor in the fact that the sale was charged to have been accomplished by the use of a prescription, which, standing alone, would naturally suggest an act in the course of professional practice. In our opinion, the criticism stated is technical, unsubstantial, and nonprejudicial, and thus within the terms of section 1691 of the Compiled Statutes and section 269 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163, Comp. St. § 1246), as amended February 26, 1919 (40 Stat. c. 48 [Comp. St. Ann. Supp. 1919, § 1246]).

As to counts 17, 18, and 26, each of which is for selling, etc., without having registered and paid the tax as a dealer: Section 1 apparently requires registering as a dealer, even on the part of a physician, if morphine is to be sold, as distinguished from a dispensing to a patient in the course of professional practice only. Such is the construction contended for by the government, adopted by the trial court, and admitted or acquiesced in by defendant. The recital in the Jin Fuey Moy Case, supra, suggests that such was the practice adopted by the Revenue Department. We think counts 17, 18, and 26 plainly sufficient.

Nor do we see any repugnancy between counts 6 and 17 (applicable to Arthur Alexander), or as between counts 7 and 18 (applicable to Nathan Alexander), or as between counts 26 and 27 (as related to Lawrence), in the fact that Nos. 6, 7, and 27, respectively, charge a sale without a written order, while counts 17, 18, and 26 charge a sale without having registered and paid the tax as a dealer. Each count charges a sale; the only difference is that in one of the groups the offense is charged to consist in failing to take a written order; in the other in having failed to register and pay the tax as a dealer. There is plainly no necessary repugnancy between the sale by one at the time a practicing physician and a sale by him as a dealer. In the Jin Fuey

Moy Case, supra, it was held that there was no necessary repugnancy even between prescribing morphine (not to a patient and in the course of professional practice only) and selling it.[2]

As to the motion to quash: In our opinion, counts 17, 18, and 26 are not duplicitous; each charges but one offense. The proposition that the respective counts leave it uncertain whether defendant is being charged with being a dealer generally, or with making a single sale only without registering, is too unsubstantial to need much discussion. The offense is the same, whether defendant made but one sale without registering, or whether the sale in question was in the regular course of an unlawful business. Defendant knew whether or not he was registered as a dealer, and could not be misled by any indefiniteness of statement thought to reside in the respective counts.

[3] 2. In our opinion, defendant's acquittal under the twenty-third count is not inconsistent with his conviction under either of the other counts. The gist of the charge in the twenty-third count is that defendant had registered and paid the tax as a physician; that for the purpose of obtaining morphine sulphate he caused to be issued certain order forms described in detail; that he unlawfully, knowingly, willfully, and feloniously obtained by means of these order forms the morphine sulphate and other drugs described, for purposes other than their use, sale, and distribution by him in the legitimate practice of his profession, viz. for the purpose of their sale by him as a dealer therein, without having registered in that capacity and without having paid the special tax as such dealer. It is true that the drugs which were the subject of this count included those embraced in the counts on which conviction was had. In this sense, but in no other, was it an "omnibus count." Clearly, an acquittal on a charge of purchasing drugs for *purposes of sale* as a dealer only is not an acquittal on a charge of *later selling* some of the drugs without the use of order form or without registering, etc., as such, or having sold any of the drugs as a dealer. In other words, a conclusion that defendant did not buy this stock for unlawful purposes is not inconsistent with a conclusion that he *actually used* portions of it unlawfully, especially in view of the facts appearing on the trial, that the stock which was the subject of the twenty-third count was apparently more than one-half of a whole year's supply, and that defendant may have had a lawful use for a portion of it in connection with his sanitarium (later referred to) for the treatment of morphine addicts, and perhaps in the operation of his practice otherwise. We also think the verdict under count 28 not repugnant to or in contradiction of counts 26 and 27, all of which relate to Lawrence.

3. *The Admission of Testimony.*—Error is assigned upon the admission, in a large number of instances, against defendant's objection

[2] In view of the conclusions announced above, it is unnecessary, as applied to count 28 (Lawrence) and count 25 (Roberts), each charging a failure to keep the statutory record, to determine whether section 2 of the act makes it an offense of itself for a practicing physician to fail to keep a record of drugs dispensed by him as a physician (except as to patients personally attended), or whether the section should be construed as requiring *either* the taking of a written order *or* a keeping of the record.

of testimony offered by the government. In a considerable number of these instances the ground of the objection is not stated, and this omission of itself disentitles defendant to complain. Robinson v. Van Hooser, C. C. A. 6, 196 Fed. 620, 624, 625, 116 C. C. A. 294, and cases cited. With one exception, the remaining assignments under this head are so plainly without merit as to call for no specific mention. The exception is this: Defendant was asked on his cross-examination if he had ever been convicted of crime. It developed that the inquiry related to a conviction under the Ohio Drug Act. The ground of the objection was that the violation of the state act occurred during the period of time which is involved in the federal inquiry, and that the transactions were the same. The trial court held, on an examination of the warrant or "charge," that it was not involved in the federal indictment in the instant case, but was an independent transaction. The record does not show the specific charge on which the state court conviction rested. So far as the record goes, it negatives an identity of offense, and such would be the natural presumption. See Whipple v. Martinson, 255 U. S. ——, 41 Sup. Ct. 425, 65 L. Ed. ——, decided by the Supreme Court of the United States, April 11, 1921. The objection is thus without force and was properly overruled.

[4] 4. *Sufficiency of the Evidence.*—Defendant earnestly contends that there was not sufficient evidence to warrant conviction, and that a verdict should have been directed upon the Lawrence counts, which are Nos. 26, 27, and 28. We find in the record no motion to direct verdict upon the Lawrence counts.[3] There was no motion to direct verdict generally for defendant, nor, so far as appears from the record, a request for any instruction whatever on defendant's part. The charge as given was not excepted to. He therefore has no right to be heard here upon his contention that the evidence was insufficient for conviction. Lockhart v. United States (C. C. A. 6), 264 Fed. 14, 16, 17. It was too late to raise the question on motion for new trial, which was addressed to the discretion of the court. Moore v. United States, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Lockhart v. United States, supra.

[5] The motion in arrest of judgment does not help defendant, for not only was that motion confined to the sufficiency of the indictment, but a motion in arrest of judgment lies only for error on the face of the record, which does not include the testimony or charge. Clark's Criminal Procedure, § 186; Towe v. United States (C. C. A. 4) 238 Fed. 557, 558, 151 C. C. A. 493; Dierkes v. United States (No. 3,362) 274 Fed. 75, recently decided by this court.

As already said, defendant was a practicing physician. Since about

[3] Lawrence was not presented as a witness; the government claiming that he could not be had. Near the close of the trial the court announced that, should Lawrence not appear, the counts relating to him would be withdrawn. At the time this announcement was made there had been no testimony touching the Lawrence transaction. Later evidence was presented by the testimony of another witness. No motion was afterwards made to exclude the counts, or to direct verdict thereon, and no exception was taken to their admission.

the year 1904 he had maintained a sanitarium at Cleveland for the treatment of mentally disturbed patients, and at which he was in the habit of treating morphine addicts. In September or October, 1917, he began the practice of dispensing morphine and other drugs to addicts at his office, numbering about 50 daily, and continuing that practice until his arrest, which was about February 12, 1919. Defendant contended that the administering of morphine under this office practice was in the course of legitimate treatment of the drug habit. The government disputed this, and contended it was designed merely to cater to the craving for the drug on the part of addicts, and this broad issue was submitted to the jury by the trial judge, so far as related to defendant's acts which are made the subject of the various counts. The court said that—

"the real question of fact * * * is whether or not the relation and practice in any case in the indictment between defendant and the party named in any count, was that of a physician treating and dealing with the patient in good faith in an effort to treat the patient medically."

The court gave, and at the suggestion of defendant's counsel repeated, to the jury the instruction which we quote in the margin.[4] Both parties introduced testimony addressed to the issue stated by the court. Defendant was registered as a physician, but not as a dealer; he took no written orders for the drugs dispensed, issued no prescriptions, delivered the drugs themselves, and kept a record of names and addresses, and amounts purported to be dispensed each day—treated in the testimony as a day's allowance or treatment. The government presented testimony tending to show that usually only superficial examinations, at the most, were made by defendant of those applying for the drug; that many of those so supplied were long-time addicts; that but a small proportion of such addicts are curable; that no effective treatment for the drug habit was possible, except where the patient was under restraint and unable to get more than the physician's allowance, which the addict is likely to seek to do and to succeed in doing; that Sarah Roberts, while a patient in another sanitarium for a long period, got morphine regularly from defendant; that while the latter usually gave the addict but one day's allowance at a time (except on Saturday, when Sunday's allowance also was given), in some cases he supplied at one time a quantity sufficient for three, six, and even seven days, allowing others than the patient to get the morphine for him, while the record was made to indicate a separate dispensing on each day of what is called a day's allowance or treatment. Such was said to be the case as to the two Alexanders; also as to Sarah Roberts, except that she is not said to have obtained the morphine otherwise than personally. There was also testimony that in many cases, in the absence of defend-

[4] "Under this law a physician is exempt from the use of the official order forms in two classes of cases. If he personally administers the drug to the patient right in the office, either by the needle method or through the mouth, he need not have an official form, or if he determines how much the patient should have, and delivers the quantity to the patient, the patient to administer the drug himself, and this is all done now in good faith, in the course of medical treatment, no order form is necessary."

ant from the office, a nurse in his employ dispensed the morphine in the amounts shown by his record of current dispensings; also that the office charge for the so-called treatments was based solely upon the rate of $1 for each day's consumption, whether a supply for one day or for seven days was furnished at the time.[5]

There was testimony tending to show that Lawrence, who was not an addict and was wholly unknown to defendant, and in no way introduced or vouched for to him, procured of defendant 41 grains of morphine (under the pretense that he was an addict) for which he paid $5.00, and that in this case defendant entered upon the record the fact of dispensing 14 grains on the day in question and 14 grains on the day following, not only leaving 13 grains unaccounted for, but making the transaction appear as covering two days. The evidence offered by the government, unless satisfactorily contradicted or explained, had a tendency to sustain the government's contentions.

On defendant's part there was testimony that he made frequent physical examinations of those to whom he dispensed morphine, and sufficient to enable him intelligently to treat them; that he in effect prescribed each day's supply, and in so doing aimed to reduce from day to day the addict's daily dosage, and usually at least for the purpose of preparing the patient for sanitarium treatment with a view to permanent cure. There was also competent evidence of the propriety of this method of treatment.

Defendant further contends, and there was evidence tending to support that contention, that the majority of the addicts whom he so treated were referred to him by either the internal revenue collector or the health officer of the city, or by other physicians. It also appeared that morphine was dispensed to Mrs. Roberts in ignorance of the fact that she was taking treatment at a sanitarium; also that both the Alexanders had previously been in defendant's sanitarium for treatment, but without success. Defendant testified that each of them had physical infirmities, which rendered them unable to "stand hard treatment." The evidence as to Lawrence was assailed as a case of entrapment by the government, it appearing that he was employed as a decoy to make the purchase.[6] Evidence was given on defendant's part tending to ex-

[5] See reference to a somewhat similar practice in Jin Fuey Moy v. United States, supra, 254 U. S. at page 193, 41 Sup. Ct. 98, 65 L. Ed. —.

[6] Defendant contends that the conviction on the Lawrence counts should be set aside because of the asserted entrapment. It should be enough to say that no claim of this kind was made upon the trial. It may be added, not only that even if the Lawrence counts were excluded the judgment need not thereby be disturbed, and that the testimony as to his experience had a bearing upon the general issue, but also that under the general rule prevailing in the federal courts the fact that sale is made to a decoy is not necessarily a defense to a prosecution therefor. 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; Goldman v. United States (C. C. A. 6) 220 Fed. 57, 63, 135 C. C. A. 625; Goldstein v. United States, (C. C. A. 7) 256 Fed. 813, 168 C. C. A. 159; Fiunkin v. United States (C. C. A. 9) 265 Fed. 1, 2; Ramsey v. United States (C. C. A. 6) 268 Fed. 825, 827. Whether the instant case furnishes an exception to the rule we are not called upon to determine.

plain or contradict the most, if not all, of the evidence presented by the government. The representative of the revenue department, however, testified that the references of addicts made by that department to defendant were made with the understanding that the patients so referred should be treated in the sanitarium; and some of the requests from the health department expressly show that the patient was expected to be so treated, or that office treatment was to be given only for a short space of time by way of preparation for such sanitarium treatment. The physicians' written requests are not necessarily decisive either way.

Defendant was represented by able and experienced counsel. The trial judge, as evidenced by his remarks when imposing sentence, was convinced of the justice of the conviction. In the absence of motion to direct verdict, or of request or exception to the submission of the case as it was submitted under the charge, we are justified in looking into the record only far enough to determine whether there has been such a plain miscarriage of justice as would warrant a reviewing court in exercising the extraordinary authority to set aside the conviction despite the absence of motion, request, or exception. We cannot weigh the evidence.[7] In our opinion, the case does not justify the exercise of the extraordinary authority referred to.

The judgment of the District Court is accordingly affirmed.

CANFIELD OIL CO. v. FEDERAL TRADE COMMISSION. and five other cases.

(Circuit Court of Appeals, Sixth Circuit. July 1, 1921.)

Nos. 3476, 3477, 3479, 3483, 3489, 3526.

1. **Monopolies ⇐17(2)—Leasing of gasoline tanks exclusively for purpose of storing gasoline purchased from lessor not objectionable.**
   The practice of leasing at a nominal rental tanks and automatic measuring pumps for storing and distributing of gasoline, on condition that they be used exclusively for the purpose of storing and marketing gasoline purchased from the lessor, does not violate Federal Trade Commission Act, § 5 (Comp. St. § 8836e), nor Clayton Act, § 3 (Comp. St. § 8835c), such system being competitive, advantageous to the public, and economical, and will not be prohibited, because tending to monopoly.

2. **Commerce ⇐33—Evidence and stipulations held insufficient to show use of gasoline tanks in interstate commerce.**
   An order of the Federal Trade Commission to desist from the practice of leasing gasoline tanks and measuring pumps to be used exclusively for gasoline purchased from the lessor, based on the theory that the parties were engaged in interstate commerce, *held* contrary to evidence and stipulations, showing that the equipment was shipped into Ohio, in the name of the lessor, and that interstate transportation had been fully accomplished and ended before the equipment was used.

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[7] Whether a physician's immunity for furnishing morphine to an addict is dependent upon his hope or expectation that he can effect a cure of the narcotic habit is a question not properly raised upon this record, and which we have not considered.

3. Commerce ⊜33—Order to desist from leasing of gasoline tanks held not warranted, on theory of interference with interstate commerce.

An order of the Federal Trade Commission to desist from the practice of leasing gasoline tanks to be used exclusively for gasoline purchased from the lessor, engaged in intrastate commerce only, *held* not justified, on the ground that competitors were engaged in interstate commerce, and that the interstate and intrastate transactions were closely related, and that hence such practice cast a burden upon interstate commerce.

Petitions to Review Orders of the Federal Trade Commission.

Petitions to review orders of the Federal Trade Commission, by the Canfield Oil Company, by Thomas K. Brushart, by the White Star Oil Company, by the Paragon Refining Company, by the Columbus Oil Company and by the Standard Oil Company, an Ohio corporation. Orders reversed.

C. D. Chamberlin and Hubert B. Fuller, both of Cleveland, Ohio (Chamberlin & Fuller, of Cleveland, Ohio, on the brief), for petitioners Canfield Oil Co., Brushart, and White Star Oil Co.

Ira C. Taber, of Toledo, Ohio, for petitioner Paragon Refining Oil Co.

Franklin Rubrecht, of Columbus, Ohio, for petitioner Columbus Oil Co.

W. T. Holliday, of Cleveland, Ohio (Niman, Grossman, Buss & Holliday, of Cleveland, Ohio, on the brief), for petitioner Standard Oil Co.

Eugene W. Burr, of Washington, D. C. (Adrian F. Busick, of Washington, D. C., on the brief), for respondent.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The above-entitled cases involve the same questions and were heard and submitted together. They are part of a group of cases recently before the Federal Trade Commission, which commission declared in its findings that the practice of leasing, at a nominal rental, tanks and automatic measuring pumps, for the storing and distributing of gasoline, upon condition that the tanks and pumps so leased be used by the lessee, the retailer, exclusively for the purpose of storing and marketing gasoline purchased from the lessor, is a violation of section 5 of the Act of Congress approved September 26, 1914, known as the Federal Trade Commission Act (Comp. St. §§ 8836e), and section 3 of the Act of Congress approved October 15, 1914, known as the Clayton Act (Comp. St. § 8835c).

[1] Pursuant to this finding the Federal Trade Commission entered an order directing the petitioners to cease and desist from this practice. In view of the very able opinion recently announced by the Circuit Court of Appeals of the Second Circuit, in Standard Oil Co., of New York v. Federal Trade Commission, 273 Fed. 478, two of the same group of cases, and involving an identical state of facts, it is wholly unnecessary for this court to enter into any extended discussion of the question whether this practice of leasing tanks and pumps at a nominal rental and upon the conditions above stated, constitute "unfair method of competition in commerce." We are in full accord with the conclusion reached by that court in the above-named cases that:

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

"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."

It necessarily follows that for this reason the acts complained of do not violate either the Trade Commission Act or section 3 of the Clayton Act.

There is, however, in each of these cases the further question whether the business in which these petitioners are engaged is, or is not, interstate commerce. The finding by the commission that this practice constitutes unfair method of competition in commerce necessarily means commerce as defined by section 4 of the Federal Trade Commission Act (Comp. St. § 8836d) in this language:

"Commerce as used herein means trade or commerce among the several states and the foreign nations," etc.

It appears that the Federal Trade Commission made one general form of findings of fact to be filed in each of the cases of this group of cases then pending before that commission. These findings may all be sustained by some evidence as to some of the cases in this group, but, in so far as these particular cases are concerned, some of these findings are not only not supported by any evidence whatever, but are also in direct conflict with the only evidence on that particular issue, and they are also directly contrary to the stipulations and agreement of counsel in these cases in reference thereto.

The second finding of fact is as follows:

"That the respondent, in the conduct of its business as aforesaid, buys said 'equipments' in various states of the United States and sells and leases, and delivers the same to various persons, firms, corporations, and copartnerships in various states other than those in which the said equipments are purchased by the respondent, and from which they are delivered to the said users."

The stipulation in each of these cases, except Brushart, No. 3477, is as follows:

"That the respondent company does no business of the sort described in the complaint herein in any other state of the United States or the District of Columbia other than in the state of Ohio."

It also appears from the Brushart Case that a similar stipulation was filed, but it is not copied into the record in that case. However, the uncontradicted evidence shows that Brushart does business in only about five counties, in the Southern part of Ohio. It does appear from the evidence and the stipulations of the parties that the larger part of this equipment, tanks and pumps, are purchased in other states and shipped into Ohio, generally to the warehouse of the different companies in different cities of the state, where they are uncrated and stored until a customer is found who desires to enter into these leases. Then the equipment is shipped directly to him from the warehouses. In one or two instances, perhaps, shipments have been made directly from the manufacturer to the city or locality where they are to be installed, but such shipment is in the name of the lessor company. In all cases, how-

ever, the transportation of these pumps and tanks in interstate commerce has been fully accomplished and ended before they are applied to the purposes of the petitioners' business. Covington Stockyards v. Keith, 139 U. S. 128–136, 11 Sup. Ct. 461, 35 L. Ed. 73; Railroad Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540.

The Federal Trade Commission, however, did not predicate its order to cease and desist upon any question of interstate commerce, in so far as the furnishing of pumps and tanks are concerned. If it had done so, it would necessarily have limited that order to cease and desist from furnishing tanks and pumps transported in interstate commerce from other states into the state in which this business is conducted. On the contrary, the order specifically commands the respondents to cease and desist from directly or indirectly leasing any pumps and tanks whatever, regardless of where manufactured or where the same may be purchased by them.

[2] It would therefore appear that this order of the Federal Trade Commission to cease and desist is based upon the theory that the petitioners in the marketing of gasoline and other oil products are engaged in interstate commerce. In view of the uncontradicted evidence and the stipulations and agreements of the parties hereinbefore referred to, this theory is not tenable. On the contrary, this evidence and the agreements of the parties in reference to the facts affirmatively show that the sales business of the petitioners is purely and wholly intrastate. Bowman, Atty. Gen., v. Continental Oil Co., 255 U. S. ——, 41 Sup. Ct. 606, 65 L. Ed. ——, decided by the United States Supreme Court June 6, 1921.

[3] It is insisted, however, by counsel for the commission that there are a number of corporations, competitors of the petitioners, doing business within the state of Ohio, who are engaged in interstate commerce, and that therefore the Federal Trade Commission has jurisdiction to make these findings and order under the doctrine announced by the United States Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, and Railroad Co. v. U. S., 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, which latter case is commonly known as the Shreveport Rate Case.

To this proposition there are two answers: (1) The findings and orders of the commission purport to regulate the business of the petitioners as interstate commerce, and not because the methods employed by petitioners in the conduct of intrastate business are discriminatory against, or a burden upon interstate commerce. (2) The evidence in these cases and the findings of fact made by the commission do not bring them within the purview of the cases above cited. The judgment in the Minnesota Rate Cases was based upon the proposition that:

"When the situation becomes such that adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to such intrastate rates of interstate carriers as substantially affect interstate rates, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply."

In the Shreveport Rate Case the Supreme Court held that:

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entiled to prescribe the final and dominant rule; otherwise the nation would not be supreme within the national field."

The findings made by the commission in these cases do not show such an extraordinary condition of affairs, or any such direct burden, hindrance, or discrimination against interstate traffic, as would call for the exercise of federal control over purely intrastate business. Nor is there any evidence in this record that would authorize such a finding. Especially is this true in view of the conclusion we have reached in this case that the practice complained of is at present, not only conducive to competition, but extremely advantageous to the public. Federal Trade Commission v. Gratz et al., 258 Fed. 314, 169 C. C. A. 330, 11 A. L. R. 793; Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993.

For the reasons above stated the orders complained of, entered by the Federal Trade Commission in each of these cases, are reversed.

CLEMENTS v. KIRBY.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3478.

1. **Patents ⟸114—Suit to obtain patent held not barred by abandonment.**
A suit under Rev. St. § 4915 (Comp. St. § 9460) to obtain a patent, not commenced until more than a year after a decision of the Court of Appeals of the District of Columbia in interference proceedings, *held* not barred because of abandonment of the application, under Rev. St. § 4894 (Comp. St. § 9438), by "failure to prosecute the same within one year after any action therein," where complainant thereafter diligently prosecuted his application in the Patent Office, though that office decided that it was concluded from further action therein by the decision of the court.

2. **Patents ⟸113(8), 114—Decision of Court of Appeals in interference not conclusive of right to file narrower claims, and refusal of Patent Office to hear new claims ground for suit in equity.**
A decision by the Court of Appeals in an interference proceeding is not necessarily conclusive as to claims of the respective parties which were not put in issue, and the refusal of the Patent Office to consider narrower claims subsequently presented by the defeated applicant, on the ground that it was concluded by the court's decision, *held* to justify a suit under Rev. St. § 4915 (Comp. St. § 9460).

3. **Patents ⟸113(2)—Decision of Patent Office held not appealable.**
A decision of the Commissioner of Patents that he was concluded by the judgment of the Court of Appeals in interference proceedings and was without jurisdiction to consider further claims presented by the defeated applicant ... *ld* not appealable, under Rev. St. § 4909 (Comp. St. § 9454).

4. **Patents ⟸114—Suit to obtain patent held maintainable.**
Where the Commissioner has refused to act on new claims presented by an applicant defeated in interference proceedings, on the ground of want

of jurisdiction, the applicant is not required to resort to mandamus to compel his action as a condition precedent to the bringing of suit under Rev. St. § 4915 (Comp. St. § 9460).

5. Patents ⇐114—Decision of Court of Appeals reviewable in equity suit.
The Court of Appeals of the District of Columbia, in respect to its action in patent cases, is one of the tribunals of the Patent Office, and its decision is in no sense a final decree which cannot be collaterally attacked, but is subject to review as to all matters decided in a suit in equity under Rev. St. § 4915 (Comp. St. § 9460), though it will be followed, unless the contrary is established by convincing testimony.

6. Patents ⇐91(4)—Complainant in equity suit held entitled to patent.
Complainant in equity to obtain a patent *held*, under the evidence, entitled to patent for the invention covered by patent for a vacuum cleaner, issued to another.

7. Patents ⇐114—Defeated party liable for costs in equity suit to obtain patent.
The provision of Rev. St. § 4915 (Comp. St. § 9460), authorizing suits in equity to obtain a patent, that "all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not," applies only to those cases just previously mentioned therein, where there is no opposing party and the bill is served on the Commissioner only.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit in equity by George Clements against James B. Kirby. Decree for defendant, and complainant appeals. Reversed, and decree directed for complainant.

Peter S. Grosscup, of New York City (Parker & Carter and Francis W. Parker, all of Chicago, Ill., on the brief, and Albert Lynn Lawrence, of Cleveland, Ohio, of counsel), for appellant.

Charles Neave, of New York City (H. E. Smith and Merrell E. Clark, of New York City, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Bill filed under R. S. § 4915 (Comp. St. § 9460), to procure for Clements the patent issued to Kirby May 23, 1916, No. 1,184,459. Clements and Kirby were contesting applicants in the Patent Office with reference to an improvement in vacuum cleaners, whereby the suction intake could be diverted from the regular nozzle to a more distant hose-connected nozzle. The primary elements of such a structure are the pump or fan chamber and the suction chamber. The two are divided by a partition having an opening. The suction chamber is provided with a suitable intake nozzle, and the pump chamber has a tangential outlet to the dust receptacle. By the suction effect of the pump, the dust is pulled through the intake nozzle suction chamber and the partition opening into the pump chamber, and is therefrom blown out to the dust receptacle. Each of the contesting applicants improved this old structure by making an opening in the outer shell of the suction chamber, directly opposite and registering with the partition opening, and inserting through the outer shell opening and tightly into the partition opening an open-ended tube for a hose connection, whereby the suction pull was cut off entirely from the normal suction chamber,

and this function transferred to the suction nozzle at the outer end of the hose. This improvement has demonstrated its utility and has been largely adopted.

It is quite obvious that the possible presence of the inserted tube is an essential part of this invention; for, without it, the invention did not exist. How this conception should be formulated is a matter of arbitrary rule; and while such rules are convenient or even necessary in the Patent Office practice, their application ought not to go to such an extent as to divert the patent from the true inventor to another. When the matter of formulation is considered in connection with the structure here described, it appears that the Patent Office procedure forbade uniting in the same claim two elements which do not simultaneously co-operate, but which have alternative and successive use. Accordingly, it was required that the inserted hose tube should not be named as a positive element of the claims, but that the inventive thought should be expressed in terms of the basic structure adapted to receive the inserted tube. Whatever language is selected for this purpose, confusion at once arises. If it has the broadest meaning, referring to any construction having oppositely disposed openings into which such a tube might have been inserted, without regard to whether the desired transfer of function was accomplished, it at once is apparent that there can be no valid patent to either contestant, because so broad a construction would cover earlier structures. If it is confined to a precise adaptability—which may be called the moderately broad construction—to receive such a particular tube in such a manner as to operate successfully for the purpose now desired, there might or might not be patentability, depending (perhaps) on whether any earlier such precise adaptability was analogously purposeful or merely accidental. If it is given the narrow meaning, implying that a suitable tube is present ready for use and that provision for changing is the essence of the invention, patentability is not challenged upon this record—though it is difficult to comprehend how there is substantial distinction between the optional insertion of the tube thereby implied and the actual presence of the tube as a named element in the combination. It is not easy to see why a claim should not have been permitted including both an element like this removable tube, which has an active function when it is in place, and an element like the suction chamber which co-operates with the tube to furnish its setting, although the chief function of the suction chamber is temporarily dormant. However that might be (a subject later mentioned), it is this confusion—which later became worse confounded—which has caused the trouble in this case.

Clements was the senior applicant. His attorneys conceived that the inserted tube was an element of his invention, and drew claims upon this theory. They were rejected, and the examiner said:

"Applicant can only cover, in this application, such a construction, complete in itself without any additions to or substractions from it, as adapts it to any desired class of work or to such classes of work as may be done by it by the mere changes of adjustment of the parts, without removing any of the parts or adding other parts or substituting one part for another."

The applicant amended the claim without prejudice, insisting that the objections went only to the form, and not to the substance, of the invention. Eventually, the applicant and the examiner agreed upon the proper form, as expressed in claims 1 and 2 quoted in the margin,[1] and they became the only claims remaining in the application.

In the meantime, Kirby had come into the office, the structure of one of his drawings being substantially identical with Clements in the respects now involved. His claim which called for the suction chamber with its nozzle and the hose with its connection, was rejected as an aggregation. He then adopted, at the suggestion of the office, Clement's claims 1 and 2, and an interference was declared with these two claims as the two counts of the issue. The parties both regarded the use of the substitutable hose connection, passing through the suction chamber and cutting it off, as the invention in controversy. Kirby's preliminary statement (his pleading on the interference issues) claimed conception in May, 1911, followed by reduction to practice and filing of application on August 19, 1911. Clements claimed conception in October, 1910, reduction to practice in January, 1911, followed by application filed June 14, 1911. The proofs seem to show without question that Clements had an operative, experimental device in February, ordered castings in April, and made his first commercial machines as early as May, 1911. These embodied the alternative hose connection. Kirby testified that in September, 1910, he was manufacturing a vacuum cleaner which had the customary opening in the dividing wall between the suction chamber and pump chamber, and which had in the outer wall of the suction chamber and directly in line with the partition opening, a removable cap; this removable cap being for the purpose of permitting access to the interior for cleaning purposes. Later and about December, 1910, he made a hole in the cap and fastened therein a tube or suction hose and closed his suction chamber nozzle by a separate plug. He says:

"Then, later on, by extending this cap in far enough to reach the dividing wall, it automatically shut off the suction nozzle and connected the hose with the fan chamber. This idea of extending the cap in deeper was the thought that I had about the 1st of May, 1911."

Obviously, upon the preliminary statements and this testimony and the conception of the meaning of the issue held by both parties, there was no escape from a decision in favor of Clements. Some testimony taken was said to have suggested to Kirby the question whether the issue ought not to be interpreted broadly enough to reach the construction made by him in September, 1910. Accordingly, he proved this

[1] 1. A vacuum cleaner consisting of a casing provided with a pump chamber and a suction chamber separated therefrom by a dividing wall provided with an opening, the walls of the suction chamber terminating in a suction nozzle and the suction chamber provided with an opening registering with the opening in the dividing wall and adapted to receive a cap closing it or a hose tube extending into the inner opening, substantially as set forth.

2. A vacuum cleaner comprising a pump chamber, a suction chamber having an outlet opening to the pump chamber, a suction nozzle and an inlet opening, and a removable closure for said inlet opening, said openings adapted to receive a connecting inlet tube.

construction more fully in rebuttal, and on October 1, 1913, applied to the Examiner of Interferences to transmit the file to the primary examiner in order that he might amend the declaration of interference so as to remove the existing indefiniteness. The Examiner of Interferences reviewed the evidence and held that the primary examiner, in formulating the claims to be allowed and the issue, had considered the invention as that construction which included "provision for changing from one kind of cleaner to another"; that the claims of the issue were neither indefinite nor alternative; and that Kirby's motion was unduly delayed. He therefore denied Kirby's application; and the Commissioner, on appeal, affirmed the action of the Examiner of Interferences, referring to the obvious fact that if the issue should be amended, and Kirby's statement dated back, Clements would have the right to take further testimony, since there would then be an issue upon which he had never been heard.

The interference itself then came on for hearing before the examiner. He first considered Kirby's motion to amend and date back his preliminary statement, and denied it, both on account of the delay and because the evidence which Kirby had taken was not sufficient to sustain his case, even upon the broad interpretation of the issue which he wished to have adopted. In substance, the examiner gave to the claim what we have called the moderately broad construction, and held that Kirby's request to amend his statement was immaterial, since even with this relatively broader construction, Kirby must fail on the proofs—Kirby announcing that he did not care to take further proofs. Proceeding to the merits upon this moderately broad issue, the examiner awarded priority to Clements, upon proofs which seem to be too clear for controversy. On appeal, the Board took the third or narrowest view of the meaning of the issue, and observed that with the broadest view, which called merely for the existence of the two openings in general alignment, a patent must be refused, as the primary examiner had also held, because of earlier patents showing that general construction. The Board recommended that, after priority was determined, the successful applicant should be required to use a formulation including the removal tube as a positive element, in order that there might be no misunderstanding as to the scope of the invention. Proceeding to the subject of priority, and with this view of the issue, the Board also affirmed the award of priority to Clements—as, indeed, it must.

Thereupon Kirby, insisting that the broadest construction was the proper one and that the Board had held it unpatentable, asked that the matter be remanded to the primary examiner in order to redraft the issue so as to confine it to what was patentable. The Commissioner denied this application, for the reason that, when one construction of claims would make them unpatentable and another would make them valid, the latter construction is the one that should be adopted. Upon Kirby's appeal from the decision of the Board denying the motion to amend and awarding priority to Clements, the Commissioner affirmed the Board. He held that the narrower construction confining the invention to a structure fitted for and intended for receiving the removable hose tube was the right construction; that the broadest one (and

probably he means the moderately broad one) would make the invention unpatentable; and that, with this view, there was no occasion for Kirby to amend his primary statement, and the case against him on priority was clear. There was then an appeal to the Court of Appeals of the District. Error was assigned because Kirby should have been allowed to amend his preliminary statement and because priority should have been allowed to him. The Court of Appeals, on May 28, 1915, filed its opinion in which it gave its attention mainly to the distinction between the broad and narrow constructions of the issue, and held that it should have, for interference purposes, the broader construction, and concludes:

"It is apparent that appellant's motion to amend his preliminary statement would have been granted, but for the interpretation placed upon the claim, and we are of the opinion that it should have been. His evidence very clearly establishes the fact that, several months prior to the earliest date which may be given the appellee, he manufactured and sold cleaners answering the requirements of the counts as we have construed them. The decision is therefore reversed and the case returned to the Patent Office for appropriate action."

Thereupon the various tribunals of the Patent Office took the view that the interference had been finally decided by the Court of Appeals, and that an award of priority to Kirby had been made by that court, and that a patent must issue to him, and not to Clements, containing the claims which formed the issues in the interference. Clements moved that the claims be amended, so as to specify the narrow construction, and that priority be thereupon awarded to him. The Commissioner denied this motion upon the ground that the Court of Appeals decision was conclusive, both as to what was decided and as to what might have been decided. Clements then moved to dissolve the interference upon the ground that under the broad construction the issue was unpatentable. The Commissioner refused to accept this view, holding again that the Patent Office had no further authority to consider the question of priority, and that there was no longer any existing interference. Clements then amended his application, inserting claims positively including the hose connection as an element. These claims were rejected on the interference record. Clements appealed to the Board, and the Board affirmed. Clements appealed to the Commissioner, and the Commissioner affirmed. In the meantime, and while this last appeal was pending before the Board, and on the 23d day of May, 1916, the patent issued to Kirby, containing the claims which had been in interference and five others, which included the removable tube as a positive element; and Clements, on June 16, 1916, filed this bill in the court below, under Revised Statutes, § 4915 (U. S. C. S. § 9460).

The parties made a stipulation that a copy of the interference record should be received in evidence, and, together with copies of patents and other proceedings, should constitute the entire record in the case. It being thus ready for final hearing, Kirby made a motion to dismiss, upon two grounds: First, that such a bill was maintainable only after the refusal of the patent by the Court of Appeals, which refusal the bill did not allege; and, second, that, if there had been such refusal, Clement's proceeding in the Patent Office was abandoned under Revised

Statutes, § 4894 (U. S. C. S. § 9438), by failure to prosecute within a year after the last action. The bill was permitted to be amended to allege, in terms, a refusal by the Court of Appeals through the proceedings which had been recited, and the court postponed the motion for argument until the final hearing. Upon such hearing, the bill was dismissed, because not filed within a year after the action of the Court of Appeals, and with an opinion which did not indicate that the trial court had considered any other question.

The result reached by the Patent Office tribunals has worked a plain miscarriage of justice. It is beyond reasonable doubt that Clements, and not Kirby, was the first to use the inserted tube to shift the intake nozzle to the distant position, or to think of using it, or to make a device which accomplished this result. It had been held by the primary examiner, by the Examiner of Interferences, by the Board, and by the Commissioner that this was the only patentable invention involved, and this conclusion was not criticized by the Court of Appeals; yet the patent therefor has been issued to Kirby and refused to Clements.

The question chiefly considered by the court below, and to which the arguments of counsel are largely directed, is whether an applicant, who is refused a patent by the Commissioner, must exhaust any existing remedy by appeal to the Court of Appeals, before he may resort to his remedy under section 4915. It is claimed for Clements that a resort to appeal is optional by the very words of the statute, "refused, either by the Commissioner *or* by the * * * court," that the legislative history of the law confirms this view, and that the decisions to the contrary are obiter or ill-considered; while it is contended for Kirby that we should apply what is called the distributive theory, and hold that, in those cases where there is no appeal from the action of the Commissioner to the Court of Appeals, his final action should be treated as the refusal contemplated by section 4915, while, in those cases which may be appealed, this remedy must be followed before the other remedy can be invoked. See Smith v. Muller (C. C.) 75 Fed. 612; McKnight v. Metal Co. (C. C.) 128 Fed. 51. We do not find it necessary to decide this question, and for the purposes of this opinion only we accept the distributive theory; and we come to consider the character of the action which the Court of Appeals took in this case.

It is not clear, on the face of its opinion, whether the Court of Appeals intended to adopt what we have called the broadest or what we have called the moderately broad construction of the issue. We have concluded that the latter was its true intent. It seems quite obvious that there was nothing patentable in merely locating the two openings opposite each other for convenient access to the inner through the outer. The Patent Office tribunals had all held that this was not new with either party, and that to give the issue this broadest construction would make it unpatentable, and the Commissioner had expressly held that, where a broad construction of an interference issue would make it unpatentable and the narrow one would make it patentable, the narrow should be taken as the true meaning. The Court of Appeals did not criticize any of these conclusions. The cases upon which it relied (Miel v. Young, 29 App. D. C. 481; Lindmark v. Hodgkinson, 31 App. D. C.

612), to the effect that the broader construction should be adopted, did not disclose any such situation as here existed, but pertained to situations where there was a possible choice between broad and narrow without destroying the whole subject-matter.

A claim to that precise adaptability, which would permit the insertion of the tube so as to make a fairly close joint at each opening, and thereby, of itself, cut off the suction from one nozzle and transfer it to the other, was not anticipated upon this record, and that limitation is fairly called for by the language of the issue. The two openings do not "register," nor is the inner opening "adapted to receive * * * a hose tube extending into the inner opening," nor are the two "openings adapted to receive an inlet tube" in the sense which the context fairly requires, unless the inner opening is not only in suitable alignment with, but is at least no larger than, the outer one; for, if it is larger, no tube which can pass through the outer opening can be received in or extended into the inner opening in such manner as to cut off the suction and accomplish the sole object of the invention. True, the fan suction might have been powerful enough, so that a leak around the outside of the tube when it entered the inner opening would have only weakened and not destroyed the suction pull at the distant nozzle; but substantially to cut off the primary nozzle was the whole object of the invention, and this required the close adaptation and registration. A consideration of all the circumstances, aided by the strong presumption that the Court of Appeals did not intend to do a vain thing, requires that this meaning should be given to its reference to "the broadest interpretation which they will reasonably support" and to the structure which "would readily permit the change from one kind of cleaner to another."

[1] We must have grave doubt whether the action of the Court of Appeals was intended to be an award of priority to Kirby upon an issue as to which Clements could persuasively claim he had never been heard, or to be anything more than a remand to permit an amendment of the pleadings and further proceedings thereon; but we pass that question and assume that, as Kirby contends, the action of the court is rightly to be construed as an award of priority upon the two claims involved, and as final, in the sense that the Patent Office could only execute and not review. Was, then, the filing of this bill barred by the delay of more than one year between May 28, 1915, and June 16, 1916? There is no limitation statute which provides that a bill, under section 4915, based upon a refusal by the Commissioner or the Court of Appeals, must be filed within one year after such refusal—as counsel in argument seem more or less to assume. The only limitation of this character results from the decisions that to file a bill under section 4915 is, within the contemplation of section 4894, to "prosecute" the application for patent, as must be done "within one year after any action therein," in order to avoid the inference that the application shall be "regarded as abandoned"—unless, even then, the delay may be found to have been unavoidable.

The question, therefore, is whether this application was abandoned by a failure to prosecute for more than a year. The mere recital of the

facts furnishes an indisputable answer. So far from being abandoned, the application was prosecuted with the utmost diligence and persistence. It is true that Clements made no further effort to get these two claims which had been in interference; but the application is and continues to be a unit, and it is plainly not abandoned unless it is wholly so. Even if it were true that Clements' theory of the further action which should be taken was wholly erroneous, and he was asking action which he should have known he could not get, or even if the Patent Office had lost jurisdiction to do anything except issue the patent, the inference of abandonment would not follow. It is a familiar principle that, though a tribunal may have no power to grant the relief asked, it has jurisdiction to hear and determine the question of power; and we perceive no tenable theory upon which it may be said that Clements' two applications to the Commissioner in June and July, 1916, each followed by "action" by the Commissioner, are consistent with a then maturing abandonment by him of his application. Even the language of Patent Office rule 171, "such proper action as the condition of the case may require," cannot mean that a request is not "prosecution" unless it is grantable.

That inference of abandonment is as much without support in authority as in principle. In Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223, one year and four months more than the specified time had elapsed after the decision of the appeal from the Commissioner, and no step of any kind had been taken. It was not denied that the application had been abandoned under section 4894, if that section applied at all to a suit under section 4915. In Westinghouse Co. v. Ohio Co. (C. C.) 186 Fed. 518, the facts in this respect are not stated, but it is assumed that the requisite time had elapsed without the taking of any step in prosecution—except the filing of a previous bill under section 4915, which was wholly ineffective because not filed against the right party; and manifestly whether certain action may properly be characterized as prosecution of the claim presents materially and perhaps vitally different questions when it is taken in a tribunal with general jurisdiction and when application is made in a forum which is open in one particular situation only.

In Colman v. American Co. (D. C.) 235 Fed. 531, the decision of the Court of Appeals was on June 3, 1913; the Supreme Court refused a certiorari on October 29, 1913; on February 24, 1914, the Commissioner gave to the applicant a formal notice, apparently to the effect that the case was disposed of in accordance with the Court of Appeals decision; the bill, under section 4915, was, in effect, filed on February 1, 1915; and there was no suggestion that after October 29, 1913, the applicant had taken any step whatever in the prosecution of the application. The case holds, in effect, though not in words, that the formal notice by the Commissioner to the applicant in February, 1914, was not the "action therein" which section 4894 contemplates—a conclusion for which no reason is given, but whether right or wrong is immaterial here.

The present situation is not like a writ of error, which is followed in the wrong court until the statutory time for application to the right

court is gone. There the limitation runs from the day of the act to be reviewed; here it runs from the time when the plaintiff becomes acquiescent and begins to do nothing. From these considerations, it necessarily follows that, as to the two claims which were in interference, Clements' application for patent had been refused within the meaning of section 4915, and that it had not been abandoned within the meaning of section 4894. As to the remaining claims issued to Kirby and sought in this bill by Clements, the situation is different.

[2] The question as to the effect to be given in the Patent Office to a decision of the Court of Appeals on an interference is a modified question of res judicata. Usually, in declaring an interference, the examiner includes all permissible claims, both generic and specific, readable upon the disclosure of both applicants, and these make the issues litigated and decided. If he fails to do so, the parties may have the omission corrected, and such right of correction may stand for issues which might have been decided though they were not. Sometimes second thoughts suggest broadly generic claims which have been overlooked; but since the invention of the specific necessarily includes that of the generic, the issue on priority would often be the same. On the contrary, the finding of priority on a generic issue may or may not require the same finding as to the specific.

As appears by the statement made on behalf of the Commissioner in Re Curtiss, 46 App. D. C. 183, at page 188, it had been the practice of the Patent Office to permit second interferences between the same parties in special cases where the character of the claims before in issue had prevented a complete decision of the whole controversy. The decision of the Court of Appeals in Blackford v. Wilder, 28 App. D. C. 535, followed by Horine v. Wende, 29 App. D. C. 415, and Carroll v. Hallwood, 31 App. D. C. 165, had caused the Patent Office to change its practice and apply in all cases the sweeping rule that the Court of Appeals decision should be considered an adjudication as to every issue which might have been made upon the two applications as well as to those which were made. These three cases were followed by the Patent Office as a rule of decision in its action in declining to consider all of Clements' later applications, and were relied upon by the court below and in this court in support of this conclusion. They were reviewed and modified by the decision in Re Curtiss, and the earlier rule of the Patent Office was, in effect, approved. Paraphrasing that opinion to fit the facts of this case, it is held:

"The real test here is whether or not the granting of these narrow claims later asked by Clements would dominate the subject-matter upon which Kirby prevailed in the interference. * * * If Clements should be found to be entitled to priority on these narrow claims, it would in no respect affect the prior rights of Kirby, acquired through the former interference."

It should be noted that this opinion was not rendered until March, 1917, but it nevertheless is applicable to the rightfulness of action which had been taken in 1916, and both by its reasoning and the force of its authority makes clear that the Patent Office ought to have entertained Clements' later narrow claims, and, if necessary, declared an-

other interference.[2] If there could otherwise be doubt of this result, it would have followed from the peculiar situation existing in this case, where the Patent Office had refused to put the narrow claims into the issue because it held they were already there.

We think it right to say that these later narrow claims were "refused by the Commissioner" before this bill was filed, although it is true that the action of the Commissioner, in person, did not occur until a later date. After the Commissioner had twice decided that the whole matter was concluded, and that the Patent Office had no power to consider narrow claims which Clements might ask, the later presentation of them by Clements to the examiner was a formality, and so with the appeal to the Board and with the appeal to the Commissioner. It was held in McKnight v. Metal Co., supra, 128 Fed. at page 54, that even before the application had been formally refused, or the patent granted to the other contestant, there was a sufficient refusal to justify resort to section 4915, when it became apparent that the controlling question had been several times decided in the Patent Office. We think that, under the circumstances of this case, Clements was at liberty, after the Commissioner had decided the substantial question and the primary examiner had decided the formal ones, to desist from further proceedings which the Patent Office officials were likely to consider as vexatious, and consider his application as refused. We have the less hesitation in reaching this result, because, in any event, the filing of a supplemental bill, after the Commissioner did act, would have cured this defect and demonstrated that it was in this case an unsubstantial formality.

[3] There remains, of procedural questions, the one whether, under the above-described distributive theory, there should have been an appeal to the Court of Appeals, from the refusal of the narrow claims, before this bill could be filed as to them. Again we assume, without deciding, that if there could be an appeal, there must be one; but it seems to be clear that under Ex parte Frasch, 192 U. S. 566, 24 Sup. Ct. 424, 48 L. Ed. 564, and Steinmetz v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555, an appeal would not lie, because the substantial holding of the Commissioner was that he had no jurisdiction, and appeals cannot be taken on such questions. The claims must have been "twice rejected," under Revised Statutes, § 4909 (Comp. St. § 9454), before starting the chain of appeals which now ends in the Court of Appeals (formerly the District Supreme Court, under R. S. § 4911). We do not overlook that in Re Curtiss the Court of Appeals entertained an appeal upon a similar point; but the question of jurisdiction was not raised, and the existence of this right of appeal is, at best, too uncertain in this case to compel a resort to it, where the necessity of such resort in any case is only inferential.

[4] Kirby's counsel say that, because Clements could have procured a writ of mandamus, under the cases just cited, to compel the Commissioner to receive and consider these claims, therefore there is no remedy under section 4915. The natural inference is to the contrary. Man-

[2] This is now the practice of the Patent Office, as appears by the Commissioner's decision in Litle v. Armstrong, 232 O. G. 935 (1916).

damus is an extraordinary remedy, awarded only when no other is adequate. It could, at the most, only direct the Commissioner to act, but could not control his action. The remedy under section 4915 is far more adequate, where the matter has progressed to the point of refusing the patent, and it would seem that if in either the Steinmetz or the Frasch Case there had been any right to get a full review of all questions by application to a court with adequate powers, the mandamus would have been refused because unnecessary. Kirby's contention requires us to write into the statute an additional condition precedent before invoking section 4915 so as to make it say:

"Whenever a patent is refused either by the Commissioner of Patents or by the [Court of Appeals] of the District upon appeal, or by any other court having any jurisdiction over the Commissioner," etc.

We conclude that the dismissal of the bill because the right to file it had never accrued or had been lost, was error. The court below did not consider the merits, but that does not affect our duty to do so. The record was complete and there was a final hearing. The settled policy of the law is against piecemeal appeals, and they are approved only in special cases. We see no reason why the case should go back for further hearing. It is true that the physical exhibits used in the interference were not shown to the court below, and those for Kirby have not been sent to this court; but the interference record makes it clear that they are cumulative and of no controlling importance.

[5] It is well established that the court appealed to under section 4915 has full jurisdiction to re-examine all matters determined by the Court of Appeals. The latter becomes, for this purpose, one of the tribunals of the Patent Office, and its decision is in no sense a final decree, which cannot be thus collaterally attacked, though it will be followed unless the contrary is established by convincing testimony. Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, Courson v. O'Connor (C. C. A. 7) 227 Fed. 890, 894, 142 C. C. A. 414, and see Baldwin Co. v. Howard Co. (April 11, 1921) 255 U. S. —, 41 Sup. Ct. 405, 65 L. Ed. —.

[6] It is clear to us that, upon the moderately broad issue as we have defined it, priority should have been awarded to Clements, and that the record permits no other result. Kirby himself testifies that in his structure of September, 1910, the inner opening was so much larger than the outer one (five-sixteenths of an inch in diameter) that any tube which could have been inserted through the latter into the former would not have cut off the suction chamber, and that, about the 1st of May, 1911, he first thought of accomplishing the object of the invention in controversy, and he did so by extending the tube across the suction chamber and by enlarging the outer opening so as to make it the same size as the inner one, so that the tube would fit both. Thus he, for the first time, conceived and reduced to practice the "registering" and the "adaptability" which are called for by the claims, even with the moderately broad construction which we think the Court of Appeals gave to them. Clements' priority in this respect was found by all the Patent Office tribunals and is hardly in dispute. It seems that the Court of Appeals overlooked the insufficiency of Kirby's construc-

tion of September, 1910, in the respect to which we have referred; and counsel for Clements say, in effect, that they did not call the court's attention to it because not believing that it could become material.

If the patent had not issued to Kirby, there might be embarrassment about granting relief to Clements as to his narrower claims, because they would not have been subjected to that revision and modification which ought to precede the action of the court, and mandamus might be necessary; but Clements is asking precisely and only the claims which the Patent Office has found properly formulated and allowable, as against all prior rights, and has included in the patent issued to Kirby. They are seven in number. The first two are those which were in interference. The remaining five are different formulations of the narrower conception, which include the hose connection or tube as a positive element. The formal objections of the Patent Office on the ground of aggregation have been overcome, either by a change of opinion on its part or by some particular wording which avoids the objections—it is not material to determine which.

[7] The decree should be reversed, and the record remanded, with instructions to enter a decree in favor of Clements pursuant to this opinion. The costs of this court and of the court below should go against Kirby. We think that the provision of section 4915, that "all the expenses of the proceeding shall be paid by the applicant whether the final decision is in his favor or not," applies only to those cases which had just been mentioned, viz. "where there is no opposing party" and the papers are served on the Commissioner only.

LEWIS, Banking Com'r, v. FIFTH-THIRD NATIONAL BANK OF CINCINNATI.

(Circuit Court of Appeals, Sixth Circuit. June 7, 1921.)

No. 3494.

1. **Banks and banking ⇐101—Directors of bank not entitled to maintain action based on ultra vires contract.**

A state bank commissioner, in behalf of the creditors of an insolvent state bank, brought suit against another bank to recover collateral pledged for a loan which created an indebtedness in excess of that permitted by the statutes of the state, but authorized by formal action of the directors. Pending the suit, the directors, who were liable under the statute for any indebtedness of the bank created by them in violation of law, paid to the commissioner the amount of the bank's indebtedness, and took from him an assignment of its assets. *Held*, that the suit could no longer be maintained for their benefit, either in their own names or in that of the commissioner.

2. **Corporations ⇐487(1)—Cannot avoid ultra vires contract which has been executed by the other party.**

A private corporation cannot avail itself of the fact that a contract made by it was ultra vires, either as a defense or as the basis of an action, where the contract has been fully executed in good faith by the other party and the corporation has received the benefit of it.

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

3. Courts ⇐372(5)—**Federal court not bound by state decisions as to rights under ultra vires contract.**

The question of the rights and remedies of the parties to an ultra vires contract is one of general jurisprudence, on which a federal court is not bound by state decisions, but must exercise its own judgment in a case before it.

4. Parties ⇐3(1)—**Court will regard rights of real parties in interest only.**

A court will determine an action in accordance with the rights of the real parties in interest, without regard to form or to those who are nominal parties only.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John W. Peck, Judge.

Action at law by James P. Lewis, Banking Commissioner of the Commonwealth of Kentucky, against the Fifth-Third National Bank of Cincinnati. Judgment for defendant, and plaintiff brings error. On motion by defendant to dismiss. Motion granted.

On the 11th day of April, 1906, George Alexander and eight other citizens of Kentucky organized a banking corporation under the name of George Alexander & Co., Bankers, which name was later changed to the George Alexander & Co. State Bank, Incorporated. The articles of incorporation provided among other things that the highest amount of indebtedness or liability which the corporation might incur should not at any time exceed $10,000 over and above its liabilities to depositors and its liabilities upon bills of exchange, checks, or drafts upon other banks having its funds upon deposit. At divers times between January 22, 1914, and May 5, 1914, inclusive, this bank borrowed from the defendant, The Fifth-Third National Bank of Cincinnati, three several sums, aggregating $35,000, and at the same time indorsed and delivered to the defendant as collateral security 16 promissory notes, aggregating about $56,000.

The George Alexander & Co. State Bank later became insolvent and turned over its property to Thomas J. Smith, banking commissioner of the commonwealth of Kentucky, and Buckner Woodford, special deputy banking commissioner of that commonwealth, who took possession thereof and proceeded to wind up the affairs of the insolvent bank in pursuance and by authority of chapter 4 of the Session Acts of the General Assembly of the commonwealth of Kentucky of 1912. A demand was made upon the defendant by the banking commissioner and special deputy banking commissioner for the return of all the notes held by it as collateral to secure the payment of the debts due it from the George Alexander & Co. State Bank, which demand was refused, and later this action was brought in the United States District Court for the Southern District of Ohio, Western Division, for an order directing this defendant to deliver said notes held by it as collateral to the plaintiffs as banking commissioner and deputy banking commissioner of the commonwealth of Kentucky, or in lieu thereof a judgment for their value. This suit was based upon the provision in the charter of the George Alexander & Co. State Bank limiting the amount of indebtedness that it might incur to $10,000. Later George C. Speer, as banking commissioner, was substituted as plaintiff in place of Thomas J. Smith, banking commissioner, and Buckner Woodford, as deputy banking commissioner. When the term of Geo. C. Speer as banking commissioner expired, his successor in office, the present plaintiff in error, Jas. P. Lewis, was substituted as party plaintiff.

On November 14, 1914, an amendment to the petition was filed, which averred, among other things, that the defendant had collected $43,640.37 on these notes deposited with it as collateral security, and had applied that sum to the payment of the $35,000 indebtedness, evidenced by the three promissory notes and the $8,640.37 overdraft, with interest thereon owing by the George Alexander & Co. State Bank to the defendant. The petition admitted that

$10,000 of this money collected was properly applied to the payment of the first $10,000 note, and asked judgment in the sum of $33,640.37, the balance of the sum realized upon the collateral securities and applied by the defendant to the payment of the two other notes and overdraft.

The defendant filed an amended answer to the petition as amended, in which answer, among other things, it averred that J. W. Bacon, W. W. Mitchell, R. B. Hutchcraft, E. P. Claybrook, John M. Brennan, and Harry Clay were and had been continuously since June 29, 1907, the duly elected, qualified, and acting directors of said bank and its predecessor, George Alexander & Co., Bankers; that said board of directors, or a majority of them, by resolution formally adopted and furnished by said bank to defendant herein, authorized the several loans and each of them thereafter made by defendant to said bank, which said loans were made and the collateral accepted by defendant in the regular course of business without knowledge of any restriction upon the power of said bank to make the same; that said directors are and have been at all times herein collectively able to respond to any judgment or judgments in amounts sufficient to make good all valid outstanding claims of creditors and depositors of the George Alexander & Co. State Bank. The defendant also averred that on July 18, 1914, the original plaintiffs in this action filed in the circuit court of Bourbon county, Ky., a petition against these directors, alleging that as such directors they had unlawfully declared and paid the sum of $44,800 to the stockholders, but that said bank had not earned said dividends, or any part thereof, and that at the time such dividends were paid the George Alexander & Co. State Bank was insolvent, and that such declaration and payment of dividends was in violation of the statutes of Kentucky; that said directors were liable, not only for the dividends so wrongfully paid, but for all valid claims against the bank totaling $143,081.23, on the ground that through negligence of said defendants as such directors the president of the George Alexander & Co. State Bank had made excessive loans to insolvent persons, and had allowed large overdrafts to insolvent persons, and had appropriated large amounts of the money of said bank to his own use; that said suit is still pending and undetermined on the docket of said circuit court of Bourbon county, Ky., and is being prosecuted by the plaintiff in this action, substituted for Thomas J. Smith, banking commissioner.

The defendant further averred that on February 25, 1915, the predecessor of Thomas J. Smith, as banking commissioner of the commonwealth of Kentucky, and Buckner Woodford, as special deputy banking commissioner of said commonwealth, filed their certain other petition in said circuit court of Bourbon county, Ky., against these same directors, alleging that they were liable jointly, severally, and individually in the sum of $83,319, with interest thereon, on the ground that they had negligently and in violation of their duties as directors of said bank loaned and permitted to be borrowed by one George Alexander, the president of said bank, and to other persons from time to time, without having security or sufficient security for said loans, certain moneys of said bank in excess of the amount or amounts which the law of Kentucky permitted to be loaned by said bank to said person or persons, and had permitted depositors in said bank to overdraw their accounts, contrary to law, which cause is still pending and undetermined, and is being prosecuted by plaintiff as the successor of said Thomas J. Smith, banking commissioner. The defendant also denies that all the assets of said George Alexander & Co. State Bank will not be sufficient to discharge its indebtedness to its depositors and creditors having valid claims, and that it will be necessary to use said notes given to defendant as collateral, or the proceeds, to satisfy the creditors or depositors of the State Bank; that if said loans were ultra vires the directors of said State Bank are personally responsible to plaintiff, and that this suit was instituted and is prosecuted for the benefit of said persons, directors of said bank and primarily liable for its alleged losses, and who are responsible and financially able to meet said responsibility, for the purpose of avoiding or reducing their liability.

The plaintiff filed a motion to strike this answer from the file, or, in the alternative, to strike out certain averments therein pleaded. Pending this

motion the present plaintiff in error succeeded George G. Speer as banking commissioner for the commonwealth of Kentucky, and filed a supplemental petition and second amendment to the petition. The court overruled the motion to strike the amended answer from the files, and it also overruled in part the alternative motion to strike certain averments from the amended answer, but sustained that motion as to averments in that answer and which are not now important.

The plaintiff then filed a reply to this amended answer, denying that the directors of the George Alexander & Co. State Bank named in the answer are or have been at all times collectively able to respond to any judgment or judgments in amounts sufficient to make good all valid outstanding claims of creditors and depositors. It denied that this suit is being prosecuted in the interest of the directors of the George Alexander & Co. State Bank; that in the action brought by this plaintiff in the Bourbon county court against these directors he did not allege as a fact that said directors were liable, but avers that in said actions the liability of said directors was alleged as a legal conclusion; that, for lack of information upon which to form a belief, the plaintiff denies that the amount necessary to pay the creditors and depositors of said George Alexander & Co. State Bank can be recovered from the defendants in said cases in the Bourbon county circuit court of Kentucky, and avers that until the conclusion of said actions it will be impossible to determine whether or not such amount or amounts can be recovered from said defendants.

Upon this state of the pleadings the court entered judgment for the defendants, and this proceeding in error is brought in this court to reverse that judgment. A motion has been filed in this court by the defendant in error to dismiss this action, on the ground that plaintiff in error has adjusted and settled the claims of all creditors of George Alexander & Co. State Bank, and has assigned all the assets of said bank to J. W. Bacon, W. W. Mitchell, John M. Brennan, E. P. Claybrook, and Harry B. Clay, being the directors of said bank named in the amended answer of the plaintiff at page 30 of the printed record. In support of this motion there was filed in this court a certified copy of the order entered by the Bourbon county circuit court of Kentucky, affirming a compromise agreement between the parties to suits Nos. 10227 and 10094 in that court, in which compromise agreement it is provided that each depositor and bona fide creditor should receive his claim as theretofore allowed in the amount and upon which the distribution has heretofore been made, without interest, less costs and allowances hereinafter incurred and made. It was further provided in the order confirming the compromise agreement that, in case any creditor or depositor fails or refuses to accept the amount due him or her under this order on or before January 1, 1922, the amount so due such creditor shall be paid by the banking commissioner to J. W. Bacon, W. W. Mitchell, John M. Brennan, E. P. Claybrook, and Harry B. Clay immediately after said date and without further order of this court.

This order confirming this compromise was entered October 18, 1920, and on November 24, 1920, a further order was entered, which order states that these defendants had paid in pursuance of this compromise agreement $93,277.82, which said sum the special deputy banking commissioner accepted in full satisfaction and settlement of all claims which he as special deputy banking commissioner may have against said parties, and thereupon agreed to dismiss and settle the two cases Nos. 10227 and 10094 pending in that court. Upon these facts, as above stated, it was ordered that "both of said suits be dismissed, settled." This order further recites that "the claim of the banking commissioner against R. B. Hutchcraft, one of the defendants in said two suits, who has not paid any part of said money, is hereby assigned to said J. W. Bacon, W. W. Mitchell, John M. Brennan, E. P. Claybrook, and Harry B. Clay, and all other assets of Geo. Alexander & Co. State Bank, after the settlement is carried out according to the order entered herein on October 18, 1920, are also assigned to them."

It is admitted by the plaintiff in error that this settlement was made by him with the approval of the court in the two several cases pending against

these directors of the George Alexander & Co. State Bank, as shown by these certified copies of the order entered by that court in reference thereto; that the defendants in that suit other than Hutchcraft paid to him the sum of $93,277.82 in full settlement and satisfaction of the claims asserted against them by the banking commissioner of the commonwealth of Kentucky in both of these actions, and that in pursuance of the settlement agreement, and in consideration of the payment to him by these directors of sufficient money with which to discharge the debts of the defunct bank, he has assigned all the assets of that bank, including the claim in suit, to these directors.

E. L. Worthington, of Maysville, Ky. (Worthington, Cochran & Browning, of Maysville, Ky., on the brief), for plaintiff in error.

Lawrence Maxwell, of Cincinnati, Ohio (Joseph S. Graydon and Joseph L. Lackner, both of Cincinnati, 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] In the disposition of this motion it is unnecessary to refer to the assignments of error upon which the plaintiff in error relies for a reversal of this judgment. This plaintiff in error has assigned and transferred to the directors of the George Alexander & Co. State Bank whatever right he may have had in his official capacity as banking commissioner of the commonwealth of Kentucky to recover these collateral securities from the Fifth-Third National Bank of Cincinnati. He has no further personal or official interest in the prosecution of this proceeding in error, and if the judgment were reversed and the cause remanded, a recovery upon the cause of action stated in the petition would not inure to his benefit either in his personal or official capacity, or to the benefit of the creditors of this defunct bank.

It is insisted, however, that not only under the rule of the common law, but also under the express provisions of statutes both of Kentucky and Ohio, these bank directors, as assignees of "all other assets of the George Alexander & Co. State Bank," are entitled to prosecute this action in the name of the assignor. That proposition is undoubtedly true, but, on the other hand, it is wholly immaterial in whose name this action is prosecuted. The substantial question is: For whose benefit is it prosecuted? That is to say, if the parties for whose benefit it is prosecuted could not maintain this suit in their own names and recover for their own benefit, then it follows as a corollary that they cannot prosecute it in the name of the assignor, who has no further personal or official interest therein.

If it were conceded that the banking commissioner of the commonwealth of Kentucky had the right and authority to transfer and assign to these directors of the George Alexander & Co. State Bank "all other assets" of that bank, not expended by him in the payment of creditors, beyond question he could not transfer to these assignees any part or parcel of his official character, or his right as such officer of the commonwealth of Kentucky to represent either the state of Kentucky or the creditors of this insolvent bank. This action is no longer in the interest of, nor for the benefit of, the creditors, and it must now be main-

tained, if at all, for the benefit of the directors of the insolvent bank that negotiated this loan from the defendant bank in excess of its charter powers to incur indebtedness.

The question is therefore fairly presented upon this motion whether the George Alexander & Co. State Bank, or these directors of that bank, as assignees of its property interest therein, can successfully maintain an action for the recovery of this collateral security without making restitution to the defendant bank of the money secured by the insolvent bank through and by this ultra vires contract. Upon the clearest principle of law and equity, the answer to this must be in the negative. By this transfer, assignment, and delivery of this collateral security, the George Alexander & Co. State Bank obtained from the defendant bank $43,640.37 of the lawful money of the United States. The balance of this collateral security, over and above this sum of money, was returned by this defendant bank to the banking commissioner of Kentucky, so that for every dollar of these securities, not specifically returned to the banking commissioner, the George Alexander & Co. State Bank, of which these assignees were the directors, received a dollar in money, which money came into the possession and control of that bank and these directors, and was applied to its purposes, and presumably increased to that extent the assets available to creditors when the bank became insolvent and passed into the hands of the banking commissioners.

Section 598 of the Kentucky Statutes provides that:

"If any director or directors of any bank shall knowingly violate, or permit any officer or employé of the bank to violate any of the provisions of the laws relating to banks, the directors so offending shall be jointly and severally, individually liable to the creditors and stockholders for any loss or damage resulting from such violation."

The law of Kentucky provides, among other things, that no corporations shall incur indebtedness or liability in excess of the amount named in its charter. It is averred in the answer, and not denied in the reply:

"That the board of directors, or a majority of them, by resolution formally adopted and furnished by said bank to defendant herein, authorized the several loans and each of them thereafter made by defendant to said bank."

Regardless, however, of the averments and admissions in the pleading, the law imposed upon these directors the duties of directing the affairs of this bank, and their responsibility in that behalf could not be transferred to its president. The banking commissioner of the commonwealth of Kentucky brought two separate actions in the Kentucky state court against these directors to recover for the benefit of creditors. These suits were based upon the violation by these directors of the statute of Kentucky above cited, and also upon their gross failure, neglect, and violation of their duties as directors of said bank in other respects. In compromise of these suits, these directors paid to the banking commissioner of Kentucky the sum of $93,277.82 for the benefit of creditors other than this defendant bank, and now seek in this action to reimburse themselves for this loss from one of the victims of this same unlawful and careless course of conduct in the management of

the affairs of the insolvent bank upon which their liability to its creditors was predicated, and in discharge of which liability they paid this large sum of money.

[4] The rule of ultra vires differs materially in its application to private corporations and its application to public or municipal corporations. Kellogg-Mackay Co. v. Havre Hotel Co. et al., 199 Fed. 727, 118 C. C. A. 165. The question here involved, however, is fully answered by the Supreme Court of the United States in the case of the Pullman Palace Car Co. v. Central Transportation Co,, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108. In that case the contract had previously been declared void by the United States Supreme Court in an action between the same parties (139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55), because ultra vires the charter of the Central Transportation Company, and also because it involved an abandonment by that company of its duties to the public. The Transportation Company by cross-appeal in this later action asked for an accounting of profits which the Pullman Company had derived by its use of this property transferred to it under this void agreement, and that it should in the future from time to time account for the sums which should be due by reason of further operations under this contract, and also for the return of its property delivered by it under this void contract to the Pullman Company, and compensation for any part of that property which it was impossible to return. In the trial court judgment was entered in favor of the Transportation Company in the sum of $4,235,044. This judgment was reversed by the Supreme Court, because the recovery was too large, and the cause was remanded to the Circuit Court for the Eastern District of Pennsylvania, with directions to enter a judgment for the Transportation Company in the sum of $727,846.50 and interest from January 5, 1885, which amount represented the value of the property transferred by that company to the Pullman Company under this ultra vires lease at the date of the repudiation of the lease, but refused any relief for the use of the property during the time both parties acted under its provisions, upon the theory that the rent paid compensated for that use. The Supreme Court in this case discussed at length the authorities applicable to the question here involved and concluded its consideration of these authorities with this statement:

"They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover."

In this case it appears that the property transferred from the Central Company to the Pullman Company under this void contract had substantially disappeared and could not then be returned; but notwithstanding that fact it required the Pullman Company to compensate the Transportation Company for its value.

In the case of Kellogg-Mackay Co. v. Havre Hotel Co. et al., supra, it was held:

"The doctrine of ultra vires may not be invoked to defeat justice or work a legal wrong"—citing in support of this 3 Thompson on Corporations (2d Ed.) § 2778; Railway Co. v. McCarthy, 96 U. S. 258–267, 24 L. Ed. 693.

The court quotes at some length from the opinion by Mr. Justice Swayne in Railway Co. v. McCarthy, supra, and concludes with this language:

"Perhaps the doctrine as announced by Mr. Justice Swayne, which is one really of estoppel, is not strictly applicable, unless in exceptional cases, where the corporations involved are of a public or quasi public character, but it would seem to be suited with strong reason and emphasis to the operation of merely private corporations, when such corporations have received the benefits of the obligations which they are seeking to repudiate, and has been so applied in a variety of cases."

The court cites in support of this proposition a great many cases decided, not only by the federal courts, but by many state courts of last resort. The doctrine announced by the Supreme Court of the United States in Eastern Building & Loan Association v. Williamson, 189 U. S. 122–129, 23 Sup. Ct. 527, 47 L. Ed. 735, applies with peculiar force to the facts in this case. The court in its opinion (189 U. S. 129, 23 Sup. Ct. 530, 47 L. Ed. 735) quotes with approval from the New York Court of Appeals in the case of Vought v. Eastern Building & Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, the following:

"It is now well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. * * * While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. * * * When it [the contract] becomes executed by the other party, it is estopped from asserting its own wrong and can not be excused from payment upon the plea that the contract was beyond its power."

Following this quotation from the New York Court of Appeals, the Supreme Court of the United States adds:

"We deem it unnecessary to add any observations of our own to these satisfactory declarations of the law of New York."

Undoubtedly a private corporation may defend against an action to enforce an executory contract upon the plea of ultra vires, where neither party has performed, or it may repudiate an ultra vires contract, upon making full restitution to the other contracting party, but the authorities are uniform that it can not keep the property of another obtained under and by the terms of such contract, and refuse performance on its part upon the theory that the contract is ultra vires its charter powers; otherwise, the plea of ultra vires would degenerate into a mere instrumentality of fraud, deceit, and dishonesty, by means of which a corporation might appropriate to its own use the private property of others, without fear of punishment or the necessity of making restitution.

[3] The Kentucky Court of Appeals decided in the case of Bank v. Smith, 170 Ky. 512, 186 S. W. 482, Ann. Cas. 1918B, 959, that a contract by the George Alexander & Co. State Bank similar to the one now under consideration, incurring indebtedness in excess of its charter limitations, was ultra vires and void. This decision is based upon a construction of the statutes of that state, and to that extent is controlling upon this court. The rights and remedies of the parties to this ultra vires contract are questions of general jurisprudence, and therefore the decision in that respect is not controlling, but must be decided by this court upon the facts in this case. Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; Kuhn v. Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. While we do not question the correctness of the judgment in that court in reference to the rights and remedies of the parties to that suit, yet that part of the judgment in the Kentucky case was predicated upon the rights of the banking commissioner of the commonwealth of Kentucky, who was not a party to the ultra vires contract, and who was prosecuting that suit in the public interest, to enforce the public policy of the state, as well as in the interest of the creditors of the insolvent bank.

[4] From the proofs submitted upon the hearing of this motion the banking commissioner, as heretofore stated, has no further official interest in this suit. He is no longer prosecuting this proceeding in error in the public interest, or in the interest of the creditors of the insolvent bank. The assignment by him of these securities did not convey or transfer to the assignees rights which the Kentucky statute vested in that officer for the protection of general creditors, but only the mere property interests of the George Alexander & Co. State Bank therein, just the same as if that bank had directly made the assignment to them, instead of through and by the banking commissioner. Therefore the situation now presented in this case is not different than if the insolvent bank itself had originally brought this action against this defendant for the recovery of this collateral security, and this is further emphasized by the fact that these assignees are the directors of the insolvent bank who were responsible for this bank entering into these ultra vires contracts. Whether or not this suit be prosecuted to final judgment in the name of the assignor is a matter of mere form only, and not of substance. In such cases courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of form, will deal with the substance of the transaction involved in identically the same manner as if the real parties in interest were substituted as parties plaintiff. Railway Co. v. Civic Ass'n, 247 U. S. 490, 38 Sup. Ct. 553, 62 L. Ed. 1229; Sudduth v. Coal Co. (C. C. A.) 268 Fed. 433.

Under these facts which have occurred subsequent to the decision of the Kentucky Court of Appeals in the case of Bank v. Smith, supra, this court is called upon to apply the settled rule of general jurisprudence in reference to ultra vires contracts, which rule in the absence of restoration of status quo leaves the parties where it finds them. It follows, therefore, that if the George Alexander & Co. State Bank, or that bank's assignees, cannot recover these securities from the defendant bank without first making full restitution to that bank, it would be an

idle performance for this court to reverse the judgment in this case, for if the judgment were reversed and the cause remanded, it would be the duty of the trial court upon the facts established upon the hearing of this motion and the admissions of the pleadings, to render a like judgment.

For the reasons above stated, the motion of the defendant in error to dismiss this proceeding in error is sustained.

UNITED STATES v. COHEN.

(Circuit Court of Appeals, Third Circuit. July 15, 1921.)

No. 2701.

1. **Larceny ⇐1—"Steal" and "take" defined.**
   To constitute "stealing" there must be an unlawful taking and carrying away, with intent to convert to the use of the taker and permanently deprive the owner, and to "take" a thing, within the meaning of the criminal statutes, it is necessary that the taker, at some particular moment, should have adverse, independent, absolute possession of it.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Steal; Take.]

2. **Larceny ⇐1—Prosecution for stealing goods in interstate commerce must conform to statute as to place of theft.**
   To authorize a conviction, under Act Feb. 13, 1913, § 1 (Comp. St. § 8603), making it an offense to "steal or unlawfully take, carry away or conceal * * * from any railroad car, station house, platform, depot, steamboat, vessel or wharf with intent to convert to his own use any goods or chattels moving as, or which are a part of, or which constitute an interstate or foreign shipment of freight or express, * * * or have in his possession any such goods or chattels, knowing the same to have been stolen," it must be alleged and proved that the property was stolen from one of the places specified in the statute.

3. **Receiving stolen goods ⇐2—Stolen goods, after recovery by owner, are not "stolen property."**
   Where the actual physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and its subsequent delivery by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime.

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

Criminal prosecution by the United States against Joseph Cohen. Judgment of conviction, and defendant brings error. Reversed, and new trial granted.

George E. Cutley, of Jersey City, N. J., for plaintiff in error.

Isaac Gross, of Jersey City, N. J., for the United States.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. Joseph Cohen, the defendant below, was indicted, tried, and convicted for having in his possession with intent to convert to his own use a case of goods belonging to the United Cigar

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Stores Company, knowing the same to have been stolen in violation of the Act of February 13, 1913, 37 Stat. 670 (Comp. St. §§ 8603, 8604). The Cigar Company delivered the case to a driver of the American Railway Express Company at its office in the Bush Terminal Building, Brooklyn, New York, to be sent by express to its office in Columbus, Ohio. The case was addressed to the United Cigar Stores Company, Columbus, Ohio. The next information of the case, based upon competent testimony, is that, some days after delivery to the driver of the Express Company, it appeared on the express company's platform in Jersey City, N. J., the address of the consignee erased, and then addressed to "J. Cohen, 347 Second Street, Jersey City." The suspicion of Edward M. Robertson, an employee of the express company, was aroused. He took the case and put it into the office of the express company until the next day, when it was, under the direction of the detectives of the company, delivered by Calvin Jenkins, a driver for the company, to Cohen, who made unsatisfactory explanations of his reception of the case, the source from which he expected it, and he was accordingly arrested by Mr. Herdling, a detective of the company, and Mr. Torpey, a detective of Jersey City.

At the conclusion of the trial, counsel for defendant moved for the direction of a verdict on the ground:

"That under the Moynihan Case there is no proof that the goods were ever stolen with intention to convert to his own use, and that under the Copertino Case the physical repossession is a recovery in law, which divests these goods of the characteristic of stolen goods."

This motion was denied, and an exception granted to the defendant, who sued out a writ of error to this court.

[1] The first question to be considered is whether or not the facts disclosed by the evidence show that the case of goods was stolen. At common law larceny was the felonious taking without his consent and carrying away the goods of another, with intent to convert to his (the taker's) own use and permanently deprive the owner of them. The statute under which this indictment was found provides:

That "whoever shall steal or unlawfully take, carry away, * * * from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, * * * or shall have in his possession any such goods or chattels, knowing the same to have been stolen," upon conviction shall incur the penalties prescribed in the act.

The word "steal" is defined by the words "unlawfully take, carry away, * * * with intent to convert to his own use." To constitute "stealing" there must be an unlawful taking and carrying away with intent to convert to the use of the taker and permanently deprive the owner. To take a thing, within the meaning of criminal statutes, it is necessary that the taker at some particular moment should have adverse, independent, absolute possession of it. People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; 2 Wharton's Criminal Law (11th Ed.) 1365.

Admittedly the taking in the case before us, if there was a taking,

was the change of the address on the case. So far as the evidence discloses, the case of goods was never out of the actual physical possession of the express company until it was delivered to the defendant. Just how, when, and where the change in the address was made is not known. The most that can be said is that the possession by the thief was constructive, and the express company was the innocent agent of the thief in diverting the goods from their course, and that the taking and carrying of them to Jersey City was in law the taking and carrying by the thief himself, who set in motion the innocent agency with the intention of permanently depriving the owner of his property. We are, however, in doubt that the facts of this case show such adverse possession; independent and absolute control of the goods, as the cases generally require, notwithstanding the case of Commonwealth v. Barry, 125 Mass. 390, the facts of which may be readily distinguished from those in this case. The thieves in that case got actual, physical possession of the property, carried it away, and converted it to their own use. The language of the opinion is dicta as applied to the facts of this case.

[2] Whether or not larceny was actually committed, there is another aspect of the case which in our opinion is dispositive of it. This is not a statute against the larceny of personal property generally, but against the larceny of a special class of property from particular places. The property must be "an interstate or foreign shipment of freight or express," and must be stolen from a "railroad car, station house, platform, depot, steamboat, vessel or wharf." The case of goods was concededly interstate in character. To sustain the conviction, however, it was necessary that the indictment should charge and the evidence establish that the case was stolen from some one of the particular places mentioned in the statute. United States v. Moynihan, 258 Fed. 529, 169 C. C. A. 469. The indictment does not charge where the case was stolen. All that it says on this subject is that the defendant, when he had these "goods and chattels in his possession, knew the same to have been stolen." They were "picked up" by a driver of the express company at the Bush Terminal Building, Brooklyn, New York, and, so far as the record shows, it is not known when and where the change of address on the case was made. The evidence is sadly silent from the time of the delivery of the case at the Bush Terminal Building until it appeared some days later on the platform of the express company in Jersey City. Consequently the crime which the statute denounces was neither charged nor proved.

[3] Assuming that the goods were stolen from a railroad car, station house, or platform, etc., there is another consideration which in our judgment would prove fatal. The facts of the case of Reg. v. Schmidt, 1 Criminal Law Cases, 15, are almost identical with those in the case under consideration. A passenger's "luggage" was stolen from a railway station, and part of it was inclosed by the thieves in a package and sent via the railway company to Brighton to a Mrs. Schmidt. While the package was at the station, but before it was delivered, the theft became known, and it was subsequently discovered that the package

contained part of the stolen "luggage." For the purpose of entrapping Mrs. Schmidt, employees of the railway company delivered the package to her. She was indicted, tried, and convicted for receiving stolen goods. After careful consideration the court held that in the discovery and delivery of the property by officers of the railway company, owner pro hac vice of the property, it lost its character as stolen property, and the verdict was set aside. When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost, and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property. Reg. v. Dolan, 29 Eng. Law & Eq. 533; United States v. De Bare (D. C. E. D. Wis.) 25 Fed. Cas. 796, No. 14,935; People v. Jaffe, 185 N. Y. 497, 78 N. E. 169, 9 L. R. A. (N. S.) 263, 7 Ann. Cas. 348; Copertino v. United States, 256 Fed. 519, 167 C. C. A. 585.

There was doubtless an attempt to steal the case of goods, and the evidence tends to show that the defendant was connected with that attempt, which would have succeeded, but for the close observation of Mr. Robertson. We are constrained to hold, however, that on the facts as presented the defendant is not guilty of receiving stolen goods.

The judgment of the District Court is therefore reversed, and a new trial granted.

HOUSTON v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Third Circuit. July 21, 1921.)

No. 2645.

1. **Carriers ⇐333(5)—Jumping from moving train contributory negligence.**
   Under Railroads and Canals Act N. J. § 55, providing that one injured by jumping from a car while in motion shall be deemed to have contributed to the injury sustained, and shall not recover therefor from the company owning or operating the railroad, there can be no recovery for the death of one jumping off the train while moving.

2. **Carriers ⇐334—Riding on platform in violation of notice contributory negligence.**
   Under Railroads and Canals Act N. J. § 39, there could be no recovery for the death of a passenger going on the platform and steps of the car while the train was in motion, in violation of a printed notice, and thrown from the train by the swaying and jolting thereof.

3. **Courts ⇐365—Rule of state court as to last clear chance followed.**
   In an action for death occurring in New Jersey, the federal court follows the rule of the state court that, to entitle plaintiff to recover under the last clear chance doctrine, defendant's negligence must be so gross as to imply a disregard of consequences or a willingness to inflict injury.

4. **Carriers ⇐346(3)—Evidence held not to show gross negligence after discovering passenger's peril.**
   In an action for the death of a passenger, who jumped or was thrown from the steps of a car and rolled under the train, evidence *held* insufficient to show gross negligence with respect to the stopping of the train after a trainman knew of his dangerous situation.

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5. Carriers ⊂=348(12)—**Instruction on last clear chance doctrine held sufficiently favorable to plaintiff.**

In an action for the death of a passenger, who jumped or was thrown from the steps of a car and rolled under the train, an instruction sufficiently charging the doctrine of last clear chance, but claimed to be erroneous because of the statement that the jury should keep in mind that this hinged on whether or not deceased was thrown from the train by a violent lurch or jerk, *held* sufficiently favorable to plaintiff, where the evidence at most showed concurrent negligence.

6. Trial ⊂=257—**Refusal of requests presented after charge held discretionary.**

Where requested charges were not made necessary by the charge given, and there was nothing to suggest inadvertence, mistake, or error in not presenting them earlier, it was discretionary to charge or refuse them, especially where it was the custom in the district to present them before counsel began to sum up to the jury, though there was no written rule on the subject.

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

Action by Sarah A. Houston, administratrix of Frank J. Houston, deceased, against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Peter F. McAllister, of Ithaca, N. Y., and Martin Conboy, of New York City (Edwin N. Moore, of New York City, of counsel), for plaintiff in error.

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

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. Frank J. Houston, plaintiff's intestate, was a passenger on defendant's train running from Hoboken to and through Orange, N. J., on April 5, 1917. The station at Orange, at this time, was a stationary one. On each side of the station the defendant was doing extensive construction work. The train was composed of the locomotive, 55 feet long, and 6 coaches, each 60 feet long. The car next to the locomotive in which the deceased was sitting was a combination car, one end of which was used as a baggage car, which was next to the locomotive, and the other end as a smoker. In the smoker end and beside the toilet near the door there was an emergency brake, and also a whistle cord that ran through the car. As the train was nearing the station, a trainman called out "Orange." About this time Houston was seen standing on the steps at the rear platform of the smoker. The train had crossed Essex avenue, 400 feet from the station, when in some way Houston disappeared from the train. At this time Harvey G. Galbraith, Jr., a trainman, was crossing from the platform of the smoker to the next car back, when he saw "an object go by." He "looked over and * * * missed a person off the lower platform * * * off the lower step, off the other step, the rear end of the smoker." "I reached up and pulled the whistle cord twice," he said. About that time somebody said some one "fell off," and Mr. Thomas Lehman, one of the plaintiff's witnesses, who was standing on the front steps of the car immediately following the smoker, said

that the trainman, Galbraith, pulled the whistle cord immediately thereafter.

The defendant's witnesses testified that the train stopped within 60 feet after the signal was received. The plaintiff contends that the train went much farther. It was testified that an arm of the deceased was found near the end of the train, which, plaintiff asserts, shows that, after Houston disappeared from the train, it ran nearly the length of the five cars following the smoker. There is no competent evidence as to whether the deceased jumped off the train or fell off. Whatever the fact may be, there was an incline of the ground toward the track where he left the train, and he apparently lost his balance and rolled under it.

The case was submitted to a jury, which returned a verdict for the defendant, and the plaintiff sued out a writ of error, alleging that the learned trial judge erred in refusing to charge two requests submitted to him after he had charged the jury and it was ready to retire. They were:

(1) "Even if Frank J. Houston had been guilty of contributory negligence at the time he was killed, but they find that the servants of the railroad company in the management and control of the train discovered the dangerous and perilous situation of the deceased in time to have prevented his death if immediate and proper steps had been taken to stop the train, and they find further that the engineer in control of the engine that was moving the train received a signal to stop the train, and that the train could have been stopped in time to have saved the life of the deceased, and was not so stopped, they should find a verdict for the plaintiff."

(2) "Even if the deceased carelessly placed himself in a position exposed to danger, and it was discovered in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure may be found to be the sole cause of the resulting injury."

The statute in New Jersey which may be applicable to this case provides that:

"If any person shall be injured by * * * jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad." Section 55 of the Railroads and Canals Act of New Jersey; 3 Compiled Statutes of New Jersey, 4245.

A notice of which the following is a copy was posted in the smoker, about a foot from the door and five or six feet from the floor on the right side of the car:

"The Delaware, Lackawanna & Western Railroad.

"Notice to Passengers.

"Passengers must not go or remain on the platforms of this car while the car is in motion, nor must they go at any time in any baggage or freight car."

[1, 2] If the deceased jumped off the train while it was moving, recovery is barred by the statute. Powell v. Erie R. R. Co., 70 N. J. Law, 290, 58 Atl. 930; Zelman v. P. R. R. Co., 93 N. J. Law, 57, 107 Atl. 442; Erie R. R. Co. v. Hilt, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. Ed. 1003. The plaintiff alleged in her complaint that—

"The said train, when about to stop at said station, suddenly and violently swayed and jolted, and the plaintiff's intestate was by said swaying and jolting thrown to the ground."

There was no evidence to sustain that allegation, and, if there had been, the deceased went on the platform and steps of the car while the train was in motion, in violation of the printed notice and the New Jersey statute. Recovery under the facts of this case is therefore barred. Section 39, Railroads and Canals Act; 3 Compiled Statutes, 4240.

The plaintiff really complains because the learned trial judge did not charge the doctrine of "the last clear chance" in the language of her requests. He had substantially covered the points of the requests in the following language of his general charge:

"The defendant's witnesses, including the engineer and fireman, testified that the train stopped within 60 feet after the signal was received. What are the facts? Was there negligence of the engineer or other trainmen in not stopping the train quicker than they did stop it? Did they, under the circumstances, do what reasonably prudent men would not have done under similar circumstances? If the train had stopped quicker, would the accident have been avoided? Were the defendant's employees guilty of negligence in the way they acted, when it was learned that a man had in some way disappeared from the platform or steps of the platform? Has the plaintiff established by evidence that, even if the engineer had stopped the train after having received the signal which was started to be given to him after the man had disappeared, that even then the man would not have been run over (keeping in mind, as I have already said, that this hinges upon whether or not Houston was thrown from the train by a violent lurch or perk of it)?"

The plaintiff contends that, even though the deceased was guilty of contributory negligence, the consequences thereof might have been avoided by the exercise of reasonable care and prudence by defendant after Galbraith saw the deceased disappear from the steps. If the engineer had stopped the train in accordance with the signals given by Galbraith, or if Galbraith himself had used the emergency brake, the accident would have occurred. Admittedly the doctrine of "the last clear chance" was sufficiently charged; but the language of the parenthesis, "keeping in mind," etc., plaintiff says, nullifies what had been charged on that subject. However that may be, the real question is whether or not any charge should have been made on that point. This doctrine was first enunciated in the case of Davies v. Mann, 10 M. & W. 546, and is thus stated by the Supreme Court:

"Contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." Grand Trunk Railway Company v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 687 (36 L. Ed. 485).

[3-5] But the Court of Errors and Appeals of New Jersey, whose decisions we follow in administering the negligence law of New Jersey, held that, to entitle plaintiff to recover under this doctrine, the defendant's negligence must be so gross as to imply a disregard of consequences or a willingness to inflict injury. Camden, etc., Railway Co. v. Preston, 59 N. J. Law, 264, 266, 35 Atl. 1119. This general doctrine was further limited by the Circuit Court of Appeals for the Sixth Circuit which held that this rule does not apply—

"to a case where it clearly appears that the injury is the result of the concurrent negligence of the plaintiff and defendant." Gilbert v. Erie R. Co., 97 Fed. 747, 752, 38 C. C. A. 408, 413.

The evidence does not show such gross negligence on the part of the defendant, if it really shows any whatever, as to imply a disregard of consequences and a willingness to inflict injury. At most, this was a case of concurrent negligence. We doubt that, under the evidence in this case, the plaintiff was entitled to have the court charge the benefit of "the last clear chance." At any rate the charge was as favorable as the law justifies. The requests were properly refused, and the verdict of the jury settles the facts.

[6] The requests were presented to the judge after the jury had been charged. When they were presented counsel for defendant said:

"I object to the making of the requests to charge after the cause has been summed up and the jury charged."

The judge replied:

"It is not in accordance with the rules."

There is no written rule in the District Court of New Jersey as to when requests should be presented, but the custom is to present them before counsel begin to sum up to the jury. There are many reasons why they should be given to the trial judge then, and not later, unless they are made necessary by the charge itself. The requests embodied the doctrine of "the last clear chance," based upon the allegations of negligence in paragraph VII of the complaint, and were not, therefore, made necessary by the charge. There was nothing to suggest inadvertence, mistake, or error of counsel, and it was discretionary to charge or refuse the requests. City of Chicago v. Le Moyne, 119 Fed. 662, 56 C. C. A. 278; Astrue v. Star Co., 182 Fed. 705; Linn v. United States, 251 Fed. 476, 163 C. C. A. 470.

The judgment of the District Court will be affirmed.

FREEDMAN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. July 21, 1921.)

No. 2643.

1. **Criminal law ⟸1038(3)—Support for assignment of error based on insufficiency of evidence as to identity held not furnished by request to charge.**
   An omnibus request to charge that under all the evidence verdict should be for defendant was not enough to call the trial judge's attention to claim that the evidence did not show identity of certain shipments of shoes with the shoes stolen and subsequently received by defendant, so as to furnish support for an assignment of error based on that claim.
2. **Receiving stolen goods ⟸3—Knowledge of theft from interstate shipment not essential.**
   Under the statute denouncing the crime of having in possession goods stolen from an interstate shipment, knowing they had been stolen,

it is immaterial that defendant did not know that they were stolen from such a shipment; he taking the chance that they had been so stolen and receiving them at his peril.

3. **Criminal law ⇐510, 780—Conviction may be had on uncorroborated testimony of accomplices; the jury being cautioned to scrutinize it carefully.**
While the jury should be cautioned to scrutinize most carefully the uncorroborated testimony of accomplices, there is nothing which forbids a conviction at common law or in a federal court on such testimony.

4. **Criminal law ⇐822(15)—Charge on defendant's testimony held fair.**
A charge to the effect that in weighing defendant's testimony the jury might consider his interest but are to accept or reject it according to their honest judgment whether it is in accord or in conflict with the truth, *held*, as a whole, full, fair, without prejudice, and free from error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Joseph Freedman was convicted of receiving stolen property, part of an interstate shipment, denied a new trial (268 Fed. 655), and brings error. Affirmed.

David Phillips and Herbert W. Salus, both of Philadelphia, Pa., for plaintiff in error.

Charles D. McAvoy, U. S. Atty., and Robert J. Sterrett, Sp. Asst. U. S. Atty., both of Philadelphia, Pa.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. The defendant, Joseph Freedman, with L. W. Becker and others, were indicted for having in possession 35 pairs of shoes and 3 cases of children's shoes, parts of interstate shipments of freight, knowing the same to have been stolen, and for conspiracy "to carry and transport from Emaus, in the state of Pennsylvania, to Brooklyn, in the state of New York," these shoes. There are eight counts in the indictment, but Freedman is mentioned in the third, fourth, seventh, and eighth counts only. The third and seventh counts charge Freedman with having the stolen shoes in his possession, there being a different shipment in each count, and the fourth and eighth counts charge conspiracy "to carry and transport," etc., which in substance is a charge of conspiracy to have the shoes in possession knowing them to have been stolen. The defendants, with the exception of Freedman, pleaded guilty and have been sentenced, or are awaiting sentence. He pleaded not guilty, was tried, convicted, and is here on writ of error.

The facts, so far as necessary for this opinion, are as follows:

James J. Devers, one of the defendants, made a practice of stealing merchandise from railroad cars in the freight yard of the Lehigh Valley Railroad at Allentown, Pa., and with the assistance of a chauffeur named Musselman sold it to persons in the neighborhood. In May, 1916, he stole the shoes in question and sold them to L. W. Becker, George Smolens, and I. Feiblowitz, who were engaged in sell-

ing merchandise in Allentown and Emaus, a small town near Allentown. It was reported that Musselman had "squealed," and Becker, Smolens, and Feiblowitz went to New York and arranged with Freedman to dispose of certain merchandise, in which were the shoes mentioned in the indictment. The other defendants were suspicious of James Devers, who had reported that Musselman had "squealed," and thought that he might be attempting to "pull off" something. This suspicion was told to Freedman, who is reported to have said:

"Introduce me to that Jimmy Devers, as a friend of yours, an attorney. I will go out with him for a walk, and I am sure I can get it from him, whether or not it is a squealing case, or whether or not it is a case of pressing money."

After talking with Devers alone for about an hour, Freedman told the other defendants that—

"It is a squealing case, not a blackmailing case. I have talked with him for quite a long while, and that is my opinion."

Freedman then engaged H. Lubarsky, a truck driver, to go down to Allentown and Emaus in a truck on May 20, 1918 to bring the merchandise in the stores of Becker, Smolens, and Feiblowitz back to New York to Freedman's place. It was thought best that Smolens and Feiblowitz should not return to Allentown, and so they gave the keys of their stores to Freedman, who himself went to Allentown and Emaus, met the truck into which, under the supervision of Freedman, all the merchandise in the two stores was placed and taken to New York.

There is no dispute that the shoes were stolen, that the conference between the other defendants and Freedman took place in New York City, and that the shoes were brought to New York from Allentown and Emaus. The only dispute is whether or not Freedman knew that they had been stolen, as the other defendants testified they told him..

The defendant contends that the judgment should be reversed for three reasons: (1) The government failed to prove the identity of the shoes; (2) the defendant may not be convicted on the uncorroborated testimony of accomplices; and (3) errors in the charge of the learned trial judge.

[1] The defendant did not bring the alleged failure of the government to prove the identity of the shoes to the attention of the court at the trial. He now contends that the evidence does not show that the particular shoes which were shipped by A. Jacobs Sons Company of Boston, Mass., and Brophy Brothers Shoe Company, Lynn, Mass., to their respective consignees in Allentown, Pa., were those identical shoes stolen by Devers, sold to Smolens, Becker, and Feiblowitz, and received by Freedman; the shoes received by Freedman may be those stolen from the cars by Devers but no one identified them as the shoes shipped by the above-named companies. However that may be, the point was not raised at the trial. In order to lay a foundation to review by writ of error the proceedings in federal courts in the trial of common-law actions the question of law proposed to be reviewed must be raised by specific, precise, direct, and unambiguous objections so taken as clearly to afford to the trial judge an oppor-

tunity of revising his rulings. Fairness to the trial judge requires this, and a bill of exceptions not fulfilling this test does not furnish support for an assignment of error. Beaver v. Taylor, 93 U. S. 46, 55, 23 L. Ed. 797; Robinson & Co. v. Belt, 187 U. S. 41, 50, 23 Sup. Ct. 16, 47 L. Ed. 65; McDermott v. Severe, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162; Frey & Son, Incorporated, v. Cudahy Packing Co. (decided April 18, 1921), 255 U. S. ——, 41 Sup. Ct. 451, 65 L. Ed. ——. The only objection disclosed by the record which might possibly cover the question now pressed was a request to charge that "under all the evidence your verdict should be for the defendant." Clearly this was an omnibus request, and did not call the attention of the judge to the point now under consideration.

[2] If the defendant had knowledge that the goods were stolen when he received them, he took the chance that they might have been stolen from an interstate shipment of freight or express, and received them at his peril. The statute provides that whoever shall steal from a railroad car any goods or chattels, which are a part of or constitute an interstate shipment of freight or express, or shall "have in his possession any such goods or chattels, knowing the same to have been stolen," commits the crime denounced, and it is immaterial whether or not he knew the points of origin and destination of the goods. Kasle v. United States, 233 Fed. 878, 147 C. C. A. 552. The contention that there is no evidence showing "that the defendant knew the goods were the subject of interstate commerce" is not, therefore, a defense to this action.

[3] The learned trial judge charged the jury that it should give far greater scrutiny, care, and consideration to the testimony of accomplices than to that of witnesses of "unsullied reputation," for "the source of that testimony, you see, is tainted." He cautioned the jury that it should consider such testimony, and give to it the weight to which under all the circumstances it was entitled. He said:

"You are not merely to scrutinize it, but look at it from every angle. You are to test the question of its truth or falsity by every test which occurs to you that can be applied to it. If, after you have carefully considered it, the conviction rests upon your minds, with that degree of certainty which the law requires, that the testimony is true in its substantial features, and convinces you, as the phrase is, beyond a reasonable doubt of the guilt of the defendant, then you are not only justified, but it is your duty, even following testimony and evidence of that kind, to convict. * * * Do not throw this testimony out because it comes from a tainted source, but consider it, and, while you are considering it, remember from whom and what kind of witnesses the testimony comes."

The charge on this point appears to us to have been eminently fair and without error. While the jury should be cautioned to scrutinize most carefully the uncorroborated testimony of accomplices, yet, when this has been done, there is nothing which forbids the conviction of a defendant, at common law or in a federal court, on their uncorroborated testimony. Richardson v. United States, 181 Fed. 1, 9, 104 C. C. A. 69; Knoell v. United States, 239 Fed. 16, 20, 152 C. C. A. 66; Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Caminetti v. United States, 242 U. S.

470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

[4] It is contended that the trial judge erroneously charged the jury on the volume of crimes of the kind here on trial, on the interest of the defendant in this case, and on the value of character testimony. We have carefully examined the charge, but do not discover alleged errors. He charged that the defendant had produced witnesses to his good reputation, he had never been convicted of any crime, his testimony was not tainted, but that he was the defendant and an interested party in the case, and that the jury might consider that fact in weighing his testimony. He summarized this part of his charge in his last sentence on the subject:

"You are not to accept it because he gives it, or throw it out because he is the defendant in the case, but you are to accept it or reject it according to your honest judgment whether it is in accord or whether it is in conflict with the truth."

And with this statement we agree. The charge as a whole, we think, was full, fair, without prejudice, and free from error, and the judgment of the District Court will be affirmed.

SANDUSKY FOUNDRY & MACHINE CO. v. DE LAVAUD et al.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1921.)

No. 3521.

1. **Patents ⇐36—Facts held sufficient to show that commmercial success which is evidence of invention.**
   Somewhat vague and general proof of commercial success is sufficient, in the absence of dispute.

2. **Patents ⇐30(1)—Device may be operative, though not commercially successful, until slightly changed.**
   A device which, in the precise form shown by the Patent Office drawings, requires partial disassembling after each operation, is not thereby made so inoperative as to be unpatentable.

3. **Patents ⇐27(2)—Slidability adapted to a new utility may be invention.**
   When the addition of a particular slidability of a part brings about a new method of use, it may involve a patentable difference over the older device.

4. **Patents ⇐259—Manufacture and sale of device capable of use infringing patent is held infringed.**
   Where defendants manufactured a device capable of an infringing use, and sold it with the intent that it shall be so used, they infringe a patent, even though their device is capable of a noninfringing use, and even though they go through the form of instructing that it shall be used in a noninfringing way.

5. **Patents ⇐328—1,058,250, claims 1, 2, and 4, for casting iron pipes, held infringed.**
   The Millspaugh patent, No. 1,058,250, claims 1, 2, and 4, for the casting of iron pipes in a whirling mould, *held* infringed by Kneass patent, No. 538,835.

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

6. Patents ⟸328—1,047,972, claim 1, for casting iron pipes, held invalid.
The Millspaugh patent, No. 1,047,972, claim 1, for casting iron pipes, *held* invalid, as not being an invention.

7. Patents ⟸322—Accounting not ordered in all cases.
An accounting will not be ordered, if a preliminary inquiry shows no probability of substantial damages or profits.

Appeal from the District Court of the United States, for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by the Sandusky Foundry & Machine Company against D. Sensaud de Lavaud and others. From a judgment for defendants, plaintiff appeals. Reversed in part; affirmed in part.

See, also, 251 Fed. 631; 258 Fed. 640.

Livingston Gifford and E. W. Marshall, both of New York City (Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for appellant.

Frank J. Kent, of New York City (Albert Lynn Lawrence, of Cleveland, Ohio, on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The appellant (hereinafter called plaintiff) brought in the court below the usual infringement suit, based upon patents No. 1,058,250, issued April 8, 1913, on an application filed in 1911, and No. 1,047,972, issued December 24, 1912, on an application filed in 1912; both granted to Millspaugh and both pertaining to centrifugal casting. As to No. 1,058,250, which we shall call the first patent, infringement is alleged of claims 1, 2, and 4. Under the second patent, claim 1 is the only claim involved. The District Judge thought the first patent not infringed, and the second patent invalid.

Claim 1 of the first patent is sufficiently typical. It reads:

> A hollow rotary member having an internal surface of definite shape surrounding the axis of rotation, a driving mechanism therefor, a filling trough, arranged to hold a predetermined amount of material, rotatably and slidably supported, projecting into said member, and means for moving said trough.

The common method of casting pipe was to provide a vertical mould for the outside and a core for the inside, and to pour the molten metal into the intermediate space. This process involved danger of imperfections, such as greater density at the bottom, imprisoned air bubbles, etc. It has long been known, at least in theory, that, if the molten metal were introduced into the center of a rapidly revolving hollow cylinder, centrifugal force would distribute the material around the interior wall of the cylinder, which would serve as a mould, and the centrifugal impetus would supply the place of the core. This would give, in theory, a tube or pipe of great perfection, with walls of the same thickness or density in all parts, and with a very regular exterior surface, since impurities are commonly lighter than the metal to be cast, and would hence remain upon the inside of the tube. The record indicates that a product thus produced was commercially unknown, and that very likely the difficulty of introducing the molten material into the inside

of the revolving cylinder at all parts of its length at the same time was the reason why the idea had not been commercially practiced.

Millspaugh's first invention was directed to the meeting of this difficulty. After mounting his cylindrical shell or mould horizontally, so that it could be rotated by means in contact with the outside, he provided a trough located in the axis of the shell and capable of being held at each end in axial position. It was also adapted to slide longitudinally part way out of the shell and to be rotated at least half a turn independently of the shell. In operation, the shell was put in revolution and the trough withdrawn longitudinally so that it projected slightly from the shell at one end, the trough-opening being on the upper side, and both ends of the trough being closed. Thereupon the molten metal was poured into the trough at the projecting end, and distributed itself evenly along the trough, which was then caused to slide back into the shell until it was entirely inside and axially held in position. It was then turned upside down. This distributed the material in an even body over the interior of the shell and for the length of the trough.

[1] We cannot doubt that this device was commercially successful and became practically the foundation of a new art. Upon this subject plaintiff contented itself with rather vague and general testimony to the effect that large amounts had been expended in development; that the plaintiff was a manufacturer of paper mill machinery; that tubes made according to this centrifugal process are used in such machinery and have been very largely adopted; that the plaintiff's ability to make this perfect pipe is chiefly what has developed plaintiff's business, and that several licenses have been granted. There was no cross-examination on this subject, nor was there testimony to dispute what was claimed in this regard. We think plaintiff was justified in assuming that there was sufficient proof of the commercial utility of the device to serve the customary purposes of such evidence.

[2] Neither can we think that there was anything inoperative about the machine as disclosed in the patent. The only serious criticism made along this line is that, if the machine were built and mounted precisely as shown in the Patent Office drawing, the tube, after casting, could not be removed from the mould without disturbing the assembly. That is true, because the standards which support the trough axis would be in the way of withdrawing the tube horizontally from the mould, excepting to the same distance which it is contemplated the trough may be withdrawn. It is a familiar rule that the Patent Office drawings are more or less conventional and are not to be considered as working drawings, and hence no defect is fatal which could be remedied by any mechanic by obvious means. The standards in this drawing are shown held to the floor by bolts and nuts. It would apparently take only a moment to remove these nuts and take the standard and the trough shaft out of the way, and the placing and replacing of this standard would not be a serious matter in such a machine as this. It would also be plain that one or the other part could be mounted on a carriage so as to permit separation if desired. With this view of the unsubstantial character of the defect, it is not important whether plaintiff's successful opera-

tion was with a machine of the precise form shown in the drawing or was with a machine embodying obvious modifications.

[3] It is necessary to refer to only one of the patents relied upon in defense, as that is the closest approximation to Millspaugh shown in the record. It is the patent to Kneass, No. 538,835, of May 7, 1895. It is sufficient to say that one figure of this patent, given as a suggestion of an alternate form, though awkward and probably impractical in some details, discloses Millspaugh's claimed construction with one exception.[1] Kneass has a trough which extends the full length of the shell and also projects endwise beyond. The metal is poured into the projecting open end, and it is Kneass' theory that it will flow along into the inside portion of the trough and be dumped wholly inside instead of partially outside. His device might or might not accomplish this result, but he did not contemplate or show a trough which was slidable in the Millspaugh sense. His drawings indicate that the trough supporting standard is on a carriage intended for longitudinal travel, and this or its equivalent would be a necessary means for getting the trough out of the way when the casting was to be withdrawn; but there could have been no intention to withdraw the trough partially, or for filling, for he has so carefully provided for ability to fill without withdrawal. By Millspaugh's slidability—sliding out and sliding in—he insures that the trough can be filled from the outside, but that, before dumping, the metal-carrying portion shall be entirely inside. This has clear advantages, and we think it a patentable difference as compared with Kneass. It follows that, while the Millspaugh first patent is valid, it must be confined to such a slidable support for the trough as contemplates its partial withdrawal for filling and then its sliding return to effective dumping position wholly within the shell, and from this point of view, we must treat the question of infringement.

[4, 5] Defendants' device responds without question to the claims in suit in every particular, unless with regard to this characteristic sliding function. Defendants have a rotatable and slidable support for the trough, but this sliding is perhaps necessary, as it was with Kneass, to get the trough supports out of the way for withdrawing the casting. They mount a hopper upon their trough axis or continuation of the trough outside the shell, and provide a longitudinal conduit within the axis which will conduct the flowing metal from the hopper into the trough within the shell. There is thus in theory no occasion to slide the trough out for the purpose of filling just before dumping; and we conclude that the method of operation for which the defendants' device is thus apparently intended would not be an infringing use. But that is not the end of the question. Where defendants manufacture a device capable of an infringing use and sell it with the intent that it shall be so used, they infringe the patent, even though their device is capable of a

[1] The limiting clause, "arranged to hold a predetermined amount of material," does not effectively distinguish from Kneass, and while the quick dumping of the patent in suit, as contrasted with the slow tilting of Kneass, might distinguish, this feature of quick dumping is not found in the claims in suit.

noninfringing use, and even though they go through the form of instructing that it shall be used in a noninfringing way.

Weed Co. v. Cleveland Co. (D. C.) 196 Fed. 213; Parsons Co. v. Asch (D. C.) 196 Fed. 215.

It seems natural that, if defendants' device is operated strictly according to their theory, some melted metal will remain in the hopper, and that when it is upset this metal will be spilled outside, and that the portion in the conduit may run back into the hopper, instead of inwardly into the trough, or that with slight use the conduit will become obstructed by the metal which cools and adheres, or that the hopper will become partially clogged in the same way. If those things occur, the device then could be used, and probably would be used, in the characteristic Millspaugh manner. It seems, therefore, that at least occasional use of this character must have been contemplated by the maker. This inference is confirmed by the fact that the axial spindle on the inner end of the trough is prolonged in a manner which was seemingly intended to facilitate this partial withdrawal while maintaining perfect axial position. The proof as to actual use also confirms this inference. There is no evidence as to the use of defendants' machine, excepting as to a more or less experimental use at the factory where it was manufactured for them. The witness who did this manufacturing and who was apparently disinterested is somewhat confused, but seems to intend to say that in the operation which he witnessed these suggested troubles did occur and that most of the work was done by sliding out the trough in the Millspaugh manner and filling it on the outside. We find also that an advertising "write-up" of defendants' machine—seemingly their authorized statement—distinctly describes withdrawal for filling as being the intended method of operation.

When we consider the advertisement and this testimony as to what was actually done, and observe the probability of a common necessity for resorting to Millspaugh's function, and that the defendants' form responds literally to the claim, we do not think that the charge of infringement can be escaped just because the device is capable of use in a manner which the patent can not rightly reach. It may be that the situation presents complications which make an assessment of damages impracticable; but this record does not raise that question; an injunction, at least, is appropriate.

The case would be more difficult of decision were it not that the defendants can apparently, if they wish, so modify their device that it can not be used according to Millspaugh's theory. Doubtless there are expedients among which a satisfactory selection could be made, if the capacity of withdrawal for filling is, in truth, not important.

[6] As to the second patent, we agree with the court below that it does not involve any invention, so far as concerns the claim in suit. This is distinguished from the first patent only by providing that the trough-opening shall be shorter than the shell, when the trough is fully inserted. The stated object is to prevent the metal being spilled against the ends of the shell. If there was trouble from this cause, it seems clear to us that to shorten the trough-opening, either by making the

trough shorter or by covering over the portion near the end, was a mere expedient not involving any invention.

[7] The decree as to the first patent must be reversed, and the case remanded, for the usual interlocutory decree for an injunction on the claims in suit. The court below will determine, upon such preliminary inquiry as seems fitting, whether the recovery of any substantial damages or profits is so improbable as to justify declining to make the usual order for an accounting. Merriam v. Saalfield (C. C. A. 6) 198 Fed. 369, 371, 372, 117 C. C. A. 245, and cases cited. As to the second patent, the decree is affirmed. The appellant will recover costs of this court.

TROY WAGON WORKS CO. v. OHIO TRAILER CO.

(Circuit Court of Appeals, Sixth Circuit. July 27, 1921.)

No. 3530.

1. **Patents ⊜37—Device held not an invention.**
   A device to steer an automobile trailer by means of a draft bar attached to a truck pulling a trailer *held* too closely allied in art to the steering gear of an automobile to be patentable.

2. **Patents ⊜38—Extension rearward and downward of draft bar held not new and novel in art.**
   Extension rearward and downward of a draft bar, used in the steering apparatus of a trailer pulled behind a truck or automobile, is not new or novel in the art, so as to be patentable.

3. **Witnesses ⊜99—Official of corporation which is a party to the suit is competent witness.**
   That a witness is secretary and treasurer of corporation which is a party to the suit does not disqualify him as a witness.

4. **Appeal and error ⊜690(5)—Objection to testimony of witness, because testimony in another suit was different, disregarded, where record does not show cross-examination.**
   If testimony of a witness in another suit was different from his testimony in the present suit, such inconsistency should be brought into the record by cross-examination, and in the absence thereof the objection will be disregarded on appeal.

5. **Patents ⊜18—Improvement in machinery, obvious to one skilled in mechanical work, is not patentable.**
   Where an improvement in machinery was made by one skilled in mechanical work, and was obvious to any person so skilled, the improvement is not patentable.

6. **Patents ⊜40—Device held not patentable.**
   Reversible trucks or dump wagons, with a pivoted draft bar at each end, which is connected to the wheels for steering purposes, and which may be locked to the wagon bed or frame in a central position when the truck is being drawn from the opposite end, are not patentable merely because of an automatic locking device to keep the apparatus out of operation at certain times.

7. **Patents ⊜26(1)—Automatic locking steering device held not to be an invention.**
   Where similar steering devices had been invented prior to the addition of an automatic lock, the addition of the lock does not constitute an invention; the mere adaptation of an old element to a specific use not

being an invention, unless the combination produces a new result or an old result in a new and materially better way.

8. Patents ⇐26(1)—**Device held not to be an invention.**
The combination of an automatic lock, which is in itself new and novel, with other locking devices, to keep the locking gear out of operation, does not amount to an invention sufficient for patent, covering the combination with any and all forms of automatic locks, although the new device in itself may be patentable.

9. Patents ⇐328—**No. 1,214,037, for improvement in steering mechanism adapted to trailer trucks, held void for lack of invention.**
The Hudson patent, No. 1,214,037, claims 1, 2, 3, and 4, for steering device for trailers, *held* invalid for lack of invention.

10. Patents ⇐328—**No. 1,117,816, claims 6, 7, and 8, held invalid.**
The Eccard & Smith patent, No. 1,117,816, claims 6, 7 and 8, for an improvement in reversible trucks or dump wagons, *held* invalid.

11. Patents ⇐328—**No. 1,117,816, claim 9, held valid, but not infringed.**
The Eccard & Smith patent, No. 1,117,816, claim 9, for an improvement in reversible trucks or dump wagons, *held* valid, but not infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by the Troy Wagon Works Company against the Ohio Trailer Company. From decree for defendant, plaintiff appeals. Affirmed.

H. A. Toulmin, of Dayton, Ohio (H. A. Toulmin, Jr., of Dayton, Ohio, on the brief), for appellant.

Lincoln B. Smith, of Chicago, Ill. (G. E. Dunstan, of Cleveland, Ohio, and Miller, Chindahl & Parker and C. Paul Parker, all of Chicago, Ill., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is an appeal from a decree of the United States District Court, Northern District of Ohio, Eastern Division, finding and adjudging patent No. 1,214,037, issued to W. R. Hudson, January 30, 1917, and now owned by appellant, null and void for want of invention; that claims 6, 7, and 8 of letters patent No. 1,117,816, issued to John F. Eccard and Jacob Smith, November 17, 1914, are invalid; and that claim 9 of this patent is valid, but not infringed.

The Hudson patent, No. 1,214,037, relates to improvements in the steering mechanism particularly adapted for trailer trucks, and this suit involves all the claims of that patent, which claims are printed in the margin.[1]

[1] 1. In a vehicle of the character described, a main frame, an axle located below said frame, carrying wheels swivelly connected with said axle, springs for supporting said frame from said axle and wheels, a draft bar pivotally connected with said frame, and steering connections from said draft bar to said wheels, said steering connections having ball and socket joints.

2. In a vehicle of the character described, a main frame, an axle and carrying wheels, springs for supporting said frame from said axle and wheels, a draft bar pivotally connected to said frame, steering rods connecting the inner end of said draft bar with said wheels, said connections consisting of ball and socket joints.

3. In a vehicle of the character described, a main frame, an axle and carrying wheels, springs for supporting said frame from said axle and wheels,

It is unnecessary in this case to repeat what was said in the opinion in the recent case of Troy Wagon Works Co. v. Ohio Trailer Co. (No. 3482) 272 Fed. 850, in reference to the old and well-known elements entering into the steering mechanism of appellant's present construction. It is sufficient to say that for the reasons stated and citations given in that opinion, claims 1, 2, 3, and 4 of the Hudson patent in suit cover nothing that is new or novel in the art, nor do they cover a combination of old elements that produce a new result or an old result in a new and materially better way.

[1] Counsel for appellant insists, however, that the prior patent art, cited by appellee, relates solely to automobile construction, and has no relation or application whatever to trailer trucks, for the reason that the steering mechanism of an automobile is controlled by the steering wheel operated by the driver of an automobile, while the steering of the trailer truck is wholly mechanical. It is clearly evident, however, that automobile construction, if not in the same art, is at least in a closely allied art. The steering mechanism of the automobile is readily adaptable to a trailer truck, the only difference being that in the automobile the force necessary to operate the mechanism is applied by the driver through the steering column, and in the trailer truck this force is applied through the draft bar from the automobile or automobile truck to which this draft bar is attached, the direction and course of which is controlled by a driver through and by the same steering mechanism operated by a steering column, instead of a draft bar.

Undoubtedly the substitution of a draft bar that will approximate as nearly as possible the same constant, immediate and efficient control of the steering mechanism of a trailer truck as a steering wheel of an automobile operated by a skillful and intelligent driver, involves prob-

a draft bar pivotally connected to said frame, an arm extending from each of said wheels, and a rod connecting each of said arms with the inner end of said draft bar, the connections between each of said rods with said bar and arm consisting of a ball and socket joint.

4. In a vehicle of the character described, a main frame, an axle and carrying wheels, springs for supporting said frame from said axle and wheels, a draft bar pivotally connected with said frame, arms extending from each of said wheels, steering rods, socket members on the respective ends of each of said rods, balls on said arms and draft bar extending into said socket members, and means for adjusting said socket members.

5. In a vehicle of the character described, a main frame, an axle located below said frame, carrying wheels swivelly connected with said axle, springs for supporting said frame from said axle and wheels, a draft bar pivotally connected with said frame having a rearwardly extending portion, and steering rods connecting the rear end of said draft bar with said wheels, said connection comprising ball and socket joints.

6. In a vehicle of the character described, a main frame, an axle located below said frame, carrying wheels swivelly connected with said axle, arms connected to said carrying wheels, springs for supporting said frame from said axle and wheels, a draft bar pivotally connected with said frame, said draft bar projecting rearwardly and downwardly so that its rear end will lie in substantially the same horizontal plane as the free ends of said arms, and steering connections from the rear end of said draft bar to the free ends of said arms, said steering connections having ball and socket joints.

lems in mechanical engineering and mechanical skill, not presented by motor car construction. However, regardless of that fact, the adaptation of the steering mechanism of an automobile to a trailer truck, and the control of that steering mechanism by a draft bar connecting with the steering mechanism and attached to a motor truck, instead of by a steering wheel in the hands of an operator, is at least analogous, if not the same art.

Even if this conclusion were not the only logical one to be drawn from the evidence in this record relating to the similarity between the steering mechanism of an automobile and the steering mechanism of a trailer truck, wholly apart from the means of controlling that mechanism either by a steering wheel or by a draft bar, nevertheless such conclusion is fully supported by the evidence of Mr. Ferris that will be considered more at length later in this opinion, in reference to the application of the knowledge he had acquired by his prior automobile experience, to the design of defendant's draft bar in December, 1916. For this reason we cannot concur in the claim of counsel for the appellant that the prior patent automobile art, in so far, at least, as it relates to steering mechanism, has no application to the present suit.

[2] It is contended, however, that the draft bar, described in this patent and covered by claims 5 and 6, is new and novel in the art, in that it projects rearwardly and downwardly, so that its rear end will lie in substantially the same horizontal plane as the free ends of the steering arms, to each of which free ends it is attached by separate steering connections having ball and socket joints.

The rearward extension of the draft bar and its connection with the steering arms to the rear of the axle, instead of in front of it, present no new or novel feature; therefore claim 5 is invalid. Eccard & Smith, No. 1,117,944; Brown, No. 41,476; Hendrickson, No. 1,109,752; Mason, No. 681,237. The novelty, if any, in the Hudson drawbar, must therefore consist in its downward extension to the same horizontal plane as the free ends of the steering arms, as described in claim 6.

It is the claim of the appellant that the invention consists in this specific type of drawbar combined with numerous other elements as stated in claims 5 and 6. The appellee admits that—

"There is an obvious advantage in so arranging the primary steering element that its directive force will be exerted on a horizontal line with the steering arm."

But it is claimed that this was accomplished by Dehn (German patent, 228,185), by bringing the steering arm up to a level with the draft bar; by Robin (British patent, 5,983), by means of a downwardly projecting part, either a part of or operatively connected with the draft bar or other primary steering element; in Eccard & Smith, 1,117,944, where the draft bar is free to move up and down in the rectangular frame built upon a tie rod connecting the two steering arms, and therefore exerts its effective directing force upon the tie rod in the same horizontal plane as the free ends of the steering arm; that the precise form shown by Hudson is found in Souther, No. 320,011, and Hen-

drickson, No. 1,109,752; and that the precise equivalent of the Hudson device is shown in Geiger, Eccard & Southerland, No. 903,185, and in Chrestenson, No. 1,068,737, where a downwardly projecting member attached to the draft bar in front of the axle brings the effective steering portion of the draft bar into substantially the same horizontal plane as the free ends of the steering arm.

By the downward projection of this draft bar to the rear of the axle Hudson accomplishes the same thing that Dehn accomplished by bringing the steering arms up to a level with the draft bar, that Robin and Mason accomplished by means of a downward projection operatively connected with the draft bar, that Hendrickson accomplished by a downwardly extending bolt from the rearwardly extending arm portion of the draft bar, and that Geiger et al. and Chrestenson accomplished by a downwardly projecting member attached to the draft bar in front of the axle, so that the directive force of the primary steering element would be exerted in a horizontal plane with the free end of the steering arm. Therefore it would appear that the Hudson method is no more than a clear equivalent of other well-known methods of construction disclosed by the prior art, to accomplish the same result.

The trial court, however, did not base its conclusion as to the invalidity of this patent solely upon the prior art, although it did hold that—

"The prior automobile art shows all drag links lying substantially in a horizontal plane and connections with the steering member made in that plane."

In that connection the trial court further held that—

"The desirability, if not necessity, for having the drag links horizontal, and the connection made in that plane, would be obvious, if not thus fully disclosed. The mechanical expedient of bending downward the rear end of the drawbar sufficiently to make such a connection is a matter of skill, obvious to any automobile engineer, and does not amount to invention."

This finding of the trial court seems to be fully sustained by the evidence of the witness Ferris, who testified that, when he designed the defendant's trailer in 1916, he had not at that time seen the Troy Wagon Works trailer, and had not seen the patent to Hudson, or any representation of the Troy trailer made in accordance with that patent. He further testified in the same connection that the standard type of drag link, which the defendant bought upon the open market, could not be used in any other position than in a horizontal plane with the free ends of the steering arms. This not only sustains the trial court in its findings that "the prior automobile art shows all drag links lying substantially in a horizontal plane and connections with the steering members made in that plane," but it also tends to show the necessity of bringing the portion of the draft bar to which these drag links were attached, by bending, projection, or otherwise, down to the level of the plane of the end of the steering arm, which fact was apparent to Ferris by reason of his former automobile experience.

[3, 4] It is insisted, however, by counsel for appellant that the tes-

timony of Ferris should have been wholly disregarded by the court for the reason that Ferris is secretary and treasurer of the Ohio Trailer Company; that the statement made by Ferris is self-serving, and not corroborated by any other evidence, and directly contradicted by Ferris himself in his testimony given in a former suit between these parties in relation to the same trailer. The fact that Ferris occupies an official position with the appellee does not disqualify him as a witness, nor require the court to disbelieve his testimony. If he testified differently in another suit, that fact should have been brought into this record by cross-examination, or in some other way, for counsel had no right to rely upon the recollection of the court as to the evidence in another case, nor expect either the trial court or this court to examine the record in the other case in order to determine whether the witness had in his testimony in this case contradicted statements made by him as a witness in that case. Not only that, but the witness had a right to have his attention called to these facts and explain any discrepancy between his testimony in the other and in this case, if it were possible for him to do so. Counsel for plaintiff in error, however, did not cross-examine this witness, nor does this record show that the witness ever testified in any other case. Therefore these objections to his testimony must be wholly disregarded.

It does appear, however, that the witness is corroborated by the blue print dated December 20, 1916, and the photographs, 4 and 5, which photographs show a portion of defendant's old factory vacated by defendant in 1917. This evidence of the drawing by Ferris of defendant's draft bar in 1916 is not offered to show anticipation in the prior art, of the Hudson patent, but rather for the purpose of showing that what is now claimed to be invention amounts to no more than the ordinary exercise of mechanical skill in meeting the obvious necessity.

[5] It is insisted, however, on the part of counsel for appellant that Ferris testified that this was obvious to him, because of his previous automobile experience as an automobile engineer; that by "experience" the witness clearly meant "experimentation," to ascertain how to make a drawbar that could work with such links; and that therefore the downward extension of this drawbar involves invention and is patentable. In reply to this it is sufficient to say that experience in a particular trade, profession, or calling does not necessarily mean experimentation with the particular thing under consideration. On the contrary, the language used by the witness is not subject to any construction other than that from his experience in that line of work the thing was obvious to him without any experimentation whatever. The term "obvious," as here used, does not mean that the thing must be obvious to men wholly unlearned and wholly inexperienced in the particular art to which the claimed invention pertains. What might be an obvious conclusion to a lawyer might not be obvious to a layman, and what "passeth the understanding of a lawyer" might be perfectly obvious to a mechanical engineer. Therefore, if this claimed invention was obvious to a mechanical engineer, or a skilled work-

man familiar with automobile and trailer truck construction, it is clearly within the meaning of the settled rule that the obvious is not invention.

[6] The Eccard & Smith patent, No. 1,117,816, relates to improvements in reversible trucks or dump wagons of the type which employ a pivoted draft bar at each end thereof, which draft bar is connected to the wheels for steering purposes, and also may be locked to the wagon bed or frame in a central position when the truck is being drawn from the opposite end. Claims 6, 7, and 8 are relied upon by the appellant. These claims are similar in their nature; claim 8 being, perhaps, a little more comprehensive than either of the other two. This claim reads as follows:

"8. In a vehicle of the character described, a main frame, a draft bar pivotally connected to said main frame at its rear end, an automatic latch for locking said draft bar to said frame near its front end in a central position with respect to said main frame, said draft bar having connections with the steering wheels of said vehicle, and means for holding said latch in inoperative position to permit said draft bar to steer said wheels."

There are other claims describing this automatic locking device in detail, but it is not seriously contended that the automatic locking device used by the defendant is an infringement of appellant's automatic locking device, separate and apart from the combination in which it is found. On the contrary, it is the specific claim of the appellant that the invention lies in the combination and not in the lock per se, and that therefore the introduction of any automatic locking device into this combination described in the specifications and claims, co-ordinating in like manner as appellant's automatic lock with the other elements of the combination, would constitute infringement.

In reply to this it is insisted upon the part of the appellee that there is nothing new or novel in appellant's combination, for the reason that automatic locks for locking the draft bar of vehicles of the character named in the patent in suit and other wheeled vehicles of a similar nature are old in the prior patent art. In support of this contention a large number of patents relied upon by appellee are cited. The steering mechanism of a trailer truck or dump wagon, that is associated in this combination with appellant's automatic locking device, is admittedly old in the art. Nor is there anything new or novel in the idea of locking the rear draft bar to the wagon bed or frame in a central position when the truck or wagon is being drawn from the opposite end. On the contrary, this is absolutely essential to its successful operation. Nelson, 793,799; Geiger, Eccard & Southerland, 903,185; Chrestenson, 1,068,737.

However, in these patents no automatic lock is used; but the locking is accomplished, as stated in the application for this patent, by the insertion of a pin or other means through suitable apertures through the draft bar and some parts connected with the vehicle body.

Souther, 207,453, relates to a reversible trailer truck for street cars. It appears from the evidence of the expert witness Browne, and also from an examination of this patent itself, that it contains fundamentally the same character of locking mechanism used by the defendant,

which consists of two latches, which co-operate directly with a hump or boss on the drawbar. Souther has two pivoted latches, which, when released by pressure of the foot of the driver, permits the drawbar to swing free, but when it comes back to a central position it is again automatically locked.

The expert witness called on behalf of the appellant testifies in reference to this patent that the action is automatic in closing, but there are no means for holding the lock out of operation except the foot of the motorman; that, because this feature is lacking, Souther's automatic lock would not be suited for use in a trailer. It is clear, however, that the idea of the automatic lock as applied to the steering mechanism of a trailer truck is fully disclosed by Souther, and that the mechanical means for holding this lock out of operation was not used, because an operator was always present on these trailers, and for that reason no such device was necessary. Therefore the most that Eccard & Smith could claim over Souther is this means for holding the automatic locking device out of operation when it is desired that the draft bar should swing free, but this is also old in the art.

In reference to this, the expert witness Browne testified:

"But it was old in the art for quite analogous purposes to make provision for doing just that thing; that is, for locking the latch or locking bolt in its unlocked position, something of the sort seen in doors, such as the door in my own office building, which has a spring lock to-day; but there is a little catch on the lock, which I move by hand, so as to hold that spring lock out of action."

In the Eccard & Smith patent it is also necessary for the operator to use his hands in placing the means provided for fastening their automatic lock in such position that it will not function.

Knupfer, 410,692, is for a seed-drilling machine, having an automatic locking device, which consists of a bolt actuated by a spring, which corresponds with a notch carried by the drawbar, so that when the spring bolt is free to move, and the notch is brought into register with the bolt, the tongue or drawbar will be automatically locked in central position. It is also provided with means for holding this automatic locking device out of operation. While this machine is being used in the field in the drilling of grain, it is desirable that the tongue or draft bar should swing freely, and therefore the lock is not released or used in the actual operation of the machine, except in turning a corner, or in moving the machine on the road, or from one field to another. It then becomes necessary that the tongue should be so locked to the body as to provide a steering means other than the mere draft. To that end the automatic locking device is released, and functions as in Eccard & Smith, to lock the tongue or draft bar in rigid relation to the frame or body.

Hurd, No. 283,712, relates to the running gear for wagons which may be steered either by the link connections between tongue or draft bar and swivelly mounted wheels, or by the old-fashioned fifth-wheel construction. The steering mechanism includes an automatic lock that operates to fasten the two plates of the fifth wheel together while the wagon is being steered by the tongue or draft bar, imparting di-

rective motion to the swivel wheels through the link connection. When the operator desires to make a more abrupt turn than possible in this way, he can release this automatic lock by a foot treadle, thereby permitting the fifth wheel construction to operate. After the turn, and when the tongue or draft bar swings into central position, and the driver removes his foot from the treadle lever, the automatic lock again functions to unite the upper and lower part of the fifth wheel. There is also provision in this patent for automatically locking the tongue as it passes over the beveled surfaces of the front locking bar.

Heisey, 67,430, Eustis, 837,242, Ruffner, 154,915, Sattley, 629,875, and Goodhue, 1,068,334, relate to agricultural implements. Each of them contains an automatic locking device. No means are provided in either of these patents for holding the automatic locking mechanism out of operation, for the reason, as explained by appellant's expert witness Wagner, that "the time during which the locking mechanism is thrown out of commission is relatively short," and perhaps for the further reason that an operator is always present who can, by the means provided, release the automatic locking device and hold it out of operative engagement with the frame or body of the vehicle for the short time required to accomplish the purpose of its release.

It is insisted, however, on the part of the appellant, that all these patents are in a remote art, and have no application or analogy to trailer trucks. The Eccard & Smith patent, however, is not confined to trailer trucks, but to reversible trucks or dump wagons of the type which employ a pivoted draft bar at each end thereof, which draft bar is connected to the wheels for steering purposes and also may be locked to the wagon bed or frame in central position when the truck is being drawn from the opposite end. Later in the description in the patent the following statement appears:

"In reversible vehicles of this character, either motor trailer or horse-drawn trucks or dump wagons."

This language would seem to be sufficiently broad to include all forms of vehicle construction where the tongue or draft bar is required to swing free for one purpose of its operation, and to be locked or fastened to the frame or body of the vehicle for the accomplishment of another purpose.

In any event, it is clear that Souther and Hurd are within the identical art, although Hurd is not of the reversible type, or of a type that requires the rear wheels to be rigidly locked to the frame or body of the vehicle when drawn from the opposite end. Nevertheless the Hurd invention relates to substantially the same problem in the same art as Eccard & Smith. It is also apparent that agricultural implements, including a frame mounted upon wheels, with tongue or draft bar connected with and used as part of its steering mechanism, if not in the same art, are at least in such a closely allied art that prior patents in relation thereto must necessarily be held as anticipatory of similar inventions in relation to reversible vehicles described in Eccard & Smith, whether motor-drawn or horse-drawn trucks or dump wagons.

[7] It is further insisted, however, that, even though these patents were in the same or an analogous art, they have no application, for the reason that the automatic locks shown in the earlier patents are not found in the same combination as in Eccard & Smith, and that the Eccard & Smith patent is for a combination, and not for an automatic lock per se. The mere adaptation of an old element to a specific use is not invention, unless the combination of such old elements produce "a new result, or an old result in a new and materially better way." Frey et al. v. Marvel Auto Supply Co. (C. C. A. 6) 236 Fed. 916, 150 C. C. A. 178. It is clear from the evidence in this case that the automatic locking device of Eccard & Smith functions in identically the same way as the automatic locking devices in the prior patent art, and that the other elements of this combination produce no new or different result in combination with this automatic locking device than produced by these elements when locked by any other means. It necessarily follows that the combination of an automatic lock with the old steering elements of vehicles of the character described in this patent does not constitute invention. Heald v. Rice, 104 U. S. 737–755, 26 L. Ed. 910; Huebner-Toledo Breweries Co. v. Mathews, 253 Fed. 435-447, 165 C. C. A. 177; Turner v. Lauter Piano Co., 248 Fed. 930, 161 C. C. A. 48; Robinson v. Fabric Co. (D. C.) 248 Fed. 526; Overweight Counter-balance Elevator Co. v. Machine Co., 102 Fed. 957, 43 C. C. A. 80; Self Sealing Can Co. v. Hocker (C. C.) 136 Fed. 418; Warren Webster & Co. v. Dunham, 181 Fed. 836, 104 C. C. A. 346.

[8] It is further insisted that the patent prior art has no application, for the reason that no means are provided for holding the automatic lock shown therein out of operation other than by the hand or foot of the operator.

[9-11] Knupfer, however, does show such means; but, aside from that, it is not only common knowledge, but shown in this record by the uncontradicted evidence of the expert witness Browne, that—

"It was old in the art for quite analogous purposes for making provisions for doing just that thing, that is for locking the latch or locking the bolt in its unlocked position." Warns, 991,199.

Therefore, even if Knupfer were to be entirely disregarded, the combination of these old elements including adequate means for holding the automatic locking device out of operative engagement, does not amount to invention, even though that means may be in and of itself new and novel, and entitled to separate and distinct patent protection or protection in combination with these old elements as to that peculiar or novel means employed for that purpose but certainly not as a monopoly covering such combination with any and all forms of automatic locks.

For the reasons above stated, the decree of the District Court as to both patents is affirmed.

BENSON v. WALKER et al.

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

No. 1843.

Health ⇐23—Prohibition of shows and circuses during epidemic of influenza held valid.

The action of the board of health and sheriff of a county in passing and enforcing a resolution prohibiting circuses and shows in the county for a period of about three months at a time when Spanish influenza was prevalent in the state, *held* within the police power and valid in the absence of clear proof that it was arbitrary and discriminatory and not taken in good faith.

Appeal from the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Suit in Equity by J. M. Benson against Dr. Walter E. Walker and others. From an order vacating a temporary restraining order, complainant appeals. Affirmed.

R. C. Strudwick, of Greensboro, N. C. (J. J. Henderson, of Graham, N. C., on the brief), for appellant.

E. S. Parker, Jr., of Graham, N. C. (F. P. Hobgood, Jr., of Greensboro, N. C., J. Dolph Long, of Graham, N. C., and W. S. Coulter, of Burlington, N. C., on the brief), for appellees.

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

WADDILL, District Judge. The appellant, a citizen and resident of the state of Pennsylvania, complainant in the court below, and hereinafter referred to as the complainant, on the 30th day of April, 1920, filed his bill in equity in the District Court of the United States for the Western District of North Carolina, at Greensboro, against the defendants, residents and citizens of the said district, constituting the board of health of Alamance county, and the sheriff of said county, setting out that he was, and had been for some years prior thereto, the owner of a traveling amusement enterprise known as the James M. Benson Shows; his outfit consisting of a menagerie, Ferris wheel, whip, vaudeville shows, horses, singers, dancers, tents, etc., with a membership of about 150 connected with the show and the operating expenses being about $1,200 a day; that having given the show at several places in North Carolina, he secured a suitable location outside of the corporate limits of the towns of Burlington and Graham. and about a mile distant from each place, known as Piedmont Park; that he reached the location in question, and was ready to open business there on the 29th of April, 1920, when to his surprise, upon making application for the proper license, C. D. Story, sheriff of said county, refused to accept his tax, and to issue him license to conduct his show, though tendered the full charge therefor; assigning as the reason for his refusal, that he had been forbidden so to do by the board of health of Alamance county, pursuant to a resolution of that board.

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

Complainant further charged that the sheriff unlawfully and willfully threatened to imprison him and his agents, if they proceeded with the show, or anything to carry out the same; also that there was nothing in the health conditions of the community which warranted the action of the board of health, and that their obstruction of complainant's business was discriminatory, arbitrary and unlawful; and he thereupon, and because thereof, sought to enjoin the sheriff from interfering with the operation of the show, and to procure a mandatory injunction requiring him to issue the proper license, and accept the license tax upon the same being tendered.

On the presentation of this bill, with affidavits in support thereof, and upon the averment that the complainant would be irreparably injured, the District Court, on the 30th day of April, 1920, the date of the institution of the suit, granted a temporary restraining order, enjoining the defendants, their agents, attorneys, etc., from obstructing or interfering with the complainant in opening and carrying on his exhibition, provided the complainant paid or tendered the required license tax. That subsequently, on the 6th of May, 1920, upon motion to vacate the restraining order and injunction aforesaid, the application being heard upon the record and affidavits filed by the respective parties, the court ordered such restraining order and injunction vacated and annulled. From this latter action of the court, pursuant to section 129 of the Judicial Code 1911 (Comp. St. § 1121), this appeal is taken.

The complainant's assignment of error is that from the pleadings, affidavits, exhibits and evidence produced at the hearing, the action of the defendants in preventing and obstructing him in carrying on his lawful business, was arbitrary, unjust, discriminatory, and in violation of his constitutional rights, and that said action was not had in good faith, to preserve and protect the public health, but under the pretense of so doing, to discriminate against the complainant in carrying on his lawful business, while others engaged in similar pursuits were not interfered with by the defendants.

The resolutions of the board of health complained of, are as follows:

"Be it resolved that, whereas, Alamance county is just recovering from a serious epidemic; and

"Whereas, in other parts of the county, both within and without the state of North Carolina, epidemics of contagious and infectious diseases are very prevalent, and are likely to be spread and contracted by personal contact in dense crowds of people; and

"Whereas, this board is of the opinion that traveling shows, such as circuses, and carnivals, are the means of transmitting and spreading dangerous and infectious diseases, and that their coming into Alamance county from other portions of North Carolina, and from other portions of the country, with their attendant crowds, constitutes a menace to the health of the people of Alamance county in that they tend to spread said contagious and infectious diseases:

"Now, therefore, be it resolved that until August 1st, 1920, all such traveling shows, usually denominated circuses and carnivals, be prohibited from exhibiting in Alamance county."

That the action of the board of health sought to be enjoined and made inoperative was respecting a matter clearly within the police power of the State, and within the peculiar province of the health authorities,

is manifest; that is, the health of the county, and for a cause which the board found and certified would be inimical to the health of the community, viz. the gathering together of large numbers of people from without, and from one community to another within their jurisdiction, would tend to the spread of the Spanish influenza, a disease which at that time, or shortly theretofore, had been epidemic, bringing death and much sickness and disease in the community.

The complainant does not seriously challenge the right of the state, under its police power, to pass reasonable laws to safeguard and protect the public health, in a proper case and in a proper manner, nor does it deny the right of the defendants, acting as a board of health, to exercise their honest, sound discretion as to matters coming within their jurisdiction, or claim for this court the right to attempt to control the honest exercise of such discretion, but insists that he is entitled to relief against the defendant's action, because the same was unreasonable, unjust, capricious, and discriminatory against him, under the guise or pretext of the rightful exercise of their legitimate powers.

Nothing is better settled than that in the consideration of ordinances and laws of the character in question here, every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety. Dobbins v. Los Angeles, 195 U. S. 223, 225, 25 Sup. Ct. 18, 49 L. Ed. 169. It is not for the courts, in the administration of justice, to substitute their judgment for that of the legislative or municipal authority or to interfere with the lawful exercise of the power and authority granted in furtherance of the ends desired, unless those acting have plainly and manifestly exceeded their power and authority to the prejudice of those affected. This is strikingly true in considering rules and regulations coming clearly within the domain and discretion of public health authorities. In the case of Reduction Co. v. Sanitary Works, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204, which involved the disposition of garbage in the city of San Francisco, Mr. Justice Harlan, speaking for the Supreme Court (199 U. S. at pages 318, 319, 26 Sup. Ct. 103, 50 L. Ed. 204), said:

"In determining the validity of the ordinances in question, it may be taken as firmly established in the jurisprudence of this court that the states possess, because they have never surrendered, the power—and therefore municipal bodies, under legislative sanction may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate, for the protection of the public health and comfort; and that no person has an absolute right 'to be at all times and in all circumstances wholly freed from restraint'; but 'persons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the state'—the public, as represented by its constituted authorities, taking care always that no regulation, although adopted for those ends shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case. Equally well settled is the principle that if a regulation, enacted by competent public authority avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down upon grounds merely of public policy or expediency. Railroad Co. v. Husen, 95 U. S. 465, 470, 471; Mugler v. Kansas, 123 U. S. 623, 661; Lawton v. Steele, 152 U. S. 133, 136; Atkin v. Kansas, 191 U. S. 207, 223; Jacobson v. Massachusetts, 197 U. S. 11, 27. In the re-

cent case of Dobbins v. Los Angeles, 195 U. S. 223, 235, this court said that 'every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.' "

As respects the law of this case, nothing need be added to what is said by the Supreme Court. That the board of health, in the passage and carrying out of the resolutions complained of, acted not with the proper motive and intent in the interest of the public health, but arbitrarily, unreasonably, and discriminatorily as against the complainant, involves questions of fact, which should call for the strictest proof on his part, especially in dealing with public officials, charged with the preservation of the health of the community; and this court would be slow to set up its judgment against that of the trial court, who saw and heard the parties litigant, and passed upon the questions of fact involved. We are not called upon to determine whether the original injunction should have been granted or not, but merely whether there was error in vacating and discontinuing the same, and on that question we are entirely in accord with the court below, and approve its order so directing.

The action of the lower court will be accordingly affirmed, with costs. Affirmed.

UNITED STATES v. COLUMBIA & N. R. R. CO.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3667.

1. Appeal and error ⇐850(2)—General finding of court, without jury, not reviewable.

Under Comp. St. §§ 1266–1268, and Rev. St. § 649 (Comp. St. § 1587), the District Court's general finding, in action in which jury had been waived, that the railroad, from whom the United States government sought to recover penalties for violation of Hours of Service Act, § 2 (Comp. St. § 8678), was not engaged in interstate commerce, and therefore was not subject to the provisions of such act, was not reviewable on writ of error; Rev. St. § 700 (Comp. St. § 1668), making the sufficiency of facts to support a judgment subject to review, when the finding is special, being inapplicable.

2. Trial ⇐388(1)—Court, trying law case without jury, may refuse to make special findings.

On the trial of an action at law without a jury, it was not error for the court to refuse to make special findings.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by the United States against the Columbia & Nehalen River Railroad Company. Judgment for defendant, and the United States brings error. Affirmed.

Lester W. Humphreys, U. S. Atty., and Thomas H. Maguire, Asst. U. S. Atty., both of Portland, Or., and James O. Tolbert, Sp. Asst. U. S. Atty., of Washington, D. C.

R. W. Wilbur, H. B. Beckett, and F. C. Howell, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. By its complaint filed in the court below the government sought to recover from the defendant railroad company penalties for five alleged violations of section 2 of the act of Congress known as the Hours of Service Act (34 Stat. p. 1415 [Comp. St. § 8678]), relating to telegraph operators, which reads as follows:

"Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

All of the alleged causes of action involved the same telegraph operator at the same station, the only difference being the number of hours he was required to work on the five days in question, which varied each day, according to the allegations, from 15 hours and 20 minutes to 18 hours and 30 minutes. It is therefore sufficient to state the first of the alleged causes of action, it being typical of all of them.

In brief, it is that the defendant company was a common carrier engaged in interstate commerce by railroad in the state of Oregon; that on September 1, 1919, at Kerry, Or., the defendant required and permitted its telegraph operator, J. G. Nash, to be and remain on duty for a longer period than 9 hours in a 24-hour period—that is, from 6 a. m. until 11:50 p. m. that night, a total of 17 hours and 50 minutes; that the Kerry office was one continuously operated night and day; and that Nash, while on duty at Kerry, used the telegraph or telephone in dispatching, reporting, transmitting, receiving, and delivering orders pertaining to and affecting the movement of trains engaged in interstate commerce.

The defendant company by its answer put in issue all of the allegations of the complaint.

By stipulation of the parties a jury was waived and the case tried to the court, which, after such trial, and on the 16th day of August, 1920, entered a general finding of facts in favor of the defendant, upon which judgment against the plaintiff was entered. Subsequently, and on the 13th day of December, 1920, the plaintiff in the case presented to the court a request for certain special findings of fact, which the court refused to grant, and to which refusal exceptions were entered.

It appears from the evidence contained in the bill of exceptions that the defendant to the action (defendant in error here) is an Oregon cor-

poration organized and existing for the transportation mainly of sawlogs to the Columbia river, but was required by the laws of that state (Lord's Oregon Laws, §§ 6857, 6858) to "afford all persons equal facilities for the transportation of freight upon payment or tender of reasonable transportation therefor." Its road extends from Kerry, a station on the Spokane, Portland & Seattle Railroad, southerly about 25 miles, all within the state of Oregon.

[1] The findings and judgment of the trial court, to which no objection or exception was taken, being to the effect that the defendant company was not engaged in interstate commerce, and therefore not subject to the provisions of the congressional act upon which the complaint is based, we see no escape from the conclusion that they are conclusive here, and that there is nothing for this court to review. Sections 649 and 700 of the Revised Statutes provide as follows:

"Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." Comp. St. 1918, § 1587.

"Sec. 700. When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." Comp. St. 1918, § 1668.

For the abolition of the Circuit Courts and the transfer of their powers and duties to the District Courts, see sections 1266–1268 of the Compiled Statutes of 1918. These statutory provisions are perfectly plain. The first cited is to the effect that where in an action at law a jury is duly waived and the trial had to the court the finding of the latter may be either general or special, and, whether the one or the other, shall have the same effect as the verdict of a jury; and section 700 is to the effect that where such an action is so tried and determined by the court without the intervention of a jury, the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal, and when the finding is special such review may extend to the determination of the sufficiency of the facts found to support the judgment.

[2] It is apparent from the record that it presents no case to which the provisions of the last mentioned section can apply. And that, on the trial of an action at law without a jury, it is not error for the court to refuse to make special findings, is well settled. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed. 373. It may be well again to direct attention to the difference between the federal statutes and those of many of the states upon the subject. Judge Taft (now Chief Justice) did so in speaking for the Circuit Court of Appeals of the Sixth Circuit in the

case of Humphreys v. Third National Bank, 75 Fed. 852, 855, 21 C. C. A. 538, 541, where he said:

"The finding in favor of the plaintiff below was a finding which involved mixed questions of law and fact, and it was general in its form. It is well settled that in such a case nothing is open to review in this court except the rulings of the trial court in the progress of the trial, and that such rulings do not include the general finding of the Circuit Court, which performs the office and has the effect of a verdict of a jury; that is to say, it is conclusive as to the facts found. The strictness with which this rule is enforced is clearly set forth in the opinion of Judge Lurton, speaking for this court in Insurance Co. v. Hamilton, 22 U. S. App. 386, 11 C. C. A. 42, and 63 Fed. 93, where all the decisions of the Supreme Court upon the subject are fully reviewed. This practice in the federal courts of appeal differs from that in the state courts of this circuit where it is open to counsel on writ of error by exception to a general finding to raise the question in the appellate court of the sufficiency of the evidence as a matter of law to sustain such finding. We fear that this difference in the practice is not sufficiently well known to counsel, and we think that their attention should be especially directed to the very technical and severe rule of the federal appellate courts in this respect. When a party in the Circuit Court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, it is possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special findings of fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes. The result in this case is that the general finding in favor of the plaintiff cannot be disturbed, because it involves a mixed question of law and fact, and is not reviewable here. We can only examine the rulings of the court on the evidence as shown in the bill of exceptions."

The judgment is affirmed.

UNITED STATES v. SENFT.

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

Criminal law ⊂=942(1)—Facts occurring after conviction, which discredit material witness, may warrant new trial.

It is ground for new trial that after defendant's conviction a material witness, without whose testimony he could not have been convicted, was indicted and convicted of a crime committed before the trial, which, if the fact could have been shown at the trial, would have tended to greatly discredit his testimony.

Criminal prosecution by the United States against George Senft. On motion to set aside verdict and for new trial. Granted.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Peter J. Brancato, of New York City, of counsel), for the United States.

Elijah N. Zoline, of New York City, for defendant.

GARVIN, District Judge. This is a motion to set aside the verdict of a jury and for a new trial. The defendant has been convicted of the crime of bribing one Daly, an officer of the United States. After the jury had rendered its verdict, and before sentence had been imposed, the court was advised that Daly, an important witness for the government, had just been indicted by a federal grand jury in the Western district of New York upon the charge of extortion. This court thereupon imposed sentence, extended the term, and granted a stay of execution of sentence, in order that the defendant might have an opportunity to move for a new trial in the event that Daly should be convicted, it being claimed by defendant that such a conviction would constitute newly discovered evidence. Daly has since been tried and convicted.

The government contends that there was nothing undiscovered when this defendant was tried, except that Daly had been involved in some occurrence, and perhaps that he had then been indicted as a result thereof, and that, while he was later convicted, he could not have been asked concerning that conviction, as it had not occurred, nor could he have been questioned about the indictment. The only question that could have been asked is whether he actually committed the crime. Obviously he would have denied the charge, for he afterward went to trial on the indictment. His denial, of course, could not be controverted. There is, therefore, no such newly discovered evidence as could have been introduced at the trial. This presents squarely the question whether the court should grant the motion on the ground that no defendant should be convicted largely upon the testimony of a man who had then actually committed the very crime (even though it could not have been proved at the trial) which it was claimed he had committed in the case at bar, for Senft testified that Daly had tried to extort money from him shortly after he placed him under arrest.

Without Daly's testimony, or with him at the trial as a witness discredited by his conviction, it may be well doubted whether the jury

would find a verdict of guilty. I have been referred to no case directly in point, but I am of the opinion that the defendant "should be allowed an opportunity to present his case to the jury upon the facts as they exist," as was said in People v. Fridy, 83 Hun, 240, 31 N. Y. Supp. 399. The jury is supposed to hear the truth and the whole truth. They were not afforded this opportunity when Daly was offered as a witness, for they were justified in accepting his testimony as given by a witness who could not be discredited because of any act that he had previously committed. Obviously they were mistaken, if they accepted his testimony upon such a belief.

Trials are conducted, under the direction of the court, in a search for the truth. A motion for a new trial, which is peculiarly addressed to the discretion of the court, should be granted, where it appears that such an important fact as was here involved was not known to the jury, for, if the whole truth had been known, it is doubtful whether the jury would have found the guilt of the defendant to be established beyond a reasonable doubt.

The court has the power to grant the motion, as the term was duly extended. Motion granted.

GAMMILL LUMBER CO. v. BOARD OF SUP'RS OF RANKIN COUNTY et al.

(District Court, S. D. Mississippi, Jackson Division. May 7,1921.)

No. 127.

1. **Courts ⇐282(3)—Allegation as to assessment in violation of equal protection clause gives jurisdiction of the whole case.**
   In a suit for equitable relief against alleged invalid assessments, plaintiff's contention that the assessments, if carried out, will violate the equal protection provision of the Fourteenth Amendment, presents a real and substantial controversy under the Constitution, which, the jurisdictional amount being involved, confers jurisdiction, irrespective of the citizenship of the parties, and the jurisdiction extends to the determination of all questions involved, including questions of state law, irrespective of the disposition of the federal question, or whether it be found necessary to decide it at all.

2. **Taxation ⇐608(12)—Equity held to have jurisdiction, if remedy at law against invalid assessments not adequate.**
   A suit in equity may be maintained by an owner of tracts of timber lands, where a cloud is cast on the title by the attempt of the board of supervisors to assess and collect an invalid tax, unless there is a plain, adequate, and complete remedy at law, and if it be doubtful whether there is an adequate remedy at law, the court of equity will take cognizance.

3. **Taxation ⇐608(5)—Remedy under statute held doubtful, and not to prevent equitable relief against invalid assessments.**
   Under Const. Miss. 1890, § 181, requiring taxation of the property of private corporations to the same extent as that of individuals, and section 112, permitting a special mode of valuation and assessment of railroad and corporate property, and Code Miss. 1906, § 80, as amended by Laws 1918, c. 120, relative to appeals by persons aggrieved by any assess-

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

ment of taxes, and section 4310, providing that the appeal shall not delay the collection of the taxes, but that any money improperly collected shall be refunded, etc., where property is not only overvalued, but assessed at more than its market value, while all other property in the county is customarily, systematically, and intentionally assessed at not exceeding 60 per cent. of its fair market value, it is doubtful whether relief against the discrimination may be had by appeal, and equity will take jurisdiction.

4. Taxation ⟸40(8)—**Discriminatory valuation of corporate property held contrary to Constitution.**
The assessment of the capital stock of a corporation at more than its market value, where other property in the county is customarily, systematically, and intentionally assessed at not exceeding 60 per cent. of its fair market value, is a plain violation of Const. Miss. 1890, §§ 112, 181.

5. Courts ⟸262(4)—**Equity has jurisdiction to grant relief against fraudulent discrimination in taxation.**
An intentional discrimination in taxation is fraudulent, and it is within the jurisdiction of federal courts of equity to grant relief against such fraud.

6. Courts ⟸489(1)—**Federal equity court's jurisdiction not affected by blending of remedies in state courts.**
That, on the hearing of an appeal from an assessment for taxation by a board of supervisors the state courts will sit as courts of law and equity and grant full relief, both legal and equitable, cannot deprive a federal court of equity of power to grant relief in a case properly falling within its equitable jurisdiction, as the blending in a state statute of legal and equitable remedies will not affect the ancient equitable jurisdiction of the federal court.

7. Courts ⟸262(2)—**Federal court without jurisdiction of statutory proceeding to review assessment.**
The remedy at law provided by Code Miss. 1906, § 80, as amended by Laws 1918, c. 120, authorizing appeals by persons aggrieved by assessments of property, is not available on the law side of the United States courts.

In Equity. Suit by the Gammill Lumber Company against the Board of Supervisors of Rankin County and others. On motions to dismiss and for preliminary injunction. Motion to dismiss overruled, and motion for injunction sustained.

Watkins, Watkins & Eager, of Jackson, Miss., for complainant.
May & Sanders and R. H. & J. H. Thompson, all of Jackson, Miss., and S. L. McLaurin, of Brandon, Miss., for defendants.

HOLMES, District Judge. [1] On the question of federal jurisdiction in this case I cannot do better than use the language of the Supreme Court in Greene v. Interurban Railroad Co., 244 U. S. at page 502, 37 Sup. Ct. 675, 61 L. Ed. 1280, Ann. Cas. 1917E, 88:

"There being no diversity of citizenship, the jurisdiction of the District Court was invoked, under the first paragraph of section 24, Judicial Code, upon the ground that the suits arose under the 'due process' and 'equal protection' clauses of the Fourteenth Amendment of the Constitution of the United States, and that the matter in dispute in each case was in excess of the jurisdictional amount. Plaintiffs also relied upon certain provisions of the Constitution of the state that require uniform taxation of property according to value and at the same rate for corporate as for individual property. * * *"

And at 244 U. S. 508, 37 Sup. Ct. 677, 61 L. Ed. 1280, Ann. Cas. 1917E, 88:

"The contention of plaintiffs, set forth in their respective bills of complaint, that the action of the board of valuation and assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the state, and if carried out would violate the equal protection provision of the Fourteenth Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 191; Ohio Tax Cases, 232 U. S. 576, 586. * * *"

And at 244 U. S. 519, 37 Sup. Ct. 681, 61 L. Ed. 1280, Ann. Cas. 1917E, 88:

"The next question in order is whether the assessments have the effect of denying to plaintiffs the equal protection of the laws, within the meaning of the Fourteenth Amendment. It is obvious, however, in view of the result reached upon the question of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the federal question; for no other or greater relief is sought under the 'equal protection' clause than plaintiffs are entitled to under the provisions of the Constitution and laws of the state to which we have referred. Therefore we find it unnecessary to express any opinion upon the question raised under the Fourteenth Amendment."

[2] Turning to the question of equitable jurisdiction, the bill alleges that the plaintiff is the owner of various and sundry tracts of timber lands situated in Rankin and other counties in the state of Mississippi, and that a cloud is cast upon the title of said lands by the attempt of the defendants to assess and collect an invalid tax. This entitles the plaintiff to bring a suit in equity, unless the contention that under the Mississippi statute it has a plain, adequate, and complete remedy at law be well founded. Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; Pacific Express Co. v. Seibert, 142 U. S. 339, 348, 12 Sup. Ct. 250, 35 L. Ed. 1035; Ogden City v. Armstrong, 168 U. S. 224, 237, 18 Sup. Ct. 98, 42 L. Ed. 444; Ohio Tax Cases, 232 U. S. 576, 587, 34 Sup. Ct. 372, 58 L. Ed. 737; Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 506, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

If under Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, P. H. Lindsay, Assessor v. First National Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505, Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, Union Pacific R. R. Co. v. Weld County, Colo., 247 U. S. 282, 38 Sup. Ct. 510, 62 L. Ed. 1110, Shaffer v. Carter, State Auditor, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445, and other similar cases, it be doubtful whether the Mississippi

statutes afford an adequate remedy, a court of equity will not decline to take cognizance of the suit, because:

"Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." Davis v. Wakelee, 156 U. S. 680, 688, 15 Sup. Ct. 555, 558, 39 L. Ed. 578, 584.

[3] This is not simply a case of overvaluation of property in an assessment for taxes, but, while alleging that the assessment exceeds the actual market value of the stock, the bill alleges also that in arriving at the excessive valuation the defendants discriminated against the plaintiff and in favor of other taxpayers by deliberately and intentionally assessing the plaintiff's property at a different and greater per cent. of its real value than the property of other citizens was assessed, in that the property of other citizens, corporations, and individuals, whether real or personal, in Rankin county, Miss., is customarily, systematically and intentionally assessed by the board at not exceeding 60 per cent. of its fair market value, while the property of the plaintiff is assessed at a sum in excess of its real market value, thereby violating designated provisions of the Constitution of Mississippi and the Constitution of the United States.

In so far as the complaint has reference merely to an overvaluation in the assessment it may be that the Mississippi statute affords an adequate remedy by an appeal from the order of the board of supervisors, but in so far as the complaint rests upon a discrimination against the plaintiff by assessing its property at more than 100 per cent. of its actual value, while the property of other persons is customarily and intentionally assessed at not exceeding 60 per cent., a very different question arises. Granting the doubtful proposition that the remedy provided by law and cognizable in the federal courts is adequate for an overvaluation of property, the question arises: What remedy, if any, could the plaintiff obtain by a proceeding at law on appeal from the order of the board of supervisors from the illegal and unjust discrimination against it on the part of the board in assessing its property at more than its real market value, and assessing the property of all other persons, individual and corporate, at not exceeding 60 per cent. of such value, and could any court, in a legal action, give complete or any relief in a case of this character? It is true the circuit or Supreme Court of the state on appeal would have the power to lower the valuation to the extent that it exceeded the real market value; but, if the legal remedy could go no further than this, it would leave the plaintiff's property assessed at 100 per cent. and the property of other persons at not exceeding 60 per cent. of the true value.

The remedy at law afforded the plaintiff by the Mississippi statutes is provided for in section 80 of the Mississippi Code of 1906, as amended by chapter 120 of the Laws of 1918. This section is as follows:

"Any person aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village, as to the assessment of taxes, may, within five days after the adjournment of the meeting at which such decision is made, appeal to the circuit court of the county, upon giving bond, with sufficient sureties, in double the amount of the matter in dispute,

but never less than one hundred dollars, payable to the state, and conditioned to perform the judgment of the circuit court, and to be approved by the clerk of such board, who, upon the filing of such bond, shall make a true copy of any papers on file relating to such controversy, and file such copy certified by him, with said bond, in the office of the clerk of the circuit court, on or before its next term; and the controversy shall be tried anew in the circuit court at the first term, and be a preference case, and, if the matter be decided against the person who appealed, judgment shall be rendered on the appeal-bond for damages at the rate of ten per centum on the amount in controversy and all costs. If the matter be decided in favor of the person who appealed, judgment in his favor shall be certified to the board of supervisors, or the municipal authorities, as the case may be, which shall conform thereto, and shall pay the costs. The county attorney, the district, or the attorney general, if the state, county or municipality be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty days after the adjournment of the meeting at which such decision is made, or within twenty days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the state tax commission, or within twenty days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the state tax commission is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as hereinbefore provided, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section."

The effect of the appeal, however, is limited by section 4310 of the Code of 1906, which is as follows:

"4310. (3797) *Effect of an Appeal, and Proceedings in Case of*—In case of an appeal from the judgment of the board of supervisors in the matter of an assessment, the appeal shall not delay the collection of taxes due by the assessment as approved; and if such taxes be collected before a final disposition of the appeal, and the judgment be in favor of the person appealing, in whole or in part, as to the matter in dispute, any money improperly collected from him for taxes, as shown by the judgment, shall be refunded to him by the state and county respectively, if they have received the money; and, if it shall not have been paid over, the tax-collector receiving it shall refund it to him; and his claim, if against the state, shall be audited by the auditor, and a warrant issued for the amount after the auditor shall have submitted the matter to the Attorney-General, and obtained his opinion that it is a legal demand against the state, and the board of supervisors shall, after such allowance by the auditor, audit and allow the claim of the party against the county. If the case be decided in favor of the party appealing while the collector is proceeding with the collection of taxes, he shall conform his action to the judgment."

In construing the latter section the Supreme Court of Mississippi, in Tunica County v. Tate, 78 Miss. 294, 29 South. 74, has held that an appeal under the section does not supersede or delay the collection of the taxes.

Section 181 of the Constitution of Mississippi provides that the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but section 112 permits the Legislature to provide for a special mode of valuation and assessment for railroad and other corporate property, provided that all such property shall be assessed at its true value. The capital stock of corporations other than banks and railroad companies is required to be assessed at its market value, less the aggregate value

of the real and personal property owned by such corporations which is required to be separately assessed.

The plaintiff in this case is a private corporation for pecuniary gain, and under said sections 112 and 181, its real and personal property and its franchise are required to be taxed at their true value in the same way and to the same extent as the property of individuals. The value of the franchise of a corporation is nothing more or less than the amount that the value of its capital stock exceeds the aggregate value of all of its tangible property, real and personal. No complaint is made in the bill of any discrimination against the plaintiff in the assessment of its real and personal property, but complaint is made that, when it came to assessing the value of the capital stock of the plaintiff, the board of supervisors deliberately, intentionally, and systematically assessed all other property in the county of persons and corporations at not exceeding 60 per cent. of the true value, whereas it assessed the capital stock of the plaintiff at more than 100 per cent. If permitted to appeal from the action of the board in erroneously assessing other property below value, plaintiff would be involved in a multiplicity of suits, but it seems the statutes do not allow an appeal in such cases. Magnolia Bank v. Board of Supervisors of Pike County, 111 Miss. 857, 72 South. 697, 3 A. L. R. 1365.

[4] Granting that on appeal the plaintiff would have a remedy as to the overvaluation, it is doubtful under the Mississippi statutes whether the circuit or Supreme Court could do more than reduce the assessment to the market value of the capital stock, less the separate assessments of its real and personal property, thereby leaving the capital stock of the plaintiff assessed at its full value, and all other property in the county of corporations and individuals intentionally and systematically assessed at 60 per cent. thereof. Here, then, is a plain violation of the Constitution of the state, which requires the property of all private corporations for pecuniary gain to be taxed in the same way and to the same extent as the property of individuals, and to be taxed at its true value. We have, then, the violation of a right for which the law affords but a doubtful remedy in the state courts and no remedy at all in the federal courts.

In distinguishing the case of Taylor v. Railroad Company, 88 Fed. 350, 31 C. C. A. 537, the Supreme Court of Mississippi, in the Magnolia Bank Case, 111 Miss. 857, 72 South. 697, 3 A. L. R. 1365, called attention to the fact that the Tennessee Constitution did not place railroads in a class to themselves, but forbade discrimination between species of property. I have already called attention to the fact that corporations such as the plaintiff are not placed, under the Mississippi Constitution, in a class to themselves, but that discrimination against them is expressly prohibited, and that they are required to be taxed exactly like individuals.

I think, therefore, that the case of Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, is absolutely decisive of every question raised in this case, except in so far as the question of whether or not the plaintiff has a plain, adequate, and complete remedy at law is affected by the

difference between the Kentucky and the Mississippi statutes with reference to the recovery of taxes wrongfully paid. The salient principles therein announced were: (a) That equity has jurisdiction to enjoin unlawful tax proceedings, which cloud the plaintiff's title and threaten irreparable injury and a multiplicity of suits; (b) that discrimination resulting from an assessment of the tangible property of a railroad corporation at 75 per cent. of its actual value, while the property of individuals and other classes of corporations taxed at the same rate is generally and systematically assessed at not more than 60 per cent. of actual value, is violative of the Kentucky Constitution, requiring uniform taxation in proportion to value and an identical rate as between corporate and individual property; (c) that a holding by the Supreme Court of Kentucky that such discrimination is not in accord with the Constitution and laws of the state, but that there is no redress in the courts of the state, and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers, while admitting the wrong, merely denies judicial relief, and is not binding upon the federal courts; (d) that the courts of the United States, when their jurisdiction is properly invoked, may afford relief against discrimination in state taxation contravening the Constitution, when the discrimination results from an intentional, systematic, and persistent undervaluation, and this is true whether the discrimination results from the action of one board or from the divergent action of different boards; (e) that sections 171 and 174 of the Kentucky Constitution requiring uniform taxation according to value and an identical rate between corporate and individual property, and requiring that "all corporate property shall have the same rate of taxation paid by individual property," means that not only the percentage of the rate, but the basis of valuation, shall be the same; (f) that uniformity implies equality, and that equality cannot exist without uniformity in the basis of assessment, as well as in the rate of taxation; (g) that when the value of taxation is systematically departed from in respect of certain classes of property its observance in respect of others would serve to frustrate its very object, and it follows that in such cases the duty to assess at full value is not supreme, but yields to the duty to avoid discrimination; (h) that the Kentucky statutes do not afford an adequate legal remedy against discriminatory assessments for both state and local taxes; (i) that a railroad company, whose intangible property is subjected to discrimination in assessment through undervaluation of other property by different assessors, is not afforded an adequate remedy, though the Kentucky statutes provided for readjustment of one class of assessment through the county board of supervisors.

The provisions of the Kentucky Constitution for assessing all property, including railroad property, are so nearly identical in meaning with the provisions of the Mississippi Constitution for assessing private corporations for pecuniary gain, such as the plaintiff, that every point urged against the plaintiff's contention seems to be settled by the Greene Case, except the question, as above stated, as to whether the

Mississippi statute affords a full, adequate, and complete remedy at law.

In the Greene Case the discrimination arose by different officers or taxing bodies adopting a different basis of valuation in assessments. In this case the same body adopts not greater than 60 per cent. for all property of individuals and corporations, except the capital stock of the plaintiff, and assesses that at more than 100 per cent. of its value. In the Greene Case the court says:

"It hardly is open to serious dispute that if the Legislature had confided to a single body the determination of the basis of assessment of the real estate and personal property of individuals and nonfranchise corporations, on the one hand, and of the tangible and intangible property of public service corporations, on the other, a valuation of property of the latter class on the basis of 75 per cent. of its actual value, while property of the former class was assessed systematically at 52 per cent., or not more than 60 per cent., of its actual value, would be inconsistent with the sections we have quoted from the Kentucky Constitution. For the provision of section 182, permitting the General Assembly to provide by law 'how railroads and railroad property shall be assessed,' and how taxes thereon shall be collected,' relates merely to the mode of assessment and collection, and manifestly does not permit a departure from the requirements of uniform taxation in proportion to value and an identical rate as between corporate and individual property, contained in sections 171 and 174. The latter section permits the General Assembly to provide for taxation based on income, licenses, or franchises. But, as already stated, at least at the time these suits arose, there was no provision of law for a taxation of franchises in any other sense than that already explained. Marion National Bank v. Burton, 121 Kentucky, 876, 885.

"The fact should be emphasized that the Kentucky court of last resort, far from holding that discrimination such as is here complained of is in accord with the Constitution and laws of the state, has recognized distinctly that it is not, but has felt constrained to hold that, under circumstances similar to those of the present cases, there is no redress in the courts of the state, and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. Louisville Railway Co. v. Commonwealth, 105 Kentucky, 710, 719. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the federal courts."

The court quotes at length and with approval from the case of Taylor v. Louisville & Nashville Railroad Co., 88 Fed. 350, 31 C. C. A. 537. After quoting from the opinion of Judge Taft, that:

"If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon fully assessed property"

—Mr. Justice Pitney says:

"The justice of this view has been recognized by the state courts of last resort in many cases. Bureau County v. Chicago, etc., R. R. Co., 44 Ill. 229, 239; Cocheco Co. v. Strafford, 51 N. H. 455, 482; Manchester Mills v. Manchester, 58 N. H. 38; Randell v. City of Bridgeport, 63 Conn. 321, 324; C., B. & Q. R. R. Co. v. Com'rs of Atchison Co., 54 Kan. 781, 792; Ex parte Ft. Smith, etc., Bridge Co., 62 Ark. 461, 468; Burnham v. Barber, 70 Iowa, 87, 90; Barz v. Board of Equalization, 133 Iowa, 563, 565; Iowa Cent. Ry. Co. v. Board of Review (Iowa, 1916) 157 N. W. 731; Lehigh & Wilkes-Barre Coal Co. v. Luzerne Co., 225 Pa. St. 267, 271; People v. I. C. R. R. Co., 273 Ill.

220, 244–250. There are declarations to the contrary (Central R. R. Co. v. State Board of Assessors, 48 N. J. Law, 1, 7; Lowell v. County Commissioners, 152 Mass. 372, 375), but they take little or no account of the rights of aggrieved taxpayers."

After distinguishing the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, the court concludes its decision as follows:

"It is contended that appellees if aggrieved, had another and more equitable remedy than a suit for injunction; that the law of the state provides a method by which, instead of lowering the assessments upon the property of appellees, they could by proper procedure compel the assessment of the property of other taxpayers to be increased, so as to come within the constitutional requirement as to fair cash value, and hence that it was the duty of appellees to adopt that method. The reference is to sections 4115–4120, Ky. Stats., which require the county board of supervisors to convene annually and make a careful examination of the assessor's books and each individual list thereof, empowering them to increase or decrease any list; 'but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value.' By section 4123, they may hear complaints, summon and swear witnesses, and require them to testify. There is nothing in these provisions to indicate that parties in the situation of the present appellees, who have no different interest in the undervaluation by the county assessors than that which might be possessed by any other citizens of the state, are entitled to be heard to complain that the county assessments are too low. Nor is any case cited where such a complaint has been entertained. The remedy of reassessment appears to be a public, not a private, remedy."

[5, 6] An intentional discrimination in taxation is fraudulent, and it is within the jurisdiction of the federal courts of equity to grant relief against fraud. It was argued that the state circuit and Supreme Courts, on the hearing of an appeal from the board of supervisors, would sit as a court of law and equity, and grant full relief, both legal and equitable. Even if this be true, the federal equity court would not be deprived of the power to grant relief in a case properly falling within its equitable jurisdiction. In other words, the blending in a state statute of legal and equitable remedies will not affect the ancient equitable jurisdiction of this court.

[7] The remedy at law provided by section 80 of the Code of 1906 is not available upon the law side of the United States courts, and even if it be such a remedy as the federal court may take cognizance of, it is not adequate, and does not afford to the plaintiff in this case as full, complete, and efficient relief as a court of equity, and for these reasons I think the motion to dismiss the bill should be overruled, and the motion for a preliminary injunction sustained; but I do not think it proper to enjoin the proceedings now pending on appeal in the state court. The injunctive relief prayed for will be granted with this exception. A decree may be drawn in accordance with this opinion. The plaintiff will be required to give bond in double the amount of the taxes enjoined.

GEORGE v. BAILEY, Collector of Internal Revenue, et al.

(District Court, W. D. North Carolina, at Greensboro. August 22, 1921.)

1. **Internal revenue ⟸2—Act levying 10 per cent. excise tax on net profits of employers of child labor held unconstitutional.**
   Act Feb. 24, 1919, § 1200 (Comp. St. Ann. Supp. 1919, § 6336⅞a), providing a revenue tax of 10 per cent. on the net profits of certain employers of child labor, is unconstitutional, as an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of a state.

2. **Internal revenue ⟸28—Revenue laws enacted by Congress to enforce legislation forbidden by Constitution are void.**
   Since Act Feb. 24, 1919, § 1200 (Comp. St. Ann. Supp. 1919, § 6336⅞a), levying a 10 per cent. revenue tax on the net gain of employers of child labor, is unconstitutional, a suit to enjoin the collection of this tax can be maintained, notwithstanding Rev. St. § 3224 (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, since to permit its collection would extend the power of Congress through taxation to legislation forbidden to it by the Constitution, especially in view of Const. Amends. 9 and 10.

In Equity. Suit by John J. George, trading and doing business as the Vivian Cotton Mills and the Vivian Spinning Company, against J. W. Bailey, Collector of Internal Revenue for the District of North Carolina, and another, for an injunction. Temporary restraint made permanent.

The complainant is John J. George, trading and doing business as Vivian Cotton Mills and Vivian Spinning Company, operating plants for the manufacture of cotton goods at Cherryville, in the county of Gaston, in this district. The defendants are J. W. Bailey, collector of internal revenue for the district of North Carolina, and Claude E. Moser, one of his deputies.

On the 9th of November, 1920, the Commissioner of Internal Revenue made an assessment for taxes against the complainant for $2,098.06, to be due the 19th of November, 1920. Penalty at the rate of 5 per cent. and interest at the rate of 1 per cent. per month for failure to pay the tax assessed by the date it was due was included. Upon notice of the assessment to the complainant, appeal was made by him to the Commissioner of Internal Revenue to remit the same. The appeal being upon the form prescribed by the Treasury Department and termed a claim for abatement. This claim was denied by the Commissioner of Internal Revenue, and thereupon the defendant J. W. Bailey, through his deputy, Claude Moser, was about to proceed by warrant of distraint to subject the property of complainant to sale to satisfy the said assessment. The said assessment was made against the said complainant by the Commissioner of Internal Revenue, under authority as it is claimed of title 12, section 1200, of the Act of Congress, approved February 24, 1919 (Comp. St. Ann. Supp. 1919, § 6336⅞a). This section is set out in the opinion.

The defendants have filed an answer denying some of the several allegations of the bill, but admitting the assessment for the amount set forth; that claim for abatement has been filed and denied, and that the collector, through his deputy, is proceeding by warrant of distraint to collect the taxes, with penalty and interest.

The purpose of complainant's bill is to restrain the collector and his deputy from proceeding to levy upon and sell his property to satisfy the assessment.

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

John M. Robinson and C. B. Fetner, both of Charlotte, N. C., for complainant.

Stonewall Jackson Durham, U. S. Atty., of Gastonia, N. C., for defendants.

BOYD, District Judge (after stating the facts as above). [1] In order to pass intelligently upon the questions involved in this case reference is had to certain of the provisions of two federal statutes and one statute of the state of North Carolina. The first of the federal statutes to be referred to is what is known as the Owen Keating Act, which was passed by the Sixty-Fourth Congress and will be found in 39 U. S. Statutes at Large, chapter 432, page 675. It is entitled "An act to prevent interstate commerce in the products of child labor, and for other purposes." The following quoted from that act is all that is deemed necessary to reproduce here:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that no producer, manufacturer or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian: Provided, that a prosecution and conviction of a defendant for the shipment or delivery for shipment of any article or commodity under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such article or commodity before the beginning of said prosecution."

This statute was before the Supreme Court of the United States upon an appeal from a decision of this court to the effect that it is beyond the powers delegated by the Constitution to the United States to regulate labor within a state by an act of Congress. This decision was affirmed by the Supreme Court, in the case of Hammer v. Dagenhart, reported in 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724, Mr. Justice Day in delivering the opinion of the court among other things said:

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. Lane County v. Oregon, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. New York v. Miln, 11 Pet. 102, 139; Slaughter House Cases, 16 Wall. 36, 63; Kidd v. Pearson, supra. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states."

It is held in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629:

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted."

It was contended by the government in the Dagenhart Case that the interstate commerce provision of the Constitution which authorizes Congress to regulate commerce with foreign nations, between the several states and with the Indian tribes, conferred the power which made the act valid, but the Supreme Court overruled this contention in most emphatic terms, as will be observed from this further quotation from the Dagenhart opinion:

"The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases, 234 U. S. 548, 560. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters intrusted to the nation by the federal Constitution."

There can be no possible misunderstanding as to the meaning of this decision, for it is distinctly declared that the right to regulate labor within a state is a state function and that Congress is forbidden by the Constitution to interfere with it.

After the Dagenhart decision, Congress has undertaken to avoid its effect by enacting section 1200 of title 12 of "An act to provide revenue and for other purposes," approved February 24, 1919 (40 Stat. at Large, part 1, page 1057). This section is in the following language:

"That every person (other than a bona fide boys' or girls' canning club recognized by the agricultural department of a state and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment."

It will be noted that this section is practically a reproduction of the material provisions of the Owen Keating bill; the only difference being that under that bill, the product of an establishment using child labor, was forbidden transportation in interstate commerce, and in the present act an establishment using child labor contrary to its provisions is subject to a tax of 10 per centum, upon the net income derived from its operations.

The question which suggests itself in the outset is whether the last act is intended to raise revenue. It will scarcely be insisted that such

is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be a rather nonproductive revenue system which imposed taxes, the effect of which would be to annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied.

In the case of Collins v. New Hampshire, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 769 (43 L. Ed. 60), the following is found:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

This doctrine is reaffirmed in the Dagenhart Case, supra. In what are called the Pipe Line Cases, 234 U. S. 548–560, 34 Sup. Ct. 956, 958 (58 L. Ed. 459), the Supreme Court used this language which is quoted before in this opinion:

"The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution."

If that principle applies to the authority of Congress in the regulation of commerce, there is no reason why it should not apply in raising revenue by taxation, for the power delegated to the United States to levy and collect taxes, is no more elastic than the power delegated by the commerce provision. As bearing upon this point the following is quoted from the opinion in Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482, which was a case involving the right of the federal government to levy taxes upon state banks:

"There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power, if so exercised as to impair the separate existence and independent self-government of the states, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

By the Constitution the federal government is invested with power by congressional legislation "to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States." But nowhere in the Constitution can be found authority to the national government to regulate labor within the states.

Upon consideration of the prime question in this case and the authorities bearing upon it, the conclusion seems to be irresistible that the national Legislature cannot do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the states, then Congress cannot intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method.

Having disposed of the two federal statutes which were to be discussed in passing upon the question involved in the case in hand, it is deemed expedient to comment upon the statute of the state of North Carolina in regard to child labor. This statute can be found in the

Public Laws of North Carolina, Session of 1919, chapter 100, page 274. Section 5 of the act is as follows:

"No child under the age of fourteen years shall be employed or permitted to work, in or about or in connection with any mill, factory, cannery, workshop, manufacturing establishment, laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, bootblack stand, public stable, garage, place of amusement, brick yard, lumber yard, or any messenger or delivery service, except in cases and under regulations prescribed by the commission hereafter created: Provided, the employments in this section enumerated shall not be construed to include bona fide boys' and girls' canning clubs recognized by the agricultural department of this state; and such canning clubs are hereby expressly exempted from the provisions of this act."

The Child Labor Law of North Carolina is made a feature of the public school system of the state, thus concentrating the means for the promotion of the mental and the physical welfare of children under one harmonious plan, to be carried out by the agencies provided for in the act, the purposes of which are to foster the health and physical development of children and at the same time train their minds for future usefulness, and its provisions appear ample to accomplish these ends.

By comparing the federal and state statutes it will be readily seen that the latter affords as much protection to the health and physical condition of children as the former, and as stated before the state act co-ordinates its purpose to promote physical welfare, with provisions for mental training, and, further, an important provision in the state statute is the punishment, provided for its violation, instead of undertaking as the federal act, to make the income of an establishment using child labor illegally, the subject of taxation, it denounces as a criminal offense the violation of its provisions and subjects the offender to a fine or imprisonment, or both at the discretion of the court.

There can be no doubt as a general proposition that the average person is more heedful respecting laws constituting crime than they are those creating civil liability. For this reason the state statute is undoubtedly more capable of prompt execution than the act of Congress, and the expenses incident to it when compared to that of the federal plan, must necessarily be a great deal less; but, however that may be, the burden incident to the enforcement of the state law, is not a drain upon the federal treasury but is borne by the state.

It is admitted that Congress engaged in a laudable undertaking when it set about to regulate child labor in the country. It began with the enactment of the Owen Keating Law September 1, 1916, which was followed February 24, 1919, by the passing of the statute now under consideration. There can be no criticism of the purpose our representatives had in view in the ennactment of these statutes, for it is evident that they were prompted by the highest motives of humanity, accompanied with a desire to protect children from mental and physical deterioration, in order to maintain a standard of manhood and womanhood fully prepared to respond to the obligations and duties resting upon the citizens of this country. There could be no reasonable ground for dissenting to what Congress has done, if the action came within the scope of power delegated to the United States by the Constitution; but, as before stated, the Supreme Court has put an end to this question, and

has decided in terms not susceptible of difference of opinion that Congress is not authorized to deal with this subject with the view of federal control, but that such is the function of the several states, each to proceed in its own way.

The state of North Carolina has undertaken to utilize the power reserved to it by the Constitution of the United States to control child labor within its borders, and through the General Assembly a law which is deemed wise, regulating this character of labor, has been enacted, and provision made for its efficient enforcement.

[2] In the presentation of this case counsel for the defendant moved to dismiss complainant's bill, relying upon section 3224 of the Revised Statutes (Comp. St. § 5947), which is in the following language:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

It is insisted that this statute renders the courts powerless to intervene where the government is proceeding under assessments to collect taxes, no matter whether the tax is legal or illegal, well-founded or erroneous, constitutional or unconstitutional. If this position can be maintained, then Congress, under the guise of raising revenue by taxation, can overcome all constitutional barriers.

The position taken by the counsel for the defendant does not appeal to the court here as being based upon sound reason or intelligent construction. The Tenth Amendment to the Constitution reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

From time to time the courts have been called on to construe the meaning of this amendment, and almost without exception it has been held that the powers of the national government are limited to those delegated. This construction is fortified by the Ninth Amendment, which reads as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

This amendment must be construed to mean that, in framing the Constitution, the sovereign people of the several states ceded to the general government certain designated powers, leaving all other rights and powers, such as are necessary to maintain our dual system of government, to the states respectively and to the people. This court fully realizes the necessity for the maintenance by all available means of healthful conditions among children, and the obligation which rests upon us, as a provident people, to rear men and women well equipped mentally and physically for future usefulness, is profoundly appreciated. There is ample authority somewhere in our governmental system to meet this obligation and discharge this duty. The Supreme Court has declared that the duty devolves upon the states, respectively, as one of reserved powers. It would seem, therefore, that the states in their efforts to meet this obligation should be left undisturbed by federal intervention.

In keeping with the line of the foregoing discussion the conclusion is that the defendants' motion to dismiss for the want of jurisdiction should be denied; that in passing the act in question Congress exceeded the powers delegated to the United States by the Constitution; that the assessment against the complainant is unwarranted, and is not a tax such as contemplated by law to raise revenue, but may be termed a penalty to prevent the violation of the provisions of the act, which could not be enforced by assessment and warrant of distraint, even if the act was valid; that he is entitled to the relief prayed for in his bill; and that the temporary restraint heretofore granted should be made permanent.

In re MOORE.

(District Court, E. D. Michigan, S. D. August 15, 1921.)

No. 4759.

1. **Courts ⟸366(19)—Manner of setting apart and awarding exemptions in bankruptcy regulated by federal courts.**
While the bankruptcy court will follow and adopt the statutes of a state as construed and applied by the highest courts thereof in determining the nature and extent of a bankrupt's exemptions created by the laws of such state, nevertheless the manner in which such exemptions are to be claimed, set apart, and awarded is regulated and determined by the federal courts as matter of procedure in the course of bankruptcy administration, as to which they are not bound or limited by state decisions or statutes.

2. **Bankruptcy ⟸400(3)—Bankrupt, who elected to take exemptions in cash from proceeds of sale, entitled only to pro rata of proceeds.**
Despite Comp. Laws Mich. 1915, § 12865, under sections 12861, 12862, bankrupt, who elected to take her exemptions in cash out of the proceeds of the sale of her stock of goods, *held* obliged to take the amount for which such exemptions sold, that is, the pro rata of the amount received as the proceeds of her assets at the sale; she not being entitled, no selection having been made by her of her exemptions, to the full amount of her exemptions as authorized by law.

In Bankruptcy. In the matter of Sarah Moore, bankrupt. On petition filed by the bankrupt to review an order of a referee in bankruptcy denying her petition for allowance of cash exemptions. Order affirmed.

Edward A. Rich, of Detroit, Mich., for trustee.
Anne R. Davidow, of Detroit, Mich., for bankrupt.

TUTTLE, District Judge. This is a petition filed by the bankrupt to review an order of one of the referees in Bankruptcy of this district, denying a petition of the bankrupt for the allowance of the sum of $250 in cash as her exemptions. The certificate of the referee, the correctness of which is not disputed by either party, states the facts and legal question involved and the conclusions thereon reached by the referee, with his reasons therefor, so clearly and concisely that such certificate is quoted in full as follows:

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

"I, Paul H. King, one of the referees of said court in bankruptcy, do hereby certify that in the course of proceedings in said cause before me the following question arose pertinent to said proceedings: Whether the misapprehension on the part of the bankrupt as to the effect of her agreement that her exemptions be sold by the trustee of her estate at public auction, no selection having been made by her of such exemptions, will sustain a demand by her of the full amount of her exemptions as authorized by law, instead of the pro rata amount received as the proceeds of said assets at such sale?

"The facts in this matter, which are undisputed, are as follows: A sale of the assets of this bankrupt was conducted on April 7, 1921; that the appraised value of said assets, consisting of men's and women's furnishings and dry goods and fixtures, was $2,198.76, and that the proceeds of such sale totaled $1,049.39; that the bankrupt elected to take her exemptions in cash out of the proceeds of the sale; that the proceeds of such sale were approximately one-half of the appraised value; that the trustee, therefore, set aside in cash out of such proceeds one-half of the statutory exemptions of $250, or $125, as shown by said trustee's report, dated April 18, 1921, and filed by the referees on April 23, 1921; that thereafter the bankrupt filed a petition, stating that she understood that she was to have the full amount of $250; that, after due consideration of such petition and hearing of the counsel thereon, I denied the same for the following reasons:

"I. That it was within the power of the bankrupt to elect to take her exemptions out of the stock and fixtures, or to take the proceeds of the same in cash when such stock and fixtures were sold by the trustee by direction of the referees.

"II. That the bankrupt having elected to take her exemptions in cash out of the proceeds of the sale, she is obliged to take the amount for which such exemptions sold, and that any misapprehension on her part as to the effect of her agreement to take said exemptions in cash does not equitably entitle her to the full statutory amount.

"III. That to say that after such sale she is entitled to the full amount is to say that such articles as she might have selected out of the stock and fixtures sold for full value, while the remainder of said stock and fixtures sold for much less than half their value; whereas, as a matter of fact, such stock and fixtures did sell for approximately one-half their appraised value.

"IV. That to pay said bankrupt the full amount of her exemptions as claimed out of the proceeds of said sale is to take money properly belonging to the creditors out of the proceeds of that part of the stock and fixtures belonging to them and sold for their benefit, less the expense of administration, which is inequitable.

"The matter is certified to the judge for his opinion thereon."

Section 12858 of the Michigan Compiled Laws of 1915 provides, among other things, that—

"The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * * The * * * materials, stock, * * * or other things, to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars."

There is no Michigan statute creating any right to a cash exemption in any amount. Of course the law, and not what the bankrupt thought about it, must determine her rights. It is conceded by the bankrupt in her brief that—

"The only question involved here is whether, upon the sale of the stock, including exempt property, the debtor or bankrupt is entitled to the same amount, viz. $250, in cash in lieu of the stock."

Speaking generally, the rights of the parties with respect to the exemption claimed are governed by the following provisions of the Bankruptcy Act: Section 2, subdivision 11 (Comp. St. § 9586), conferring on courts of bankruptcy jurisdiction to "determine all claims of bankrupts to their exemptions"; section 6, providing that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition" (section 9590); section 7, subdivision 8, requiring the bankrupt to file with his petition schedules containing, among other things, "a claim for such exemptions as he may be entitled to" (section 9591); and section 47a, subdivision 11, requiring trustees in bankruptcy to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment" (section 9631).

The only claim for exemption shown in the bankrupt's schedules herein is the figures "$250.00," appearing on Schedule B–5. While I have some doubt as to whether this is a proper description of the exemption claimed, and therefore whether she is now entitled, as a matter of strict legal right, to any such exemption (Burke v. Guarantee Title & Trust Co. [C. C. A. 3] 134 Fed. 562, 67 C. C. A. 486), yet as no objection on this ground has been raised by the trustee, and it appears that the latter has set apart the sum referred to as her exemption, and the schedules are amendable, I have concluded to pass upon the merits of the question presented for decision.

It is urged by the bankrupt that, under the circumstances, she is entitled to the amount of her statutory exemption in cash, instead of in property, by reason of the provisions of section 12865 of the Michigan Compiled Laws of 1915, which provides as follows:

"Whenever a levy is made upon any article, belonging to a class or species which is exempt from execution to a specified amount or value, and the value thereof, as determined by the appraisal, shall be in excess of the amount of the exemption allowed therein to the defendant in execution, levy and sale thereof may be made under the execution in the ordinary way, and unless the amount of the exemption shall have been claimed or set off in other property or waived, the officer shall pay to the defendant in execution, the amount of such exemption, in money from the proceeds of the sale, and the balance of such proceeds shall be applied towards the satisfaction of the execution."

This statute was enacted as part of the Michigan Judicature Act of 1915, and does not appear to have yet been construed or otherwise passed upon by the Michigan Supreme Court. It seems, however, by its language, to be limited in its application to cases where a statutory exemption is claimed in a single, indivisible "article," the appraised value of which is "in excess of the amount of the exemption allowed therein." Its purpose is apparently to protect the rights of both creditor and debtor in a situation where the exemption provided by law is inseparably impressed into, and included within, other property, so that such exemption cannot be removed and set apart for the debtor,

leaving the remainder of said property for the creditor. Under such circumstances, some provision of this nature is highly desirable, if not necessary, to protect the interests of all parties concerned. Where, however, as in the present case, it does not appear that the exemptions claimed consist of, or inhere in, a single "article" having a greater value than that of the exemption, or that property of the exempt class and value cannot be selected and set apart from other property of the same class, but of greater quantity and value, the proper procedure, at least in a proceeding in the state courts, would seem to be indicated, not by the statute last quoted, but by sections 12861 and 12862 of the Michigan Compiled Laws of 1915, providing as follows:

"(12861) When a levy shall be made upon property of any class or species, which is exempt by law from execution to a specified amount or value, the officer levying such execution, shall make an inventory of so much of such property belonging to the person against whom the execution was issued, as shall be sufficient in the judgment of such officer, to cover the amount of such exemptions, and satisfy the execution, and cause the same to be appraised at its cash value, by two disinterested freeholders of the township or city where the property may be, on oath to be administered by him to such appraisers.

"(12862) Upon such inventory and appraisal being completed the defendant in execution, or his authorized agent, may select from such inventory an amount of such property not exceeding, according to such appraisal, the amount or value exempted by law from execution; but if neither such defendant nor his agent shall appear and make such selection, the officer shall make the same for him."

[1] While, however, the bankruptcy court will follow and adopt the statutes of a state, as construed and applied by the highest courts thereof, in determining the nature and extent of the exemptions created by the laws of such state (In re National Grocer Co. [C. C. A. 6] 181 Fed. 34, 104 C. C. A. 47, 30 L. R. A. [N. S.] 982), yet the manner in which such exemptions are to be claimed, set apart, and awarded is regulated and determined by the federal courts, as matter of procedure in the course of bankruptcy administration, as to which they are not bound or limited by state decisions or statutes. (In re Friedrich [C. C. A. 7] 100 Fed. 284, 40 C. C. A. 378; Lipman v. Stein [C. C. A. 3] 134 Fed. 235, 67 C. C. A. 17; Bank of Nez Perce v. Pindel [C. C. A. 9] 193 Fed. 917, 113 C. C. A. 545; In re Stitt [C. C. A. 6] 252 Fed. 1, 164 C. C. A. 113.

[2] Considering, then, the question here presented in the light of the rule just referred to, I am satisfied that the conclusion reached by the learned referee is not only correct in principle, for the reasons pointed out by him, but in accord with the weight of authority and in conformity with the views of the Court of Appeals for this Circuit. In re Stitt, supra; In re Crum (D. C.) 221 Fed. 729; In re Arnold (D. C.) 169 Fed. 1000; In re Ansley Brothers (D. C.) 153 Fed. 983; In re Richard (D. C.) 94 Fed. 633.

It follows that the order complained of must be affirmed; and it is so ordered.

AMERICAN RY. EXPRESS CO. v. RAILROAD COMMISSION OF GEORGIA et al.

(District Court, N. D. Georgia, N. D. August 15, 1921.)

1. **Carriers ⇐12(6½)—Order to carriers as to joint rates held not too uncertain to be enforceable.**
   An order by the state public utility commission to express companies to receive for each other for transportation within the state at all terminal or intermediate points of physical contact or connection of routes over railroad lines over which they have respectively established routes and to charge joint rates is not too uncertain to be enforced.
2. **Carriers ⇐12(6½)—Failure of notice to carrier by public utility commission of making joint rate makes rate invalid.**
   Where an express company filed a schedule containing joint rates with another, and the public utility commission changed provisions of the schedule as to joint rates, making them more extensive, in the absence of 30 days' notice to carriers, as provided by Code 1910, § 2630, the joint rates are invalid.
3. **Carriers ⇐12(1)—Public utility commission has no power to institute joint rates.**
   Where an express company filed a schedule of joint rates with another express company, a public utility commission may not, by striking out clauses of the schedule without notice or hearing, extend these joint rates, since to do so would amount to an institution of rates, while the utility commission is limited to a making of rates.
4. **Carriers ⇐12(6½)—When a public utility commission makes joint rates, it must make division between the carriers.**
   When a public utility commission makes joint rates, it must make division between carriers, and give the carriers an opportunity to be heard and contest the division, before requiring the service to be given.
5. **Carriers ⇐12(5)—Public utility commission, in making rates, is limited to just and reasonable rates.**
   In making joint rates between express companies, a public utility commission may not require one express company to make short hauls for a pro rata share of the joint rate, since to do so would be to require the carrier making the short haul to render service for an unjust and unreasonable rate.

In Equity. Bill by the American Railway Express Company against the Railroad Commission of Georgia and Charles Murphy Candler and others, members of the Railroad Commission of Georgia. Injunction granted, without prejudice to the commission to fix just and reasonable joint rates on due notice to the carriers affected thereby.

Robert C. & Philip H. Alston, of Atlanta, Ga., for complainant.
James K. Hines, of Atlanta, Ga., for defendants.

Before KING, Circuit Judge, and BEVERLY D. EVANS and SIBLEY, District Judges.

KING, Circuit Judge. The American Railway Express Company (hereinafter styled American) is a corporation of Delaware, organized during the period of federal control, to which were transferred all of the properties of the Adams, American, Wells Fargo, and Southern Express Companies, then owning or controlling the entire express busi-

ness of the United States. It continued to conduct such business as the agent of the Director General of Railroads until November 17, 1918, when the President, by proclamation, took over the American, and it was operated under government control during the period thereof.

On March 1, 1920, the American began operating on its own account. At that time it was the only express company doing business in Georgia. Prior to September 1, 1920, the American was operating on practically all railroads in Georgia. It paid the railroads slightly more than 50 per cent. of gross receipts for their services. Under this division it had been and was losing money, and it proposed a new contract to the railroads, increasing its percentage. This contract was accepted by practically all railroads in the United States, except those composing the Southern Railway System.

The Southeastern Express Company (hereinafter styled the Southeastern) was organized through the agency of the Southern Railway Company and the Mobile & Ohio Railroad Company (controlled by the Southern Railway Company), and began business in the state of Georgia on May 1, 1921. The American has its lines on practically all railways in Georgia except those embraced in the Southern Railway System. The Southeastern has its lines on those of the Southern Railway System.

On August 30, 1920, the American filed with Railroad Commission of Georgia a schedule of tariffs entitled:

American Railway Express Company
In connection with

Canadian Express Company.....Ex 5—No. 2. P. A. No. 2.
Canadian National Express Company.....Ex 5—No. 1. P. A. No. 1.
Dominion Express Company.....Ex 5—No. 18. P. A. No. 3.

Local and Joint Schedule of First and Second-Class Express Rates.

Just before May 1, 1921, the Southeastern filed with the Railroad Commission of Georgia its concurrence in the above schedule of rates. On April 28, 1921, the American filed a supplement to said tariff, effective May 1, 1921, containing the following:

"This tariff will apply from offices of the American Railway Express Company to offices of the American Railway Express Company, Canadian Express Company, Canadian National Express Company and Dominion Express Company; also from exclusive offices of the American Railway Express Company to exclusive offices of the Southeastern Express Company; also from exclusive offices of the Southeastern Express Company to exclusive offices of the American Railway Express Company, Canadian Express Company, Canadian National Express Company and Dominion Express Company; also from offices of the Southeastern Express Company to offices of the Southeastern Express Company.

"*Routing.*—Shipments destined to offices reached by both the American Railway Express Company and the Southeastern Express Company shall be forwarded by the Company receiving the same by shipment over its own lines to destination."

The entire purpose of this supplement was to specify the points between which joint rates with the Southeastern would be charged. Prior to the filing of this supplement, no joint rates had been agreed on or fixed for business between the American and Southeastern.

On May 18, 1921, the American proposed the establishment of certain through routes for traffic between itself and the Southeastern in addition to the points indicated in said supplement of May 1st. On notification from the Southeastern that it would not accede to such proposal, the American prepared a supplement to former tariffs, indicating these and certain additional routes, and on May 31st filed the same with said Railroad Commission. No hearing by, or action of, the Commission thereon has been had.

Thereafter the American refused to accept shipments from the Southeastern on joint rates, except from and to exclusive points, as stated in said supplement of May 1st and over the through routes designated in said supplement of May 31st. It refused to accept other shipments except on local rates.

On June 24, 1921, without notice to the American or hearing, said Railroad Commission issued an order entitled "In re Numerous Complaints by Shippers, as to Express Services, Facilities, and Practices as to Intrastate Traffic within Georgia," which concluded as follows:

"It is therefore ordered, after consideration of all the foregoing, that the said two restrictive paragraphs in the special supplement filed with this Commission by the American Railway Express Company under date of April 28, 1921, to become effective on May 1, 1921, in so far as they relate to and affect intrastate traffic in Georgia, be and they are hereby disapproved, and the said company is hereby directed to file with this Commission within ten (10) days from this date an amended copy of said supplement with the said restrictive paragraphs as to the Southeastern Express Company stricken therefrom.

"It is further ordered, that the American Railway Express Company and the Southeastern Express Company, both now operating in the state of Georgia, be and they are hereby directed to receive from each other for transportation between points wholly within this state, at all terminal or intermediate points of physical contact or connection of routes or rail lines over which they have, respectively, established routes, all express matter duly tendered to each other, and forward the same with due regard to the interests of shippers and in accordance with the rules and regulations of this Commission hereinbefore quoted, this specific direction and order to become effective within three days from this date.

"By Order of the Railroad Commission of Georgia, this June 24, 1921."

This bill is filed to enjoin said order on the grounds: (1) That the order is too indefinite and uncertain to be enforceable; (2) that it is void because issued without notice, or hearing, or an opportunity to be heard, and is therefore in violation of the Constitution of the United States and of the state of Georgia, and the statutes of said state applicable thereto; (3) that it is void because it seeks to establish through routes and joint rates without statutory authority therefore; (4) that it is void because unjust and unreasonable.

[1] The order is not too uncertain to be enforceable. As conceded by both parties, it requires the receipt of express matter for transportation, not only over routes jointly established by the American and Southeastern, but these companies are ordered to receive such matter at all terminal or intermediate points of physical contact or connection of routes or rail lines over which they have *respectively* established routes, and, as emphasizing this, the American is required to strike the restrictive clauses of its tariff filed April 28, 1921, and refile its tariff

without such restrictions as applicable to the Southeastern. It is therefore to be assumed that the Commission intended to make the tariff applicable as a through tariff at all points of contact for business there tendered, though originating elsewhere.

[2, 3] The question therefore arises: Has this tariff been properly established, and is it a lawful exercise of power on the part of the Commission? That the Commission has no express power to establish through routes appears quite plain. Its power is confined to making through rates. This power is expressly limited by the proviso that, before applying the same to carriers, not under the control of the same company, they shall give 30 days' notice to such carriers of the joint rate contemplated and of its division between said carriers, and give a hearing to the carriers desiring to object to the same. Code of Georgia (1910) § 2630.

Take the illustration admitted by the counsel for the Commission to be quite possible under this order i. e., of a shipment from Atlanta to Forsyth, Ga., taken by the Southeastern at Atlanta. The tariff is based on the block distance by the direct route from Atlanta to Forsyth (about 75 miles). This route is via the American. The Southeastern would take it to Macon, approximately 90 miles, and deliver it to the American for transportation, 28 miles, to Forsyth. The Southeastern does not propose to pay the American its local rate for the 28 miles, but a pro rata of the rate based on the 75 miles or block distance from Atlanta to Forsyth; that being the rate stated in the tariff established by the Commission's order.

It is quite evident that no joint rates between the American and Southeastern existed when by its supplement of April 28, 1921, the American offered to institute such rates between exclusive offices of these respective companies as therein stated and proposed the additional lines named in the supplement of May 31, 1921. It will not do to say the Commission is not instituting joint rates by ordering the American to strike out the words which would offer a limited number of joint rates to the Southeastern and thus compel the American to greatly increase the joint rates so offered.

While the Commission would not be prevented by an approval of the proposed supplements from proceeding in the manner provided in Code, § 2630, to provide additional joint rates and the division thereof in cases where the public interest dictated such action, it cannot, by an order such as that of June 24, 1921, accept such joint rates as are there tendered, and by striking out the restrictive clauses, without notice or hearing, convert the proposed joint tariff into one of much wider scope.

[4] Not only has no joint rate been applied as between these carriers, on notice and opportunity for hearing to the American, but no divisions of such rate have been fixed. It is no reply to say that, if the carriers cannot agree, the Commission will then fix the division. The statute requires that the division be first fixed and the opportunity to be heard and contest the division be given, before the service is required. The order, therefore, is invalid for want of notice and hearing as required by the statute, and has not afforded due process of law.

[5] Again, the order, so far as it may require joint rates in instances like the foregoing, would be unreasonable. The power granted to the Commission is to fix "*just and reasonable* joint rates" and divisions thereof between connecting carriers, and is one to be exercised for the public interest. It never was intended to permit one carrier to short-haul another in the interest of its own business, unless a most decided case of promotion of the public service demanded it.

Where a carrier is furnishing reasonable facilities to the public, it cannot be required to open its exclusive business facilities to a competitor, or enter into joint arrangements with it to promote its business. We therefore think that in this case, if the Commission establishes joint rates between these carriers, it should designate the routes over which such rates are to apply and the division thereof in the light of the above principles.

The order of the Commission, so far as it attempts to create joint rates between said American and Southeastern Companies, is void as made without due notice or in accordance with the statute (Code, § 2630), and should be enjoined, without prejudice to the Commission to proceed under said statute to fix just and reasonable joint rates and apply the same and the divisions thereof, on due notice to the carriers affected thereby.

HELFI CO. v. SILVEX CO. et al.

(District Court, E. D. Pennsylvania. July 25, 1921.)

No. 1851.

1. Trade-marks and trade-names and unfair competition ⇐70(1)—Competitive sale of similar article, free from deceit, is not unfair competition.
The copying by defendant of an article made by complainant, not protected by patent, and its sale in competition, does not constitute unfair competition, unless accompanied by acts tending to create confusion as to origin of defendant's article, or to induce purchasers to believe that it is complainant's product.

2. Patents ⇐328—1,061,915, for a spark plug, held void for lack of invention.
The Charles F. Johnston patent, No. 1,061,915, for a spark plug, *held* void for lack of invention.

In Equity. Suit by the Helfi Company against the Silvex Company and the Bethlehem Spark Plug Company. Decree for defendants.

Chester N. Farr, Jr., and William A. Glasgow, Jr., both of Philadelphia, Pa., and Wallace R. Lane and George Mankle, both of Chicago, Ill., for plaintiff.

Dallett H. Wilson and Edward H. Schwab, both of Bethlehem, Pa., and J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. Before the incorporation into the equity rules of the principle embodied in rule 26 (198 Fed. xxv, 115 C. C. A. xxv) this bill of complaint would have been open to the charge of

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

multifariousness. It combines in one complaint two wholly different and independent causes of action. One is based upon an averment of a trespass upon the patent rights of the plaintiff; the other upon an averment of unfair competition. More than this, of one this court has jurisdiction and may entertain, and of the other by itself we can entertain jurisdiction only because of the consent presumed because of the waiver of the defendants' rights implied by the failure to raise the question of jurisdiction. Having jurisdiction of the cause and of the parties in respect to one cause of action, this court, on the principle of doing full and complete justice, may of course proceed to determine all the questions raised. It is well, however, for the purpose of clarity, to keep the discussion of each clear of all admixture of the other. We would have been much helped in this effort if the parties had kept the two complaints clear of each other. This has not always been done, either in the development of the facts or the discussion of the merits of the cause. More than this, most of the testimony was by way of depositions, and the record has been swelled by discursive statements, none of which are in any sense evidential and have only the purpose of disparagement.

[1] *Unfair Competition.*—This complaint will be first heard. To get the facts upon which this complaint is based, we have been forced to go over, with painful attention, the whole of the evidence and all the testimony of all the witnesses other than the patent expert testimony. The gravamen of the charge consists in averments to the following effect:

The plaintiff had on sale a spark plug, to the exclusive sale of which they not only had a proprietary right under the patent laws, but a make of plug which had become known to users by the distinctive name of the "Helfi" plug. This name, and the exclusive right to the use of it, had been secured to the plaintiff by its registration as a trade-mark. A reputation had been built up for plaintiffs' make of plug under this name by an extended and expensive campaign of advertising, conducted along their own lines, and with the aid of pictorial illustrations of artistic merit and original design. The services of the defendants had been enlisted in the marketing of this make of plug, by becoming the sellers of it, through which connection the defendants had learned of the plaintiff's plan of advertising campaign in all its methods and details and became possessed of a list of plaintiffs' customers.

The charge is made that the defendants broke with the plaintiff, ended all relations, and set up as rival contestants for plaintiff's trade, and in order to share in it copied not only plaintiff's make of plug, but followed the same advertising methods, used the same illustrations in the unfair, but successful, attempt to create the impression among buyers and users of spark plugs that what the defendants were selling was the spark plug of the plaintiff for which they had built up a reputation. We are unable to make the fact findings upon which a charge of unfair competition could be based. The sincerity of plaintiff's emphatic assertions of belief in the charge is due to a misconception of what unfair competition is, and the failure to get the right view of defendants' conduct and motives.

The plaintiff claims to have been the first to put these plugs upon the market. We have frequently before had occasion to observe that whenever any one has a special make of anything, for which he has created a market, or whenever he is the first to discover or occupy a new commercial field, there is a proneness to set up an exclusive proprietorship in such specialty and to the field thus occupied. As has before been remarked, this feeling of exclusive ownership is so general and sincere as that there must be some basis for it in the common sense of right and justice. Indeed, it is this common feeling which prompts the grant of the legal rights awarded by our patent, trade-mark and copyright laws.

Beyond the reach and scope of these laws, however, the legal right does not exist, because there is otherwise no recognition by the law of any exclusive right. The refusal to give such recognition is built upon a policy of the law adopted in deference to the need which the public has of protection against the evils of monopoly. The need, as well as wisdom, of such a policy, is attested by the fact that the accusation most insistently made and indignantly repelled is that of lowering the price charged for these spark plugs. The fact is worthy of comment that each of these litigants deems this to be the most damaging accusation which can be hurled against the other.

The doctrine of the law of unfair competition is wholly different from the law of patent rights and has another basis. This is built upon the right of every man to the enjoyment of the benefits of the business as well as the personal reputation he has made for himself. No rival is permitted to deprive him of this personal reputation by destroying it by the arts of detraction or slander, or to divert the benefits of this business reputation by creating the deception that what the one is selling is what the other has made. The test of the representations made is not in the thought that one product is like the other, or indeed identical in kind and quality with the other, but in the thought of origin. What the defendants did may or may not have been an ungracious thing; it may have been what, in the common phrase, is called "not the decent thing"; but it was not unlawful, nor was it unfair in the legal sense.

The real indictment of the defendants is found, not in the fact that they imposed their make of plug as the plug made by the plaintiff, but because they set themselves up as rivals, striving to supplant plaintiff's make of plug with a make of their own. It is true the plug in kind and accomplishments was the same plug, but the make was that of defendants, and not plaintiff. Indeed, defendants would have defeated their own purpose if they had represented, or even permitted purchasers to think, the plugs made by them to be plaintiff's make of plug.

The prompting, purpose, and accomplished result of what defendants are charged with having done was this:

A plug was being made and sold by the plaintiff; it was a good plug; the defendants thought, however, the price was high, and that there was more money to be made through a lowered price; the plaintiff stood out for the higher price. Such was the situation. It was met by the defendants with the thought that, if the plaintiff had an exclusive proprietary right to market a plug of this kind, they of course could control its sale;

otherwise, any one was legally free to put it upon the market. The defendants were of opinion that the right to sell was not exclusive, and took the risk involved in acting upon the soundness of this opinion.

The position of the plaintiff is that the defendants sold a Chinese copy, as it is commonly called, of the plaintiff's plug. If the novel features of this plug are functional, the defendants have infringed plaintiff's patent; if they are not functional, and because of this not patentable as a mere special make of plug, then the defendants have been guilty of unfair competition. The support of each horn of this dilemma is a legal right. If the claims of the patent are valid claims, the first has support; but there is no support for the other in a claim to an exclusive right in a mere special make of spark plug lacking in patentable features. The support, if there is any, is in the finding of an imposition of one make upon purchasers for the other. This is the finding which we refuse to make. Indeed, it is not possible to go over this record without being impressed with the thought that the gravamen of the complaint is not so much the competitive sale by defendants of plaintiff's spark plugs as it is of the handicap imposed upon plaintiff in the competition for trade.

The plaintiffs were hampered by the lack of adequate capital and of business prestige. They could build up their reputation only by building up their trade, and the want of the one was felt to hinder the other. They saw, with feelings of apprehension, a competitor enter the field supplied with unlimited resources, backed by a business reputation which sprang out of the glamor surrounding the name of a great steel plant. This was felt to be unfair, not only in the sense in which unfairness is felt when one enters into competition with those who are not in his class, but also because the defendants were thought to be seeking trade through a reputation not their own, and one in which they had no just share. The resources of the defendants in money and organization enabled them to go into new fields which the plaintiffs could not reach, and to go heralded by the reputation of a name synonymous with business success. The plaintiffs felt themselves helpless in the face of such a rivalry. However much we may appreciate and sympathize with them in this feeling, we cannot extend to them the aid of the power of the law. The consequence is that their cause of action rests wholly upon their claim to a patent right.

[2] *The Patent.*—This feature of the case concerns letters patent No. 1,061,915, applied for February 4, 1911 and issued May 13, 1913, for an improvement in spark plugs, intended chiefly for use in automobiles. The defense is invalidity. A main utility merit claimed for this spark plug is that previously to its introduction users of cars were troubled with "the carbonization and sooting of the cylinders." This made necessary the overhauling of the engine, with its attendant annoyance to users, expense, and temporary loss of the service of the car. The advantage of avoiding this is claimed to be due to or to result in the production of a larger spark. Because larger, it is "more diffused" and is hotter, and, being produced where its work is most effective, it thus brings about a more complete combustion as the explosion occurs. Utility is denied to some features of plaintiff's plug. As a practical

question, any criticism of a claimed invention on this ground (if infringement be present) is disposed of by the infringing act. Such a criticism by an infringer is usually worse than idle. By making the criticism good, he goes dangerously near at least the border land of unfair competition. If the device or feature imitated is useless, why was it imitated? The only possible answer is that the purchasing public had been educated into believing the inutile thing to have value. If this market demand, although baseless, had been created by one maker, a second, who seeks to get the benefit of it, is striving to appropriate the fruits of another's labors. He may stop short of the unfair competition which would subject him to an action for damages; but any assertion of the worthlessness of what he has appropriated proclaims the assertion worthless, or at least unsafe to accept.

We will not further trouble ourselves with any inquiry into utility. It holds out no promise of being worth while itself. The real question presented is whether the defendants had a like right with the plaintiff to sell these spark plugs. They had such right, unless the plaintiff's patentee had invented and patented them. The right of the defendants, if any, may be best tested by the results of the inquiry of whether the inventive ideas embodied in these plugs were derived by plaintiff and defendants alike from a common source. The fact, which is a fact in the defendants' conduct boldly admitted, that they appropriated plaintiff's make of plug, does not affect the right, if that make of plug was common property. We may begin the inquiry by learning the resources of the prior art and then comparing these possessions with what the defendants have, or by first learning to what the plaintiff lays claim, and then looking for this in the prior art.

The second method has its advantages, and because of this is commonly employed. The thought of spark plugs was part of the common fund of knowledge. This narrows our inquiry, so that we look, not for spark plugs, but for particular makes. Every invention, when viewed as embraced in a physical structure, includes a function and the means of performing it. The function may be a broad or a particular subordinate one. The riddance of sooting is one of those claimed. The thought of this purpose antedates all the patents. It was at least one of the aims of the present patentee. In addition, or supplementary to this, he strove for a larger spark. These were his main objectives. The ultimate one was of course to assure or at least promote ignition. The prevention or removal of soot deposits would do this. The presence of a large spark would assure ignition whether the cause or effect of the absence of sooting. The patentee, in consequence, places the large spark first and emphasizes it. A subordinate purpose was to facilitate the cleaning process, if found necessary.

Let us keep these objectives in mind as we probe into the prior art: (1) Prevention or removal of soot deposits; (2) the assurance of a spark in order to have combustion, in the absence or presence of soot; and (3) facilities for cleaning. All of these objectives were old. Our inquiry may in consequence be confined to the means proposed. What are they, how far are they novel, and to what extent do they involve invention? Wherever there is patentable invention, there is

both an idea and an embodiment of it. This patentee has sought to cover every possible form of spark plug construction, but this is for the avowed purpose of protecting essential features from encroachment. These features are the projection of the electrodes beyond the casing or any form of housing, multiple electrodes, their parallelism at their extremities within sparking proximity, and some basket or other form of arrangement productive of a splitting up of the gases. These are the features of the invented device. They are redescribed by an enumeration of their functions. The last-mentioned feature can only thus be described.

It thus becomes apparent that in this device there can be no combination in which real invention is present, unless one or more of the elements combined possesses novelty. The experience of this application in the Patent Office, as disclosed by the file wrapper, makes, it seems to us, the absence of invention clear. The very problem presented by his employers to the patentee emphasizes it. He was not called upon necessarily to invent anything, but merely to get up a special make of spark plug, which the plaintiff might put on the market as their make. The giving to it of a trade-name and protecting the name by a trade-mark and the charge of unfair competition are all admissions of the absence of a patent right. The distinction between a special make of anything which may have the protection of a trade-mark, and an invention to which is given the reward of a patent of monopoly, is basic and important. Which is one and which the other may be determined by subjecting the question to the test of the rights of the claimant to exclusive proprietorship and the rights of any intending competitor.

The right of the one is to go to the prior art (assuming it to be common property) and with its aid to get up a special make of anything. He may have invented nothing, but yet the maker may protect this special make by a trade-mark. This gives him, however, only the exclusive right to his make, not the exclusive right to the thing made, or to make the thing itself. If, however, invention is involved in what he has done, then his right is not merely to his make of what he has made, but is the exclusive right to make, and this right is assured to him by a patent. If the first maker has no patent, but only a trade-mark, any competitor may make what the first maker has made with impunity, as long as he respects the first make and the name by which it is known. In other words, when there is no invention, the test is not whether there is substantial likeness or even identity in the things made, but whether there is confusion of the makers. Where invention is present, substantial equivalency in what is made is the test. As we view it, the claims of the letters patent issued, or indeed any claims which could be formulated, based upon the features of plaintiff's spark plug, would be inclusive of any spark plug which could be devised by any one instructed wholly by the prior art, unless he omitted features admittedly present in that art.

These conclusions result in a finding that the claims of the patent in issue are of no validity, and that the averments of unfair competition are not sustained, and, in consequence, the bill of complaint is dismissed, with costs, for want of equity.

BATES & ROGERS CONST. CO. v. BOARD OF COM'RS OF CUYAHOGA COUNTY, OHIO.

(District Court, N. D. Ohio, E. D. July 16, 1920.)

No. 10275.

1. **Bridges ⇐20(4)—Failure to furnish and deliver site to contractor is a breach of promise, for which damages may be recovered.**
A contract for the construction of approaches to a bridge carries with it an implied covenant to deliver the site in a condition to permit the work to be done, and a failure is a wrongful breach, for which the contractor may recover damages.

2. **Bridges ⇐20(4)—Where contract fixed no time for delivery of site to contractor, delivery must be within reasonable time.**
Where a contract for the construction of bridge approaches required the work to be done within a specified time, but made no provision as to when the site for the work should be delivered to the contractor, the law implies that the site should be ready for delivery either on execution of the contract or within a reasonable time thereafter.

3. **Contracts ⇐296—Owner must be deemed to have warranted that plans and specifications were sufficient.**
Where work was to be done according to plans and specifications on file, the owner, or the one engaging the work done, will be deemed to have warranted their sufficiency, and the contractor may recover, where they were changed and such change caused injury.

4. **Bridges ⇐20(4)—County liable to contractor, who is injured by failure to deliver site for work.**
As full power is conferred upon county commissioners by Gen. Code Ohio, §§ 2333–2361, to contract for the construction of bridges, and as section 2408 authorizes the county commissioners to bring and defend suits involving injury to any roads, etc., the county is liable to a contractor injured by failure of the county authorities to deliver the site for the work within a reasonable time and by change in plans and specifications, notwithstanding section 2359 and related sections require a preliminary estimate of the cost of the entire work, and forbid the letting of the contract at a price exceeding such cost, and section 5660 requires a certificate of the county auditor that funds are in the treasury or in the process of collection sufficient to defray the expense, for, were any other rule followed, great confusion would result, and the latter sections must be deemed merely to describe conditions precedent to liability on a contract.

5. **Bridges ⇐20(4)—Prohibition against extra compensation will not prevent bridge contractor from recovering for breach of contract by county.**
Although Const. art. 2, § 29, declares that no compensation shall be made to any public officer after the service shall have been rendered or the contract entered into, etc., a contractor who was to build approaches to a bridge may, in case of breach of contract by the county in delivering the site, etc., recover damages.

6. **Pleading ⇐216(2)—Only allegations of petition can be considered on demurrer.**
Under Gen. Code Ohio, § 11333, the court, on demurrer to a petition, can consider only the allegations of the petition, and not exhibits attached thereto.

7. **Bridges ⇐20(4)—In case of failure to deliver site within time, contractor is not restricted to a mere extension of time for performance.**
In case of failure of county authorities to deliver site to the contractor for work within time, the contractor is not restricted to an extension of time for performance, but may recover damages resulting, notwithstand-

ing the contract provided for liquidated daily damages in case of the contractor's failure to complete within the time specified.

8. **Bridges ⟸20(4)—Provision allowing engineer to suspend work will not warrant discontinuance entirely for other reasons.**
A provision in a contract for the construction of bridge approaches, allowing the engineer to suspend work, must be deemed to relate to any part or portion, and not the whole work, and the act of the county in discontinuing the entire work for its own interest cannot be justified under such provision, so as to escape liability to the contractor who was thus injured.

9. **Contracts ⟸296—Provision allowing change by engineer held not to contemplate substantial modification.**
A provision allowing the engineer to make alterations, to be paid for at the contract price, will not prevent the contractor from recovering for substantial modifications of the contract, which changed the entire work.

10. **Bridges ⟸20(4)—Provision for payment on engineer's estimates will not preclude recovery for breach.**
A provision in a contract for bridge approaches for payment on estimates of the engineer will not preclude the contractor from recovering damages for a substantial breach of the contract, caused by failure to deliver the site within a reasonable time and a substantial change of specifications.

At Law. Action by the Bates & Rogers Construction Company against the Board of Commissioners of Cuyahoga County, Ohio. On demurrer to the petition. Demurrer overruled.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff.

Samuel Doerfler, County Prosecutor, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This cause is before me on general demurrer of defendant to the first cause of action in plaintiff's petition. This cause of action is based on alleged breaches of a written contract for the construction of approaches to the Detroit-Superior bridge in the city of Cleveland, Ohio. The breaches complained of, and as a result of which plaintiff seeks to recover damages, are two: (1) That defendant failed in a reasonable time to deliver possession to the plaintiff of the sites upon which the approaches were to be constructed, as by its contract it was required to do. (2) That the plans and specifications for the work to be done which defendant was required to furnish, and which were on file at the time the contract was entered into, were during the progress of the work modified, changed, and altered, thereby causing great delay, to the damage of plaintiff. Defendant's main contentions are that for injuries of this character, no action can be maintained against the county commissioners of an Ohio county, and that, even if such an action may be maintained, the defendant is not liable for damages due to a delay caused by the wrongful neglect or default of the county commissioners.

No doubt is entertained by me that the contract required the defendant to deliver the site upon which the plaintiff was to do the work within at least a reasonable time, nor that the defendant was required to furnish completed plans and specifications whereby the contract work

might be done either at or before the time the plaintiff undertook to do the work, and that consequently, if defendant were a private corporation, plaintiff would have a right to recover such damages as resulted from the wrongful delays thereby occasioned, unless its right so to recover is prevented by other provisions of the contract, later to be noted.

[1] A few only of the important facts set forth in the petition need to be now stated. The work to be done consisted in the construction of subways and approaches to the bridge in question, with appropriate underground waiting stations, of reinforced concrete, so as to allow traffic access to the bridge at either end, and to permit the flow of pedestrian and vehicular traffic on an upper level, and street railway traffic on a lower level. These approaches were to be constructed in public highways, which were, at the time the contract was made, incumbered by buildings, lines of street railway, with poles and trolleys, lines of telephone and telegraph, and substructures, such as water mains, sewers, gas mains, and telephone and telegraph conduits. All these had to be removed before full possession of the site for the approaches could be delivered and the construction work could begin and progress. The petition alleges, and the fair interpretation of the contract is, that plaintiff was not obliged to remove any of these obstructions, but that all this work was to be done by the defendant. Time, it is alleged, was of the essence of the contract. The contractor was given 175 days after an order to start the work was given by the engineer within which to complete the work, and liquidated damages were imposed in the sum of $500 for the first day, and increased $25 for each additional day of delay beyond the 175 days allowed for completing the work. Plaintiff, it is alleged, was assured before entering into the contract that full possession of the east approach would be given December 1, 1916, with the right to proceed with the work before this formal order to start was given, and that full possession would be given of the west approach not later than March 1, 1917, as of which date the formal order to start work would be given, and the 175 days would begin to run from the last-named date. These respective dates, it is alleged, were in fact a reasonable time within which the defendant should remove all obstructions and deliver full possession.

[2] That an implied, if not express, covenant is contained in this contract, requiring defendant to furnish and deliver the site in a condition to permit the work to be done, and that a failure so to do is a wrongful breach of the contract for which the contractor may recover damages, is well settled by numerous cases. See Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 340, 39 Sup. Ct. 102, 63 L. Ed. 275; Mansfield v. N. Y. Central, etc., Co., 102 N. Y. 205, 6 N. E. 386; Blanchard v. Blackstone, 102 Mass. 343; Allamon v. Mayor of Albany, 43 Barb. (N. Y.) 33; King Bridge Co. v. St. Louis (C. C.) 43 Fed. 768, 10 L. R. A. 826. Assuming, without deciding, as is contended by the defendant, that the assurance given as to the date when possession of the site would be delivered cannot be proved, because, even though the written contract was silent with respect thereto, it must nevertheless control, then the law implies either that the site should be ready for

delivery upon execution of the contract or at least within a reasonable time thereafter. See same authorities, and Elliott on Contracts, § 3713. Plaintiff has elected to adopt the theory that, if the assurances given do not control, then the rule of a reasonable time should prevail, and alleges the respective dates at which defendant assured plaintiff the site would be delivered is a reasonable time. I shall dispose of the demurrer upon the rule adopted by plaintiff.

[3] That defendant was also required by its contract to furnish the necessary plans and specifications sufficient to permit the performance by plaintiff of its contract, either at the time the contract was entered into or within a reasonable time thereafter, and that the plans and specifications on file and made a part of the contract are warranted to be sufficient and adequate for that purpose, is equally well-settled law. See the authorities above cited. The written contract obliges the plaintiff to construct the approaches in conformity with specifications and plans now on file in the office of the engineer. Plaintiff alleges that, after the work had progressed to the level shown on these plans, certain of the plans were changed by defendant to meet certain new conditions and improvements not in contemplation of the parties at the time the contract was made, which changes required excavation to a greater depth and modification of design of certain parts of the work to be done, and thereby caused great delay in the completion of the entire contract.

Plaintiff further alleges that, had full possession of the sites been delivered as contemplated and as was required, and had not the changes and modifications been made in the plans and designs of the work, the plaintiff could and would have been able to complete the work as originally contemplated, by July 31, 1917; that in consequence of this failure to deliver possession until approximately four months later than the date when such possession should have been delivered, and of these changes and modifications in the plans and specifications, plaintiff was so delayed that it was not able to complete the work until October 30, 1918, and that plaintiff was, as a result of these delays, obliged to do the work during two winter seasons, under adverse weather conditions, at great disadvantage, and during a period of time when, owing to war conditions, there was a shortage of labor, and wages and prices of material were constantly and rapidly rising. This increased cost and expense, it is alleged, amounts to $199,000.

As already said, upon the principles and authorities above noted, a good cause of action, it seems to me, is thereby stated, if defendant is subject to the same legal responsibilities under its contract as is a private corporation. Defendant's contention that it is not so liable, and that, on the other hand, no legal right exists to sue a county in this situation, and even that, if it may be sued, it is not responsible for damages arising by reason of delays thus caused, is not, in my opinion, sustainable. All the cases cited in support of this contention have been given due consideration, and do not, it seems to me, when rightly understood, support it.

[4] Full power to contract for the construction of bridges is conferred upon county commissioners by certain provisions of the Ohio statutes. General Code, §§ 2333–2361. True, certain formal requirements are provided, such as preparation of plans and specifications, the previous making of an estimate of the cost of the work to be done, the letting of the contract to the lowest bidder after due advertising, approval by the prosecuting attorney, etc.; but the petition alleges, and so far as appears, all these conditions precedent to the making and entering into a valid and binding contract were complied with. I am not overlooking defendant's contention that the damages which plaintiff seeks to recover are outside and in excess of the estimates thus made, and are not within the express language of these sections, and shall make some observations later on with respect thereto. For the present, the point I wish to emphasize is that full authority is conferred by law on county commissioners to make the contract sued on, and that the statutory requirements in so doing, it is averred, were complied with. This being so, no doubt exists that county commissioners may be sued to enforce any liability created thereby in favor of the other contracting party, and that the language of section 2408, G. C., authorizing the county commissioners to bring, maintain, and defend all suits at law or in equity involving injury to any public, state, or county road, bridge, ditch, drain, or water course, and for certain other specific purposes, is not to be taken as a limitation, either on the right to sue or the liability to be sued, respecting contracts lawfully made.

This proposition has often been held and decided in Ohio, and the general rule is that the capacity to sue and to be sued, and to prosecute and defend all suits in law or in equity, is commensurate with the official powers and duties of county commissioners, and embraces all causes of action arising out of the duties and powers vested in them by law. The net result of these several decisions is, in my opinion, correctly summed up in Commissioners v. Ziegelhofer, 38 Ohio St. 523, 529, in these words:

"Here the claim is founded upon contract, and grows out of the corporate liability of the county for the official acts of the board of county commissioners. In this respect, the rights of persons contracting with the commissioners, and the liability of the county on their contracts, are of the same nature as the corporate liability of private corporations. In either case, the capacity to contract is derived from the statute, but the liability to others arises from the acts of those authorized to bind the corporate body."

See, also, the following: Shanklin v. Commissioners of Madison County, 21 Ohio St. 575; 582, 583; Commissioner v. Noyes, 35 Ohio St. 201, 206, 207; State ex rel. Jewett v. Sayre, 91 Ohio St. 85, 109 N. E. 636; Paine v. Portage County, Wright (Ohio) 417; Kinney v. Commissioners, 8 Ohio Cir. Ct. R. 433; McLean v. Hamilton County, Fed. Cas. No. 8881.

In State ex rel. Jewett v. Sayre, it is in effect held that county commissioners are liable in damages for the breach of an express or implied covenant in a road construction contract, and that they may

compromise and adjust that liability and order its payment from public funds. In McLean v. Hamilton County, both contentions now made by defendant were there made, and it is held that a contractor might sue and recover against county commissioners of an Ohio county damages due to a wrongful breach of a construction contract.

Defendant cites and relies upon the following authorities: Commissioners of Hamilton County v. Mighels, 7 Ohio St. 110; Grimwood v. Commissioners, 23 Ohio St. 600; Finch v. Board, 30 Ohio St. 37, 27 Am. Rep. 414; Board v. Volk, 72 Ohio St. 469, 74 N. E. 646; Board v. Storage Co., 75 Ohio St. 244, 79 N. E. 237; Commissioner v. Gates, 83 Ohio St. 19, 93 N. E. 255. All of these cases are of the same general character and involve the same legal principles as Commissioners of Hamilton County v. Mighels. In this case it was held that a county is not liable in an action for damages due to the negligence of its commissioners in the maintenance of a public building whereby a person lawfully therein sustained personal injuries. However, in the opinion, at page 116, it is recognized that a county would be liable for damages growing out of a wrongful breach of a contract lawfully entered into. It will also be noted in passing that the authority of the other cases is somewhat shaken by the recent decision of the Ohio Supreme Court in Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131, particularly in consequence of the reasoning upon which the judgment therein rests. See 100 Ohio St. 175, 126 N. E. 72, 9 A. L. R. 131; Ohio Law Reporter, March 15, 1920.

Defendant further alleges in support of its contention that, if a recovery is here permitted, sections 2359 and 5660, G. C., will be violated, and that therefore no cause of action is stated, because to allow a recovery would be to violate these sections. Section 2359, G. C., and related sections, require a preliminary estimate of the cost of the entire work to be made, and forbid the letting of a contract at a price in excess of that estimate. Section 5660 requires a certificate of the county auditor that funds are in the treasury or in process of collection, not appropriated for any other purpose, sufficient to meet the liability created by the contract. It is urged that these provisions of the law evidence a fixed purpose to limit the liability of a contract lawfully entered into, so that no burden can be placed upon the taxpayers in excess of the preliminary estimate or of the amount so certified, and that no action can be maintained to recover any sum which may be in excess thereof. Upon principle and sound reasoning it does not seem to me that this can be the force and effect of these sections. Undoubtedly it is the law that no recovery can be had upon a contract entered into in violation of the provisions of section 2359 and related sections, nor in violation of section 5660 in cases to which that section is applicable.

But this is a different proposition from saying that no recovery can be had upon a contract entered into in conformity to these sections, which is afterwards wrongfully breached by the county commissioners, even though the damages thereby sustained are not included as a part of the estimate, or if added to expenditures previously made on account of the contract may be in excess of the estimate or of the certificate.

These sections at most prescribe certain mandatory conditions precedent to the exercise by county commissioners of the power to contract; but when these conditions have in good faith been met and complied with, as is averred in the petition, then upon principle it would seem that the liability of both contracting parties becomes and thereafter remains the same as exists between private contracting parties; otherwise, if, peradventure, the public authorities had in good faith miscalculated the cost of performing a public work upon unit prices, the contract must be regarded as annulled and the contractor exonerated from further liability, whenever it appears that the preliminary estimate and certificate would be exceeded. A construction of these sections which would produce these absurd and inconvenient consequences ought not to be adopted, unless such is the only permissible construction of the language used, or unless impelled so to do by controlling decisions of the court of last resort of the state of Ohio.

[5] It does not seem to me that this construction is required by the decisions. Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N. E. 372, and kindred cases, merely hold that no action can be maintained if a contract has been originally entered into in violation of these mandatory conditions precedent. Section 29, art. 2, of the Constitution of Ohio, seems to me to be without pertinency. Carthage v. Dickmeier, 79 Ohio St. 323, 87 N. E. 178, at first reading, may seem to forbid a recovery of any amount in excess of the certificate; but I do not find that this case has ever been followed or approved, and should, in cases where a certificate is required, be confined to the special facts of that case. On the other hand, this bridge, as appears from the petition, was to be wholly constructed from the proceeds of bond issues lawfully authorized by a vote of the electors, and, with respect to contracts thus to be paid for, it is settled law in Ohio that the auditor's certificate is not an essential condition to a valid and binding contract. See Comstock v. Nelsonville, 61 Ohio St. 288, 56 N. E. 15; Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269; Akron v. Dobson, 81 Ohio St. 66, 90 N. E. 123; also inferior court decisions in note to section 3806, G. C. True, all these cases relate to contracts made by municipalities; but section 5660 is in the same language as section 3806 and kindred sections, and was a later enactment of the provisions of the Burns Law originally applicable alone to municipalities. The same construction should on familiar principles be applied to both.

[6] Certain additional contentions are made, depending on the phraseology and construction of certain provisions of the written contract sued on. This contract and its provisions, except as pleaded in the petition, are not properly before me, nor subject to examination in passing on this demurrer, notwithstanding a copy of the contract is attached to and made a part of the petition. The sufficiency of the petition must be judged by its allegations, and not by exhibits attached thereto. See section 11333, G. C.; Larimore v. Wells, 29 Ohio St. 13. However, as counsel for both parties orally and by briefs have discussed these questions, it is not, perhaps, exceeding my duty to express briefly my opinion thereon.

[7] Defendant contends that, inasmuch as the 175 days' time was to run only from the giving of the formal order to start work, and that no time was fixed for the giving of this notice, the plaintiff's sole remedy for a failure to deliver possession of the site, or to give the notice within a reasonable time, is by an extension of the period within which performance was required. This proposition has already been sufficiently discussed. Nothing appears in the contract tending to support the view that the defendant might delay giving this notice, any more than delay delivery of possession of the site beyond a reasonable time.

[8] Defendant further urges that, inasmuch as paragraph 8 gives the engineer authority to suspend or discontinue work, and provides that no damages to the contractor by reason of delay incident thereto will be allowed, but that a corresponding extension of the time for completion of the contract will be given, plaintiff's right and remedy is limited exclusively to an extension of time. This does not seem to me to be the proper construction of this provision. The suspension permitted relates to any part or portion of the work, not to the entire work. The suspension is permitted only whenever, in the opinion of the engineer, the best interests of the county or the progress of the work, upon other parts or portions of the work, may demand it. This obviously does not contemplate a right in the defendant to discontinue entirely, and prevent or delay performance of the contract during any substantial period of time. Manifestly, when time is made the essence of the contract, and the contractor is required to complete it within a fixed period, he acquires an equal right to complete it during that period, and no construction of isolated paragraphs can be indulged or permitted which would destroy the essence of the contract and deprive it of its mutuality.

[9] Defendant further contends that, inasmuch as paragraphs 16 and 17 permit the engineer to make alterations in the lines, grade, plans, form, position, dimensions, or material of the work during the progress or performance, or may order any portion of the work to be left out, and that the increased amount of such work shall be paid for at the prices established by the contract, and that no damages shall be allowed because of any diminution in the quantity of the work to be done, that therefore such changes and modifications as the petition alleges were made are permitted by the terms of the contract itself, and the remedy of the plaintiff is limited to that given by section 16. This also seems to me an untenable position. The contract must be construed as a whole, and its essential provisions should not be destroyed. The right and obligation is to perform the work in strict conformity to the specifications and general plans on file and such detail plans and directions as may be issued by the engineer during the construction of the work. The right to make alterations in lines, grades, plans, etc., has a more obvious relation to these detail plans and directions, so as to permit the work to be done in substantial conformity to the general plans and specifications, and not justify or warrant such substantial changes in these general plans as destroys the subject-matter of the contract or

produces a substantial breach of it. Nor do these provisions deprive the plaintiff of his right to recover damages for a substantial breach of the contract, due to substantial change or modification of the general plans and specifications. The contractor may, it is true, either because of the failure to deliver the site within a reasonable time or because of substantial changes in the general plan or design, which would unreasonably delay the work or substantially change the subject-matter of the contract, refuse to perform further, abandon the contract, and recover damages. He may, however, elect to proceed, notwithstanding his right to abandon, and, if he does, he is not held to waive his right to recover damages. See Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 39 Sup. Ct. 102, 63 L. Ed. 275; Marsfield v. N. Y. Central, etc., Co., 102 N. Y. 205, 6 N. E. 386; United States v. Mueller, 113 U. S. 153, 5 Sup. Ct. 380, 28 L. Ed. 946; Bush v. Trustees, 2 Hudson on Building Contracts, 122.

[10] Likewise the provisions of paragraphs 18, 25, 37, and 38, relating to the power and duty of the engineer in making estimates and measurements, and in determining the quantity and quality of the work, and in making a final estimate which shall include all work of every description, and material furnished under the contract, and providing that payment of the final estimate shall release the county from any and all claims of liability on account of work performed under said contract, or any alterations thereof, it cannot be said, preclude the contractor from maintaining an action for a wrongful breach of the character herein alleged, provided, of course, he can sustain by evidence the allegations of his petition. These provisions have to deal with the performance by the engineer of his duties under the contract. The cause of action is based upon alleged breaches of the contract, with respect to which the engineer is given no power to make a decision, and is not called on to perform any duty.

For the foregoing reasons, I am of opinion that plaintiff's first cause of action is in law sufficient, and that the demurrer thereto should be and is overruled. An exception may be noted.

ONE-PIECE BIFOCAL LENS CO. v. STEAD.

(District Court, W. D. New York. July 1, 1921.)

No. 232-B.

1. **Patents ⇐328—932,965, for one-piece bifocal lens, held valid and infringed.**
The Conner patent, No. 932,965, for a one-piece bifocal lens, *held* not anticipated, valid, and infringed.

2. **Patents ⇐65—To anticipate, method of producing patented article must be shown.**
Prior inventions or discoveries, relied on to anticipate or limit a later patent for a manufactured article, must disclose a method of producing such article.

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

In Equity. Suit by the One-Piece Bifocal Lens Company against Harold J. Stead, doing business as the H. J. Stead Optical Company. Decree for complainant.

Edward Rector, of Chicago, Ill., and V. H. Lockwood, of Indianapolis, Ind., for plaintiff.

Howard P. Denison, and Eugene A. Thompson, both of Syracuse, N. Y., for defendant.

HAZEL, District Judge. [1] This suit was brought to restrain infringement of letters patent No. 932,965, of August 31, 1909, granted to plaintiff's assignor, Charles W. Conner, for a solid bifocal lens made of one piece of glass. Patents to the same inventor for the process, and patent to Alexander, No. 954,772, for the product were originally included in the bill; but they have been withdrawn, the former because of its recent reissue, and the latter because of its adjudicated invalidity. See One-Piece Bifocal Lens Co. v. Bisight Co. (D. C.) 146 Fed. 450, affirmed 259 Fed. 275, 170 C. C. A. 343. A supplemental bill was filed to include defendant's product, and the so-called shock absorber lens, which is also alleged to infringe the patent in suit. We are therefore not concerned herein with any infringement of the process of making bifocal lenses or any apparatus relating thereto, but simply with a new and useful article or product. The real question is whether the type of bifocal lens manufactured and sold by the defendant company is substantially the same as the product of the patent in suit. The single claim of the patent reads as follows:

"A bifocal lens comprising one piece of glass having an upper distance field, a lower and smaller near field, and an arched division separating the two fields, but the lens at the curved line of joinder of the upper and lower fields having a uniform thickness through both fields, whereby the said division is practically free from prismatic effects."

The defenses are limitation of the claim and noninfringement.

Several prior patents for bifocal lenses were discussed at the trial to establish that the claim is of limited scope, and hence that the product is differentiated from the product of defendant. It appears that the solid bifocal type of lens made of one piece of glass by grinding has received the favor of the purchasing public, and other types of bifocal lenses known to the art—so-called built-up lenses have become less popular, though they still possess extensive commercial value. The validity of the patent in suit was sustained by Judge Rose in One-Piece Bifocal Lens Co. v. Bisight Co., supra, and in that case the general state of the bifocal lens art was carefully examined and reviewed. Reference may be had to the opinion of the court for a detailed description of bifocal lenses generally and the difficulties confronting the patentee in overcoming objections to prior spectacles of that type. It was determined in that case, and the proofs here show, that the old solid bifocal lenses were made by cementing or building up, or by grinding down the upper surface of a single piece of glass to lessen its power, with the result that the division line between the upper and lower portions of the eyeglass was curved upwardly, and it was shown that

in such structures the ground or distance portion was too small to avoid prismatic effect.

Afterwards the Kryptok eye lenses, which were produced by building up or grinding, or by using two pieces of glass of different kinds and cementing or fusing them together, came on the market. See Kryptok Co. v. Stead Lens Co. (D. C.) 207 Fed. 85, and Kryptok Co. v. United Bifocal Co., 214 Fed. 983, 131 C. C. A. 279. These types of spectacles obtained deserved popularity, but, according to the record, the skilled in the art desired further improvements by grinding a better bifocal lens out of a single piece of glass than had been produced before, since the line of separation in such lens between the near and distance fields of vision resulted in aberration of the light rays. To overcome such defect in eye lenses was difficult of accomplishment. How to build up or grind the lower or reading portion of the glasses so as to give them the required strength and power, and using the larger or upper portion for distance vision without a too apparent separating line between the two fields, was the problem for solution. The problem was finally solved, as Judge Rose held in the Bisight Case, and as the proofs here show, by Conner (who invented new tools and apparatus), and a bifocal lens was produced by him by a method of merging the surfaces into each other and leveling them, and a lens of greater usefulness resulted.

Defendant contends, however, that the prior art requires strictly limiting the patent to a solid bifocal lens with two surfaces on the same level, or to an arched dividing line "between the two surfaces, which are of even thickness at the line of division, so as to avoid prismatic effect." Such a separation between the two fields, it is argued, is the very essence of the claim, and its novelty depends thereon.

Importance is given to the patents to Alexander, No. 954,772, and Gregg, No. 5,995, dated November 27, 1866. There is evidence that the application for patent by Alexander for a solid bifocal lens preceded the application of the patentee herein by about two months. Interference was declared between them on certain features of the invention, and priority was awarded to Alexander. While the interference was pending, the patent to one Mayer, No. 798,435, dated August 29, 1905, for a single-piece bifocal lens, was granted; but later on it was ascertained that his claim interfered with a similar feature of Conner's invention that was not involved in the Alexander interference. The Mayer patent and Conner's application then came into interference, and priority of invention was awarded by the Patent Office to Conner, to whom the patent in suit issued for the identical claim of the Mayer patent, and Mayer's patent was decreed canceled in the Bisight Case.

The Alexander patent, owned by the plaintiff herein, for a bifocal lens of a single crystal having formed upon one face a pair of concentric ground visual surfaces of different diopterics, was held invalid. The description of the Alexander patent does not disclose to the skilled in the art a practical method of making bifocal lenses of the character specified in the Conner claim in suit. Plaintiff's expert witness Wheeler testified that the defendant could not, by following the description in the Alexander patent, produce a lens similar to the lens attached to

Defendant's Exhibit E, because in following the Alexander description a lens would be produced having a much higher shoulder than is produced by practicing defendant's method, and one that would be impracticable. No eye lenses are shown to have ever been made under the Alexander patent. It is true that the briefs and arguments submitted to the court in the Bisight Case credited Alexander's patented process with practicability, regardless of an abrupt shoulder between the near and distance fields; but Judge Rose reached an opposite conclusion, and the evidence here establishes to my satisfaction that a bifocal lens of the character described in the patent in suit could not be produced by following the Alexander method. The description in the Gregg patent also shows abrupt ridges or shoulders at the point where the surfaces are separated. It does not make clear how the lenses were to be made, nor is there anything to show that there was any process known to the art for making them. In the Bisight Case the court said:

"The description [Gregg] does not tell how to make the article it described. It is one published at a time when those skilled in the art would not, either from its disclosure, or their knowledge, or from both combined, know how to produce it."

[2] The proofs in this case do not show that it was possible to produce plaintiff's bifocal lens by adapting either the Alexander or Gregg patent. The law is that prior invention or discoveries, relied on to anticipate or limit the claim of a later invention, must disclose a method capable of producing the result designed to be obtained. As said in Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821, the burden of proof rests upon the defendant to show that the invention relied upon as a defense was capable of achieving the result, and "every reasonable doubt should be resolved against it." It is satisfactorily shown herein that Conner was the first to make a solid bifocal lens wherein the two field surfaces merged together by a curved division between the two fields, and that he accomplished what Gregg and Alexander failed to accomplish. He eliminated the injurious effects from a shoulder or abrupt line of separation between the surfaces. He advanced the art by making a meritorious improvement, and the claim, in my opinion, is entitled to a scope broad enough to protect his product from colorable evasion. The crucial question, therefore, is whether the lens produced by the defendant, a solid bifocal lens made of a single piece of glass by grinding, is an infringement. Defendant claims that its completed product has an intermediate zone of aberration between the near and distance fields; that, notwithstanding the similarity of the product to plaintiff's, the grinding of the shoulder by its process between the two surfaces materially differentiates its lenses.

Testimony was introduced to show that the lens-making tools used by defendant could not be used for making plaintiff's lens; that the shoulder produced by its method was described in the Gregg and Alexander and Mayer British patent. If I were convinced that the defendant's lenses embodied a substantial aberration, or that the fields of vision are not practically on the same level, I would incline to the view that defendant has avoided infringement; but the proofs do not permit any such determination. The witness Zircher, who formerly was

foreman in defendant's service, testifying for plaintiff, stated, true enough, that the tools used (Exhibit F) in grinding defendant's lens formed a vertical shoulder (see Exhibit E) between the distance and near fields; moreover, that he had been instructed while in defendant's employ to grind the fields of vision in such a way as to have a definite separating shoulder on the blanks. But he also testified that, notwithstanding the use of the centerless grinding tool for making the shoulder, the two surfaces in the operation were caused to merge together by polishing, which removed any shoulder irregularity at the division between the two surfaces and smoothed it. From such testimony it is quite clear that, when the defendant's blanks are ground, there are two fields of vision at different elevation, but that by the subsequent use for an hour or more of a pumice stone polisher the line of joinder is leveled to substantially conform to plaintiff's finished product.

Defendant's insistence that the polishing to which its lens is subjected merely grinds off the edge of the shoulder without decreasing the elevation or changing the optical surface, and forms an irregular sloping curve from one field to the other or a marked zone of aberration, is not substantiated by the evidence, for it is conceived that if such were the fact a comparison of defendant's lenses with plaintiff's would unquestionably be confirmatory. But upon making visual comparisons it is perceived that in defendant's constructions there exists no definite elevated surface aside from a line that separates the two optical fields the same as in plaintiff's lenses. A smoothing of unevenness, however, as, for example, in Conner's earlier products, is observed. There is no ridge or visible crease in defendant's products to indicate a marked zone of aberration, and whatever difference there is in the line of curvature is, I think, unimportant, since the line of division no doubt creates a little aberration in both products. Defendant's eye lenses in some instances seemingly show a wider arched line separating the near and distant fields, and it is quite likely that it in good faith desired to preserve a distinct zone of aberration; but any such difference or purpose does not avoid infringement (Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586), since, as heretofore indicated, the rubbing and polishing of the surfaces materially decreases any nonoptical zone or line created by the grinding tools used by it. They undeniably perform the same function as plaintiff's, and in my opinion are their equivalent. Comptograph v. Mechanical Co., 145 Fed. 331, 76 C. C. A. 205; American Co. v. Wyeth, 139 Fed. 389, 71 C. C. A. 485.

Defendant also urges that its lenses are manufactured in the manner described in Mayer's British patent, No. 22,432, application filed October 18, 1904; but the invention there was two years later than the invention in suit. No consideration need be given to any difference in the process by which defendant's lenses are produced, as it is immaterial by what means or by what process they are manufactured. It suffices that they are of substantially the same character as plaintiff's, performing the same functions, and by their use achieve the same result.

A decree for injunction and accounting, with costs, may be entered.

NOBLE v. DOUGLAS, Pros. Atty., et al.

(District Court, W. D. Washington, N. D. April 15, 1921.)

No. 233.

Constitutional law ⊜88—Physicians and surgeons ⊜2—Statute vesting board with arbitrary power to grant or refuse licenses to practice dentistry held unconstitutional.

Rem. & Bal. Code Wash. § 8416, being part of a statute creating a board of dental examiners, with authority to grant licenses to practice dentistry, without which such practice is made unlawful, and which provides that any person seeking to practice dentistry shall file an application with the board for an examination, and present evidence of good moral character and a diploma from some dental college in good standing, but which does not in terms require the board to make such examination, nor prescribe of what it shall consist, or for what qualifications the applicant shall be tested, but vests the board with arbitrary power to grant or refuse a license at its will, *held* void as not an exercise of the police powers of the state, but an arbitrary and unwarranted interference with the constitutional right to carry on a lawful business.

In Equity. Suit by Leon Noble against Malcolm Douglas and Bert C. Ross, Prosecuting Attorney and Deputy Prosecuting Attorney for King County, Wash. On motion for preliminary injunction. Granted.

Browder Brown and J. W. A. Nichols, both of Tacoma, Wash., for complainant.

Malcolm Douglas and Bert C. Ross, both of Seattle, Wash., pro se.

Before GILBERT, Circuit Judge, and CUSHMAN and NETERER, District Judges.

CUSHMAN, District Judge. The bill avers:

"That complainant is by profession and practice a dentist, and skilled in the theory and practice of dentistry, having pursued his studies in the science and practice of his said profession in a reputable and standard school and college of dentistry, to wit, the North Pacific Dental College of Portland, Or., from which college, after attendance and study and practice therein for the full term required, and after examination by the faculty of said college, the complainant was awarded and received the diploma of said college as evidence of his learning and skill in said profession, and authorizing him to practice his said profession in all its branches as a graduate of said college from and after the date of said diploma, to wit, May 21, 1909. And your orator further says that during the time since receipt of said diploma the complainant has engaged in the practice of his said chosen profession in its various branches, and in the cleansing, care, and repair of teeth, and the manufacture and fitting and adjustment of artificial teeth, * * * and that he has no other available means whatever of maintenance or support."

It is further averred that the prosecuting attorney for King county, Wash., has filed an information in the superior court of that state, charging—

"the complainant herein with a crime against the laws of the state of Washington, to wit, with practicing dentistry in the city of Seattle, in said state, without having a license so to practice from the state board of dental exam-

iners, and by said information caused the arrest and imprisonment of complainant, and said cause is now pending in the said superior court; complainant being at present released from custody on bail pending the hearing, trial and judgment in said cause.

"And, further complaining, your orator says that, since his said arrest, imprisonment, and release on bail, the complainant under the advice of his counsel has continued in the practice of his profession, and in order to maintain and support his family is compelled so to follow and practice his said profession, and without the aid and support derived from such practice the complainant and his family will be wholly without means of support, and will be wholly dependent upon the charity of friends or the public; that the defendants have threatened to have complainant again arrested and imprisoned, unless he desists from the practice of dentistry, and to continue so to arrest and imprison him as often as he shall engage in such work, and so to compel him to abandon his profession, and thereby destroying the fruits of his college study, and education and life work, and leave him helpless in the discharge of his duties to his family and as a citizen.

"And your orator further complains and says that the information and arrest of complainant aforesaid, and which defendants are threatening to repeat, are brought under the pretended authority of the statutes of Washington, to wit, sections 8412 to 8425, both inclusive, of Remington's Code of said State of Washington, and particularly of sections 8416, 8421, and 8425 thereof, and that said statute is repugnant to the Constitution of the United States and to the Fourteenth Amendment thereof, and that by enforcing said statute complainant is deprived of his liberty and of his property without due process of law.

"And your orator further says that the aforesaid trial of complainant in the state courts will require long periods of time in the presentation, trial, and determination of complainant's defense, and that, whether the judgment therein shall be favorable or adverse to complainant, the cause will proceed by appeal or writ of error to the Supreme Court of the United States, and that pending such procedure through long periods of time complainant will be prevented from practicing his profession, unless by relief granted by this court, and will thereby suffer great and wholly irreparable loss; that complainant has tried to comply with the requirements of said board of dental examiners, and therein has taken three several examinations and paid each time the required fee of $25, but that said board has each time arbitrarily refused to grant complainant a license, and so without assigning or giving any reason therefor, and without giving to complainant any record or information as to the result of his examination, other than to inform him that he had not passed; that by reason of the unlimited and arbitrary power granted to said board by said statute, and exercised by them thereunder, and by the arrest and imprisonment of complainant by defendants pursuant thereto, complainant is deprived of his liberty and property without due process of law."

Defendants have answered, and, while denying complainant's conclusions, admit the material allegations of fact in the complaint, and aver that—

"plaintiff's bill of complaint depends entirely upon the question of the constitutionality or unconstitutionality of said sections of Remington's Code of the State of Washington, and that said sections are constitutional."

The sections referred to are sections 8412–8425, inclusive, and particularly sections 8416, 8421, and 8425, of Remington & Ballinger's Code of the state of Washington. The pertinent provisions of the chapter of the Code regulating dentistry are as follows:

"Sec. 8412. A board of dental examiners, consisting of five practicing dentists, is hereby created, whose duty it shall be to carry out the purposes and enforce the provisions of this chapter."

Section 8413 provides that the members of the board shall be appointed by the Governor, and regulates their terms of office and the portion of the state from which they shall be appointed. Section 8414 gives a form of oath administered to the board. Section 8415 provides:

"The board shall choose one of its members president and one secretary thereof, and it shall meet at least twice each year, in May and November, or oftener at the call of the president or secretary. * * *"

Section 8416 provides:

"Any person or persons seeking to practice dentistry in the state of Washington, or to [own], operate or cause to be operated, [or to run or manage] a dental office or place for the practice of dentistry in the state of Washington after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and shall give satisfactory evidence of his or her rightful possession of the same: Provided, this section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are bona fide citizens of the state of Washington. All persons successfully passing such examinations shall be registered as licensed dentists in the board register as hereinafter provided, and also receive a certificate, said certificate to be signed by the president and secretary of said board and in substantially the following form, to wit:

" 'This is to certify ——— is hereby licensed to practice dentistry in the state of Washington. This certificate must be filed for record in the office of the auditor of any county in which the party holding such certificate desires to practice, and it is unlawful for him (or her) to practice dentistry in any county in which said certificate is not filed for record.

" 'Dated at ——— this ——— day of ———, A. D. 190—.' "

This section, as well as sections 8421 and 8424, was held unconstitutional as to "owning, running or managing" a dental office in State v. Brown, 37 Wash. 97, 79 Pac. 635, 68 L. R. A. 889, 107 Am. St. Rep. 798.

Section 8417 defines the rights conferred by the certificate, and provides:

"* * * Any person failing to pass the first examination successfully may demand a second examination at a subsequent meeting of said board, and no fee shall be charged to [for] said examination: Provided, that the second examination is taken before the expiration of one year."

Section 8418 requires admitted dentists to register with the board. Section 8419 provides that persons practicing dentistry shall display, conspicuously, the names of all employees. Section 8420 provides for the recording of the certificates issued by the board with the county auditor. Section 8421 provides:

"Any person who, as principal, agent, employer, employee or assistant, who in any manner whatsoever shall practice dentistry or who shall [own, run] operate or cause to be operated, [or manage], a dental office or headquarters in the state of Washington without having first filed for record and had recorded in the office of the auditor of the county wherein he shall so practice or do such act, a certificate from said board of dental examiners as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall

be fined in any sum not less than fifty dollars, nor more than two hundred dollars, or be confined for any period not exceeding six months in the county jail for each and every offense: Provided, the foregoing provisions of this section shall not, prior to the tenth day of July, 1901, apply to any person who shall be practicing dentistry in this state at the time of the passage of this act and whose name shall be registered under the provisions of this act in the records of said board. After said tenth day of July, 1901, all the provisions of this section shall apply to all persons whomsoever. All fines recovered under this act shall be paid into the common school fund of the county in which the conviction is had."

Section 8422 makes the auditor's certificate of no record of the board's certificate prima facie evidence against an accused of want of authority to practice dentistry. Section 8423 regulates the handling of fees charged for examinations, the compensation of the members of the board and related matters. Section 8424 provides:

"All persons shall be said to be practicing dentistry within the meaning of this chapter who shall contrary to this act for a fee or salary or other reward paid either to himself or to another person for operations or parts of operations of any kind, treat diseases of lesions of the human teeth or of jaws or correct malpositions thereof, [or who shall own, run or manage a dental office or department] in the state of Washington, without registering and procuring the licenses as herein provided."

Section 8425 charges the prosecuting attorney with the duty of attending to prosecutions under the act.

No claim is made that the practice of dentistry is not a proper subject for legislative regulation under the police power of the state, in the interest of public health. The complaint is that there has been no legislative regulation of the practice of dentistry, but merely an attempt on the part of the Legislature to delegate to the board of dental examiners the regulation of the practice of dentistry.

In State ex rel. Smith v. Dental Examiners, 31 Wash. 492, 72 Pac. 110, this law was attacked under the state Constitution upon other grounds and upheld. The petitioner in that case did not hold a diploma from a dental college. The Supreme Court, by upholding the validity of the statute in that decision, held the requirement of a diploma from such a college a reasonable exercise of the police power. To the same effect was the unreported decision of Judge Neterer (filed September 23, 1915) in Re Francis Stephen Medcraf, which was affirmed in Medcraf v. Hodge, 245 U. S. 630, 38 Sup. Ct. 63, 62 L. Ed. 520.

The issue at bar, concisely stated, is the inoperative effect of the provision of the dental act requiring the holder of a diploma to present himself at a meeting of the dental board "to undergo examination before that body." In Re Thompson, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149, the validity of this law was again before the Supreme Court of this state. In disposing of the question, and upholding the constitutionality of the law, the court held:

"* *. * No power of legislation is conferred by the act upon the dental board, unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized. There is nothing in the record before us to indicate that the dental board have adopted any rules, arbitrary or otherwise; but assuming that the board have adopted some rules—as they certainly must, in order to properly determine the good character of the ap-

plicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession—we must assume in this proceeding that such rules are reasonable and within the scope and purview of the act. That the board may adopt unreasonable, unwarranted, or purely arbitrary rules for the examination of applicants cannot be presumed to defeat the act. Unless the act itself is void, arbitrary or void rules, made without authority of the act, cannot render it so. The remedy of petitioner for an abuse of the powers of the dental board is not an attack upon the act creating the board, but must be found in some appropriate proceeding to review the conduct of the board." 36 Wash. at page 379, 78 Pac. at page 900, 2 Ann. Cas. 149.

The court, in so deciding, based its ruling entirely upon Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; which decision, in turn, was decided upon authority of Dent v. West Virginia, 129 U. S. 124, 9 Sup. Ct. 231, 32 L. Ed. 623. The Washington court, in the above decision, recognizes that there must be some rules to "properly * * * conduct the examinations upon subjects reasonably required in that profession." The court evidently assumed that the board had adopted such rules, and that they were reasonable rules, and, inferentially, that they had followed such rules, and, further, that they could be depended upon to continue to do so. This appears to us to be a non sequitur.

The court made the further deduction that no legislative power was conferred by the act, "unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized." Other than as shown above, the court does not discuss or dispose of the question of whether or not the terms of the statute purported to clothe the board with power under which it "may adopt" arbitrary rules.

The question of whether arbitrary power is included in the terms of a statute is not to be determined by ascertaining whether arbitrary action has been had under it, else we would be compelled to conclude in one case that arbitrary power had been conferred by a statute because arbitrary action was taken under it, and in another that arbitrary power had not been conferred by a statute, because, forsooth, in the particular case considered, there had been no arbitrary action under it. The power would be conferred to make rules, if at all, whether the rules were good or bad. If the rules were bad, it would be an abuse by the board of the power conferred, and not want of power to make rules.

In the Dent Case, supra, the West Virginia statute did not require—as the Washington statute does—that the applicant for license to practice should have a diploma from a dental college in good standing *and* be examined, in addition thereto, by the board, but required that the applicant for license to practice should have practiced medicine in the state continuously for 10 years *or* be a graduate of a reputable medical college, *or* be examined by the board, and "if upon full examination, they find him qualified to practice medicine in all its departments, they, or a majority of them shall grant him a certificate to that effect." The petitioner in the Dent Case was not a graduate from a reputable college, as found by the board. He had not practiced 10 years, and he did not submit himself for an examination by the board.

In the case now before this court, it is admitted by the answer that the petitioner holds a diploma from a reputable and standard school of dentistry. The answer admits petitioner's allegation that petitioner tried to meet the requirements of the state board of dental examiners, and took examinations three several times, but denies that the board arbitrarily refused to license petitioner to practice dentistry. Petitioner is 38 years of age, and graduated from a reputable dental college in 1909, and holds a diploma therefrom. Since his graduation he has practiced his profession. Under such circumstances, it is hard to reconcile the admission that the dental college from which he graduated was a reputable and standard dental college with the allegation that the refusal to grant him a license was not arbitrary. The facts admitted tend to defeat the conclusion alleged.

The most important distinction between the Dent Case and the one under consideration is that in the West Virginia statute there was something to guide the board of examiners in the course to be pursued by it in the examinations. This, to some extent was pointed out, as shown above, for the act provided that the board "shall examine him as herein provided, and if upon full examination, they find him qualified to practice medicine in all its departments, they, or a majority of them, shall grant him a certificate to that effect." 129 U. S. at page 116, 9 Sup. Ct. at page 232, 32 L. Ed. 623. This statute, to a limited extent, laid down a rule of action for the board to follow, and rendered the question of whether the board had, in a given case, obeyed such rule, capable of proof. They were commanded thereby to examine the applicant in all the departments of medicine, and further commanded to find if he has qualified in such departments, and further commanded, if they so found him, to certify to that effect.

There are no such directions in the Washington statute now before the court. Aside from the requirement of eligibility for examination—that is, the right to be examined—all that is commanded is that "all persons successfully passing such examination shall be registered as licensed dentists," and the form of the certificate provided in the Washington law does not certify that the holder is qualified in any respect, nor does it certify anything save that the holder is licensed to practice dentistry.

The statute contains no regulation whatever covering the matter of said examination, save the preliminary question of eligibility of the applicant for examination; that is, the right to demand an examination depends upon the applicant's being of good moral character, presenting a diploma from a dental college in good standing, and giving satisfactory evidence of his or her right to the possession of the same. It seems to have been assumed, rather than decided, in Re Thompson, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149, that the statute contemplated an examination by the board after determining whether the applicant was of good moral character and had a diploma from a dental college in good standing. This interpretation of the meaning of the state statute by the Supreme Court of this state is binding upon this court.

In addition to the foregoing, defendants have cited and rely upon the following cases:

Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987. The question before the court in that case was different from that here presented. It was whether the equal protection of the law guaranteed by the Constitution had been denied by reason of an unreasonable classification.

In Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563, the question considered was whether judicial power had been conferred by the statute on the board of dental examiners. There was no question of the delegation of legislative power. The further question was raised in that case of due process—whether it was necessary to notify the applicant and give him a hearing on whether his tendered evidence of former registration was sufficient.

Rogers v. Jones, 214 U. S. 196, 29 Sup. Ct. 635, 53 L. Ed. 965, was a suit for the removal of a cloud on title to land.

State v. Littooy, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292, was a case arising under the present law, but the question involved was as to the validity of the requirement of a diploma from a dental college as a prerequisite for an examination for a license to practice dentistry, although there was no such college in the state of Washington.

In State v. Sexton, 37 Wash. 110, 79 Pac. 634, the constitutionality of this act was again upheld, but solely upon the authority of State ex rel. Smith v. Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110, and In re Thompson, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149.

In State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544, the court held that the questions and answers in an examination by the dental board were not admissible in court; that the court had no power to review the action of the board, unless it be arbitrary and fraudulent to the extent of being a refusal to exercise its discretion. The present question was not discussed by the court, and presumably not considered.

In Brown v. State, 59 Wash. 195, 109 Pac. 802, the constitutionality of the act was again before the court, and it was held to be no longer an open question, upon authority of the cases already noticed.

In Wilkins v. State, 113 Ind. 514, 16 N. E. 192, the dental examining board statute was not set out. The attack on the law was upon grounds other than those now being considered, being because the statute authorized the Dental Association, a corporation, to select the members of the board of examiners, and because the board were invested with judicial, not legislative, functions. Enough appears in the decision to show that it was not an uncontrolled power or discretion with which the board was clothed. It would appear from the language of the decision that the statute defined the qualifications entitling one to practice dentistry, for, among other things, the court says:

"* * * As we have seen, the Legislature may prescribe the qualifications of those permitted to practice the profession. The board of examiners established under the law is the lawfully constituted authority, and from it the certificate required by law must be obtained. The Legislature, as the law-making power, has authority to prescribe the method of procedure. Its

authority does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is wise and expedient, both as to the qualifications required, and as to the method of ascertaining these qualifications." 113 Ind. at page 516, 16 N. E. at page 193.

In State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306, the statute before the court authorized all those in the state engaged in the practice of dentistry at the time of the passage of the act to continue such practice, but required that any one desiring to enter such practice after the passage of the act should present to the board for examination a diploma, which, if found valid by the board, entitled the holder to a license. The attack on the law was made because of claimed class discrimination between those practicing before the passage of the act and those seeking to enter the practice afterwards.

The case of People v. Griswold, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915D, 538, is to substantially the same effect.

State v. Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119. This was a case where the Minnesota statute creating a board of dental examiners, attacked, was held valid by the court. The attack was made because of the requirement that the applicant for examination have a diploma from a dental college in good standing. The court says of the statute:

"It then goes on to prescribe the manner, extent, and subjects of the examination." 42 Minn. at page 132, 43 N. W. at page 790, 6 L. R. A. 119.

These are the very things lacking in the Washington act.

In Eastman v. State, 109 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400, the statute is not set out in the decision, but its requirements are indicated by the following from the opinion:

"* * * The statute does not require the clerk to sit in judgment upon the sufficiency of the application for a license; for the affidavits prescribed, and the diploma required, constitute the evidence upon which the clerk must act. The diploma and affidavits compel him to grant the license, and it is therefore not possible to regard his duty as a judicial one. Flournoy v. City of Jeffersonville, 17 Ind. 169; Betts v. Dimon, 3 Conn. 107; State v. Doyle, 40 Wis. 188." 109 Ind. at pages 281, 282, 10 N. E. at pages, 98, 99, 58 Am. Rep. 400.

There is no regulation in the statute under consideration concerning the subjects upon which the applicants shall be examined; no regulation as to the percentages required to pass the examination; no regulation as to whether the examination shall be confined to the theory of dentistry; whether written, or oral, or whether the applicant's proficiency shall be determined by requiring him to demonstrate his skill with the tools and materials of his profession, or whether the examination may include both methods. In fact, the letter of the statute does not even command or direct that the examination shall relate to his qualifications to practice dentistry. There is no requirement even that the board shall find the applicant competent and qualified in all or any subjects related to his profession, and, for that matter, no requirement that they shall find him qualified as to subjects corelated or unrelated to his profession. No tests for the determination of his fitness, either appro-

priate or unappropriate, are provided. No provision is made for the keeping of any records—either records made by the board or made in the process of examination by the applicant; neither a record for the purpose of review, in case of dissatisfaction or complaint, nor as a precedent and guide for future examinations.

Section 8415 does provide that "three members of said board shall constitute a quorum and the proceedings thereof shall at all reasonable times be open to public inspection." This language does not contemplate a record of the proceedings, but that the meetings at which the examinations are held, and the proceedings during and at such meetings shall be open at all reasonable times. The board is not required to give the applicant any notice of his standing; nor is it required to inform him whether he has passed or not, or why he has not passed. The board is not even charged with the duty of making regulations, uniform or otherwise, as to examinations, which would insure, in some degree, uniformity of treatment accorded applicants and the public.

There is no restraint in the statute preventing one applicant's passing an examination solely on subjects and by methods not mentioned to another, also passed and licensed by the board, and nothing to prevent one applicant's being passed and another rejected, although the latter had admittedly passed as good, or better, examination. The only regulation as to the examination, not already pointed out, is that the board shall meet at least twice each year in May and November, and that 30 days' notice shall be given by publication in at least four newspapers. The place of holding the examination is not provided by the statute.

If a record were made up of the proceedings of the board in a given case, and the same were brought to a court or other authority for review, the statute affords no rule or guide that would enable the reviewing tribunal to determine whether or not right or wrong had been done. This would simply result in making such court or reviewing board a supervising autocrat, to arbitrarily determine the claims of the applicant and substitute its arbitrary determination for the arbitrary determination of the board.

This statute, as interpreted in the Thompson Case, supra, is not a lawful exercise of the police power, but, under the guise of a police regulation, on its face clothes the board with arbitrary, autocratic, and undefined powers, and is therefore, itself, an unwarranted and arbitrary interference with the petitioner's constitutional right to carry on a lawful business. The case is not one of the board's abuse of powers lawfully conferred; but the abuse and wrong consist in undertaking to confer unlimited powers. Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

The upholding of this statute would, in this particular, make the government one of men, rather than law, for there is no curb or limit in the law to the exercise of the will of the board. If its members will that one be licensed and another not, it is so. It is not law that one should hold the means of living by such a tenure, at the will of another. Yick Wo v. Hopkins, 118 U. S. 356 at page 370, 6 Sup. Ct. 1064, 30 L. Ed. 220.

All that the letter of this law requires is that the board shall examine the applicants presenting themselves for that purpose, and even that duty is not expressly commanded. The letter of the law goes no further than to infer that the board shall examine the applicants; how, or for what, there is nothing to indicate. There is nothing in the letter binding or defining the character, degree, or particulars, or qualifications, for which the applicant shall be tested. Nor, for that matter, does the letter of the law command that it is the qualifications of the applicant to practice dentistry that the board is charged with the duty of investigating. Such duty must be inferred. Being so unaided by the letter of the law, its spirit is so elusive that it may be all things to all men, or rather anything to any man, which is only to say that arbitrary power is conferred, and that the applicant, in appearing for examination, subjects himself to the mere favor, spite, whim, caprice, or will of the board members. If so, our vaunted liberty is, indeed, shrunk to narrow compass.

Considering the unbridled power which is attempted to be conferred by the statute, the logic of the Washington court in the later cases of Seattle v. Gibson, 96 Wash. 425, 165 Pac. 109, and State ex rel. Makris v. Pierce County, 193 Pac. 845, is more satisfying to the reason—not only because it is of later pronouncement, but because of its inherent strength—than what is said by the same court in the Thompson Case above quoted. In the Gibson Case, the court was considering a statute providing for the licensing of pharmacists, which reads:

"The city comptroller shall report the petition to the city council which shall refer the same to the license committee, which committee shall consider such petition and may, in its discretion, investigate any of the matters set forth therein, and report its findings and recommendations thereon to the city council, and if said committee recommends that said petition be granted, shall accompany such recommendation with a proposed ordinance granting the license petitioned for." 96 Wash. at page 428, 165 Pac. at page 110.

Of the foregoing the court says:

"It is plain from this provision of the ordinance that the license committee is vested with discretion to report either favorably or unfavorably to the city council. If this discretion is exercised favorably, and a recommendation that a license be issued is made by the license committee, it shall report an ordinance granting the license petitioned for. The ordinance also provides that every license shall be granted by ordinance of the city; that is, before an applicant for a license may receive the same, a special ordinance must be passed granting a special privilege, and the passage of such ordinance rests wholly in the discretion of the city council. *The ordinance in question here makes no provision for determining the qualifications of an applicant.* It does not require the license committee, to whom the petition is referred, to investigate any of the facts stated in the petition of the applicant. The committee may investigate or not as its discretion dictates. In short, the ordinance leaves to the license committee the authority arbitrarily to grant or reject a petition for a license to operate or conduct a drug store and pharmacy. *This discretion is purely arbitrary under the ordinance, because no standard of qualifications, nor rule, is fixed upon which an investigation may be made.* The ordinance recites that the committee may, in its discretion, investigate any of the matters set forth in the petition, and if it may investigate these matters in its discretion, it may not investigate them at all, and may report according to its desire." 96 Wash. at pages 428 and 429, 165 Pac. at page 111. (The above italics are those of this court.)

In State ex rel. Makris v. Pierce County, supra, the commissioner of public safety at Tacoma had revoked the license of plaintiff to conduct a soft drink and candy business and threatened to close his place. The ordinance for licensing such a business provided that, after application, the city commissioner should—

"inspect, or cause to be inspected, the premises where such business is to be conducted. If the premises are found to be in a sanitary condition and to comply in all respects with the provisions of the health and food ordinances of the city of Tacoma relating thereto, and if the premises conform to the building regulations and in no way menace the peace and good order of the community, said commissioners or their representatives shall recommend to the City Clerk that such license be issued."

The ordinance further provided:

"The license of any business mentioned in this section may be revoked by the commissioner of public safety *in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary.* Such revocation shall be subject to appeal to the city council, to be prosecuted by filing a written notice with the council within ten days after the revocation. Upon receipt of such appeal the council shall appoint a day for hearing the appeal, giving the appellant at least three days prior notice in writing thereof. The decision of the council shall be final." 193 Pac. at page 846. (The italics are those of this court.)

Under the latter provision the commissioner of public safety assumed to revoke plaintiff's license because in his opinion "the business, *as conducted by Makris, had become a menace to 'the preservation of public morality, health, peace and good order.'*" 193 Pac. at page 846. In disposing of the question of the constitutionality of the ordinance, the Washington court says:

"The argument here made in behalf of Makris is, in substance, that the effect of the provisions of the ordinance authorizing the revocation of the license is to place in the hands of the commissioner of public safety, and in turn in the hands of the city council upon appeal from the commissioner, the arbitrary power, *uncontrolled by any prescribed rule of action, to effectively decide who may and who may not engage in and carry on the manifestly lawful business of selling soft drinks and candy in the city.* As we read the ordinance such is the meaning of its terms. *It may be that the authority* to revoke the license *because* of the permission by the licensee, or 'gambling on the premises,' is a sufficient prescribing of a cause for revoking the license, and that the revocation provisions of the ordinance in so far as that cause alone is concerned might be upheld, if that specified cause for revoking the license be sufficiently separable from the other provisions of the ordinance, to stand alone.

"That, *however, is not the question before us.* That is not claimed as the cause for revoking this license. There is no other specifically prescribed cause for revoking the license or specifically prescribed rule of action which limits or controls the commissioner or the city council in deciding the question of revoking the license. This means that the commissioner, and in turn the city council, may *according to their own notions of what is a menace to 'the preservation of public morality, health, peace or good order'* in each *particular case,* decide *who may and who may not engage in business of this character* in the city. In other words the commissioner is left to determine for himself, *not only what acts may have been committed by the* licensee, but *also whether or not such acts are 'disorderly or immoral,' or are a menace to the 'preservation of public morality, health, peace or good order,'* warranting revocation of the license. Manifestly, upon appeal to the city council,

that body is not, by the terms of the ordinance, controlled by any more specifically prescribed rule of action, but, like the commissioner, is a law unto itself in each particular case when the question of revocation of a license comes before that body.

"Our decision in Seattle v. Gibson, 96 Wash. 425, 165 Pac. 109, is practically decisive of this case in principle, in favor of Makris, though the license ordinance there involved sanctioned a somewhat *plainer usurpation of arbitrary power than does this ordinance, in that it made no attempt whatever to prescribe any rule touching the question of who should be granted a license and who should be refused a license* to conduct a drug store. It is true, in that decision particular mention is made of the fact that the license might, under the terms of the ordinance, be granted or refused without even an investigation or hearing touching the merits of the application therefor; but the law invoked in support of our conclusion that the ordinance was void, in that 'this *discretion is purely arbitrary under the ordinance, because no standard of qualifications, nor rule, is fixed upon which an investigation may be made*' (using the words of the decision), citing and quoting from Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, State v. Mahner, 43 La. Ann. 496, 9 So. 480, and State ex rel. Garrabad v. Doring, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948, is, we think, decisive of this case in favor of Makris. All of those decisions were rested upon the principle that an ordinance which authorizes the issuing or withholding of a license to engage in a lawful business, that is a business which within itself is ordinarily perfectly lawful, and committing to any officer or set of officers the *power to decide according to their own notions in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the guaranty of the Fourteenth Amendment of the Constitution of the United States that* 'no state shall * * * deny to any person within its jurisdiction the equal protection of the law.' In section 12 of article 1 of our state Constitution we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.' Our decision in Seattle v. Gibson, supra, and those of the federal and state courts upon which that decision is rested, render it plain that it is sufficient *to render a law or ordinance void in the light of these* constitutional guaranties, if the *prescribed* manner of administering such law or ordinance *results in leaving the question of the propriety of issuing, withholding, or revoking a license to conduct an ordinarily lawful business, and thus the question of who may and who may not engage in such business, to the decision of any officer or set of officers, uncontrolled by any prescribed rule of action.*

"Among the many additional authorities lending support to this view of the law, we note the following: The case of Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593, 1 L. R. A. (N. S.) 940, 112 Am. St. Rep. 228, 6 Ann. Cas. 740, is particularly enlightening and persuasive upon this question. In that case there was involved an ordinance of the city requiring the use on street cars of fenders of a particular make 'or some other fender equally as good, to be approved by the common council or its street committee.' The ordinance was held void because of the uncertainty of the standard prescribed, in that, whether some other fender than that named was equally as good was left to the decision of the city officers. In the course of the opinion Chief Justice Monks, speaking for the court, said: 'The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the *will or unregulated discretion of the common council or any officer.* If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the

arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action, and leaves the right of property subject to will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons.' Numerous authorities are then cited in support of this view. The Chief Justice then proceeding, referring to one of the court's prior decisions, said: 'In Bessonies v. City of Indianapolis, supra, at page 197, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for any one to establish or conduct one without a license or permit from the common council and board of aldermen; and *the granting or refusal of the license or permit is not governed by any prescribed rules, but rests in such case in the uncontrolled discretion of the common council and board of aldermen.* It is apparent that, under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case at their mere pleasure, and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them, to grant or refuse the license as they might think * * * for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license, and refuse another, under the same circumstances. No law could be valid, which by its terms would authorize the passage of such an ordinance. The twenty-third section of the Bill of Rights provides that 'the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the Legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do."'" 193 Pac. at pages 846–848. (Italics those of this court.)

The Washington court, in the Makris Case, also considered Portland v. Traynor, 94 Or. 418, 183 Pac. 933, 186 Pac. 54, and found the same difference between the ordinance in question before the Oregon court and the one held invalid by the Washington court in the Makris Case which we have already pointed out between the West Virginia statute, considered in the Dent Case, supra, and the one now before this court. This is shown by the following quotation by the Washington court from the Oregon decision:

"* * * As we construe it, the ordinance in question is certain and definite in its terms. It provides if, upon investigation, *the location 'is found to be suitable for a food establishment, and in proper sanitary condition according to the* ordinances of the City of Portland and the regulations of the United States with reference to plumbing, water supply, ventilation, and cleanliness, the bureau of health shall issue to such applicant a food establishment permit.'" 193 Pac. at page 848. (The italics are those of this court.)

The ordinance, by using the language quoted by the court, laid down a rule of action to be followed by the board (whether sufficient or not, it is not for this court to decide), and, to that extent, it supplied that which is wanting in the dental board statute before us.

It is true that in the Makris Case the Washington court says:

"We do not in our present inquiry take note of decisions which have to do with the granting of licenses for the sale of intoxicating liquors, the maintenance of pool rooms, *the practice of professions*, or entering upon occupations more or less dangerous to others, looking to the personal qualifications of the licensee. As to such licenses there is necessarily involved *some*

measure of discretion to be exercised by the officer or body charged with the duty of deciding who may or may not engage in such businesses, professions, or occupations. Such cases do not deal with constitutional rights *so clearly ascertainable* as those drawn in question in this case." 193 Pac. at page 849. (The italics are those of this court.)

Doubtless there is need for clothing with a wider discretion those charged with the duty of determining the qualifications of a person to engage in the professions than of those whose duty it is to act with regard to readily observed and determined physical conditions; nevertheless there are well-known, recognized, and established methods and rules for measuring the storehouses of the mind and the cunning of the hand in the arts, trades, and sciences. There is no right in the Legislature to delegate the exercise of discretion, beyond what is reasonably necessary.

In Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, the Supreme Court of the United States says:

"* * * It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period before March, 1881. If, in the proceedings under the statute, there should be any *unfair or unjust* action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient." 129 U. S. at pages 124 and 125, 9 Sup. Ct. at page 234, 32 L. Ed. 623. (Italics those of this court.)

This amounts to an assurance that a remedy will be found for wrongs done by such a board.

In State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544, the complaint was that the board of dental examiners fraudulently denied a license to practice, not because of petitioner's failing to pass the examination, but because the applicant refused to subscribe to a certain code of ethics presented to him by the board. In this case the court held that it would have been reversible error to have admitted the questions, answers, and other documents relating to the examination, and said:

"* * * The general rule is well established that the courts cannot review the discretion which has by law been vested exclusively in inferior tribunals, and mandamus will therefore not lie to compel the performance of acts or duties which necessarily call for the exercise of discretion on the part of the officer or board at whose hands their performance is required, because the state has, as in this instance, determined upon and specified the officers upon whose *judgment of the questions submitted* to them the state is willing to rely." 38 Wash. at pages 327, 328, 80 Pac. at pages 544, 545. (The italics are those of this court.)

The only criticism of the foregoing is that the statute does not define the questions that are submitted to the board's judgment. The statute simply leaves it to the board to say whether those of good moral character holding diplomas shall or shall not be licensed to practice dentistry. The Washington court further says:

"* * * The action of the court must, in reality, be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed, because, if it acts arbitrarily or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals, under the law, and therefore against the law itself, it has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, it has not exercised its discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for the honest discretion demanded by the law. In such cases the law will, by mandamus, compel the tribunal to act honestly and fairly, or, in other words, *to exercise its discretion*; and, when this distinction is kept in mind, the seeming difficulties which have surrounded this question, and which have caused so much discussion, disappear. But, in the light of the record in this case, these abstract principles are scarcely involved; for, while it is at least theoretically true that there is no wrong without a remedy, there is no allegation of any wrong in the petition in this case upon which the appellant *was denied a hearing*." 38 Wash. at pages 328 and 329, 80 Pac. at page 545. (Italics those of this court.)

It is well-settled practice in the federal court to admit in evidence the examinations—including questions and answers propounded to and given by immigrants applying for admission to the United States, and the various witnesses in deportation cases (cases in which, not the rights and liberties of citizens are involved, but merely the rights of aliens to enter the United States), in order to determine whether the action and rulings of the officers and boards considering the same have been arbitrary or capricious, and necessarily would it be so if the charge were that fraud was involved, because of the great latitude allowed in cases of the latter character. The decision of the Washington court in the Brown Case, supra, and what is said above, hardly appear to this court to be the full measure of relief which the language quoted from Justice Field's opinion, supra, gives promise. The greatest latitude is, ordinarily, allowed where the purpose or intent with which an act has been done is charged to have been fraudulent—that is, concealed and dishonest; and despite the ruling in the foregoing case, and while we have not the record before us, it would appear that the "questions, answers, and other documents," relating to the examination therein attacked, might reasonably be expected to throw some light upon the intent, motive, and purpose of the board in refusing applicant a license.

While, no doubt, the executive's appointees may formulate rules and regulations supplementing to some extent the law, where authority is expressly conferred so to do, and while the courts are not prone to interfere with the exercise of such discretion, as is shown by the numerous decisions which we have reviewed and considered, it is not consistent with our system of government that the executive shall both make and execute the law. If law be a rule of action, then section 8416 is no law; for, while it undertakes to authorize the board to act—to examine—it gives the board no rule by which to act. In the regulation of such matters, the need of some exercise of judgment and discretion, no doubt, exists, and the line of demarcation, the bounds of such legal discretion, must ever remain difficult of determination.

The board of dental examiners, under this act, from the dental

graduates of good moral character presenting themselves, may simply appoint, as they see fit for any reason, dentists to practice. A power so unconfined and unrestrained as that sought to be conferred by this section authorizes, in no proper sense, the exercise of discretion, but rather the exercise of autocratic and arbitrary power. The part of the statute requiring the examination should be, and is, held inoperative and of no effect.

The temporary injunction prayed for will be issued.

GILBERT, Circuit Judge, and NETERER, District Judge, concur.

J. C. FRANCESCONI & CO. v. BALTIMORE & O. R. CO.

(District Court, S. D. New York. June 1, 1921.)

No. L19-337.

1. **Railroads ⇐139—Liable for unreasonable detention of shipper's tank cars.**
   In the absence of a contrary regulation under the Interstate Commerce Act, a carrier is liable to a shipper for the unreasonable detention and use of the shipper's tank cars for the carrier's own purposes, contrary to the instructions of the shipper.

2. **Railroads ⇐138—Tariff rule held not to authorize unreasonable detention of shipper's cars.**
   A carrier's tariff rule on file with the Interstate Commerce Commission, which required the carrier to pay the shipper three-fourths of a cent a mile for the use of the shipper's cars, which rate was admittedly less than the value of such use, does not authorize the carrier to retain possession of such cars indefinitely, on payment of that rate contrary to the shipper's orders, especially in view of the second section of the rule, which applies to the same transaction and manifests the contrary intention.

3. **Railroads ⇐138—Tariff rule held not to charge owner of tank cars with empty movements under carrier's direction.**
   The provisions of the tariff rules of a carrier, charging the owner of a tank car with the excess of empty mileage, over the loaded mileage, for which the carrier was to pay the shipper a stated allowance for the use of the car, did not intend to charge the shipper with the empty mileage traveled under the carrier's directions contrary to the shipper's instructions and therefore indicates that the provision for mileage paid to the shipper was not intended to authorize the carrier to retain possession of the car indefinitely on payment only of such mileage.

4. **Railroads ⇐138—Carrier's regulation against payment for diversion does not justify indefinite detention.**
   The regulation of a carrier, in its tariffs on file with the Interstate Commerce Commission, that it shall not be liable to a shipper owning its own cars for delay or diversion, except as authorized in filed tariffs, does not give the carrier the right purposely to detain the cars contrary to their owner's orders for the carrier's own purposes.

5. **Customs and usages ⇐6—Uniform conduct essential to establish "practice" of carriers.**
   Though "practice" of the carriers, within Interstate Commerce Act, § 1 (Comp. St. § 8563), covers a large field, such practice is not established by occasional, or even common, assertions of right, but its essence is uniformity, so that the general refusal of a carrier to pay for the use

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

of privately owned cars detained by it for service other than the owner's does not establish such practice, where it had occasionally paid for such use.

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

6. Commerce ⊜89—Courts can determine applicability of tariff rules in first instance.

Even though all questions as to rates of an interstate carrier must be presented to the Commission in the first instance, before recourse is had to the courts, the courts can determine whether the tariff rules of the carrier on file apply to the situation in controversy, though such determination involves a construction of the rule.

At Law. Action by J. C. Francesconi & Co. against the Baltimore & Ohio Railroad Company to recover damages for the use and injury by the defendant of two tank cars owned by plaintiff. Verdict directed for plaintiff.

The two tank cars in question were delivered empty to the defendant, with written orders to return them to the shipping point by designated routes. Instead of returning the cars, the defendant placed them in service, carrying acid, between other points, and used them in such service for more than six months, and when they were returned to plaintiff they were so damaged by the acid that the tanks had to be repaired.

Rule 29 of the Interstate Commerce Commission's tariff rules reads as follows:

"Tank Cars of Private Ownership—Obligation to Furnish—Mileage Allowance, and Equalization of Mileage.

"Section 1. In providing ratings in this Classification for articles in tank cars, the carriers whose tariffs are governed by this Classification do not assume any obligation to furnish tank cars. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters (¾) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

"Sec. 2. Private cars will be moved empty, without charge, at the time movement is made between stations or junction points on the lines of carriers whose tariffs are governed by this Classification (either individually or jointly), including delivery to connecting lines, subject to the following conditions:

"(a) Should the aggregate empty mileage of any owner's cars on June 30th of each year, or at the close of such yearly period as may be mutually agreed upon, exceed the aggregate loaded mileage on the lines of such carriers individually (or jointly when mileage accounts are computed jointly), such excess must be paid for by the owner, either by an equivalent loaded mileage during the succeeding six months, or, at tariff rates without minimum, plus the mileage that has been paid by the carriers to the owners on such excess empty mileage. Any excess of loaded mileage over empty mileage of any owner's cars at the end of the accounting period will be continued as a credit against the empty movement of such cars for the ensuing twelve months.

"(b) New cars or newly acquired cars, moved empty to home or loading point by order of the owner, must be billed at regular tariff rates."

Rule 13, formerly rule 14d, provides:

"When private tank cars are unloaded, the owner will issue instructions for empty movement to the agent at point of unloading, either direct or through consignee. The agent will bill each car to final destination, showing name of the consignee and full route."

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

Macklin, Brown, Purdy & Van Wyck, of New York City (Walter A. Swett and James M. Gorman, both of New York City, on the brief), for plaintiff.

Cravath & Henderson, of New York City (Lyle H. Hall, of New York City, on the brief), for defendant.

Douglas Campbell, of New York City, appearing by permission of the court for the Union Tank Car Co.

LEARNED HAND, District Judge. [1] In the absence of regulation under the Interstate Commerce Act (24 Stat. 379), there is no dispute that the defendant would be liable. The plaintiff's tender of the cars and its acceptance by the defendant gave the latter no rights beyond the fair import of the transaction, and, taken merely as a custom, the practice of retaining cars at the convenience of the carriers is not sufficiently proved to form a part of the bargain. If so, the proper interpretation of the bailment is that, when the contents of the car have been delivered to the consignee, the car is at the shipper's order.

The defendant's reliance is upon the fact that rule 29 of the Interstate Commerce Commission provides a rate to cover the empty mileage of tank cars, and that by implication this gives to the carrier a right to hold it as long as it suits its necessities in the general handling of its traffic. At first blush the position appears hardy, since it altogether deprives the shipper of his car, and appropriates it as a part of the general equipment of the carrier, at a rate which is concededly but a fraction of its actual use value. Nevertheless, it is quite true that, if the Commission have ruled in the subject-matter, recourse must be had to it, before the courts can interfere, since the question would be one of administration. Pennsylvania R. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867.

Nor do I mean to suggest that the Commission might not, if it chose, provide that the tender of a loaded car should give the carrier the right to make it a part of its general equipment, for a time to be determined by its own convenience, at rates which were adequate in the Commission's judgment. That the carrier must, at the cost of paying the full value, at once return the car under the shipper's direction, is not an inevitable necessity. The exigencies of car distribution, the necessities for a reliable and steady supply of equipment, the loss involved in the absolute requirement at once to return empties when and where the shipper might demand, might well give the Commission the power to impose upon the shipper's tender conditions very different from those attending the usual bailment. Similar considerations dictated the decision in Proctor & Gamble v. U. S. (C. C.) 188 Fed. 221, which was reversed on another ground in 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091. See, also, Swift & Co. v. Hocking Valley Ry. Co., 243 U. S. 281, 37 Sup. Ct. 287, 61 L. Ed. 722.

[2] The first question here is whether rule 29 authorizes the indefinite detention of cars at the carrier's pleasure. It is apparent that the rule, in fixing a rate, did not necessarily touch upon this question. At best, if it be an administrative question, which courts should not meddle with, it can be such only because of some established practice

of the carriers, whose prima facie validity courts must recognize. I think that rule 29 does not even leave the matter open.

[3] The defendant's position is that the rate applies to movements made at the carrier's pleasure, as well as the original movement dictated by the shipper. But section 2 charges the shipper with all excess empty movements. If so, it will follow that the allowance of three-fourths of a cent for all movements, loaded or empty, is subject to a deduction for all excess empty movements which the carrier may find it expedient to make. Now, section 2 was certainly not devised upon any such theory, but to impose upon the shipper some motive to reduce his empty haulage. It would clearly frustrate the scheme of the rule if the shipper's compensation, inadequate in itself, were exposed to deductions dependent, not upon his own control, but upon the convenience of the carrier in the use of his property. Nor is it possible to say that section 2 applies only to empty movements directed by the shipper, while section 1 applies both to those and to putative movements directed by the carrier. The rule is clearly one and section 2 is intended to cover the same ground as section 1.

[4] It follows that the rule does not authorize the carriers to detain or divert such cars at their will. The defendant, nevertheless, argues that under a regulation of the American Railway Association, passed May 17, 1911, it is forbidden to make any payment of the kind here sued upon. That rule, which may be taken as a "regulation" under section 1 of the Interstate Commerce Act (Comp. St. § 8563), provides that the carriers will pay nothing for delay or diversion, except as authorized in filed tariffs. That this is not an assertion of any right deliberately to divert such cars appears, not only from rule 29, but from rule 13 of the Car Service Rules, and from the evidence in the case that the practice is to observe the shipper's orders in the return of cars. Such detention remains, therefore, a wrong as much under the regulations and practices of the carriers as at common law, and prima facie it is reserved under section 22 of the Interstate Commerce Act (Comp. St. § 8595), and is a dispute justiciable in court.

[5] The defendant, however, insists that, granting all this, the carriers have nevertheless established a practice by which they have interpreted rule 29 as covering the case of cars which happen to be delayed or diverted, and that this practice must be reviewed by the Commission before it can come before any court. The word "practice," as used in section 1 of the act, covers a large field. Northern Pacific Ry. v. Solum, 247 U. S. 477, 483, 38 Sup. Ct. 550, 62 L. Ed. 1221. But it appears to me open to doubt whether there has been any consistent practice among the carriers on this subject. Certainly the Union Tank Company, a very large owner of cars, has collected damages for diversions in the past from other carriers, and though this defendant appears generally to have refused to recognize any such claims, its own practice is not uniform. On the contrary, it has seized cars from the Union Tank Company and paid sums not calculated upon the rate fixed by rule 29.

Therefore it is fair to say that carriers generally have not, and that this defendant individually has not, "established, observed, and en-

forced" any "regulation or practice" which treats all diversions as falling within rule 29. Occasional, and even common, assertions of right, do not make such a "practice." Its essence is its uniformity. Carriers may not claim the sanction of the statute for a usage which they apply only with exceptions; they cannot say that in such cases they "observe and enforce" it themselves.

[6] In Texas & Pac. Ry. v. Amer. Tie & Timber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, it was held that the Commission must first pass upon the question whether railroad ties were within a lumber rate, before the court got jurisdiction over an action for wrongful refusal. If this case means generally that the interpretation of all rules must be fixed first by the Commission, then no case can come up in court involving the meaning of any rule unless the parties agree upon that meaning. In that case the question was of rates, and the case may possibly be taken as deciding that the meaning of rates is always primarily for the Commission. Here, however, is a question whether the rule provides for the involuntary detention of cars; if it does not, that detention was a wrong, and it cannot be argued that there is a rate established for a wrong. The mere fact that the enforcement of a rule of the Commission comes incidentally in question does not divest a court of jurisdiction. The Supreme Court has several times enforced such rules or practices of the carriers without preliminary recourse to the Commission. Pennsylvania R. R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Swift & Co. v. Hocking Valley R. R. Co., 243 U. S. 281, 37 Sup. Ct. 287, 61 L. Ed. 722; Pa. R. Co. v. Kittanning Co., 253 U. S. 319, 40 Sup. Ct. 532, 64 L. Ed. 928. It cannot be that the rule is to be enforced only when its meaning is not in dispute, and in the last case cited there was a careful analysis of the meaning of a rule and a decision as to its application to the case. Texas & Pac. Ry. Co. v. American Tie & Timber Co., supra, must be understood as depending upon the fact that it was a rate which was in question.

The three cases in which the question has already arisen have been decided against the carrier. Gustafson v. Michigan Central R. Co. (Ill.) 129 N. E. 516; Sun Co. v. Pennsylvania Co. (Ct. Com. Pleas Pa., July Term, 1920); Empire Refineries v. Guaranty Trust Co. of New York (C. C. A. 8th, March 17, 1921) 271 Fed. 668.

Verdict directed for the plaintiff for $3,990, with interest from March 1, 1918.

SHANLEY et al. v. UNITED STATES.

(District Court, E. D. New York. June 27, 1921.)

1. Seamen ⊂=7—Must serve until termination of voyage though beyond contract term.

Extension of the voyage beyond the time mentioned in the contract, due to perils of the sea, which the master or owner could not reasonably be expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination, but, if the voyage cannot be completed, or is ended by mutual agreement, the former articles are of no effect upon the future status of the crew, who are free to make a new agreement with the captain if he has the authority to make it.

2. Seamen ⟸7—Contract made by master on compulsion by crew held invalid.

Libelants signed for a voyage to African ports and return to a port of the United States, the term to expire in six months. At the end of the six months the vessel, owing to delays caused by breaking down of machinery, was at a West African port where there was no consul, and another crew could not be obtained. The master proposed to extend the articles, but libelants refused, demanding a new contract at higher wages, which the master signed under protest, claiming duress. Gibraltar was the nearest port where the questions at issue could fairly have been considered by a consul, but the vessel continued her voyage and returned to the United States, and no further contract was made. *Held*, that libelants were not entitled to demand the contract at the time they did, and that it was invalid, but that libelants were entitled to pay at the new contract rate from the time the vessel might have reached Gibraltar, when such demand would have been within their rights.

3. Seamen ⟸25—Release by not conclusive.

Under Rev. St. § 4552 (Comp. St. § 8341), a release signed on payment at completion of a voyage by seamen who claimed further wages, but whose claim was not considered on its merits by the Commissioner, who told them it could later be determined by a court, cannot be used as a receipt in full.

In Admiralty. Suit by Joseph S. Shanley and others against the United States. Decree for libelants.

Frederick R. Graves, of New York City (Martin A. Schenck, of New York City, of counsel), for libelants.

Burlingham, Veeder, Masten & Fearey, of New York City (Roscoe H. Hupper and W. J. Dean, both of New York City, of counsel), for respondent.

CHATFIELD, District Judge. The libelants were members of the crew of the Liberty Land (a boat owned by the United States and operated by the United States Emergency Fleet Corporation), who shipped at Philadelphia for a voyage to an African port and return to the United States. The articles were signed at Philadelphia before the Shipping Commissioner, and, although there was some discussion about the necessity of making the contract for a longer period, these particular articles were to expire in six calendar months, as was the custom at the time. When the six months expired, the vessel was in the port of Accra, on the Western coast of Africa. Before reaching the Azores, the vessel was delayed by the breaking down of a turbine. The vessel was further held for six weeks in Lagos, Africa, to repair a windlass and a steam valve chest for which a casting had to be made. The vessel finally left Lagos for a port called Winnebach, but boiler trouble compelled them to again return to Lagos for a period of three weeks. Before the vessel reached a port where there was an American consul who could act as Shipping Commissioner, the six months expired. The vessel was then anchored at Accra in an open roadstead two miles off shore.

The matter of extending the articles was at once taken up for discussion. The captain desired the crew to continue under the old articles. The crew insisted on the making of new articles and de-

manded double pay for the balance of the voyage home. Finally the captain called in a British customs supervisor, in order to have a record made of the matter before some impersonal third party, and the British customs supervisor has certified to the facts.

After negotiations, the captain agreed to pay the rate of wages demanded by the crew, but under a protest or claim of duress and illegal demand, and kept on to some, but not all, of the ports where he had intended to take cargo on his return voyage.

There is almost no dispute as to the facts. The vessel had prior to the time when the six months expired touched at a port where an American consul was available, and the captain had cabled for and received authority to make an extension of the articles. Thereafter the captain had gone on to different ports for which he had cargo, in disregard, as the libelants claim, of the situation which he knew would be later presented.

The libelants contend that on these facts the former contract was terminated and a new agreement entered into, based upon a valid consideration, and free from any duress or breach of the former ship's articles, either in spirit or in letter. The respondent asserts the converse of each of these propositions, claiming as a premise that the members of the crew could not, under the circumstances, terminate or treat as abrogated the obligation which rested upon the crew at the time the paper was signed by the British customs supervisor at Accra.

The captain had obtained authority to extend the ship's articles. Both he, the owners, and the crew evidently considered that the six months' period was an essential element of the contract, subject only to such legal consequences as might follow therefrom. A new contract was therefore legally possible.

[1] In the case of U. S. v. Hamilton et al. (C. C. A.) 268 Fed. 15, the following propositions are laid down, among others:

"(1) The master cannot discharge the crew, and the crew cannot demand wages in full, until the end of the voyage.

"(2) The end of the voyage is not a port of distress, but the port of destination.

"(3) Seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular.

"(4) Extension of the time of the voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port.

"(5) But extension of the voyage beyond the time mentioned in the contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination."

To these can be added another proposition as follows: If the voyage cannot be completed, or is ended by mutual agreement, the former articles are of no effect upon the future status of the crew, who are free to make a new agreement with the captain, if he has the authority so to do. Rand v. The Hercules, Fed. Cas. No. 11548.

In the case at bar, if the captain voluntarily and with knowledge

of the circumstances terminated the voyage and entered into a new agreement with the same men, as a new crew for a new voyage, this, in the absence of express restriction of his authority, known to those dealing with him, would be sufficient as the basis for a valid agreement. McKenzie v. Oglethorpe, Fed. Cas. No. 8857.

But if the crew either knew that the captain had not the authority to terminate the voyage and to make a new contract, or if they were aware of facts affecting the validity of such new contract, they cannot insist upon the enforcement of the new and invalid agreement.

[2] As was stated in the Hamilton Case, supra, a port of refuge is not a port of destination. Delays occurring during the voyage, from perils of the sea, and circumstances attendant upon the subject-matter of the contract itself, must necessarily be in the minds of the parties to the contract, and the duration of the contract must therefore be prolonged to such an extent as will make it safe and possible, within reasonable limits, for the voyage to be terminated. A crew cannot leave a ship at an unreasonable place, with the voyage unfinished, even if the delay has been caused by such negligence on the part of the captain or the owners that the voyage would, except for such negligence, have been terminated at a port of destination. Nor can the crew leave the vessel while in distress and with the voyage undetermined, solely because of their desire to make a new contract.

The libelants claim that the captain of the Liberty Land, through his desire to extend the voyage beyond its original time limit and to call at ports where he wished to deliver or take on cargo, even though he knew that no American consul was present and no crew could be obtained, ignored the obvious effect of the delays which had occurred through accidents earlier on the voyage. They do not dispute the proposition that a crew could not desert the ship before reaching port if an accident had delayed the vessel in getting to that port, but they contend that if, after the occurrence of accidents, port has been made, where the crew can be discharged and the voyage terminated (if it cannot be completed according to the original articles), then the master has no right to continue upon his original schedule, and, solely to prevent financial loss, insist upon holding the crew beyond the time fixed for the voyage.

The question thus comes down to whether the crew or the owners of the vessel are to stand the consequences of accidental delays in the earlier stages of the voyage.

The court is unwilling to find that seamen may thus arbitrarily compel or coerce the captain of the vessel into yielding to their terms. As was held in the Hamilton Case, supra, such coercion may be under circumstances rendering the seamen liable to a criminal charge of revolt. Such conduct can certainly not be the basis of a valid contract. In the case at bar the captain evidently anticipated delay. He cabled for instructions and authority and received directions to do that which he had the power to do without express direction. If the crew had been willing to sign new articles, extending the period of the voyage on the same terms, no question could have arisen. If they were

not willing to do this and insisted upon a termination of the voyage, they were bound to stand by their vessel until it reached a point where the voyage could properly be considered at an end, and where they could be properly released from their obligations.

The captain of the Liberty Land had done nothing which justified his crew in their insistence that by his own acts and negligence he had prevented them from having the voyage declared terminated, and from insisting upon being sent home or released from their contract. If the vessel had gone to Lagos, or to some other point where an American consul could have been found, the facts show that no other crew could have been obtained within a longer time than was necessary to bring the vessel to Gibraltar, which seems to have been the nearest port where the questions at issue could fairly have been considered by a consul. Until this point was reached, the crew were not in a position to insist that they be sent home, that they be paid off, or that a new arrangement be entered into.

The libelants, therefore, were not in a position to insist upon the making of the contract which the captain entered into under duress and protest. The contract itself is based upon sufficient consideration, provided the making of the contract be valid. But, when duress enters into the exchange of mutual promises, sufficiency of consideration is not the test of legality of the contract. Evidently the captain and the crew entered into an apparent agreement which was rendered invalid by the lack of right on the part of the crew to insist that the agreement be made.

This court has no power to make a new contract if the original contract was invalid. It is impossible to determine what solution the parties would have worked out as a basis of agreement, but, inasmuch as the crew were bound to stick to their contract and to their vessel, at least as far as Gibraltar, and as upon reaching that port, they could have insisted upon making a contract like that forced on the captain at Accra; in other words, inasmuch as the element of duress depends upon the exercise of compulsion prematurely, and inasmuch as the captain of the Liberty Land agreed to pay wages at the rate demanded, rather than to lose his crew, and then proceeded to New York instead of to a port like Gibraltar, where the matter could have been terminated, it would seem that the new contract was invalid only in part or during that period wherein the crew mistakenly assumed that the new contract could be put in force. The captain of the Liberty Land did not have the right to demand that his crew continue to sail with him, according to his wishes and until he should reach the United States, no matter how long the voyage might take.

[3] On this basis the libelants would be entitled to pay at the rate under the new contract (inasmuch as they actually did receive their passage to the United States upon the Liberty Land itself) only for such period as would have been represented by the voyage from Gibraltar to the port of destination. Upon arrival at Philadelphia, the matter of paying off the crew and the dispute as to the rate of wages was

taken before a Shipping Commissioner. The testimony of the Shipping Commissioner is that at the time of the discharge, when a great majority of the crew were present, they were informed by the Shipping Commissioner that "by signing clear, if they could show cause in the future, they could collect their wages if the court rules so," and the understanding was that they were signing under protest. The printed portion of the release was not read to any of the crew by the Commissioner, as he understood that since the Seamen's Act (38 Stat. 1164) the validity of the release was open for construction by a court, and he did not even enter a protest in the paper as signed. The Shipping Commissioner apparently did not go into the merits of the claim by the crew, but denied it as a matter of course and left them to their action. Under these circumstances the release cannot be used as a receipt in full, under section 4552, R. S. (Comp. St. § 8341).

Decree may be entered as above indicated.

THE TAMBA MARU.

(District Court, W. D. Washington, N. D. November 5, 1919.)

No. 3815.

1. **Shipping ⟸123—Nature of cargo must be considered in stowage.**
   In the stowage of cargo the carrier is required to take into consideration the nature of the cargo and the causes which may effect its injury, including the season of the year where it is of a nature to be affected by temperature.
2. **Shipping ⟸132(5)—Damage to shipment of eggs held due to improper stowage.**
   Damage to a shipment of eggs from Shanghai to Seattle *held*, on the evidence, to have been caused by their improper stowage in a lower after hold, around and over the shaft tunnel, where the eggs were subjected to excessive heat and vibration, and were without proper ventilation.
3. **Shipping ⟸131—Shipper held entitled to recover freight paid on damaged cargo.**
   Where the damages recovered for loss and injury to cargo is measured by the market value at the port of shipment, libelant is also entitled to recover the freight paid.

In Admiralty. Suit by the Hazelwood Company against the steamship Tamba Maru; Nippon Yusen Kaisha, claimant. Decree for libelant.

Platt & Platt, of Portland, Or., for libelant.

Oliver C. McGilvra, of Seattle, Wash., and F. G. Dorety, of St. Paul, Minn., for claimant.

CUSHMAN, District Judge. The libel is in rem by the assignee of the bill of lading to recover for the loss of 1,769 cases of eggs, containing 30 dozen each, and for damage to eggs in the remaining cases, in a shipment totaling 3,400. The eggs were shipped from Shanghai, Oc-

tober 24, 1914, to Seattle, which port they reached November 21st of the same year. The causes of the loss and damage, as set forth in the libel, are:

That it was "improperly stowed in the lower after hold of No. 5 hatch, on both sides of, against, over, and upon the shaft tunnel back of the boilers of said steamship, in the warmest storage place on said steamship, which place, by reason of the temperature and lack of ventilation and excessive vibration, was an improper, unseamanlike, and wrongful place to store a perishable commodity such as eggs."

This suit is, in very many respects, similar—strikingly so—to the case of the Aki Maru, tried in this court before Judge Neterer, and later, upon appeal, before the Circuit Court of Appeals (255 Fed. 721, 167 C. C. A. 67). Among the more important points of similarity may be mentioned:

The recital in the bill of lading that the eggs were "received in apparent good order and condition"; that the ships in question—the Tamba Maru and the Aki Maru—are twin vessels; that the eggs in each case were gathered in the same locality, and therefore transported an equal distance to Shanghai; that at the time of shipment they were similar as to quality and inspected and candled in the same way; that they were stowed in the same part of the same hold; that the season of the year was the same in each case—the eggs in this shipment having been shipped on October 24, 1914, while those in the other case were shipped on November 4, 1914. The loss and damage in the two shipments were found at Seattle to be, relatively, in about the same proportion to the total shipment.

Claimant contends that the decision of the present suit should not be controlled by the decisions in the Aki Maru Case, because of certain claimed differences in the testimony. No contention has been made here that the conditions of the shipment in the Aki Maru Case were not actually, in all substantial respects, similar to those of the shipment now in question. Under the testimony of the manager of the steamship company, it could not well be otherwise:

"Q. The location of the eggs on the Tamba Maru shipment and the Aki Maru shipment was practically the same, was it not? A. I didn't quite hear the first of your question.

"Q. The location of the eggs on the Aki Maru shipment that came in December 5, 1914, was practically the same as the location of the eggs of the Tamba Maru shipment which came in November 21st, was it not? A. Each shipment was stowed in lower No. 5 hold of the respective steamer.

"Q. As to the stowage of the eggs on the ship? A. Yes; very similar.

"Q. What was the difference, then? A. The Tamba Maru had a larger number of cases of eggs.

"Q. That was practically the only difference? A. As far as I know, yes, sir."

In the Aki Maru Case, the Circuit Court of Appeals, under the recitals in the bill of lading, held, quoting from the decision in Nelson v. Woodruff, 66 U. S. (1 Black) 156, 17 L. Ed. 97:

"* * * In case of such loss or damage the presumption of law is that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible."

Claimant undertakes in this case, as in that of The Aki Maru, to show that the cause of the loss and damage was the hot weather at the time of shipment and the then unfitness of the eggs. Claimant frankly states its position as follows:

"The whole issue here is as to whether this shipment was too early. Libelant concedes that summer eggs cannot be shipped successfully, and we concede that winter eggs can be. The whole question is as to where the line should be drawn. It is a sine qua non, therefore, in showing the similarity of other shipments, to show similarity in date and weather conditions, and no such evidence whatever is shown in this case."

While there may be other minor points of difference in the evidence in these cases, claimant's chief contention for a distinction in the two is based upon the following points and testimony:

Less care in the candling of these eggs is claimed to be shown than was taken with those upon the Aki Maru. This contention is based upon the opinion given by the witness Adler that 5 per cent. were rejected in candling, although he disclaims any recollection upon this point, while 60 per cent. were candled out at Shanghai before shipment on the Aki Maru.

In the memorandum decision by Judge Neterer, in the Aki Maru Case, it is shown that, in that case, the contention of claimant was that the rejection of such a large percentage of the eggs by the candlers showed that they were then generally tainted. The same claimant now takes the contrary position, and contends that the small amount rejected on candling shows that defective eggs were shipped.

As the eggs were candled at least twice before shipment, giving this argument full weight, it may only show that they were more thoroughly candled upon the first occasion in the present shipment, thus lowering the percentage rejected in the second candling. Again, if there is anything in either contention, there would probably have been a greater disproportion in the losses upon the two shipments after reaching Seattle; the conditions being so similar in all other respects.

A witness in the present case, not testifying in The Aki Maru, was C. H. Clark, who testified to handling two separate lots of Chinese eggs in Seattle, one lot purchased in 1914. Witness had so many complaints from purchasers that he had them recandled, and only put out to the trade the day they were candled. They were badly shrunken and showed effects of age. Another lot handled by this witness in 1917 showed that they were old from heat. He says that the Chinese eggs he has seen were about four months old; that there is a difference in the market price in Seattle of Chinese eggs and American eggs of from 8 to 15 cents per dozen; that eggs exposed to rain are not fit for shipment, because the rain washes off the secretion from the laying hen, which seals the pores of the shell and keeps out the air (the transcript of the evidence furnished the court says "water," but my recollection is that it was "air" of which the witness spoke); that, in his opinion, there would be some deterioration in the eggs in question between November 21st and December 5th, while they were on the dock in Seattle, before the work of candling began; that heat and rough handling destroy eggs more rapidly than age. There is no show-

ing as to how long the eggs referred to in either shipment mentioned by the witness had been in America before they came into his hands.

Thad R. Perry, who has been in the egg business 14 years, a witness in the Aki Maru Case for claimant and respondent in that case, testified to not having handled Chinese eggs. In the present suit, he testified that he had handled five cases of Chinese eggs, that he had observed them from a number of different shipments, that they were generally inferior in size and fullness, and virtually all that he had seen were shrunken, which indicated age.

Dr. Hall, a medical missionary in China for a number of years, was not a witness in the Aki Maru Case. He was located 1,000 miles from Shanghai, and, as I understand his testimony, in the interior of China, away from the seaboard. He had spent about 6 weeks in Shanghai, and gave general testimony as to the production of eggs in China, lack of care for the laying hens, and the keeping and transportation of eggs.

General testimony along this line was evidently given in the Aki Maru Case, as indicated by the opinion in the Circuit Court of Appeals. Dr. Hall testified:

"Q. What is the attitude of the Chinese henkeeper towards fresh eggs? A. He doesn't appreciate fresh eggs. They are flat. He likes them with a little taste to them.

"Q. Does he consider there is any advantage in getting an egg to the table as soon as it is laid? A. No; no; they are too flat. If they are a little old, they have a better flavor."

If old eggs are preferred to fresh by the Chinese, there would appear to be no incentive, in candling eggs, to try to smuggle stale ones into the fresh, because of the local demand for the former. This preference on the part of the Chinese, composing, doubtless, the vast majority of the customers in the interior, and the well-known reluctance of Chinese to any change in custom, might account for the difficulty this witness experienced in obtaining fresh eggs from the local dealers, but it would in no way interfere with the thorough candling of eggs desired for export.

E. L. Corcoran, who was one of the men who worked at candling the eggs in this shipment in Seattle, says that they were hot weather eggs, meaning that they were laid in hot weather, and, from his experience, he pronounced them "anyway from 2 to maybe 4 months old." His opinion being so worded, I do not feel warranted—even taking his opinion at its face—in finding the eggs to be over 2 months old. So considered, this evidence is not greatly at variance with that of libelant, for, allowing 2 days in China for the transportation of the eggs to Shanghai, 2 days for candling the eggs there, 29 days upon the voyage, and 14 days upon the dock in Seattle, makes a total of 47 days. This computation does not include the time preceding the shipment from the local market in China to Shanghai, and would not in any way discredit the opinions expressed in the testimony relied upon by claimant to the effect that eggs 30 days old in China would be too old to ship.

Cheng Yuen Sing, the Chinese merchant from whom Giesel & Co. purchased the eggs, testified in the Aki Maru Case as to a conversation had with the agent of the compradore of Giesel & Co. Concerning this

conversation in that case, he testified that the conversation was all about the egg business; about the shipment of 3,400 cases the previous month; about a contemplated shipment; chiefly about price, quality of goods, etc. Nothing was said about cold storage. This shipment was to be made the same as the previous one. At the time of the conversation, the eggs were good. "I told him they were the same as the previous shipment" (referring, evidently, to the 3,400 cases involved in the present suit). The weather in Shanghai during the months of October and November, 1914, was not good for shipping eggs to America, being sometimes cold, sometimes warm, and sometimes rainy.

In that case, the witness appeared to volunteer but little information. In the present case, he testifies:

"I had a conversation with Lo Tah Chang, who is the compradore of Giesel & Company. Lo Tah Chang came to me and told me he had a telegram from America ordering him to buy eggs. I said the weather was not favorable for buying eggs to send to America, unless the eggs were put up in cold storage. Then Lo Tah Chang returned to his office, and after a while he telephoned for me, but I did not go. The following day he sent me a chit, asking me to go to his office, and I called at his office, and he talked to me about the egg business again, and I told him that the weather was too bad for shipment of eggs, unless they were shipped by cold storage. He told me he had made diligent inquiries, and could find no cold storage available. I told him that without cold storage eggs are not reliable, and I did not want to do the business, because I might have spoiled my reputation. We met again the following day, and I asked if he could get any cold storage, and he said it was impossible, and he asked me if the eggs I was going to sell him were good, first-class, fresh eggs. I said, 'Yes, I will sell you good, first-class, fresh eggs for Shanghai.' Lo informed me that other companies were shipping eggs, and he asked me if I was unwilling to sell eggs to him. I said I was not unwilling to sell eggs to him, but I will deliver the eggs, and after he examined the eggs, and accepted them, that I would take no responsibility whatsoever. Then I sold the eggs."

No satisfactory reason appears why the apparent willingness of this witness should be so much greater, and his recollection so much better, concerning a conversation long past—as the one was in the present case—than they were in the former case. Being taken at its face, this evidence is not essentially different from other testimony given upon the trial of the Aki Maru Case concerning the bad weather conditions for shipments over this route in October and November. While it is testimony given by the seller of these eggs to the representative of the exporter, it does not establish that these particular eggs were in any way inferior.

It appears in the present suit that, in the Aki Maru Case, it was not disclosed that a number of October and November shipments over the southern route to San Francisco, mentioned by the witness Henningsen, were in fact, under refrigeration. The contention is now made that the decisions of both courts in that case were made upon the assumption that these shipments were stowed forward, without refrigeration, and that this assumed state of facts controlled those decisions.

The shipping season in question, of 1914 and 1915, spoken of by the witness Henningsen particularly, I understand to refer to the fall of 1914, the winter of 1914–1915, and the spring of 1915. There is but

one shipment of eggs from Shanghai to Seattle shown to have been made during that season earlier than the one in question. These eggs were shipped October 16th, and consisted of 350 cases, not under refrigeration, and reached Seattle in good condition, it would seem.

The point is made that this was not a large shipment. There is nothing in the evidence to show any advantage possessed by a small shipment over a large one in the respect in question. The evidence as to early shipments in other years is general, and is given by the witness Henningsen, who has imported 75 per cent. of the eggs brought to this country from China since the tariff was taken off in 1913. This witness did not have his records as to other years, and, although he offered to look them up, was not required to do so.

This general evidence supports libelant's contention as to the propriety of shipments without refrigeration in October and November, if properly stowed. That such stowage as these eggs were given is likely to result in loss is strikingly shown by one instance stated in the testimony of the witness Henningsen. He testifies that, in a shipment from Shanghai, reaching Vancouver, B. C., February 26, 1914, on the Canadian Pacific steamship Empress of India, which consisted of 8,000 cases there were 1,043 cases loaded aft, and the remainder were loaded forward above the water line. The 7,000 cases loaded forward above the water line reached Vancouver in perfect condition, but the 1,043 loaded aft, out of the same shipment, were very badly damaged. The 1,043 cases netted less than $1 a case, while the balance, loaded forward, netted an average of $5 a case.

[1] It is a further significant fact, and one relied upon by the District Court in the Aki Maru Case, that, since the losses incurred, resulting in this suit and the case of the Aki Maru, claimant has stowed all eggs not under refrigeration forward. In the opinion of Judge Hunt in the Aki Maru Case, it is said:

"The carrier having accepted the eggs, and it being plain that eggs are a kind of freight which requires special care in stowage, we inquire whether the lower hold No. 5 hatch was a proper place to stow the eggs." 255 Fed. at page 723, 167 C. C. A. 69.

The effect of this is that special care should be taken where there is a particular danger. See, also, The San Guglielmo (D. C.) 241 Fed. 969, at 977. It logically follows that, if the season of shipment increased the danger, increased caution in stowage was required to offset the danger.

[2] No contention has been made but that the conditions of the shipment in question in the Aki Maru Case were actually, in all substantial respects, similar to those of the shipment now in question. Claimant was allowed ample time to procure further evidence in the Circuit Court of Appeals after the adverse decision of the District Court in the Aki Maru Case, and failed to produce sufficient evidence to establish any mistake in that decision, resulting in its affirmance by the Circuit Court of Appeals. The new evidence now offered in this court should, under such circumstances, be of a positive, important, and decisive character, to persuade this court to reach a conclusion con-

trary to that reached by those courts upon the issues, and it is not of that character. I conclude, as did those courts, that—

"* * * The disturbance or vibration due to the stowage of the eggs in No. 5 hold, through which the propeller shaft passes, together with the heat in the hold and lack of better ventilation, caused the damage to the eggs, and that, the eggs having been delivered to the carrier in good condition, the carrier failed to show that it was free from negligence in stowage." 255 Fed. at page 724, 167 C. C. A. 70, opinion.

[3] The question as to the measure of damage remains. The market value of the eggs in Shanghai is shown to have been $4 per case. Under the rule laid down in the Aki Maru, the libelant is entitled to recover the Shanghai value of the 1,769 cases which were a total loss, together with the difference between the Shanghai value of the 1,631 salvaged cases and the net amount realized. But, in the present case, libelant was permitted to amend its libel and recite a further claim of damages on account of freight paid upon this shipment of eggs from Shanghai to Seattle of $1,457. The allowance of this further item of damage would appear proper (Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 575, 37 Sup. Ct. 468, 61 L. Ed. 908), unless, as contended by claimant the ruling of the District Court and the Circuit Court of Appeals in the Aki Maru Case—that the Shanghai price was the measure of damage, and not the Seattle price—was controlled, primarily, by the fact that, after some months had elapsed from the time of the arrival of the eggs in Seattle, libelant made up a detailed statement in support of its claim for damaged and destroyed eggs, and placed their value at the Shanghai price, and that the libelant proceeded on the theory that the damages should be the value of the eggs at Shanghai.

In view of the wording of the bill of lading, restricting the claim to be made to the cash value of such goods or merchandise at the original port of shipment at the time of shipment, the holding of these courts would probably have been the same, in the absence of any such admission in the claim of libelant. Any reason requiring a claim to be made would not be applicable to such an item, where the freight was, in fact, paid to the party responsible for the damage. Such party would be presumed to know as much about that as the complaining party. Under the authority of Pennsylvania R. R. Co. v. Olivit Bros., supra, the freight paid upon this shipment, $1,457, will also be allowed.

The question of what, if any, interest should be allowed, has not been presented or considered.

AMOS BIRD CO. v. THOMPSON, Atty. Gen. of Washington, et al.

(District Court, W. D. Washington, S. D. June 24, 1921.)

No. 130-E.

1. Commerce ⇐60(3)—Food ⇐1—State statute requiring marking of imported eggs held valid.

Laws Wash. 1915, p. 274, as supplemented by Laws 1919, p. 290, requiring eggs imported from foreign countries and offered for sale in the state to be sold as such, and to that end that each imported egg shall

be marked, branded, or stamped with the name of the country in which it was produced, and that broken eggs or those offered for sale in other than the original form shall be similarly designated by marks on the containers or packages, but which exact no license fee and place no restrictions on dealings in or use of such eggs, *held* not unconstitutional, as imposing a restraint on foreign commerce, but within the police power of the state, and valid.

2. Commerce ⇐⇒18—State statute within police power not invalid because incidentally affecting commerce.

A statute enacted by a state in the exercise of its police power is not invalid, as in violation of the commerce clause of the Constitution, because it may incidentally affect foreign or interstate commerce, if such effect was not the object of the Legislature, but results from the legitimate protection of the people of the state in their health, or from fraud or deceit, intentional or otherwise.

In Equity. Suit by the Amos Bird Company against L. L. Thompson, Attorney General of the State of Washington, and others. On motion for preliminary injunction and motion to dismiss bill. Injunction denied, and motion to dismiss granted.

Kerr, McCord & Ivey, of Seattle, Wash., for complainant.

L. L. Thompson, Atty. Gen., of Olympia, Wash., and Malcolm Douglas, of Seattle, Wash., for defendants.

Before GILBERT, Circuit Judge, and CUSHMAN and NETERER, District Judges.

CUSHMAN, District Judge. This suit is one by a Connecticut corporation against certain officers of the state of Washington, to enjoin the enforcement of certain legislative acts of the state. The matter is now before the court upon application for a temporary injunction.

[1] The showing of irreparable loss may be sufficient to warrant the injunction, providing the court is satisfied as to the invalidity of the laws in question. The complaint avers:

"That the complainant is engaged in the business of buying and selling eggs and importing eggs from foreign countries into the United States and the state of Washington, and in preparing foreign eggs for shipment by breaking the same and removing the shell and placing the eggs in cans, containers and covers. * * * That said eggs are as wholesome, and are produced, handled and shipped under as sanitary conditions, as domestic eggs."

In 1915, the Washington Legislature passed a law containing the following provisions:

"All eggs imported into the state of Washington from foreign countries shall be sold as such. The case or container in which they are shipped shall have the words 'foreign eggs' displayed thereon in letters two inches high. All retailers of said eggs shall sell them from the container in which he received them and shall inform each purchaser that said eggs are foreign eggs. All restaurants, hotels, cafés, bakeries and confectioners using or serving foreign eggs must place a sign in letters not less than four (4) inches in size in some conspicuous place where the consumer entering their place of business can see it, to read 'we use foreign eggs.'" Section 1 (e).

"Every person, firm or corporation having in his possession for the purpose of sale or offering for sale or selling any eggs shall classify and brand the same with the classification provided for in section one of this act." Section 2.

"The word 'person' as used in this act shall mean and include individuals and employés or agents of individuals, firms and members of firms and their employés and agents, corporations and officers of corporations and their employés and agents." Section 4.

"Every person who shall violate any provision of this act shall be guilty of a misdemeanor." Section 5.

Laws of 1915, c. 94, pp. 274 and 275.

In 1919, a further act was passed, containing still further provisions, as follows:

"Section 1. All eggs imported from foreign countries and offered for sale in the state of Washington shall be sold as such. Each egg offered for sale in this state shall be marked, branded or stamped with the name of the country in which it was produced, and such mark shall be in legible Gothic letters in durable, indelible ink.

"Sec. 2. Broken eggs or eggs offered for sale in other than the original form shall be marked or branded as in section 1, except that such mark or brand shall be stenciled on the can, container, and cover or covers in letters two (2) inches high in black face type and in durable ink or paint, and the words 'Eggs from' shall prefix the mark or brand and such words shall be in similar type and ink or paint.

"Sec. 3. The state commissioner of agriculture shall make all necessary rules and regulations to carry this act into effect, such rules and regulations shall be filed in the office of the state commissioner of agriculture and shall be in effect thirty (30) days after such filing.

"Sec. 4. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and in case of second or subsequent offense shall be guilty of a gross misdemeanor."

Session Laws 1919, c. 120, p. 290.

The provision in the latter act for stamping each egg probably repeals that part of the act of 1915 requiring the retailer to inform each purchaser that such eggs are foreign eggs.

While it is complained that these acts are in violation of the Fourteenth Amendment of the Constitution of the United States, in that they and their enforcement would deprive complainant of its property without due process of law, and, further, that they are in violation of section 12, article 1, of the Constitution of the state of Washington, upon the hearing on this application, these grounds have not been stressed, and they will not be further noticed by the court. It was complainant's sole contention upon the hearing that the acts were void because in conflict with section 8, article 1, of the Constitution of the United States, providing:

"Congress shall have power * * * to regulate commerce with foreign nations, and among the several states."

No question is raised in this case of the conflict of the statute in question with any provision of the Food and Drug Act; nor whether the removal of the tariff on eggs by Congress was in the exercise of its war powers. There is no contention in the present suit that foreign commerce is burdened because of the expense incurred in stamping the eggs and posting the signs.

It appears from the complaint that the first of the foreign egg laws, passed in 1915, has never been enforced. A prosecution was started under it early in 1916, but, upon the act being held unconstitutional by a justice of the peace, no further attempt was made to enforce it until

1919, after the passage of the second act, when a suit similar to the present was begun in the state court, which also held the act unconstitutional. It was appealed to the Supreme Court of the state, where the constitutionality of the act was upheld. Parrott & Co. v. E. F. Benson, (Wash.) 194 Pac. 986. The remittitur did not come down in that case until about May 1st of the present year.

On account of the Legislature of the state having, in 1921, about the time of the decision in the Parrott Case abolished the office of commissioner of agriculture, against whom the suit had been brought, and created the office of director of agriculture, upon whom the duties of the former office devolved, it was deemed that an appeal would not lie to the Supreme Court of the United States, and the present suit was brought.

There is no doubt that these statutes discriminate against foreign eggs, for they are singled out for the operation of the law. Therefore, unless their enactment is justified under some one of the police powers reserved to the state, they are not operative, even though the provisions in question are limited in application to a time when the eggs are no longer in foreign commerce, nor in the original package, but have become mingled with the general property of the state. Tierman v. Rinker, 102 U. S. 123, 127, 26 L. Ed. 103.

[2] It is also true that these statutes are not rendered invalid by reason of such discrimination, if it only incidentally affects such foreign commerce, if such effect was not the object of the Legislature, but resulted from a legitimate attempt on its part to protect the people of the state in their health, or from fraud or deceit, intentional or otherwise. The remaining question, therefore, is: Is the discrimination against such commerce the incidental result of such a legitimate attempt, or, rather, has it been shown beyond reasonable question that it is not such a result? Savage v. Jones, 225 U. S. 501, at 525, 32 Sup. Ct. 715, 56 L. Ed. 1182; Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835.

Eggs, under ordinary conditions, deteriorate rapidly. Foreign importations, as a general thing, would necessitate their being brought from a considerable distance, ordinarily requiring handling and lapse of time, both of which, it is well known, tend to impair the soundness of an egg. By reason of the nature of its structure, upon casual observation, the quality, condition, and soundness of an egg are not readily disclosed.

If a state law absolutely prohibiting the sale of oleomargarine is valid, because its appearance was so like that of butter as to render it likely that a buyer would be deceived or mistaken, and purchase it for butter (Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253), it follows, as a matter of course, that a law requiring that reasonable notice be given concerning the origin of a food, similar in such respect, which may reasonably be considered as liable to impairment because of conditions attendant upon its removal from the place of its origin to the place of its consumption, is valid, for the greater must include the less. The power to prohibit includes the power to regulate.

In Corn Products Rfg. Co. v. Eddy, 249 U. S. 427, 431, 432, 39 Sup. Ct. 325, 327, 63 L. Ed. 689, a statute was involved which required a label upon syrup containers disclosing the ingredients. The court pointedly stated:

"* * * *And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.* The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, *to require that the nature of the product be fairly set forth.*" Italics ours.

In Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, the court held such statutes to be valid, provided they have a real relation to the suitable protection of the people of the state.

While not so directly in point as the three foregoing cases, the ruling in any one of the following is broad enough to sustain the acts in question: Schmidinger v. Chicago, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284; Heath & Milligan v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; Armour & Co. v. North Dakota, 240 U. S. 510, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548; Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643; Savage v. Jones, 225 U. S. 501, at 525, 32 Sup. Ct. 715, 56 L. Ed. 1182; Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197.

It is true that the decisions in State v. Jacobson, 80 Or. 648, 157 Pac. 1108, L. R. A. 1916E, 1180, and Ex parte Foley, 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A, 180, are directly opposed to the conclusion we have reached. In the first of these cases the court assumes that the law was passed, not with the object of protecting the health of the residents of the state, nor to prevent their being deceived, either intentionally or inadvertently, but that its purpose was to protect the industries of Oregon by counteracting the custom duty act enacted by Congress, admitting eggs from foreign countries duty free. If the assumption is warranted, the holding is no doubt sound.

"Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state." Sligh v. Kirkwood, 237 U. S. 52, at 60, 35 Sup. Ct. 501, 503 (59 L. Ed. 835).

If the law is reasonably calculated to protect the health, or prevent deceit, we do not feel warranted in undertaking to determine who would be otherwise benefited, and what part their interest played in the enactment of the law. The Oregon court in the Jacobson Case, supra, evidently concluded that Congress had exercised its authority in this matter, at least in so far as the public health was concerned, for in the opinion it is said:

"* * * In the present case the articles in question were imported from a foreign country. They are subject to the pure food and drug act of the United States." 80 Or. 648, 656, 157 Pac. 1108, at 1111, L. R. A. 1916E, 1180.

The court fell into error in this, we believe, at least as to eggs in their natural state. The decisions in the Foley and Jacobson Cases, supra, do not mention the cases which we have cited from the Supreme Court of the United States in support of our holding, save as below mentioned. The cases relied upon by the Oregon court—Walton v. Missouri, 91 U. S. 275, 23 L. Ed. 347, Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743, and Commonwealth v. Caldwell, 190 Mass. 355, 76 N. E. 955, 112 Am. St. Rep. 334, 5 Ann. Cas. 879—were cases where license or wharfage charges had been exacted on account of matters wholly unrelated to the subject of the charge, thereby imposing a direct and discriminating burden on interstate commerce.

In Ex parte Foley, 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A, 180, the court limits its comments on the decisions of the Supreme Court of the United States to Plumley v. Commonwealth of Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, and interprets that decision as limiting the right to regulate under the police power of the state in such particulars to preventing actual fraud. As we have pointed out, the right of the state to protect itself—that is, its residents—is not so restricted. It may reasonably protect them from the danger of mistake, of inadvertently being deceived.

"* * * *And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.* The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, *to require that the nature of the product be fairly set forth.*" Corn Products Rfg. Co. v. Eddy, 249 U. S. 427, at 431 and 432, 39 Sup. Ct. 325, 327 (63 L. Ed. 689).

Both the California and Oregon courts criticize the acts considered by them as not calculated to protect the public from the sale of stale eggs, and suggest that the law should be directed to, and controlled by, the age or condition of the egg itself, rather than its place of origin. It may be that a more perfect law could be devised. It may be that the Oregon statute, requiring the posting, where applicable, of the sign, "Imported eggs used here," and the California statute, requiring the sign, "Imported eggs sold here," without more, on account of a possible distrust on the part of the public because of the origin of Asiatic eggs, works to the disadvantage of Canadian eggs, where used; but dealers are not prohibited or forbidden by these acts from disclosing, even, if necessary, on the same signs, the exact country from which their eggs come. In this particular, the foregoing cases, while directly in point as to certain provisions of the Washington acts, yet the later act of the Washington Legislature, providing for the stamping of each egg with the name of the country in which it was produced, would tend to obviate this alleged objection, and therefore, to that extent, distinguish the present case from both of those decisions.

It is possible that eggs from nearby parts of Canada and Mexico would not have to be carried as far as, and in consequence would not be so old, nor exposed, to an equal extent, to damage or deterioration as, would be eggs brought from distant parts of the United States, yet it is

not what is possible under such a law that is in all cases to determine its validity. Its general and practical effect is not to be put out of sight. If, as has been argued, the quantity of the importation of eggs into the United States, save from Asia, is negligible, in view of our distance from that continent, climatic conditions, and the means of communication, the court cannot, with reason, say that the provisions of the law to which objection is made have no real relation to the sound condition of such eggs. Savage v. Jones, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197.

Even as to the eggs of Canada and Mexico, the court feels that, as eggs are produced in all parts of the United States, it is warranted in presuming, in the absence of evidence to the contrary, that, as a rule, the domestic eggs—that is, those of the United States—consumed therein are fresher and less exposed to deteriorating influences than, as a whole, are the eggs imported from those countries. This, if true, would authorize the enactments.

The limits of the state's police power are difficult of determination, as is also the extent of the federal power conferred under the commerce clause, which, no doubt, accounts for the fact that the courts have not attempted to exactly define their limits. It is, therefore, not surprising that it is difficult to fix the points at which these jurisdictions touch, or the extent to which they may overlap, and that the courts are far from uniform in their holdings on these questions. The range of difference in their rulings can hardly be better illustrated than by the following language of the Supreme Court of the state of Washington:

"'In determining whether the provisions of the law bring it within the police power it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power.' State v. Pitney, 79 Wash. 608, 612, 140 Pac. 918, 920, Ann. Cas. 1916A, 209; Fisher Flouring Mills Co. v. Brown, 109 Wash. 680, 187 Pac. 399. In the cases cited the authorities upon which this doctrine is based are collated and discussed, and need not now be again reviewed. It is apparent that California follows a different rule, as in the Foley Case it was said: '"Imported" eggs are not necessarily stale or unwholesome eggs, and the advertising of such eggs as coming from some place without the United States tends in no manner to protect the health of the California public.' While under our doctrine we are bound to say that, unless it appears that imported eggs are in all respects equal to or better than domestic eggs, and that no set of circumstances can exist which would justify the enactment of the law, then we must presume that the Legislature had good and sufficient reasons for its enactment. While there is some evidence in the record tending to show that eggs imported from China are wholesome and equal to the domestic product, except in size, yet there is much tending to the contrary, purporting to show conditions under which eggs are produced, handled, and shipped, which might well justify the consumer in exercising a choice between domestic and such foreign eggs, and all this act can do is to identify imported eggs, either as eggs or as ingredients in other merchanise, so as to permit of such choice. Surely, if the foreign egg is entirely fresh and wholesome when placed upon our markets, it can stand upon its own merits and win its way to popular favor under its true designation. We cannot hold anything to be unjust discrimination or

unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is. Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889; Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643." Parrott & Co. v. Benson, 194 Pac. 987.

This clearly shows the Washington court asserting the state's extreme right, under the police power, and the California court contracting the state's power to its narrowest limits; the former stating that a statute is only void when "no state of circumstances could exist to justify it," and the latter, apparently, considering that the existence of such a state of circumstances must not only be demonstrated, but universal and without exception. As between the California, Oregon, and Washington decisions, we are better satisfied with the conclusion reached by the latter court, but do not mean to hold that an enactment must be held valid, unless "no state of circumstances could exist to justify the statute."

Again recurring to the ruling in Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, which impliedly holds that it is necessary to the validity of such a statute that it have a real relation to the suitable protection of the people of the state, if any generalization upon the subject is necessary, this is sufficient. The following cases, it has been contended, require a different conclusion than that which we have reached:

In the present case, there is no license tax imposed upon one dealing in foreign eggs, which would be a direct burden upon foreign commerce. Hence the decisions in Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347, and Tierman v. Rinker, 102 U. S. 127, 26 L. Ed. 103, have no application. This is also true of the following cases, which are the same in principle: Webber v. Virginia, 103 U. S. 350, 26 L. Ed. 565; Commonwealth v. Caldwell, 190 Mass. 356, 76 N. E. 955, 112 Am. St. Rep. 334, 5 Ann. Cas. 879. The decision in Howe Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754, was also a license tax case, and the law was there upheld because it did not discriminate against foreign and interstate commerce.

Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743, while not a case where a license tax had been imposed upon one dealing in the products of another state, not required of one dealing in domestic products, is the same in principle, for, in that suit, under an ordinance, the city of Baltimore undertook to charge vessels carrying products of states other than Maryland for the use of the wharves of Baltimore, a charge not exacted from vessels carrying products of Maryland. In Darnell & Son Co. v. Memphis, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. Ed. 413, under a statute of Tennessee, domestic products were exempted from a general tax to which the products of other states were left liable. In Voight v. Wright, 141 U. S. 65, 11 Sup. Ct. 855, 35 L. Ed. 638, and Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, there were involved laws prohibiting sales without inspection and a fee was charged for the inspection, both constituting a direct burden.

The foregoing cases are wholly unlike the present. A tax is a direct burden and an interference, and it matters not whether the foreign

taxed article be better or worse than the domestic—whether it be preferred or discredited. The injury here, if any, resulting is not proximately caused by the information required to be given, unless it be a libel to tell the truth about these foreign eggs. The injury to the trader is the result of the defect, or reputed defect, inhering in the foreign eggs—a repute suffered independently of the information required to be given. It is by reason of their origin. The discredit or prejudice is on account of the added opportunity for deterioration with the time elapsing on its journey to the consumer.

In Hannibal & St. Joseph Ry. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, a Missouri statute, held in conflict with the commerce clause, provided that no cattle from Texas, Mexico, or the Indian Territory should be driven into the state between the 1st day of March and the 1st day of November of each year. The act was held, so far as the evidence in that case was concerned, not a proper quarantine law. There was no showing that, during the months in which the importation of cattle was prohibited, all such cattle were infected, or liable to be infected, or that it was difficult to determine which were and which were not so infected. Schollenberger v. Pennsylvania, 171 U. S. 12, 18 Sup. Ct. 757, 43 L. Ed. 49, was an original package case. The statute there in question prohibited the sale of oleomargarine. There is no prohibition in the present statute of the right to deal in eggs of foreign production.

Collins v. New Hampshire, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60, is a case which, upon casual examination, would appear more nearly in point. This was also an oleomargarine case. The New Hampshire statute provided for labeling packages as "Adulterated Butter," "Oleomargarine," or "Imitation Cheese," and, further, if the product was a substitute for butter, that it should be colored *pink*. The act was held in conflict with the commerce clause, not because it required the packages to be labeled as provided, but because of the provision requiring the oleomargarine to be given a color that would prejudice its use and sale, a prejudice not caused by indicating its true nature, but because the color given it (pink) was so foreign to that natural to such a food as to take away the appetite for it.

The acts now before this court are designed to show what the article is. Such coloring matter was not calculated to make the article look like what it was, but rather like what it was not. The case would be more nearly in point if the present law required the injection into foreign eggs of a red coloring matter before permitting them to be offered for sale. That this is the effect of the ruling in that case is shown by the following from the opinion:

"In a case like this it is entirely plain that, if the state has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as

provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Henderson v. Mayor of New York, 92 U. S. 259; Morgan's Steamship Co. v. Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition. If this provision for coloring the article were a legal condition, a Legislature could not be limited to pink in its choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article which, while not deleterious to health, would nevertheless give out a most offensive smell. If the Legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor would not be just as valid as one prescribing the particular color. The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon the principle recognized in the Pennsylvania cases it is invalid." Collins v. New Hampshire, 171 U. S. 30, at 33 and 34, 18 Sup. Ct. 768, 769 (43 L. Ed. 60).

In the foregoing case, it was the coloring matter that hurt, and not the truth, of which, alone, complaint is made in the present case.

In Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, a statute of the state of Minnesota was involved which provided that no meat should be sold within the state unless inspected within 24 hours before the slaughter of the animal. The purpose of such a statute was to prevent the importation of meat products. Under the terms of this statute, live stock alone could be brought in for slaughter or brought in for inspection, and thereafter taken out for slaughter and returned, all within 24 hours of inspection. Such a provision, while purporting to be one of regulation, judged by its necessary effect, was virtually one of prohibition, accomplished by requiring conditions practically impossible of performance. That this is the ruling in that case is shown by the following:

"* * * It is one thing for a state to exclude from its limits cattle, sheep, or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a state to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that state, or, as is practically said, unless the animal is slaughtered in that state." 136 U. S. at page 328, 10 Sup. Ct. 867, 34 L. Ed. 455.

The ruling in In re Ware (C. C.) 53 Fed. 783, is fairly disclosed by the syllabus:

"In the absence of proof that alum in baking powder is deleterious to health, Gen. Laws Minn. 1889, c. 7, § 1, as amended by Gen. Laws Minn. 1891, c. 119,

declaring it a misdemeanor to sell baking powder containing alum, unless the package have a label stating that it contains alum, violates Const. U. S. art. 1, § 8, granting to Congress the power to regulate interstate commerce, in so far as it relates to original packages imported from another state."

The holding in In re Schechter (C. C.) 63 Fed. 695, is stated in the syllabi, as follows:

"A state statute requiring every person selling fruit trees or other nursery stock grown outside the state to file an affidavit with the secretary of state, and a bond of $2,000, and to exhibit to each purchaser a certificate of the Secretary that he has complied with these provisions (Laws Minn. 1887, c. 196, §§ 1–3), is unconstitutional, as imposing vexatious and annoying restrictions upon interstate commerce (article 1, § 8, cl. 3), and cannot be upheld on the ground that it is intended to protect the citizens of the state from the fraudulent representations of such dealers.

" 'When a state undertakes by statute to deprive citizens of other states who deal in sound articles of commerce produced in those states of that presumption of honesty and good intent which it indulges in favor of its own citizens who deal in its own products, and which the law raises in favor of every man, it effectually deprives the citizens of those states of some of the most valuable privileges and immunities its own citizens enjoy.' "

Both of these decisions are by Judge Sanborn. While the first of these cases was an original package case, the language of the decision is not so confined, and it cannot but be admitted that the opinion supports complainant's contention. The first of these cases was decided in 1892, and the second in October, 1894. In December, 1894, the Supreme Court decided Plumley v. Mass., 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, wherein it was held:

"The statute of Massachusetts of March 10, 1891, c. 58, 'to prevent deception in the manufacture and sale of imitation butter,' in its application to the sales of oleomargarine artificially colored so as to cause it to look like yellow butter and brought into Massachusetts, is not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several states."

In the course of the opinion, the court said:

"It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. It appears, in this case, that oleomargarine, in its natural condition, is of 'a light-yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that state or to sell it there in such manner as to inform the customer of its real character. He is only forbidden

to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" 155 U. S. at pages 467, 468, 15 Sup. Ct. 156, 39 L. Ed. 223.

The scope of the court's ruling is further indicated by the language of Chief Justice Fuller in his dissenting opinion:

"I deny that a state may exclude from commerce legitimate subjects of commercial dealings, because of the possibility that their appearance may deceive purchasers in regard to their qualities. In the language of Knowlton, J., in the dissenting opinion below, I am not 'prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations." 155 U. S. at page 481, 15 Sup. Ct. 161, 39 L. Ed. 223.

We conclude that to the effect of the latter decision may be attributed the fact that the rule laid down by Judge Sanborn in the two foregoing cases does not appear to have been followed in any reported decision.

In People v. Hawkins, 85 Hun, 43, 32 N. Y. Supp. 524, it was held:

"Laws 1894, c. 698, requiring goods made by convict labor to be labeled as such when exposed for sale in New York, is repugnant to the interstate commerce clause of the federal Constitution."

In that case the statute was limited in application to goods produced in any state except New York by convict labor. It was later sought to avoid the effect of this decision by passing such a law applicable alike to such goods produced in any state. The object sought was held not to have been accomplished. People v. Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736. In that decision, however, the court points out that the district attorney had stated, and the court agreed, that the sole object of the legislation was to save workmen from competition with convict labor. It is clear, as in the Oregon case, that, if the assumption is correct, the holding is sound. The court quoted from the district attorney's brief as follows:

"* * * It is against sound public policy to compel workmen, who have to support their families by their daily earnings, to compete with the unpaid labor of convicts in penal institutions. The framers of the state and federal Constitutions never intended to create and foster such competition." 157 N. Y. 6, 51 N. E. at page 258, 42 L. R. A. 490, 68 Am. St. Rep. 736.

The court said:

"* * * *It is not claimed that there is any difference in the quality of this scrubbing brush when compared with one of the same grade or character made outside the prisons. There is no pretense that the act was passed to sup-*

press any fraudulent practice, or that any such practice existed with respect to such goods. The validity of the law must depend entirely upon the exercise of the police power to enhance the price of labor by suppressing, through the instrumentality of the criminal law, the sale of the products of prison labor." 157 N. Y. 7, 51 N. E. at page 258, 42 L. R. A. 490, 68 Am. St. Rep. 736.

The same consideration, evidently, controlled the court in In re Opinion of the Justices, 211 Mass. 605, 607, 98 N. E. 334, 336 (Ann. Cas. 1913B, 815), for the court points out:

"* * * It is a restriction upon the freedom of trade in articles of legitimate business transactions to permit goods made in factories in other states to be sold freely in the market and *to require goods alike in every particular in all physical and commercial qualities,* after being lawfully purchased in some other state, to be branded as 'convict-made' before being offered for sale here. *Plainly, the purport of the bill is to affect the availability and attractiveness in the market of the branded or labeled goods.* There is nothing wrong in the nature of things in prison-made goods. The employment of those convicted of crime in healthful labor is recognized as a necessity of confinement, whether its end be punitive or reformatory. * * * *Such goods are not unsanitary or so inferior in quality that their sale would constitute a fraud on the public.* * * * *Differences in grade or workmanship, if there are any, would be as apparent without branding as in like products made in private shops.*"

Not so here; the workmanship upon a scrubbing brush may be apparent, but the condition of the contents of an egg is not to be seen of all men. Both of the above decisions were, in part, controlled by the effect a different determination would have upon the humanitarian policy which the court considered had been adopted by the state in the treatment of its prisoners—teaching trades and striving to foster industrious habits.

The effect reasonably to be anticipated from such branding would be the arousing of a prejudice—a prejudice based, not on any quality or condition or anything that might reasonably be considered as touching the quality or condition of the goods, but solely because of their origin—because of their having been produced by convicted criminals. The fact that a manufactured article is convict-made bears in no way upon its quality or merit; but an egg is such a perishable thing that it is liable, or may not unreasonably be considered as liable, to injury, both by reason of aging and by reason of handling and other conditions attendant upon transportation from abroad. Aki Maru, 255 Fed. 721, 167 C. C. A. 67; Hazelwood Co. v. Tamba Maru, 274 Fed. 696, decided November 5, 1919, Cushman, District Judge. It cannot truthfully be said that the compliance with a requirement that eggs be branded with the name of the country where they are produced would furnish information having no bearing upon, or relation to the quality, merit, or soundness of such eggs.

It is, of course, true that a foreign article of commerce is entitled to compete in the domestic market upon its merits. It appears to this court that this is exactly what this law requires—that is, that these foreign eggs shall compete on their merits and on that alone; that they shall not compete upon the strength of a credit or reputation secretly borrowed from the domestic eggs. For hundreds of years the cuckoo, which lays its eggs among those in the nests of other birds, has been

held up as a type of fraud. The legislative acts now considered condemn little more, and, by this bill, we are asked to sanction little less, than such action.

Without the power conferred by the commerce clause, doubtless, the United States would be but a loose federation of states, and, for that reason, the courts should jealously guard the authority arising thereunder. But we are not convinced that the perpetuity of our institutions depends upon concealing, or preserving the right to conceal, from the individual the nature of the contents of his alimentary canal.

The temporary injunction will be denied, and the motion to dismiss granted.

GILBERT, Circuit Judge, and NETERER, District Judge, concur.

C. NOEL LEGH & CO., Limited, v. STITZINGER et al.

(District Court, E. D. Pennsylvania. July 13, 1921.)

No. 8046.

Sales ⇐172—Conditions requiring delivery of lumber by seller held not fulfilled.

A contract, evidenced by correspondence, by which defendants agreed to sell and deliver in Liverpool certain lumber within 60 days, providing ocean rates not exceeding $1 per 100 pounds could be secured, or plaintiff would consent to absorb the excess, if higher rates were paid, but expressly providing that, if such rates could not be obtained, defendants were not required to hold the lumber and the contract should be considered canceled, *held* not extended as to time by further correspondence, and, the conditions for shipment not having been met within the time, defendants *held* not chargeable with breach of contract for refusal to ship thereafter.

At Law. Action by C. Noel Legh & Co., Limited, against George G. Stitzinger and others, trading as G. G. Stitzinger & Co. On affidavit of defense raising question of law. Judgment for defendants.

Carr & Steinmetz, of Philadelphia, Pa., for plaintiff.
John J. Sullivan, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The plaintiff declares upon an oral contract entered into with the defendants the early part of April, 1919, and confirmation thereof in writing on April 21, 1919, for the sale and delivery to the plaintiff at Liverpool, England, of 26 carloads of lumber of various sizes, grades, and kinds, and at various prices. The terms of the contract as set out in the defendants' confirmatory letter are as follows:

"The sale which was made to you at Philadelphia, Pa., is as follows:

5 cars	4/4 No. 2 com. white oak	at $ 83.00
1 car	4/4 wormy white oak	at 92.00
10 cars	4/4 No. 1 com. white oak	at 100.00
5 cars	4/4 1's and 2's white oak	at 125.00
5 cars	4/4 1's and 2's chestnut	at 93.00

"All delivered to Liverpool, England, less 2½ per cent. on net f. o. b. mill price and 4 per cent. commission on the gross amount of invoice terms, sight draft attached to B/L for full net amount of invoice. You to pay the insurance on the lumber, shipment to be made within 60 days from May 1st, providing we could secure ocean rate not to exceed $1.00 per 100 lbs. Shipments may be made at a higher rate, with your consent only, and you to absorb the rate in excess of $1.00 per 100 lbs.

"It must be understood, however, that unless there is a likelihood of being able to secure the rate specified above, that we shall not be expected to hold the stock for you, and in that event the order is to be considered canceled."

On May 21, 1919, the defendants wrote to the plaintiff's managing director at New York as follows:

"New Castle, Pa., May 21, 1919.

"Mr. F. Hooton, Pennsylvania Hotel, New York, N. Y.—Dear Sir: We received your night letter reading as follows: 'Letter received. Yes other shippers have just booked at dollar fifty five through Baltimore. Telegraph what quantity first and seconds and number one oak you have ready for immediate shipment against our order and will write you instructions. Pennsylvania Hotel, New York.'

"We are not wiring you for the reason that we want to go into detail more fully than we can by wire.

"We have made a great many inquiries for space and rates. The B. & O. have not been able to encourage us any for shipment from Baltimore. The latest quotation we have was from Furness-Withy & Co., who quote us a rate of $1.90 per 100 lbs., freight to be prepaid. Their letter dated the 19th we are inclosing herein.

"Now, with reference to the stock, desire to say that we sold this for shipment in May and June and delivered prices were based on ocean rate of $1.00 per 100 lbs. To get space and a rate that we thought would be satisfactory to you seemed practically out of the question, consequently we were under the impression that you would not be able to take the stock and we were probably a trifle hasty in disposing of a few cars of the material which we had intended to apply on your order.

"About the only stock we have now which is dry enough to ship is one car 4/4 No. 1 common white oak, and five cars No. 2 common white oak. If we could secure space and you are willing to absorb the difference in ocean rate, of course we will be pleased to ship this.

"Your commission, however, will apply to the gross amount of invoice, computed on an ocean rate of $1.00 per 100 lbs.

"On account of extremely wet weather, we have not been manufacturing the amount of stock anticipated, neither has the stock that is in pile been drying very rapidly, both of which had a tendency to shorten our supply.

"If it will suit you as well, we would prefer to hold the order up for the time being, but will be guided by your wishes in the matter.

"Yours truly [Signed] G. G. Stitzinger & Co., G. G. S."

Replying to the above letter, the plaintiff, by its managing director, wrote the defendants as follows:

"May 23, 1919.

"Messrs. G. G. Stitzinger & Co., New Castle, Pa.—Dear Sir: I was pleased to receive your letter of the 21st. inst. and note carefully all you state, and are rather sorry that you have disposed of some of the stock purchased by us. I note that it would suit you better to hold the stock up for the time being, and would certainly like to meet your wishes all we can. We will therefore leave matters as they are say for another month, when we shall be pleased if you will advise us what stock you have on hand against our order, and we will let you know exactly what to do.

"Regarding shipment we would just like to point out that our friends the C. S. Powell Lumber Co., 1270 Broadway, New York, inform us that it is possible they will obtain space for a good bunch out of Norfolk in the near future,

in which they have promised to give us some of this space, and we would like you to take this letter as an authority to ship any of your goods to them at Norfolk for our account, and satisfactory arrangements will be made regarding payment. Probably Messrs. Powell would cable us at Liverpool and ask us to put up a bank credit, so that they could pay you the amount necessary, equivalent to what the stock would cost on a cif basis as per contracts between us.

"Meanwhile, I remain

"Yours sincerely, [Signed] F. Hooton."

It is averred in the statement of claim that in the above letter of May 23, 1919, the plaintiff agreed to extend the time for shipment one month, or until August 1, 1919, and that it thereupon became the duty of the defendants to ship the lumber not later than August 1, 1919. That the plaintiff, desiring to remove any cause for delay by relieving the defendants of all responsibility in procuring a freight rate, made an agreement with the C. S. Powell Lumber Company to allot to the plaintiff space reserved for its lumber on a steamship or steamships to sail for England, and that the plaintiff on July 1, 1919, sent the defendants a cablegram in code, and confirmed it in a letter of the same date to the defendants, reading as follows:

"Liverpool, July 1, 1919.

"Gentlemen: We received a cable from our friends Messrs. C. S. Powell Lumber Company, New York, indicating that they had an opportunity of chartering a United States Shipping Board vessel at a low rate of freight out of Norfolk, Va., and knowing that the writer when in the States had purchased large blocks of lumber from different friends, Messrs. Powell cabled to us, asking if we would like to get in touch with our friends and authorize them to ship out our lumber on this space and take advantage of the low freight offering, and we lost no time in cabling you as follows: 'Will you communicate with Powell Lumber Co. New York reference lumber on order they will arrange freight we give you authority to deliver to their instructions.'

"Of course, as soon as ever you have delivered the goods to Messrs. Powell's mills, and they indicate to us that everything is in order, we will promptly protect your drafts on this side as usual. We certainly hope that you will be able to arrange matters satisfactorily with Messrs. Powell, so that we can take advantage of this freight space, which will be in our mutual interests. Meanwhile we await hearing from you, as also Messrs. Powell, at the earliest possible as to what has been done, and remain

"Yours very truly, [Signed] C. Noel Legh & Co., Inc."

Upon July 10, 1919, the defendants wrote the plaintiff, refusing to deliver the lumber. The letter read as follows:

"New Castle, July 10, 1919.

"Messrs. C. Noel Legh & Co., Ltd., Liverpool—Dear Sirs: We received your message in due time, but have never gotten it translated until to-day. There was no one here who could help us out, then we sent the message to Ellwood City, where we thought it could be translated, but finally found that it could be translated at Beaver Falls, Pa., by the Union Drawn Steel Company, and so just now are able to reply. The message, when translated, read as follows: 'Will you communicate with Powell Lumber Co. New York reference lumber on order they will arrange freight I will give you authority to deliver to their instructions.'

"As stated in a previous letter to you, the conditions attached to this purchase were peculiarly indefinite. They were providing you could get a rate of $1.00 per 100 lbs. or near that rate within about four to six weeks of the date of our meeting you in Philadelphia. We followed the matter up very closely with a view to arranging for some rates which would be

something near your idea, but for the reason that it looked as though we would not be able to even touch it, we disposed of the stock that we had, and on account of labor troubles and other matters beyond our control we have not been able to accumulate as much stock in any one item as you were expecting on this purchase. We really intended to go on the market and purchase some of the stock at neighboring mills, but not being able to ship precluded our buying until later on, when the markets began advancing here at a tremendous rate, and of course at this time we could not buy and cover on it for anything like the prices which you were to pay. We manufacture some oak, but do not get a very large amount of No. 1 common and better, and at this time do not have a full car of green or dry stock available; so under the conditions we believe that we might as well say that it will be an impossibility for us to furnish this material until conditions change somewhat in this country. We regret this exceedingly, as we would have liked very much to have done some business with you, but assure you the only reason we have not been able to handle this order was the freight rate question, which prevented us doing so.

"Yours truly, [Signed] G. G. Stitzinger & Co., G. G. S."

The plaintiff claims damages for breach of contract in the sum of $19,395, alleged to represent the difference between the contract price and the market price at Liverpool on August 1, 1919, with interest from that date. The affidavit of defense raises the question whether the letter of April 21, 1919, confirming the oral contract, constitutes such a "note or memorandum in writing of the contract or sale signed by the party to be charged," as to be enforceable under section 4 of the Uniform Sales Act of Pennsylvania of May 19, 1915 (P. L. 543; Pa. St. 1920, § 19652).

The letter in question sets forth the quantity and kinds of lumber, the prices, the place of delivery, the terms of payment, and the time within which shipment was to be made, namely, within 60 days from May 1, 1919, with, however, the proviso that the defendant can secure a freight rate not to exceed $1 per hundred, shipments to be made at a higher rate with the plaintiff's consent only, they to absorb the rate in excess of $1 per hundred. It is expressly stated in the letter that it must be understood, however, that, unless there is a likelihood of being able to secure the rate specified, the defendant will not be expected to hold the stock for the plaintiff, and in that event the order is to be considered canceled.

The letter contains sufficient to support a suit for a breach of its terms, if the plaintiff's demand for delivery was made in accordance with those terms, or in accordance with modified terms, if there was a modification of its terms agreed to by the parties. It is contended by the plaintiff that the defendants' request in its letter of May 21 and the plaintiff's reply of May 23 constituted an agreement to extend the time for delivery for one month to August 1. This contention will be discussed hereafter.

In order for the plaintiff to recover upon the contract, it must appear that there was a likelihood of the defendants being able to secure a rate not exceeding $1 per hundred, or that the plaintiff consented to shipments at a higher rate. There is no averment in the statement of claim which supports any other variation of the terms of the contract, except as to the extension of time for deliveries. The language in the defendants' letter of May 21 bearing on that question is as follows:

"If it will suit you as well, we would prefer to hold the order up for the time being, but will be guided by your wishes in the matter."

In reply thereto, in the plaintiff's letter of May 23, it says:

"I note that it would suit you better to hold the stock up for the time being, and would certainly like to meet your wishes all we can. We will therefore leave matters as they are say for another month, when we shall be pleased if you will advise us what stock you have on hand against our order, and we will let you know exactly what to expect."

This language must be construed in connection with the plaintiff's night letter requesting the defendants to telegraph what quantity firsts and seconds and No. 1 oak they have ready for immediate shipment against the plaintiff's order, concerning which it states it will write the defendants instructions. The defendants' request, therefore, was to hold up, for the time being the order for immediate shipment under the contract of April 21, and the plaintiff granted that request by leaving matters as they were without any orders against the contract for another month from May 23, and at that time the defendants were to advise the plaintiff what stock they had on hand against the order, when the plaintiff would let them know exactly what to do. There is nothing in this correspondence, therefore, extending the time of deliveries beyond the 60 days running from May 1, and for all that appears in the statement of claim there was no communication between the parties again until July 1, 1919, when the time for delivery had expired.

Coming down to the plaintiff's code cablegram and letter of July 1, 1919, we have a new proposal from the plaintiff, under the apparent impression that it had an additional month in which to demand deliveries, requesting delivery under a proposed arrangement with the Powell Lumber Company to give the plaintiffs freight space on vessels at their disposal. Assuming that the suggested shipment was, as to rates, in accordance with the defendants' letter of April 21, 1919, that is, at a higher rate than $1 per hundred, with plaintiff's consent, the defendants in that letter had agreed to make delivery at Liverpool, England, with a sight draft attached to the bill of lading, for the full net amount of the invoice.

The proposal in the letter of July 1 was that the lumber be delivered to the Powell Lumber Company in accordance with the latter's instructions, the plaintiff offering to protect the defendants' draft at Liverpool, but leaving out of consideration the terms of delivery to the carrier with sight draft attached to the bill of lading. The defendants, as they had a right to do, refused to make delivery, stating that in their previous letter the conditions attached to the purchase were "peculiarly indefinite." Under the terms of that letter, the defendants were not to be expected to hold the stock for the plaintiff, and the order was to be considered canceled unless, during the time of the life of the contract, there was a likelihood of their being able to secure the specific rates.

The statement of claim therefore fails in the following particulars: (1) It does not appear that there was a likelihood of securing the specific freight rate within the 60 days from May 1, 1919. (2) It does not appear that the plaintiff consented to a higher rate within the 60 days. (3)

There was no extension of time for shipping beyond the 60 days. (4) The plaintiff's proposal of July 1, 1919, was not in accordance with the terms of the contract, and was not accepted by the defendants.

For the reasons stated, judgment must be entered for the defendants upon the questions of law set out in the affidavit of defense, and it is so ordered.

KNEE v. KARMIN et al.

(District Court, S. D. New York. October 27, 1920.)

Patents ⇐328—1,231,382, for felt welts for gloves, valid and infringed.

The Knee patent, No. 1,231,382, for welts for gloves made of felt, and process for making the same, *held* not invalid for anticipation or prior use, and to disclose invention; also infringed.

In Equity. Suit by Louis Knee against Max Karmin and David H. Flanzer. Decree for complainant.

Decree affirmed, 274 Fed. 724.

T. F. Bourne, of New York City, for plaintiff.

J. G. M. Browne, of New York City, for defendants.

LEARNED HAND, District Judge. This is the usual suit in equity on a patent to Louis Knee, No. 1,231,382. All five of the claims in the patent are in suit, and infringement is not denied; so that the question depends entirely upon validity.

The object of the patent is to provide felt welts adapted to be sewed in the seams of gloves and other articles of apparel, to be strong and durable, readily manufactured, used, and shipped to manufacturers, and to include certain novel details of improvement and combination of parts which are described in the claims. I need not go into the claims in detail. The first four, which are for the product of the process described in claim 5, are substantially similar in character, and it would serve no purpose to distinguish the slight details of the different elements which they set forth. It is better to describe what the invention is.

At the time the invention was made the patentee supposed that he was the first person who had discovered the use of felt welts in the manufacture of gloves, and in that respect it turned out, after he got into the Patent Office, that he was mistaken, for as early as 1888 there had been an invention of precisely that sort by one Busby, No. 379,855. But it appears from the evidence that Busby's invention never came into active use. In heavy workmen's gloves there were always welts, but until the price of leather, during the Great War, became very high, it was more satisfactory and not too expensive to use leather, instead of felt, and so Busby's invention lay unused and apparently unnoticed. Mr. Knapik, who was well versed in the art, knew nothing of felt welts; so we may safely say that Busby's invention never bore any fruit.

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

That, I know, makes no difference, because it was there. The patentee was chargeable with it, and he can claim no invention by substituting felt for leather. Therefore his patent must rest (and the examiner made it rest) upon his manufacture of felt welts upon a single spool. This he did in the following way:

He placed a cardboard core upon the shaft of the well-known Adams machine; to this core he pasted the free end of a roll of felt a yard wide. The Adams machine then wound up the whole roll of felt upon itself; after this the roll was snugly covered with a piece of paper, pasted together so as to give a firm body to the roll. Then a rotary knife was placed upon the periphery of the roll, the roll was rotated in one direction and the knife in the other, and the knife was pressed down until it reached to, but not through, the core. The roll was then moved forward $^{11}/_{64}$ of an inch along the bar, and another slice was made, and so on until there were 40 slices along the whole roll. As in each case the knife did not cut the core, the resulting spool carried a set of 40 convoluted or wound felt strips, $^{11}/_{64}$ of an inch wide, all held upon an uncut cardboard core. This he packed and sent to the trade.

Coming, as it did, at a time when the price of leather was very high, this spool, after a slight hesitation on the part of the trade, met with so much favor that at the present time it has substantially, if not wholly, displaced the use of leather, and will continue to do so until leather becomes much cheaper than it now is. The plaintiff has about 95 per cent. of the trade. Shortly after plaintiff's goods came into the market, there appeared from Gloversville, N. Y., spools of felt welts, of about the same width, wound as any spool is wound, in one continuous strand. This has not successfully competed with the plaintiff's goods, and probably for the reason that it is not as convenient as is his, for his welts unroll without any rotation of the spool as a whole, and do not become tangled, as does the Gloversville spool.

The only art cited in the Patent Office, except the patent of Busby, were two other patents—one to Coe, No. 929,557, and one to Smith, No. 1,031,386. Coe's patent was for a roll of metallic leaf, in narrow convolutions, similar in general appearance to the plaintiff's felt welt; but the patentee prescribes that the core shall be cut through. Each of the rolls is therefore a small spool, and as the substance was of a kind which would readily break down, the patentee provided two guards on each side. It is quite clear that he did not think of leaving the core uncut and the metallic leaf all on one large spool.

Smith, who attempted a similar invention for metallic leaf, built up his core in a series of cylinders; but he did not (why, we do not know) cut the leaf when rolled upon the core into slices of the requisite width. Therefore we have, on the one hand, Smith contributing one part of the invention, and Coe contributing the other part, but neither of them combining, even in metallic leaf, the whole invention as the plaintiff combined it. As all three of these patents were cited by the examiner, I should have to be very clear before I held that there was no invention over them.

There remains, then, the question of the prior art as applied to bindings. The patentee, like many others in New York, had made bindings for various kinds of clothing upon the Adams machine. The general practice was to cut through the core and separate the coils at once. Perhaps it required no invention, once one wanted to use felt welts made upon the Adams machine, to work out the idea of cutting only to the core; on that I need not pass. In any case, it so happens that there is no adequate proof in this case that any one had done it, either in the case of felt or of any other material. There is, to be sure, evidence of such a practice in the case of cambric and cotton bindings; but even in those cases the proof is not sufficient.

The first of these supposed uses is that of the defendant himself, who says that he at several times made up cotton spools on a single core. The only occasion where he specifies the date with any exactness is a sale to a man named Shapiro, in the city of New York, and this date he places in March, 1914, and attempts to corroborate himself by his ledger, which shows an entry of a sale made to Shapiro. This, he says, was made of binding material on a core, which was cut just as the plaintiff's was cut. In the first place, this necessarily rests upon his recollection, for the entry itself does not describe this feature of the article sold, nor indeed does it describe the article in any way at all.

But the date of the entry itself is very doubtful, and really, so far as it is a corroboration at all, depends upon whether you read the page on which it occurs as the first page of the ledger entries against Shapiro, or the second page. The two pages are numbered 88 and 89, and if one supposes that the entries were made in the sequence of the pages there is no reason to assume that the entry was not made in March, 1914. However, at the bottom of page 89 there occurs, apparently in the bookkeeper's handwriting, the words "see page 88," and that to my mind shows that the account was opened on page 89, and, when page 89 was filled, instead of turning over to page 90, the bookkeeper put the rest of the account on page 88. If she had done that, she would make just such an entry at the bottom of page 89 as she did. If one reads it in that sense the sequence of months is entirely consistent, but the year would necessarily be 1916.

The plaintiff's date of invention has been carried back of March, 1916; so it seems to me that the date on which the defendant relied is very far from being proved beyond a reasonable doubt, even if the entry itself was sufficient corroboration, which I do not think it is. So much for the defendant's use.

The only other two uses are of one Kulchinsky and of the plaintiff's own witness, Freydberg. Kulchinsky says he cut binding for sailors' collars in the way in which the plaintiff has done with felt. He places this date in an uncertain way. The first time he testified he said it was six or seven years ago. When he was cross-examined as to the way in which he fixed the date, he said that it was before he had moved from Division street, which was three years ago, and finally in his testimony he said that it was four, five, or six years

ago. It is perfectly clear that his recollection was uncertain as to how long before he moved from Division Street he did this. The witness, in my judgment, was an exceptionally honest witness; he was telling the truth so far as he could remember it, but he did not remember it accurately enough. Plaintiff's patent has now been dated back to October, 1915, and therefore it must be over five years ago to be a valid anticipation, and it is quite clear that, under the rigid rules which are applicable to proof of anticipation, the defendant cannot succeed. Therefore I do not accept this prior use.

The remaining prior use is of one Freydberg, called by the plaintiff, and, so far as I could see, also an exceptionally reliable witness. He said at a time which he places as eight years ago, although he has no means of fixing it definitely in his mind, that in one stage of the process of making a doubled binder he did not cut through the core. His process was this: On an Adams or similar machine he wound up the fabric, which was a heavy glazed cambric; then he made slices three-eighths of an inch apart, down to the core. He had another machine by which he could fold these three-eighths of an inch slices so as to make three-sixteenths of an inch slices. This second machine he called a gauge.

It is quite clear, from his own statement, that this was never an article of manufacture; it was but a step in a process of his own to make something else, and I think it does not come under the requirement of the statute, that the article must be either in public use or offered for sale. Apparently it was done only once in his shop, and, as I have said, as an intermediate step in the manufacture of another article, and it seems to me that it would be improper to say he had anticipated the invention, merely because in one stage of an incompleted process the spools were like the plaintiff's.

Therefore, in the case of all these prior uses, I must find that they are not proved, and the question therefore resolves itself into this: Was it invention on the part of the plaintiff, knowing the method of manufacture of the Adams machine in the case of cottons, cambrics, and so on, to stop the process as usually carried out and to make a new article of commerce? I have already said that, merely as a question of manufacture, once the need was suggested, perhaps that would not be invention; but it seems to me that to make this spool of felt for the purpose of felt gloves, an article which had never been made before, was invention. No one had thought of it. The need was pressing. It leaped at once into very marked approval of the trade, and at least one other manufacturer had tried it and had not succeeded.

I do not forget the fact that the general rule is that a mere change in material is not sufficient for a patent; but I must again recur to the fact that the plaintiff not only changed the material, but he made what was in fact novel. Novelty is established; the question is of invention, and that question must depend upon whether the plaintiff, in seeing the opportunity which the high price of leather gave, did not show an ingenuity which justified him in obtaining a patent in the slight modification of the use of the Adams machine, which turned

out something never made before, and extremely useful in that particular contingency. I think he did. For that reason it seems to me that I ought not to upset the conclusion of the examiner that this was a good invention. It may have a very limited life; when the price of leather falls again it may go out altogether, but, in my judgment, it took more than an everyday imagination to perceive the opportunity that the trade offered, and to meet it, as he has alone been able to meet it.

In making his invention he was undoubtedly very happily placed, because he was familiar with the kindred art of rolling of cotton and cambric bindings in a very similar way; but for one reason or another (just what it is impossible now to say) he was the first, and he alone thought of the modification which answered the needs of the moment. That, I think, is sufficient for invention.

Plaintiff may therefore take a decree, with costs, and the decree will be on all claims.

KNEE v. KARMIN et al.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 205.

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

Suit in equity by Louis Knee against Max Karmin and David H. Flanzer. Decree for complainant (274 Fed. 720), and defendants appeal. Affirmed.

Barnett E. Kopelman, of New York City (Joseph G. M. Browne, of New York City, of counsel), for appellants.

T. F. Bourne, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

UNITED STATES v. REED.

(District Court, E. D. New York. July 1, 1921.)

1. Customs duties ⇐129—Master of vessel not subject to penalty for failure to manifest contraband articles.

The master of a vessel is not subject to the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506), for bringing into the United States merchandise not shown on his manifest because of the landing from his vessel of smoking opium, not shown in the manifest, and the importation of which is prohibited by Act Feb. 9, 1909 (Comp. St. §§ 8800, 8801).

2. Customs duties ⇐129—"Merchandise" in collection statutes does not include contraband articles.

The word "merchandise," as used in Rev. St. § 2809 (Comp. St. § 5506), imposing a penalty on the master of a vessel for bringing into the United States merchandise not shown on his manifest, is limited in meaning to "goods, wares and chattels * * * capable of being im-

ported," as defined in section 2766 (section 5462), and does not include articles importation of which is prohibited.

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

3. Customs duties ⇐129—Master of vessel not subject to penalty for failure to obtain permit to land contraband articles.

Rev. St. § 2873 (Comp. St. § 5564), subjecting the master of a vessel to a penalty for unloading merchandise from a foreign port without a permit from the collector, does not apply to an article importation of which is prohibited and for which a permit could not, therefore, be obtained.

At Law. Action by the United States against John Reed to recover penalties. On demurrer to petition. Demurrer sustained.

Leroy W. Ross, U. S. Atty., and Henry J. Walsh, Asst. U. S. Atty., both of Brooklyn, N. Y.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Harry D. Thirkield, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The United States has brought a civil action against John Reed, captain of the steamer Royal Prince, to collect penalties on two causes of action. The first alleges that the defendant was master of the steamer on January 4, 1921, and that on that day 13 cans of smoking opium were brought into the United States from a foreign port without being included in the manifest, that the value of the merchandise was $650, and that under section 2809 of the Revised Statutes (Comp. St. § 5506) the defendant was liable to pay a penalty of that amount. For a second cause of action it is charged that the defendant, under section 2872 of the Revised Statutes (section 5563), was required to obtain and have a permit from the Collector of Customs in order to unload or deliver from the steamer any merchandise, and that on said day the defendant unloaded and delivered the said 13 cans of smoking opium without such permit, and thereby became liable to a penalty of $400, under section 2873 of the Revised Statutes (section 5564).

[1] Defendant demurs to both alleged causes of action on the ground that facts sufficient are not set forth. The defendant bases his demurrer upon the case of U. S. v. Sischo (D. C.) 262 Fed. 1001, affirmed in the Circuit Court of Appeals for the Ninth Circuit on February 7, 1921, 270 Fed. 958, in which the propositions involved are discussed at length. These opinions, starting with the proposition that smoking opium is not within the list of opium products which can be imported, but is made absolutely contraband or prohibited from importation by Act Feb. 9, 1909 (Comp. St. §§ 8800, 8801) conclude that no penalty can be collected for failure to manifest an article which is not capable of being imported into the United States.

Section 2766, R. S. (section 5462), provides that "merchandise," as used in title 34, "may include goods, wares and chattels of every description capable of being imported." Title 34 has to do with the "col-

lection of duties upon imports." Section 2806, R. S. (section 5503), provides that "no merchandise shall be brought into the United States, from any foreign port, in any vessel unless the master has on board manifest in writing of the cargo, signed by such master." Section 2807, R. S. (section 5504), requires the manifest to contain "a just and particular account of all the merchandise so laden on board," and also "an account of the sea stores remaining, if any."

[2] It is unnecessary to go into a discussion of the various sections and the many cases considered in the two opinions above referred to. The prevailing opinion of the Court of Appeals, like the decision in the court below, holds that merchandise capable of being imported must exclude articles contraband by their nature, as distinguished from articles contraband because smuggled or illegally brought in. In the Court of Appeals a dissenting opinion cites many instances where the word "merchandise" is made to refer to movable personal property or chattels, even though not capable of importation, and holds that the word "merchandise" in sections 2806 and 2807 is not limited merely to the articles which by section 2766 are permitted to be "or may be" classified as merchandise. The words "may be" (section 2766) are exclusive, that is, the permission goes so far and no further. Anything else may not be called "merchandise," so far as the collection of customs revenue is concerned. Should other provisions, useful in aid of collecting revenue, include other "merchandise"?

The statutes relating to smoking opium, like the statutes relating to many other articles made contraband or nonimportable, were enacted subsequent to the original section 2866 and to the originals of sections 2806 and 2807.

The issue, therefore, which was before the court in the Sischo Case, supra, and which must be determined in this case, is whether Congress intended, when it provided that certain articles could not be imported into the United States, to remove them from the category of "merchandise," so far as the collection of duties upon imports was concerned, or whether, on the other hand, Congress intended inferentially to amend or enlarge the statutes such as 2806 and 2807, while not amending or enlarging any of the provisions which defined that merchandise as goods actually capable of importation.

It is evident that no particular consideration of this technical difficulty was had. Congress provided in other sections specific and criminal penalties for the bringing in of contraband or prohibited articles. It also provided that copies of the manifest shall be filed with the collector.

But under the Constitution no person can be compelled to furnish evidence against himself. To compel a man to list or include in a paper to be filed something which would convict him or render him liable to conviction for a crime, and then to collect a penalty from him for failure to give evidence against himself of his commission of a crime, resembles closely the principles involved in prosecutions under the Volstead Law, where defendants have been accused of violating

the internal revenue laws compelling them to register, put up a distillery sign, and pay a tax for the manufacture, etc., of liquor which is prohibited and for which specific penalties and punishments are provided.

In the case of United States v. Boze Yuginovich and another, 255 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided by the Supreme Court of the United States on June 1, 1921, it was held that Congress must have necessarily intended to repeal the internal revenue laws in so far as they verbally or literally required performance of acts prohibited as crimes. In the same way it would seem that Congress could not have intended to require the captain of a vessel to make a report to the effect that he was committing a crime against the laws of the United States, in order to avoid liability for a penalty not expressly defined, but only forced out of language which, taken literally, is not broad enough to justify such interpretation..

This makes it unnecessary to base the conclusion upon the proposition that articles which cannot be brought in or disposed of can have no "value" for the purpose of computing the amount of the penalty.

[3] When we come to the second cause of action, a similar question is presented. If the smoking opium cannot be considered "merchandise," then of course no permit to unload "merchandise" could be obtained for the opium, and inferentially the passage of the law making smoking opium contraband has rendered futile (and therefore invalid or inferentially repealed) the provisions as to permits. Again, the criminal statutes cover the act, and the penalty under the customs law is not needed.

It follows from the decision in the Yuginovich Case, supra, that the captain should not be penalized for not obtaining that which he could not obtain. If he unloaded articles or chattels which were not "merchandise" within the sense in which that term is used with respect to permits, he committed a crime and should be punished under other sections rather than that regulating the handling and unloading of articles "capable of importation."

If the captain had no knowledge of the presence of the smoking opium and it is sought to punish him for failing to discover it, it is apparent that in the absence of negligence he should not be penalized. If he had discovered it before reaching the point where a manifest must be ready (section 2811 [section 5508]), he would have been compelled to destroy it rather than to manifest it. If he had no knowledge of importable goods which were being smuggled by the crew, he might be punished for his negligence under section 2806, if the statute be so interpreted, but whether he would thus be liable or not furnishes no solution of the present case.

Demurrer sustained.

CLINE v. HORTON.

(District Court, E. D. New York. June 17, 1921.)

1. **Patents ⇐90(7)—Acceptance of suggestions from others does not defeat right to patent.**
   Acceptance of suggestions made by workmen or associates of the inventor during experimentation do not deprive the inventor of the right to claim sole invention, if the improvements are not of themselves patentable.
2. **Patents ⇐328—Design 49,204, for an insulator, held valid.**
   The Cline design patent, No. 49,204, for a design for an insulator, *held* valid.
3. **Patents ⇐209(1)—License may be granted by parol.**
   Where defendant manufactured and marketed an article patented by complainant, with complainant's acquiescence, though the oral agreement between them was never made definite as to terms, defendant cannot be charged as an infringer, but is accountable for an equal share of the net profits, as a partner.

In Equity. Suit by Jerome G. Cline against John T. Horton. Decree for complainant.

Paul L. Kiernan, of New York City (Maurice J. Moore, of New York City, of counsel), for plaintiff.

Conrad A. Dieterich, of New York City, for defendant.

CHATFIELD, District Judge. The plaintiff is the patentee of design patent No. 49,204, granted June 20, 1916. The object depicted in the design is an insulator body intended for use in supporting an electric conductor dependent from overhead beams or similar surfaces. It consists of a rectangular block terminating in a square plate, from the lower surface of which depends a solid flange or petticoat around its outer edge, and with a thin round boss or washer on the top of the flat plate, by which the bearing surface is diminished, in order to prevent cracking when the insulator is drawn up close and tight to the supporting surface. The conductor is carried through an opening in the lower part of the rectangular body. The different parts, viz. the rectangular body, the plate, and the boss, are all integral and constructed of insulating material. A threaded attaching bolt is imbedded in the insulator.

It appears from the testimony that the plaintiff, who was a salesman dealing with the defendant, interested the defendant in the manufacture of these insulators. At that time the plaintiff showed a drawing to the defendant, representing only the rectangular block, the aperture for carrying the conductor, and the threaded bolt inserted in the upper side. Some discussion arose before the defendant undertook to manufacture the article, and the obvious and well-known feature of a petticoat (but in a somewhat unusual shape) was added as soon as the question of using the insulating body out of doors was considered. The novel form of the petticoat consists in its having square corners, corresponding to the rectangular shape of the block; but it is admitted by all the parties that the use of a petticoat on an insulator was well known in the art.

It appears from the testimony that the suggestion of the petticoat came from the defendant, Horton, while the precise form of the petti-

coat, as set forth in the design, was worked out by a draftsman and was evidently agreed to by the plaintiff. In the same way, upon the trial it was apparent that the flat plate carrying the petticoat was fragile when the block was closely drawn up to the supporting surface. An iron washer was used by the defendant in experimentation, and the plaintiff then embodied the use of such a washer in his design, but constructed it of the material of which the block was made, and showed it as an actual part of the block.

Before the patent was obtained, the plaintiff and the defendant discussed various arrangements for putting the device upon the market. The defendant insisted upon an assignment of a part interest in the patent. The plaintiff demanded some interest in the other business of the defendant. No written agreement was entered into, but the defendant by oral agreement was in the meantime given the right to manufacture and dispose of the articles, which were stamped "Patent Applied For."

The parties never reached an agreement as to the terms under which the business should be conducted. The defendant has been putting the device upon the market, and the plaintiff, after obtaining the design patent, has demanded an accounting, and now charges infringement against the defendant.

The defendant alleges that the patent is invalid, inasmuch as the plaintiff filed a verified application as sole inventor, and also denies the right of the plaintiff to charge the defendant with infringement, claiming an oral assignment of one-half interest in the patent, as well as a share in the invention as joint inventor.

It is evident that the plaintiff cannot charge infringement against the defendant, if it be established that plaintiff has assigned to the defendant a one-half interest in his patent. Nor can the defendant allege invalidity, if he has any valid assignment of interest in, or license under, the patent. The assignment would give the defendant the right to manufacture, and methods of accounting or division of profits would depend upon the details of the arrangement. But this would not be a suit under the patent law.

The present action is not maintainable on any grounds of United States jurisdiction, even if maintainable in equity for an accounting, unless the plaintiff can make out his charge of patent infringement, as the parties are both residents of this state and citizens of the United States.

The defendant has not, however, attacked the jurisdiction of the court, nor presented any evidence to oust the court from hearing the action. On the contrary, the defendant has gone into the merits and submitted much of the testimony necessary on the accounting. Unless, therefore, the case is evidently one where lack of jurisdiction over the cause of action is apparent (Danks v. Gordon [C. C. A., Second Circuit, March 2, 1921] 272 Fed. 821), we must proceed to consider the issues.

[1] The first defense, that the plaintiff is not the lawful owner of a valid patent, presents a situation which frequently arises. Suggestions as to improvements during experimentation may be made by workmen or associates of the inventor, but do not thereby deprive the inventor of the sole right to claim invention, if they are not of them-

selves patentable, or if they have to do with mere details in the work which were pointed out to the inventor and accepted and worked out by him, so that his own independent effort is actually responsible for the complete device. It is frequently difficult in a simple structure to determine whether there was participation by other people in what is claimed as invention, or whether the inventor has received ideas from his workmen and associates, under such circumstances that his own mind has been working with these associates, and has arrived at the result without independent invention on their part. Frequently this question must be determined by the acts of the parties. A share of credit for an invention does not mean that there has been joint invention in the legal sense, nor is an inventor to be deprived of his property in the invention because subsequently those who have voluntarily assisted him decide that they should have demanded recognition as co-inventors in applying for a patent.

As has been said, the addition of the petticoat, or the employment of a particular style of petticoat, would not of itself be invention in a device patent. The prior art shows many forms of device for this precise purpose. None of the parties hereto seemed to consider the device itself patentable, and as a design the elements are old.

[2] But, taken as a whole, the design in question, including the petticoat and the idea of an integral washer, was evidently patentable. Undoubtedly the defendant, Horton, had some share in working out this design. What is just as apparent is that he was content to divide the profits accruing from the device, and to leave to the plaintiff the rights of claiming invention or taking out a patent. He has never sought to protect himself by seeking a patent, nor brought an action for a specific performance of the alleged agreement. Under such circumstances, it is impossible to hold that the plaintiff made a false oath, or should be deprived of his patent by the subsequent idea of the defendant that his share in the invention should be recognized to the extent of depriving the plaintiff of the patent.

[3] But patent rights or a license may be transferred orally, and parties may enter into an agreement by which they may act as partners without the making of a written contract. This seems to be the situation in the present case. The plaintiff and the defendant never reached an agreement as to how they would become general partners, but they did act in perfect accord in so far as the defendant began to put upon the market the plaintiff's device. He thereby inferentially and legally bound himself to account to the plaintiff therefor. Pending negotiations, and in the absence of any objection under the statute of frauds, his temporary agreement was valid.

Since that time the defendant has been manufacturing the patented device under this oral license, until it was in fact terminated by the plaintiff, prior to the bringing of the action. The defendant then became an infringer, but by a sort of mutual stipulation, recognized by both the plaintiff and defendant as beneficial, although not satisfactory, and not in accord with their personal feelings, the defendant, subject to an accounting or settlement of the dispute, has continued putting on

the market the patented device, as if under an extension of this license or oral agreement, even though it had been actually terminated.

The plaintiff is estopped from claiming damages, but has rights under his patent and a share of net profits, which must be divided equally. Therefore an accounting will be ordered, but the decree may provide for a continuation of the license, on the basis of one-half net profits, unless the plaintiff insists upon possible further litigation in another jurisdiction as to the alleged violation of his agreement to convey the right to manufacture under the patent.

FOX FILM CORPORATION v. KNOWLES et al.

(District Court, E. D. New York. June 28, 1921.)

1. **Copyrights ⊂=82—Objections to bill for infringement of renewal not sustained.**
   A bill for infringement of a copyright renewed under Copyright Act, § 23 (Comp. St. § 9544), alleging that the renewal was granted to an executor and was "duly obtained," *held* sufficient to show a right of action as against a motion to dismiss, as importing the existence of a will and the nonexistence of living widow or children of the author, having exclusive, prior right of renewal.
2. **Copyrights ⊂=33—Right of renewal is new property right.**
   The right to renew a copyright, given by Copyright Act, § 23 (Comp. St. § 9544), is a new property right vesting exclusively in the persons enumerated in the statute in the order named and which cannot be affected by any assignment or other action by the author with respect to the original copyright.
3. **Copyrights ⊂=33—Notice of copyright by person obtaining renewal as executor held sufficient.**
   Notice of copyright by the person who obtained a renewal as executor of the author *held* sufficient where the renewed copyright vests in the estate.
4. **Copyrights ⊂=33—Executor cannot renew where author dies before renewal period.**
   The author of a copyrighted work who dies more than a year before expiration of the copyright has no right of renewal under Copyright Act § 23 (Comp. St. § 9544) which he can bequeath as part of his estate, but, where he leaves neither widow nor children, such right vests directly, under the statute, in his next of kin, and cannot be exercised by his executor.

In Equity. Suit by the Fox Film Corporation against Frederick M. Knowles and others. On motion to dismiss bill. Granted.

Saul E. Rogers, of New York City (Percy Heiliger, of New York City, of counsel), for complainant.

Bick, Godnick & Freedman, of Brooklyn, N. Y. (Fred Francis Weiss and Louis R. Bick, both of Brooklyn, N. Y., of counsel), for defendants.

CHATFIELD, District Judge. The defendants move for judgment under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) dismissing a bill of complaint charging infringement of copyright. This application is exactly similar to one made in the case of Fox Film Corporation v.

Frederick M. Knowles and Others, 275 Fed. 582, in the Southern district of New York, in which the bill was dismissed upon a decision filed May 18, 1921, by Knox, District Judge. As the principles of law involved have been recently passed upon in the case of Danks v. Gordon, 272 Fed. 821, decided by the Circuit Court of Appeals upon the 2d day of March, 1921, and the case of Silverman v. Sunrise Pictures Corporation, 273 Fed. 909, decided by the Circuit Court of Appeals on the 11th day of May, 1921, it is unnecessary to repeat the various propositions discussed and determined in those decisions.

[1] But three points are presented on this application. In the first place, it is suggested that the plaintiff has failed to allege a cause of action because it has neglected to state specifically that an executor recording a copyright and claiming the copyright as legatee took such action in the absence of any living widow, children, or next of kin of the author.

If we were considering the matter of jurisdiction in the District Court, as was the case in Danks v. Gordon, supra, allegations of fact rather than conclusions of law would be necessary so as to make out prima facie grounds for the exercise of jurisdiction by this court. But in this case jurisdiction is undoubted. An allegation that action was had by an executor plainly imports a will, thus excluding next of kin under the statute. An allegation that the copyright was duly obtained, when admitted for the purpose of this motion, makes it unnecessary to specifically allege the nonexistence of other persons entitled.

In order to avoid confusion, as was held by Judge Knox in the case in the Southern district, amendment could be had, but is unnecessary, as the present motion cannot be supported on any such ground.

[2] The real point in the case is the question whether Will Carleton, the author of the copyrighted poems, who had assigned his interest, including authority to copyright, to Harper & Bros., many years previous, could, by will, at the time of his decease in 1913, transfer to his executor or legatee under the will the capacity to obtain, under the provisions of the copyright statute, any interest by filing a notice of renewal on January 21, 1915, just one month prior to the date of expiration of the previous copyright.

The cases cited and also Paige v. Banks, 80 U. S. (13 Wall.) 608, 20 L. Ed. 709 (decided with respect to the language of the previous statute of May 31, 1790 [1 Stat. 124]), established the proposition that no assignment of copyright or of right to copyright, can anticipate or assign away the right of renewal which is conferred upon the author, widow, children, next of kin, or executor by the statute. In other words, the property right obtained by the filing of a copyright is the power to prevent copying or use of the material during the period provided for by statute. Neither the author nor his assignee possess any rights or powers which can be transferred in such a way as to run beyond that period. When the renewal of the copyright is sought, a new property right is created and a new power to prevent copying given to the persons entitled, not in any way dependent upon the previous bestowal of a similar authority.

When there are no widow, children, or next of kin, and the right of renewal vests in an executor, the right must become property which is a part of the estate. Upon the happening of the condition subsequent, the estate thus gains the renewal of the copyright, and the person then entitled to receive the estate or that part of it which includes the renewed copyright will receive the benefit at the hands of the executor. No formal transfer by the executor is necessary, as evidently the executor can hold this property right only subject to accounting for and turning over the estate.

[3] A third objection is raised in the present case because notice of copyright, after renewal by the executor, was printed as "Copyright 1915, by Norman E. Goodrich."

Section 18 of the Copyright Law of 1909 (Comp. St. § 9539), which was in force at that time, did not require that the name of the person entitled to file the copyright should be printed, and this notice would seem to be sufficient under the statutes, if on January 21, 1915, the filing of a renewal of copyright by the executor of Will Carleton, the author of the poems in question, secured the copyright to the estate. The executor was also sole legatee, and, if he obtained the rights to this renewal, these rights would upon his decease pass under his own will. The plaintiff in this case claims these rights by assignment from this legatee.

[4] The conclusion of the court in the case of Fox Film Corporation v. Knowles and Others, in the Southern district, that the executor and legatee of Will Carleton, deceased, obtained no valid copyright by filing the notice of renewal, is based upon the statement in the Silverman Case, supra, as follows:

"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."

It is apparent that in 1915 the decedent, Will Carleton, had no power to make any disposition with respect to the copyright then in existence. But the point which must now be decided is whether the right to renew the copyright was lost to his estate, and passed to his next of kin directly, if the decedent left him surviving no widow or children, who were living during the last year before the expiration of the earlier copyright, when the decedent's death occurred before the beginning of this year.

In Danks v. Gordon, supra, and Silverman v. Sunrise Pictures Corporation, supra, it was held that an administrator, as such, obtained no right of renewal of a copyright. It evidently follows that next of kin may take directly, but that their rights do not pass through the hands of the administrator; that is, that their rights are not a part of the estate of the decedent. If the right of renewal is not a part of the estate of the decedent, then it would not pass by will. The only purpose of including the word "executor" in the statute must then have been to cover the possible situation presented by the death of an author before renewing a copyright but within the year during which a copyright might be renewed, where no widow or children were living

at the time, and where the decedent, by living until his power of renewal had accrued, obtained thereby a property right which was recognizable as part of his estate, as soon as the privilege was exercised.

On this view of the statute as interpreted by the cases, the author, Will Carleton, at his decease had no rights which he could dispose of in the old copyright which he had assigned. He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived. The power to renew apparently vested in his next of kin and was not exercised, and no valid copyright for the renewal period now exists.

The motion must therefore be granted, and the complaint dismissed.

THE FORT MORGAN.

(District Court, D. Maryland. July 22, 1921.)

No. 711.

1. **Shipping ⊜132(3)—Owner, invoking protection of Harter Act, has burden of proof.**
   Where a steamship stranded through fault or negligence in navigation, to entitle the owner to the protection of Harter Act, § 3 (Comp. St. § 8031), it must be affirmatively shown that due care was exercised in the selection of the navigation officers and engine room force.
2. **Shipping ⊜53—Breakdown clause held not to exempt ship from liability to charterer for damages to cargo from negligent stranding.**
   The breakdown clause in a charter party *held* not to exempt the ship from full liability for damage to cargo owned by the charterer, resulting from her stranding through fault or negligence in her navigation.
3. **Shipping ⊜42—Ship held liable for late arrival to load bananas.**
   A ship *held* liable to the charterer for damage resulting from her late arrival at a wharf for loading bananas, due to delay caused by her negligent stranding, where it was shown that in accordance with the custom of the trade the bananas had been cut and were ready for loading.

In Admiralty. Suit by the Baltimore & Jamaica Trading Company against the steamship Fort Morgan. Decree for libelant.

John H. Skeen and J. M. Mullen, both of Baltimore, Md., for libelant.

Lee S. Meyer, of Baltimore, Md., for respondent.

ROSE, District Judge. [1] The Baltimore & Jamaica Trading Company, hereinafter called the "charterer," has libeled the steamship Fort Morgan for the value of 1,500 bunches of jettisoned bananas, and for the damage done by decay to many thousands more, all of which it says was the proximate result of the stranding of the ship. There is no doubt that she went ashore, and as little that her doing so was due to gross negligence in her engine room. As the fault was in her navigation or management, she sets up the Harter Act (Comp. St. §§ 8029–8035); but, in order that she may have its protection, she must affirmatively show that her owner exercised due diligence to

make her seaworthy. The Wildcroft, 201 U. S. 386, 26 Sup. Ct. 467, 50 L. Ed. 794.

The libel now before the court charged, among other things, that proper care had not been given to the selection of her engine room force. The record at least suggests that the skill and discipline of that portion of the ship's company left much to be desired. All the evidence that she offered on this vital point was that of one of the officials of her owner, who testified that her chief engineer was competent. How the witness knew that he was, or what inquiry, if any, had been made as to his fitness, was not stated, and not a word was said as to the capacity or reliability of his assistants, in the watch of one of whom the blunder seems to have been made. Such a showing falls far short of what was required to entitle her to the benefits of the act, and it therefore is unnecessary to inquire whether that statute has any application to the loss suffered by reason of her delay in taking on the portion of the cargo not on board at the time she went upon the strand.

[2] The charter contained the usual "breakdown" clause, and the ship contends that by it the parties have themselves fixed the measure of damage for the delay resulting from a breakdown, no matter how caused. She relies upon The Ask (D. C.) 156 Fed. 678. In that case it turned out that the libelant was not interested in the cargo, and suffered nothing by the damage to it. Under such circumstances, remission of charter hire for the period the ship was out of service was all that the charterer could ask. Judge Hough, moreover, pointed out that under the other facts in that case, had the charterer been the owner of the cargo, the ship could not have escaped with no greater liability than temporary loss of charter hire. In both The Craigallion (D. C.) 20 Fed. 747 (decided in this district by the late Judge Morris), and The George Dumois (D. C.) 88 Fed. 537, upon facts similar to those of the instant case, it apparently was not suggested that the breakdown clause in each of those charters limited the right of the charterer to recover all the damage proximately resulting from the ship's default.

[3] The ship further insists that a charterer may not recover for damage resulting from her delay in taking bananas on board, if they had been cut before the arrival at the wharf from which she was to take them, or in its immediate vicinity, whatever may be the law as to other kinds of losses. Upon the record before it, the Circuit Court of Appeals of this circuit some 30 years ago so held. The Curlew, 55 Fed. 1003, 5 C. C. A. 386. That decision was put upon the ground that the evidence showed that it was not the custom of the trade to cut the fruit before the ship was at or near the wharf. The ordinary rule of law that the shipper must have the cargo ready for the ship when she arrives, laid down in Postlewaite v. Freeland, L. R. 5 App. Cases, 620, and countless other cases, has little or no application when the ship is under time charter, for then waiting costs her nothing. Accordingly, in The Curlew it was held that unless there was a general usage, well known in the trade, to cut the fruit before the arrival of the ship, but at such time as would permit its being put on board of

her so soon as she made fast at her wharf, the shipper could not recover for the damage resulting from her not being on time. In that case there was express proof, not only that there was no such custom, but that the practice of the trade was to wait to cut until the ship was at her dock or in its neighborhood.

In the case at bar the uncontradicted evidence is all the other way. In the three decades which have elapsed since the Curlew was tardy, the trade usage has apparently altered. For many years past, every one has been in the habit of cutting the fruit a day or two before the ship in ordinary course will call for it, in order that it may be at the water side when she ties up. The witnesses make it clear why this is for all concerned the most convenient way of dealing with a problem which from any aspect is not without its difficulties. The ship seldom gets a full cargo at one port. Usually she has to gather it from half a dozen. If the bananas to be shipped from each of them are not cut until she gets to it, the time consumed in cutting them and in bringing them from the interior to the landing place will in the aggregate amount to many days, during which the fruit already on board will be suffering. The charter in this case was on the ordinary West Indian fruit form. Everybody knew she was to be used in the fruit trade, although the charterer had the right to employ her otherwise if it wished. Her owner was well aware that delay in keeping her schedule meant loss to the charterer. She should answer for the proximate consequences of her tardiness.

Opportunity will be given to the parties to be heard orally or by briefs, as they prefer, on the amount of the damages suffered by the charterer, as little or nothing has been heretofore said by the advocates on that subject, although the testimony concerning it has been taken.

MONROE CIDER VINEGAR & FRUIT CO. v. RIORDAN, Late Collector of Internal Revenue.

(District Court, W. D. New York. July 2, 1921.)

No. 2020.

1. **Internal revenue ⇐11—Sweet cider a "soft drink."**
The term "soft drinks," as used in Revenue Act 1918, § 628(a) (Comp. St. Ann. Supp. 1919, § 6161½d[a]), imposing a tax on "unfermented grape juice, ginger ale, * * * and other soft drinks," *held* to include sweet cider.

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

2. **Internal revenue ⇐11—Sale price of soft drinks includes containers.**
Revenue Act 1918, § 628a (Comp. St. Ann. Supp. 1919, § 6161½d[a]), imposing on soft drinks "sold by the manufacturer, producer or importer in bottles or other closed containers a tax equivalent to 10 per centum of the price for which so sold," *held* to authorize assessment of the tax on the price received for the beverage and containers.

3. **Words and phrases—"Cider;" "hard cider;" "sweet cider."**
"Cider" is the juice of apples, either before or after fermentation; "hard cider" being fermented cider, a strong, spirituous, and intoxicat-

ing drink, while "sweet cider" is either unfermented juice, or juice the fermentation of which has been prevented.

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

At Law. Action by the Monroe Cider Vinegar & Fruit Company against Vincent H. Riordan, late Collector of Internal Revenue. Judgment for defendant.

William W. Armstrong, of Rochester, N. Y., for plaintiff.

Stephen T. Lockwood, U. S. Atty., and Edward N. Mills, Asst. U. S. Atty., both of Buffalo, N. Y. (Carl A. Mapes, Solicitor of Internal Revenue, of Washington, D. C., and Russell N. Shaw, of Washington, D. C., Atty. Treasury Department, of counsel), for defendant.

HAZEL, District Judge. [1] This is an action at law against the collector of internal revenue to recover $386.22, representing beverage taxes assessed under section 628 (a) of the act of Congress passed February 24, 1919 (Comp. St. Ann. Supp. 1919, § 6161½d), and paid by plaintiff corporation under protest. The material allegations of the complaint are admitted, and it is urged that the tax assessed was collected without authority of law, in that sweet cider, the beverage in question, was not taxable as a soft drink or otherwise, and further, that the sale price, including the container, was not taxable. The Revenue Act in question, subdivision (a), provided as follows:

"Upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold. * * *"

In the earlier Act of October 3, 1917 (Comp. St. 1918, § 6161½a, subd. [b]), omitting nonessential parts, it was provided:

"Upon * * * soft drinks * * * sold * * * in bottles or other closed containers, * * * a tax of one cent per gallon."

The departmental regulations (article 13) relating to the taxation of soft drinks and other beverages sold in bottles or closed containers states that the term "other soft drinks" includes apple juice, loganberry juice, lime fruit juice, and other fruit juices sold as beverages, etc.

[3] The provision under which the tax in controversy was assessed does not in words include cider or sweet cider, and hence the question is whether sweet cider is taxable as a soft drink. It is commonly understood that cider is the juice of apples, either before or after fermentation; hard cider being fermented cider, a concededly strong, spirituous, and intoxicating drink, while sweet cider is either unfermented, or fermentation has been prevented. It was held a number of years ago in Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. 570, that the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juices of the apple before and after fermentation; that the juice of the apple before fermentation is apple juice pure and simple, and becomes cider by fermentation only.

Sweet cider is commonly understood to be a soft drink, and as drinks of that description are specifically taxed, the assessment in question in

my opinion, was in contemplation of the act. In enacting the law Congress had in mind the essential distinction between hard and soft cider, and the comprehensive term "soft drinks" was used to include it and other soft drink beverages fairly and reasonably coming within that classification. It is not conceivable that the law-making power intended to exclude sweet cider, which has less than one-half of 1 per centum of alcohol, from taxation, and to tax other soft drinks which also have hardly any alcoholic content. In Bradford v. Jones, 142 Ky. 820, 135 S. W. 290, the words "soft drinks" were held to mean nonintoxicating beverages, and the court took judicial notice of the fact that such beverages were sold in places where there were formerly sold intoxicating liquors. Such has become the common understanding, and therefore the language of the statute must be taken in the sense in which it will be understood by the public. U. S. v. Isham, 17 Wall. 496, 21 L. Ed. 728; Brown v. Piper, 91 U. S. 42, 23 L. Ed. 200. Giving effect to the rules of construction enunciated in these adjudications requires me to hold that the words "other soft drinks," as used in the statute, clearly include for taxation the beverage sweet cider. There is no ambiguity in the term, and its meaning is plain, when we adhere to the common understanding. The doctrine of noscitur a sociis, or ejusdem generis, urged by plaintiff, need not be called upon to assist in interpreting the statute, in view of the apparent intent with which the term was used in the statute.

[2] The basis for computing the amount of the tax was the price of the beverage and container, and plaintiff challenges the same. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has the right to make reasonable rules and regulations to enforce the acts of Congress with reference to the assessment and collection of internal revenue. If such rules and regulations are not in conflict with the expressed will of Congress, they have the force and effect of law (Maryland Casualty Co. v. U. S., 251 U. S. 342, 40 Sup. Ct. 155, 64 L. Ed. 297), and judicial notice will be taken of them. The language of section 628 (a)—i. e., "and other soft drinks, sold * * * in bottles or other closed containers, a tax equivalent to 10 percentum of the price for which so sold"—seems to me to be in thorough harmony with the letter of the statute, and Congress authorized and intended the assessment of a tax on the sale price of the beverage, since the selling price evidently comprises the amount paid by the customer for the beverage and container. Should the purchaser, however, return the container to the vendor, receiving a refund on the price paid, the regulation affords ample protection to the vendor from the payment of a double tax, by giving him credit therefor in the monthly return required to be filed by him. It is not unreasonable that the tax should attach when the beverage is actually sold, since the sales price includes the container. That such was the intention of Congress is quite apparent upon comparing the Revenue Acts of 1917 and 1918. The former authorized levying a tax of one cent per gallon "upon * * * drinks * * * containing less than one-half of 1 per centum of alcohol sold * * * in bottles or other closed containers," while the latter, instead of levying a tax of one cent a gallon,

authorizes a levy equivalent to 10 per cent. of the price for which the beverage is sold.

My conclusion upon the question submitted is, first, that sweet cider, within the intendment of Congress, was and is a soft drink, a beverage specified under section 628 (a) of the Revenue Act of 1918, and the assessment of tax thereon by the collector was lawful; and, second, that such tax is payable upon the sales price of the beverage and the container.

The complaint does not state facts sufficient to constitute a cause of action and accordingly a judgment may be rendered for the defendant.

DOERSCHUCK v. UNITED STATES (three cases).
THOMAS v. SAME.

(District Court, E. D. New York. March 17, 1921.)

Internal revenue ⊜7—Debenture bonds issued as dividends to stockholders held taxable as "income."

Debenture bonds, issued by a corporation to its stockholders, representing accumulated surplus or undivided profits, so far as they represent earnings since March 1, 1913, *held* taxable as "income" of the stockholders, under Act Sept. 8, 1916, § 2a (Comp. St. § 6336b [a]).

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

At Law. Separate actions by Richard R. Doerschuck, by Ralph M. Thomas, by Walter J. Doerschuck, and by George C. Doerschuck against the United States. Complaints dismissed.

Harold H. Seaton, of Brooklyn, N. Y., for plaintiff.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Chas. J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

CHATFIELD, District Judge. The plaintiff in each of the above actions has paid income tax on one-quarter of an issue of debenture bonds of the North American Brewing Company, which came into the hands of the plaintiffs because of the ownership by each of 1,230 shares (or one-quarter) of the entire capital stock of said North American Brewing Company. The directors of said corporation had voted an issue of $738,000 of debenture bonds from a surplus or undivided profits amounting to $840,368.09, which had accrued between 1906 and July 1, 1916. The portion of the bonds representing surplus earned before March 1, 1913, was not taxed and hence is not involved in these actions. The balance, viz. $262,334.44, was assessed as income for the year 1916, during which year each of the plaintiffs had received his one-quarter part of said funds.

In the case of Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, shares of stock were issued in the form of a dividend to stockholders, leaving ownership of the property in the stockholders the same as before the issuance; that is, the prop-

erty representing the value of the stock was the same, and the only change was that each stockholder held two certificates, representing in the aggregate and in theory the same stock value as previously had been represented by one certificate. It was held in that case that such stock dividend was not equivalent, for the purposes of income tax, to the payment of a dividend in property or in cash, and was not to be taxable as income under Act Sept. 8, 1916, §§ 1, 2, and 3 (Comp. St. §§ 6336a–6336c).

The plaintiffs in the present action rely upon the case of In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33, which holds that debenture bonds, having the characteristic features of preferred stock, are, from the standpoint of creditors of the corporation, when the corporation becomes insolvent, no different than such preferred stock. It would follow from this that, for the purpose of liquidation or dissolution of the corporation, or for consideration in insolvency or bankruptcy proceedings, such debenture holders would not rank as general creditors.

Plaintiffs also cite the case of Cass v. Realty Securities Co., 148 App. Div. 96, 132 N. Y. Supp. 1074, which held that bonds having a definite date and conditioned as were the debenture bonds in the present action were for the purposes under consideration in that case equivalent to preferred stock, and should not be considered as bonds in the usual meaning of that word. It has been held in Peabody v. Eisner, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152, that a dividend of shares in another corporation is taxable as income of the corporation owning the shares and distributing it as a dividend in specie rather than in money.

In Strattan's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, it was held that the transformation of ores in a mine into cash proceeds through the business of mining was a production of income, in so far as net profits were concerned, and that the amount by which the body of ore was reduced should not be added as a part of the expenses of conducting the business. This illustrates the difference between the production of income and the mere changing of form in which capital may be owned by the individual stockholder. In Eisner v. Macomber, supra, 252 U. S. at page 208, 40 Sup. Ct. at page 194, 64 L. Ed. 521, 9 A. L. R. 1570, the court says:

"The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risk of the enterprise, and looking only to dividends for his return."

It is apparent, therefore, in the present case, that the plaintiffs received an actual payment (in the form of securities available for disposition in the market, and entirely severed or distinguished from their control of the property as stockholders) of profits which the company wished to distribute as earnings to its stockholders. It did this by distribution of obligations which, like a promissory note, called for the payment of cash, and did not invest the holder with merely a different form of holding of stock.

There is no question here between the persons receiving this dividend and creditors as to priority of payment. Evidently, so far as these

debenture bonds are concerned, the corporation was solvent, and to whatever extent they might be of value this value was separated from any stockholders' control of the corporation. As stated in Eisner v. Macomber, supra, 252 U. S. at page 212, 40 Sup. Ct. at page 195, 64 L. Ed. 521, 9 A. L. R. 1570:

"It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that, if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and, so far as it may have arisen since the Sixteenth Amendment, is taxable by Congress without apportionment."

The debenture bonds in the suit at bar fall into the class of stock sold rather than stock held in a continued status of shareholder.

The complaints should be dismissed.

In re SOL GROSS & CO., Inc.

(District Court, S. D. New York. July 16, 1921.)

Bankruptcy ⇐384, 484—Composition not to be confirmed where allowance to receiver exceeds that prescribed by act.

Under Bankruptcy Act, § 48d (Comp. St. § 9632[d]), providing that on confirmation of a composition the commissions allowed a receiver or marshal shall not exceed one-half of 1 per centum of the amount to be paid creditors, and section 72 (Comp. St. § 9656), providing that "neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act," a court is without power to confirm a composition which provides for compensation of a receiver in a sum largely in excess of that prescribed in section 48d.

In Bankruptcy. In the matter of Sol Gross & Co., Inc., bankrupt. On application for order confirming composition. Denied.

Hays Hershfield & Wolf, of New York City, for bankrupt.

Robert P. Levis, of New York City, for receiver.

KNOX, District Judge. From the affidavit filed herein in conformity with bankruptcy rule 17 (89 Fed. viii, 32 C. C. A. xix) it appears that the bankrupt has agreed to pay for the services and disbursements of the receiver the sum of $800. The items of disbursement are not segregated from the amount payable as fees. I assume, however, that disbursements constitute a minor portion of the amount agreed upon. The terms of the composition are that the bankrupt shall pay all priority claims, the costs of the bankruptcy proceedings, and 20 per cent. in cash upon filed and allowed claims of creditors. The cash distribution to be made to creditors amounts to $9,619.37. Waivers from creditors aggregate $9,912.85.

Section 48d of the Bankruptcy Act (Comp. St. § 9632[d]) provides:

"That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition. * * *"

And in section 72 of the act (Comp. St. § 9656) it is said:

"That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

In the face of these limitations I do not see how the bankrupt properly can pay to the receiver the said sum of $800. I am frank to say that in cases of this character the compensation allowable by the act is altogether inadequate. The demands upon the time and attention of a receiver during the period preceding a composition may be, and indeed frequently are, as great and exacting as when the administration proceeds in ordinary course, and yet, in the latter event, the commissions of a receiver are far in excess of those which lawfully may be paid in composition.

At section 2119¼ of Remington on Bankruptcy it is suggested that—

"The 'consideration' deposited by or for the bankrupt in composition cases is for the purpose of redeeming the estate (rather than for administering it) and manifestly is an entirely different fund, in theory at least, from the bankrupt estate itself, and creditors are not interested in what allowance may be made out of that fund to the distributing agent for his care in making the distribution of the consideration to creditors. The 'consideration' is to be 'distributed as the court may direct' and the distributing agent who performs the distribution may be compensated as the court deems suitable. It is only upon the supposition that the court will appoint the receiver or trustee in composition cases distributing agent that the allowance of one-half of 1 per cent., respectively, for the receiver's and trustee's services before the composition, is endurable."

This argument, in view of the court's desire to adequately compensate the persons chosen to aid in the administration of the law, is engaging, and one I should be glad to adopt, were it not for section 72 of the act, supra. Indeed, this practice has unquestionably been followed in a great number of cases. Judge Augustus N. Hand, in the Matter of Julius S. Rosenthal, Bankrupt, decided June 15, 1917, permitted a receiver to be paid, out of the redemption fund, a larger amount than one-half of 1 per cent. There, however, the payment was consented to by all parties. Here it does not appear that the creditors have ever had brought to their attention the cost of administration under the composition, and while no objection is now voiced upon the part of any creditor, I am unable to say that no objection would have been filed had the creditors been informed of the costs. The size of a redemption fund and the ability of a bankrupt to pay administration costs bears, I am sure, some relation to the value of the estate it is sought to redeem. I also admit that a bankrupt has a right to "trade" with his creditors as to what the composition shall be; but such right of bargaining should be upon even terms and with an appreciation by the creditors as to the size of the payments being made outside of the composition. Only by the possession of such knowledge can creditors fairly determine if a composition is for their best interests.

It is doubtless true that no obligation rests upon a receiver to act as a distributing agent, and that, if such services be performed, he may be compensated therefor. Nevertheless, the compensation to be paid

must be commensurate with the worth of such services. Otherwise, the payment of such compensation would be a "form" and "guise" whereby the court's officer would receive "further compensation" for his services than that expressly authorized and prescribed by the act. I therefore reach the conclusion that I cannot sign the order confirming the bankrupt's composition, and such refusal must continue until the court is assured that its receiver has not and will not receive compensation in excess of that allowable by law.

By what has been said I do not mean to indicate that I consider the receiver's agreed compensation as excessive. I do not know what he has done, or the extent of his responsibility. I mean only that he is the victim of a harsh statutory enactment, but must, none the less, be subject thereto.

CRAMPTON v. LAUTZ BROS. & CO., Inc.

(District Court, W. D. New York. April 1, 1921.)

Courts ⇐363—Priority of claims for wages given by state law followed in distribution of assets of domestic corporation.

In the distribution by a federal court of the assets of a domestic manufacturing corporation in a suit to preserve the good will and property of the corporation, effect may equitably be given to a state statute giving priority to claims of employés for wages.

In Equity. Suit by William C. Crampton against Lautz Brothers & Co., Inc. On petition for allowance of priority to claims for wages. Granted.

Love & Keating, of Buffalo, N. Y. (George P. Keating, of Buffalo, N. Y., of counsel), for petitioner.

Franklin R. Brown, of Buffalo, N. Y. (John E. Durkin, of Buffalo, N. Y., of counsel), for receivers.

HAZEL, District Judge. This action was brought to preserve the good will and property of the defendant, a domestic corporation, and as the order appointing receivers contained a direction that the business be continued as a going concern the receivers retained in the service of the corporation the petitioner and other employees to maintain it. Thereafter this court, on application of the receivers, made an order directing them to pay the back wages of all employees.

The question now arises, after sale of the assets of the defendant company, whether this court has power to direct priority payment of the wages of workmen over other unsecured debts, as provided by section 9 of the Labor Law of this state. The statute of the state of New York, true enough, as contended, does not control this proceeding; still upon a question of priority of payment of wages it should be taken into consideration, in view of the fact that defendant is a domestic manufacturing corporation. Dickinson v. Saunders, 129 Fed. 16, 63 C. C. A. 666. If there had been an adjudication in bankruptcy of the defendant company, the petitioner would have been entitled to his earnings for a period of three months before the proceeding was begun, not

exceeding, however, $300, but instead a bill in equity prayed to preserve the assets on the theory of solvency.

The receivers took the property, not only subject to existing liens, but also as to any priorities of payment of wages for labor as against unsecured creditors. There is persuasive authority for this holding. In Dickinson v. Saunders, supra, the facts were not unlike those here. There it was urged that the claims of employees were on no different footing than those of the unsecured liabilities, but the Circuit Court of Appeals for the First Circuit reached a different conclusion, and in its opinion said:

"It is simply a question between different classes of unsecured creditors; that is, between those who, on the one hand, are understood to give credit, and those, who, on the other, furnish labor with no intention of credit, but with the expectation of immediately being paid from day to day out of the accruing earnings of the property. Therefore the questions arise whether there is such an equity, and, if yes, what is its extent? This equity, if it exists at all, is, of course, applicable to all classes of employers whose property comes into the hands of chancery for administration."

The court approved of the decision in Jones v. Arena Publishing Co., 171 Mass. 22, 50 N. E. 15, wherein it was substantially stated that it would be plainly inequitable if a general creditor in an action to preserve assets of a corporation secured an equitable division of the assets and the further advantage of reducing to the level of common creditors the wages of workmen who would be entitled to priority if the assets were left to be administered at law. Moreover, I think the priority of employees under the Labor Law of this state over other unsecured creditors is fairly implied in this circuit in Schmidtman v. Atlantic Phosphate & Oil Corp., 230 Fed. 769, 145 C. C. A. 79, and in this district whenever the question has heretofore arisen, it has been held that since receivers represent the corporation, and generally are authorized to continue the business and good will of the company, the state Labor Law giving to wage-earners a preference in payment over other unsecured creditors was equitable and just, and should be applied by analogy.

The decisions cited in opposition to the priority of payment herein deal with corporations of a quasi public character wherein such payments are justified; but I am unable to draw the inference from them that as to manufacturing corporations such priorities of payment would be inequitable to other unsecured creditors. It is perhaps not difficult to conceive of a situation where it would be inequitable and unjust to grant employees priority of payment over the general creditors, but such a situation is not presented. In this case the circumstances of the order appointing receivers to continue the business as a going concern necessitating retaining the employees, or some of them, the subsequent order directing payment of back wages, and the knowledge of such orders possessed by the purchaser at the sale equitably require, I think, applying the Labor Law of the state and directing prior payment in full of the claim in question.

So ordered.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. STEVENS et al.

(District Court, S. D. Mississippi, Jackson Division. July 5, 1921.)

1. Injunction ⇐137(4)—Preliminary injunction denied, where rights in doubt.

A suit by a telephone company against a number of patrons, as individuals and as representing other patrons, to enjoin them from bringing suits which are threatened in case complainant raises its present rates, which it claims are confiscatory, involves no federal question, in the absence of a state statute or order of the state Railroad Commission commanding the continuation of the alleged confiscatory rates; but where the telephone company is threatened with innumerable suits by its patrons, who are all citizens of a different state, in all of which suits there is involved a common question of law and fact, a federal court has jurisdiction on the ground of diverse citizenship, and a court of equity on the ground of preventing a multiplicity of suits, but where the confiscatory character of the present rates and the reasonableness of the proposed rates are sharply contested a preliminary injunction will not be granted.

2. Courts ⇐508(2)—Federal court held without jurisdiction to enjoin suit in state court.

A federal court *held* without jurisdiction, under Judicial Code, § 265 (Comp. St. § 1242), to enjoin prosecution by the Attorney General of a state of certiorari proceedings in a state court against a telephone company.

In Equity. Suit by the Cumberland Telephone & Telegraph Company against J. M. Stevens and others. On motion for preliminary injunction and motion to dismiss bill. Motion for injunction denied, and motion to dismiss sustained in part.

E. D. Smith, of Atlanta, Ga., A. S. Bozeman, of Meridian, Miss., Stone Deavors, of Laurel, Miss., and George Butler, of Jackson, Miss., for plaintiff.

Frank Roberson, Atty. Gen., F. A. Lotterhos, Asst. Atty. Gen., and Hugh V. Wall, of Brookhaven, Miss., for the State of Mississippi.

HOLMES, District Judge. [1] This is not a suit to restrain the enforcement of a state statute, or any order of the Mississippi Railroad Commission, as violative of the Fourteenth Amendment. Far from being an attack upon any order of the Commission, one of its main purposes is to have such an order adjudicated valid, because, if the validity of the order is upheld, it will settle the legality of the rates in question. This was practically conceded, when it was agreed by all parties that it was not necessary to have three judges sit upon the hearing of the motion for a preliminary injunction.

While it is true that the plaintiff is entitled to a fair return at all times, while rate-making is in process as well as when completed, yet the Constitution of the United States does not guarantee it such a return, except in so far as the Fifth and Fourteenth Amendments forbid the deprivation thereof by federal or state action. Neither the state nor the Railroad Commission has done anything to prevent the plaintiff from charging reasonable rates pending a determination of the certiorari proceedings. It was the action of the plaintiff's patrons in threatening innumerable suits and to discontinue service that forced it to return to the old rates, which are alleged to be confiscatory. This was the action of private citizens, and not of the state or rate-making body.

There is no federal question in this case. The suit does not arise under the Constitution or laws of the United States, but is purely a controversy between the plaintiff and its patrons over the exchange rates it should charge them. The plaintiff is incorporated under the laws of Kentucky, and the defendants, who are sued individually and as representatives of all patrons of the plaintiff in this state, are all citizens of Mississippi.

This is a rate controversy, and this court has jurisdiction of it solely because it is wholly between citizens of different states. In this controversy between the plaintiff and its patrons, it may be necessary for the court to pass upon the validity or status of the order of March 2, 1921, by the Railroad Commission, and while a decision of that question may settle this controversy, it will not necessarily do so, as the plaintiff contends, even if the order be suspended or invalidated, that it is nevertheless entitled to charge the increased rates contended for by it, because, without those rates, it is not receiving a fair return on its investment. No statute in Mississippi subjects the plaintiff to a penalty for a violation of an unreasonable and unjust tariff of charges. Section 4883, Code 1906.

The bill alleges that the rates it is now operating under are confiscatory, and have been for some time, and that since last September it has been seeking relief from the rate-making body of the state without avail. It sets out a schedule of alleged reasonable rates which it desires to establish and put into effect, pending final fixation of reasonable rates by the proper body. This may be done, pending an unreasonable delay in the processes of rate-making which have not taken final form, if the controversy is wholly between citizens of different states, or if the court has jurisdiction on other grounds. On the motion to dismiss, the allegations that the present rates are confiscatory, that the proposed rates are fair and reasonable, that there has been an unnecessary delay in the promulgation of new rates, as well as all other facts well pleaded, are taken to be true.

The sole proper ground of equitable jurisdiction is to avoid a multiplicity of suits, and not conspiracy. A conspiracy is an agreement between two or more parties to do an unlawful thing, or to do a lawful thing in an unlawful manner. The bill does not state facts which show the defendants to have agreed to do anything unlawful, or to do any lawful thing in an unlawful way. The bill does show a bona fide dispute between the plaintiff and defendants, and numerous other parties similarly situated, over the legality of rates or charges, and equity should take jurisdiction of the controversy to prevent the plaintiff from becoming involved in a multiplicity of suits with its thousands of patrons, in all of which suits there would be a common question of law and fact to be determined, and no question of amount of damages to be fixed by a jury. The expense of litigating separately with each one of its patrons would exceed the small fixed amounts involved in each case, in which exactly the same principles of law and exactly the same proof would be necessary. In such circumstances it is proper that a court of equity should settle all of the controversies in one suit, and stay separate proceedings at law.

[2] No injunction should issue to restrain the certiorari proceeding pending in the circuit court of Hinds county, not only because such an injunction is unnecessary to protect the rights of the plaintiff, but because the same is prohibited by section 265 of the Judicial Code (Comp. St. § 1242).

The motion to dismiss will be sustained, in so far as the bill seeks to enjoin the Attorney General from prosecuting the certiorari proceedings in the circuit court of Hinds county; but otherwise it will be overruled, and the cause, which involves the most intricate accounting, referred to a master to take testimony and report.

Coming to a consideration of the facts, the reasonableness of the proposed rates is sharply disputed, and the confiscatory character of the existing rates is vigorously denied. An injunction pendente lite, changing the status quo, should not be issued, unless it clearly and conclusively appears that the party is entitled thereto. Taking all the facts of this case into consideration, the court does not feel justified in granting the plaintiff's motion for a preliminary injunction, and this motion will be overruled.

An order may be taken in accordance herewith.

MEINECKE & CO. v. LISK MFG. CO.

(District Court, S. D. New York. October 16, 1920.)

Patents ⊂=328—920,463, for improvements in bed and douche pans, held void for lack of invention.

The Meinecke & Co. patent, No. 920,463, for alleged improvements in bed and douche pans, *held* void for lack of invention.

In Equity. Suit by Meinecke & Co., a corporation, against the Lisk Manufacturing Company. Decree for defendant.

Decree affirmed, 274 Fed. 748.

Wilbur E. Warland, of New York City, for plaintiff.

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

LEARNED HAND, District Judge. In this case the patent has, in my judgment, no patentability over Hogan's original patent, even if there was nothing else in the case. It is exactly the same invention, except that the claims require that the lip or spout shall be at least as high as the level of the thigh supports. In Hogan's patent, 651,310, that spout is only very slightly lower than the thigh supports, and the only distinction in the patent, whatever may have been the actual practice, is that the lip or spout shall be *as* high. Such a distinction would be a mere question of degree, and would not support a patent.

But when you come to look at the art it is perfectly clear that, even if there was any invention over Hogan, 651,310, in having the spout *as* high as the thigh support, it was anticipated by several patents. It is quite true, there is no exact anticipation of the whole patent in suit in

all its details, but the practice had early indicated the desirability of having a high front. As far back as 1887, in Haertel's patent, there was a large front wall, very awkward, no doubt, and perhaps for that reason discontinued, but exactly answering the purpose of this new element here. In Ovington's patent of 1889, the whole invention is also anticipated, except that the thigh features are not present; instead there were rounded edges, which undoubtedly cut the thighs of the patient. The art came to see that this was undesirable, and therefore the rounded inside pieces were run the whole way to the front, as, for example, in Gold, in Nelson, in Hogan's design patent 32,788, in Meinecke & Hogan's 712,700, and in Meinecke & Hogan's 760,229, though in the last the thigh pieces were flanged out instead of in. Of these patents, Nelson's would be exactly the same thing as the patent in suit, if it had been made in a single piece of enameled iron ware. It was not made in that way, for there was an elaborate structure of pneumatic cushions which was objectionable; but the idea of the high front and thigh pieces was clearly disclosed, and the purpose of the high front is exactly the same as that of the patent in suit—i. e., to prevent the splashing of the fecal matter in case of a loose discharge.

Finally, the proof from commercial user is inconclusive. So far as the patented pan has displaced the low front in hospital service, it is open to doubt whether it is not as much from the cleanliness of its unitary structure as from the high front. Certainly in the plaintiff's advertisements both elements are equally emphasized. That the patent may be the present preferred form I may accept; it will not make the element an invention, where the art had developed it so fully. Rather I attribute the success of the patent to the cheap and convenient design and structure of the article as a whole. Commercial success is notoriously a dangerous basis of invention, except when we can see that it depends altogether upon the actual elements which the patent adds.

The bill is dismissed, with costs, for lack of invention.

MEINECKE & CO. v. LISK MFG. CO.

(Circuit Court of Appeals, Second Circuit. May 11, 1921.)

No. 236.

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

Suit in equity by Meinecke & Co., a corporation, against the Lisk Manufacturing Company. Decree for defendant (274 Fed. 747), and complainant appeals. Affirmed.

Hauff & Warland, of New York City (Robert S. Allyn and William E. Warland, both of New York City, of counsel), for appellant.

Davis & Simms, of Rochester, N. Y. (C. Schuyler Davis, of Rochester, N. Y., and Oscar W. Jeffery, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

BURLESON, Postmaster General, v. UNITED STATES ex rel. WORKINGMEN'S CO-OP. PUB. ASS'N.

(Court of Appeals of District of Columbia. Submitted May 3, 1921. Decided June 6, 1921.)

No. 3494.

1. Post office ⟸14—Publication held nonmailable, as encouraging insurrection.

Where a newspaper published articles encouraging insurrection against the government and destruction of the established order of society, and expressed approval and justification of the crimes committed in the Russian revolution, the publication may be excluded from the mails, under Criminal Code, § 211, as amended by Act March 4, 1911, § 2 (Comp. St. § 10381), declaring nonmailable matter of a character tending to incite arson, murder, and assassination.

2. Constitutional law ⟸90—Post office ⟸14—Exclusion of publication from mails, as encouraging of insurrection, is not censorship of press.

Where a publication is nonmailable, as tending to encourage arson, murder, and assassination, the excluding of it from the mails is not a censorship of the press, but merely the refusal of the government to distribute literature tending to its destruction.

Appeal from the Supreme Court of the District of Columbia.

Suit by the United States, on the relation of the Workingmen's Cooperative Publishing Association, against Albert S. Burleson, Postmaster General of the United States, for a writ of mandamus to compel restoration of second-class mailing privileges to a publication. From a judgment granting a writ of mandamus, defendant appeals. Reversed and remanded.

John E. Laskey, Charles W. Arth, William H. Lamar, and Walter E. Kelly, all of Washington, D. C., for appellant.

Seth Shepard, of Washington, D. C., and S. John Block, of New York City, for appellee.

ROBB, Associate Justice. This appeal brings up for review a judgment in the Supreme Court of the District, granting the prayer of the petition of appellee for a writ of mandamus to require the Postmaster General to restore to second-class mail privilege the New York Call, a newspaper published by the appellee.

In November of 1917, after notice and hearing, the second-class mail privilege of the Call was revoked, upon the ground that the publication was in violation of the Espionage Act of June 15, 1917 (40 Stat. 217). On January 9, 1919, a petition for reinstatement was filed on behalf of the Call, which was denied in December following.

In United States ex rel. Milwaukee Social Democrat v. Burleson, 49 App. D. C. 26, 258 Fed. 282, this court, although sustaining the action of the Department, expressed a doubt as to the authority of the Postmaster General to make a blanket order refusing the second-class mail privilege to a publication in the future, and the trial justice doubtless was influenced in the present case by the views then expressed. The Supreme

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

Court of the United States, however, on March 7, 1921, in an opinion reviewing our decision, held broadly that the Postmaster General was clothed with such authority as to future publications, so that the question for our determination here is whether there was substantial evidence before that official upon which to base his decision refusing reinstatement of the Call.

The armistice having been signed before this application was made, the circumstances differed from those existing at the time the original order was made. The Postmaster General recognized this fact, and based his decision refusing reinstatement in part upon the provisions of section 211 of the Criminal Code, as amended by the Act of March 4, 1911, 36 Stat. 1339, § 2 (Comp. St. § 10381). That section, as amended and so far as applicable to this case, declares nonmailable "matter of a character tending to incite arson, murder or assassination." That the original order of the Postmaster General denying second-class mailing privilege to the Call was based upon substantial evidence that the publication was in violation of the Espionage Act is to us free from reasonable doubt. The various extracts from issues of the Call appearing in the record were quite as objectionable as were the issues of the Milwaukee Social Democrat involved in the case decided by the Supreme Court; and that fact, in our view, should receive consideration when we scrutinize the issues of the publication just prior to and following the application for reinstatement, for subsequent to the filing of that application the editor of the Call, in a statement to the Post Office Department, declared that—

"The Call has not changed its policy one bit since it was barred from the mails, and is not going to change."

Certainly this declaration did not indicate an intent on the part of the Call "to mend its way," as the Supreme Court held a publication must do to regain the lost privilege.

During the progress of the war the Call waged a persistent campaign to embarrass the government in its prosecution and to imbue the minds of readers of the publication with the thought that it was a class war, fought, not "for democracy, but for groups of capitalists." After the armistice, the efforts of the Call were directed toward imbuing its readers with a sense of injury and prejudice, not only against the government, but against organized society, and toward justifying to those readers the horrible nightmare of crime that had been committed in Russia, and inciting and encouraging like crimes in the United States. We here reproduce a few typical extracts from matter appearing in issues of the publication subsequent to the original order:

"Labor Day will never be fitly celebrated until the workers have taken possession of the world. * * * They can do this whenever they choose."

"We are class-conscious revolutionists."

"In the United States the symptoms of a rebellious spirit in the ranks of the working masses are rapidly multiplying."

A reference in the same issue to "promising indications of a definite tendency on the part of American labor to break away from its reactionary and futile leadership and to join in the great emancipating move-

ment of the more advanced revolutionary workers of the world" was followed by this statement:

"We, the organized Socialists of America, declare our solidarity with the revolutionary workers of Russia in the support of the government of their soviets, with the Radical Socialists of Germany, Austria and Hungary in their efforts to establish working class rule in their countries, and with those Socialist organizations in England, France, Italy and other countries, who, during the war as after the war, have remained true to the principles of uncompromising international Socialism."

The article concludes:

"Long live the international Socialist revolution, the only hope of the suffering world!"

The Call also published, in extra heavy black-face type, the so-called Soviets' Bill of Rights, advocating the "arming of the laborers and peasants and disarming of the propertied classes," closing with the slogan, "Long live the Socialist world revolution."

"The war of the nations is well-nigh over; the war of the classes has well-nigh begun. Long live the revolution! Down with the Christian Brotherhood of Sham!"

"* * * Making the world safe for Socialism at the extra cost of a hundred lives was cheap at the price."

In an article addressed "To the Toiling Masses of America, France, Britain, Italy, and Japan—An Appeal of the Russian Workmen and Peasants' Soviet Government—Appeal to World's Workers," after referring to attempts to embarrass the Russian revolution and threatening "two blows for every one against the soviet," is the following:

"Long live the solidarity of the workers of the world! Long live the solidarity of the working people of America, France, England, Italy, and Japan with the Russian workers! Down with the bandits of international imperialism! Long live the international revolution!"

In another issue, containing resolutions of the Oregon delegates to the Chicago Socialistic convention, the delegates were instructed—

"to take such steps as may be found necessary to organize a revolutionary Socialistic party, whose sole aim shall be the overthrow of the capitalistic system by the establishment of the dictatorship of the proletariat."

Under "Editorial Comment" was the following:

"Oh, America; When will you, too, join the great procession? When will your workers unfurl red banners and proclaim themselves part of the free children of earth?"

In an issue containing "A Proclamation of the Newly Elected Soviet in Petrograd Addressed to the Workers, Soldiers, and Sailors in England, France, Italy, America, Sweden, Finland, Esthonia, and Serbia," is the following:

"We live under the conviction that the workers of France, England, America, Italy, and other countries will not allow their bankers and landowners to use them as the gendarmes and hangmen of the workers' revolution. * * * Arise in revolt, comrades! Put an end to the crimes of your government. * * * Long live the revolution of the workers in all lands!"

Was matter contained in these articles and others of a similar nature "of a character tending to incite arson, murder, and assassination?". [1] Taken as a whole, it is difficult to perceive what object the publication sought to accomplish, unless it was the destruction of society by any means, including "arson, murder, and assassination." The revolution in Russia had resulted in wholesale arson, murder, and assassination, the suppression of justice, the plunder of the industrious by the indolent, and the overthrow of the laws of morality which had obtained since the dawn of civilization. Over and over again in these articles sympathy was expressed with the Russian revolution, and an appeal made to the workers of all other countries to bring about the same conditions. It is one thing to advocate revolution, but quite another thing to advocate the substitution of anarchy for government, the arming of one class, and the plunder and annihilation of all others. We have in our own country a concrete illustration of the result of such revolutionary propaganda in the recent bomb outrage in New York City, resulting in the death of many innocent persons and an appalling destruction of property. When it is kept in mind that this publication constantly has sought to imbue its readers with the idea that it is their duty to overthrow the government, disregard all law, and seize for themselves the property and belongings of others, irrespective of means and regardless of consequences, we must find that there was substantial evidence before the Postmaster General justifying his refusal to accord any postal privilege to this polluted matter.

[2] As found by the Supreme Court of the United States in the Milwaukee Social Democrat Case, 255 U. S. ——, 41 Sup. Ct. 352, 65 L. Ed. ——, to which reference has been made, this does not constitute a censorship of the press, but merely evidences the unwillingness of the government to lend its aid to those who would destroy it in the dissemination of "matter of a character tending to incide arson, murder, and assassination."

It follows that the judgment must be reversed, with costs, and the cause remanded, with directions to dismiss the petition.

Reversed and remanded.

LEDERER, Collector of Internal Revenue, v. CADWALADER.

(Circuit Court of Appeals, Third Circuit. August 18, 1921.)

No. 2667.

Internal revenue ⇐7—Commissions received by a lawyer as executor not subject to excess profits tax as income from "trade or business."

Commissions received by an attorney as executor of a decedent's estate *held* not subject to excess profits tax under Revenue Act Oct. 3, 1917, § 209 (Comp. St. 1918, § 6336⅜j), imposing a tax on the net income of a "trade or business" having no invested capital, including under section 200 (section 6336⅜a) "professions and occupations," as distinguished from the tax on income derived from trades or businesses having invested capital, under sections 201–208 (sections 6336⅜b–6336⅜i), notwithstanding section 206 (section 6336⅜g), providing for the ascertainment of the net income on the same basis and in the same manner as provided in section 1200 (section 6336b), amending Act Sept. 8, 1916, tit. 1, § 2, defining income to include "income derived from any source whatever," since taxes on income from a "trade or business" are taxes on the trade, business, profession, or occupation of the taxpayer himself; the executorship not constituting the trade, business, profession, or vocation of such attorney.

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

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Proceeding by John Cadwalader, Jr., against Ephraim Lederer, Collector of Internal Revenue. Judgment for plaintiff (273 Fed. 879), and defendant brings error. Affirmed.

Charles D. McAvoy, U. S. Atty., and T. Henry Walnut, Sp. Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

Thos. Raeburn White, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. John Cadwalader, Jr., plaintiff below, was appointed executor and trustee of the estate of Mr. Eckley B. Coxe, who died in 1916. His account, filed in 1917, showed that he received in commissions as executor $28,974. Ephraim Lederer, collector of internal revenue for the First district of Pennsylvania, imposed an excess profits tax under the Revenue Act of October 3, 1917 (40 Stat. 300 [Comp. St. 1918, § 6336⅜a et seq.]), for the calendar year of 1917, of $1,971.23 on these commissions, which plaintiff paid under protest and for the refund of which he immediately filed a claim, which was rejected. These proceedings were instituted to recover the tax thus paid. The case was tried to a jury which rendered a verdict in favor of the plaintiff and the defendant is here on writ of error.

The tax was levied under the authority of section 209 of the act (section 6336⅜j), which provides:

"That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected and paid,

in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section two hundred and one, a tax equivalent to eight per centum of the net income of such trade or business."

This is the only section of the act designed to reach the income derived from a trade, business, or profession in which no capital or only a nominal capital is invested. The tax "equivalent to eight per centum" assessed by this section is in lieu of the higher tax imposed by section 201, in which capital is invested.

The determination of this case depends upon what is meant by "trade or business," which, as defined by section 200 of the act (section 6336¾a), includes "professions and occupations."

The defendant contends that "trade or business" as used in section 209 comprehends all the activities of an individual of every kind which may be followed and called a trade, business, profession, occupation, or vocation; and the income received from such activity if engaged in only a single time is taxable under this section because such activity may be followed as a vocation or profession. According to this view, it makes no difference whether the income is received from a vocation or avocation, if the activity is such that it may be followed by some one as a trade, business, or profession. If this position is correct the defendant's motion for a nonsuit should have been granted.

The plaintiff tried his case on the theory, which he is seeking to maintain here, that to be taxable under section 209 of the act, the income, in the case of an individual, must be derived from some activity engaged in with such frequency and to such extent that it may be called *his* trade, business, profession, occupation, or vocation, and that income derived from any activity not so engaged in by an individual is not taxable under this section as "war excess profits tax."

This section has been construed by the Secretary of the Treasury, who is charged with the administration of the act, in article 8 of the Regulation No. 41 in the following language:

"'Trade' in the Case of Individuals.—In the case of an individual, the terms 'trade,' 'business,' and 'trade or business' comprehend all his activities for gain, profit, or livelihood, entered into with sufficient frequency, or occupying such portion of his time or attention as to constitute a vocation, including occupations and professions. When such activities constitute a vocation they shall be construed to be a trade or business whether continuously carried on during the taxable year or not, and all the income arising therefrom shall be included in his return for excess profits tax.

"In the following cases the gain or income is not subject to excess profits tax; and the capital from which such gain or income is derived shall not be included in 'invested capital': (a) Gains or profits from transactions entered into for profit, but which are isolated, incidental, or so infrequent as not to constitute an occupation; and (b) the income from property arising merely from ownership, including interest, rent, and similar income from investments except in those cases in which the management of such investments really constitute a trade or business."

The testimony discloses that the plaintiff is a lawyer and has no other profession. He had nothing to do with the preparation of the will and never represented the testator professionally. There was no testimony tending to show that he ever held himself out as a person

specially qualified to act or desirous of acting as executor, and so far as the testimony shows this was the first and only time that he ever acted as such. While it may be true, as defendant contends, that an attorney's training and experience qualify him to be a good executor, they may also qualify him to be efficient in many other pursuits which professionally he never touches. The training of men in other professions and occupations may fit them also to be good executors, but this does not, in our opinion, furnish a ground for taxing income under this section of the act if it is received by such persons for a single, isolated, avocational activity, requiring no more of those taxed than the record discloses was required of the plaintiff.

The defendant's argument to sustain his position is as follows: Section 206 of the act (section 6336⅜g) provides that the net income of an individual shall be ascertained and returned "for the taxable year upon the same basis and in the same manner" as provided in title 1 of the Act of September 8, 1916 (39 Stat. 756), as amended by this act. Section 2 of that act, as amended by section 1200 of this act (section 6336b[a]), provides that—

"Net income of a taxable year shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit, or gains or profits and *income derived from any source whatever.*"

He therefore concludes that income derived from any source whatever forms the basis of ascertaining and returning excess profits, or additional income, tax of individuals having no invested capital or only a nominal capital, but this conclusion is a non sequitur.

The defendant tries to sustain his position by applying the provision regarding trades and businesses of corporations to the trades, businesses, and professions of individuals. Section 201 (section 6336⅜b), after setting forth the taxes to be paid by corporations, partnerships, and *individuals,* provides in the case of *corporations* and *partnerships* that:

"For the purpose of this title every corporation or partnership * * * shall be deemed to be engaged in business, and all trades and businesses in which it is engaged shall be treated as a single trade or business, and all its income from whatever source derived shall be deemed to be received from such trade or business."

So, also, defendant says, in the case of individuals having no invested capital, all their trades, businesses, or professions are treated as a single trade, business, or profession, and income from whatever source derived is deemed to be received from that business or profession. Consequently the commissions of the plaintiff, though not received strictly from his profession, are deemed to have been so received and are therefore subject to the excess profits tax. The provision, however, is expressly limited to corporations and partnerships. But it was meant, defendant argues, to apply to individuals, because "under the

provisions of section 206 whereby an individual's net income for the purpose of the act is to be figured in the manner provided in title 1 of the 1916 act, his income 'derived from any source whatever' is specially made subject to the tax," and it is therefore not necessary expressly to make the provisions applicable to individuals. But defendant loses sight of the fact that identically the same language was used as to the basis and manner in which income is to be ascertained and returned in the case of individuals as in the case of corporations and partnerships. Consequently Congress could not have intended that income derived from any source whatever, whether vocational or avocational, should be deemed to be derived from an individual's profession. If it had so intended, the provision would have expressly included individuals as well as corporations and partnerships.

Section 2 of the act of 1916, which simply defines income, cannot be made the basis for imposing an excess profits tax under section 209, as defendant contends. On income thus defined a tax must, of course, be paid, and as a matter of fact the defendant did make return of and pay the tax on his commissions, but not as excess profits tax. There is not a word in the statute which says or even hints that this additional tax of "eight per centum" "in the case of a trade or business having no invested capital" shall be ascertained and returned or paid on a single avocational activity on the basis of income as defined in section 2 of the act of 1916.

The taxes provided for in section 209 are "in addition to taxes under existing law." Sections 201–208 (sections 6336⅜b–6336⅜i) provide for taxes on income derived from trades or businesses having invested capital. Section 209 provides for taxes on income from a "trade and business," including professions and occupations "having no invested capital." Section 2 of the act of 1916 simply defines income, and does nothing more. It does not attempt to declare when a tax on income thus defined shall be imposed under section 209. It does not provide a "basis" or "manner" for ascertaining and returning income under section 209 of the act of 1917, except in so far as it defines what income is. As a matter of fact there were no taxes ascertained and returned under the act of 1916 in the case of a "trade or business having no invested capital."

Taxes on income from a "trade or business" clearly mean taxes on the income from the trade, business, profession, or occupation of the taxpayer himself. This is the plain meaning of the statute, and any other construction distorts the simplicity of the language and requires that we read into the language something it does not contain. A single, isolated activity of the character of the executorship of the plaintiff does not constitute a trade, business, profession, or vocation under the facts of this case. We agree with the Secretary of the Treasury and the learned trial judge in the interpretation of this section.

The question of whether acting as executor of this estate was the business, occupation, or profession of the plaintiff was correctly submitted to the jury, whose verdict settled the fact in the negative, and the judgment of the District Court will therefore be affirmed.

UNITED PROPERTIES CO. OF CALIFORNIA et al. v. KIBBE.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3192.

Corporations ⊜406(1)—Certificate for delivery of bonds to be issued held authorized.

A certificate issued by defendant corporation, by which it agreed to deliver to plaintiff 13 of its first mortgage bonds, of $1,000 each, to be secured by trust deed then in preparation, *held* duly authorized, and binding on defendant, and to sustain an action by plaintiff for damages for nondelivery of the bonds

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

Action at law by Mary Ellen Kibbe against the United Properties Company of California. Judgment for plaintiff, and defendant and Albert Hanford and others, trustees acting in behalf thereof, bring error. Affirmed.

The defendant in error commenced this action in the court below against the defendant the United Properties Company of California, to recover damages in the sum of $13,000, the alleged value of certain bonds, with interest and costs of suit—the complaint alleging in substance that on the 15th day of February, 1912, the defendant company, for a valuable consideration, undertook and agreed in writing to deliver to Ira M. Condit and the plaintiff as joint owners, or the survivor of them, or order "thirteen of its first mortgage and collateral trust 5 per cent. 50-year sinking fund gold bonds of the denomination of $1,000 each, with all interest coupons attached, said bonds to be issued under and secured by a deed of trust dated January 1st, 1911, then in course of preparation by the said defendant, and so to be delivered under, as, and when said bonds might be certified, issued, and ready for delivery; a true and correct copy of which agreement, marked 'Exhibit A'" was annexed to and made part of the complaint, and is as follows:

"Bond Certificate.

"Number 660.

"For First Mortgage and Collateral Trust Five Per Cent. Fifty year sinking fund gold bonds. Par Value of Bonds, $13,000.00

"The United Properties Company of California.

"The United Properties Company of California, a corporation organized and existing under the laws of the state of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby, as joint owners, or the survivor of them, or order, upon the surrender of this certificate duly indorsed, 13 of its 'First Mortgage and Collateral Trust Five Per Cent. Fifty Year Sinking Fund Gold Bonds,' of the denomination of one thousand dollars ($1,000.00) each with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in preparation dated January 1, 1911, made by said the United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery.

"In witness whereof, said the United Properties Company of California has hereunto caused its corporate name to be signed and its corporate seal to be

affixed by its president or one of the vice presidents and treasurer or assistant treasurer thereunto duly authorized, this 15th day of February, 1912.

"The United Properties Company of California.
"W. K. Alberger, Vice President.
"A. G. Rayecraft, Asst. Treasurer."

Indorsed on certificate:

"Interest from January 1 to July 1, 1911, amounting to $325, paid July 1, 1911, $25 Nov. 18, 1911, $300. A. G. Rayecraft, Asst. Treasurer.

"Interest from July 1, 1911, to January 1, 1912, amounting to $325 paid Jan. 2, 1912. A. G. Rayecraft, Asst. Treasurer.

"Interest from January 1, 1912, to July 1, 1912, amounting to $325 paid July 1, 1912. A. G. Rayecraft, Asst. Treasurer.

"Interest from July 1, 1912, to January 1, 1913, amounting to $325 paid January 2, 1912. A. G. Rayecraft, Asst. Treasurer."

The complaint alleged the death of Ira M. Condit and that the plaintiff was his daughter and had become the sole owner and holder of the agreement; that September 13, 1915, the plaintiff demanded that the defendant execute to her the bonds as required by the agreement and execute the trust deed therein mentioned, all of which the defendant refused to do, and further alleged that neither the said trust deed nor the said bonds have ever been executed; that at the time of the making of the said demand the plaintiff tendered to the defendant the said agreement and offered to surrender it upon the execution and delivery by it to the plaintiff of the said bonds; that had the bonds been executed and delivered to the plaintiff as required by the agreement and the said trust deed been executed as so required the bonds would have been of the value of $13,000 in gold coin, and that by reason of the matters alleged the plaintiff has been damaged in that amount of money.

The defendant company put in issue the substantial allegations of the complaint, and also set up certain affirmative defenses, and after a trial of the issues by the court—a jury having been waived—judgment was entered as prayed for.

R. P. Henshall, of San Francisco, Cal., for plaintiffs in error.

Keyes & Erskine, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). We see no merit in any of the contentions on the part of the plaintiff in error. At best they are purely technical and mainly directed to the alleged insufficiency of the complaint, to which there was no demurrer for uncertainty or on any other ground. What according to the complaint, the defendant to the action agreed to do, and what, according to the record of the trial, it did not do, was to deliver to the promisees the bonds described in the complaint, to the alleged damage of the plaintiff in the action in an amount which the trial court found was actually sustained.

The contention that the certificate upon which the action was based was issued without authority, and that there was never any subsequent ratification thereof, is clearly shown by the record to be without any valid foundation. The record shows that the plaintiff in error is a Delaware corporation, and was organized under the laws of that state by R. G. Hanford, W. S. Tevis, and Frank M. Smith as a holding company of stock in other corporations held by them; that accordingly, at a special meeting of the board of directors of the plaintiff in error, held February 24, 1911, at its office in the city of San Francisco, Cal., duly called, and at which all of the eight directors except one were present, this, among other resolutions, was adopted. to wit:

"Resolved, that First Vice President W. S. Tevis and Vice President R. G. Hanford be and they are hereby authorized and empowered, on behalf of this company, to enter into negotiations for the purpose of acquiring such electric lighting and distributing or other plants or properties and franchises as they may think desirable, or to acquire shares of stock in corporations owning or controlling such plants or properties or franchises."

The record shows that the president of the company thereupon laid before the board of directors a communication from R. G. Hanford, wherein he offered to transfer to the plaintiff in error certain shares of the capital stock of certain named corporations, at and for the price of $145,346,730, "for and in exchange for all of said stock," reads the communication of Hanford,

"And as the consideration for the delivery thereof to you, I bereby offer to accept from you the following amounts of the common and preferred shares of the capital stock of your company, the United Properties Company of California, and the following amounts of your first-mortgage bonds and convertible debenture bonds, all of which must be delivered as fully paid, to wit:

First. 575,792 shares of the fully-paid common stock of your company, having a par value of	$ 57,579,200
Second. 336,014 shares of the fully-paid preferred stock of your company, having a par value of	33,601,400
Third. 10,411 of the fully-paid first mortgage bonds of your company, having a par value of	10,411,000
Fourth. 43,755.15 of the fully-paid Convertible Debenture bonds of your company having a par value of	43,755,130
Total	$145,346,730

"As a further consideration for this exchange, I must require you to enter into an agreement with me whereby you shall undertake at any time on or before July 1, 1911, to exchange with any of the stockholders of the Bay Cities Water Company, whose stock shall not be transferred and delivered to you by me, the following amount of your shares of stock for shares of stock of the Bay Cities Water Company owned by them, respectively, that is to say:

"For each $10 par value of the shares of the common stock of The Bay Cities Water Company received by you, you shall issue in exchange therefor $3 par value of your common stock, $1 par value of your preferred stock, and $1 par value of your convertible debenture bonds.

"If this offer is accepted by you, the exchange of stock herein contemplated shall be made and consummated within 30 days from the date of such acceptance. If your company is unable, within said time, to issue and deliver to me the permanent first mortgage bonds or convertible debenture bonds of your company, hereinabove mentioned, I agree to accept from you, in lieu thereof, certificates for such bonds authorized and issued by you, which certificates shall provide that the holders thereof shall be entitled to receive from you the said first mortgage bonds and convertible debenture bonds as soon as the same are executed, issued, and ready for delivery, together with all interest coupons attached to said first mortgage bonds, entitling the holder thereof to interest at the rate of five per cent. per annum from and after the 1st day of January, 1911.

"Yours truly, [Signed] R. G. Hanford."

The record shows that, after a full discussion of that offer and of the value of the shares of stock in the various corporations offered by Hanford, it was, upon motion duly made and seconded, and carried by the unanimous vote of all of the directors of the defendant in error except Hanford, who did not vote:

"Resolved, that the stocks offered by Mr. R. G. Hanford in his communication, a copy whereof is hereinafter spread upon these minutes, are of a value of not less than $145,346,730.

"Further resolved, that the said offer be, and the same is, hereby accepted, and that the proper officers of this company be, and they are, hereby authorized and directed to issue such shares of stock, bonds, and convertible debenture bonds of this company, and to do all such other acts and things as may be necessary to effect the said exchange.

"Further resolved, that a copy of said communication of R. G. Hanford be spread upon the minutes of this meeting."

Mr. Tevis, the vice president of the plaintiff in error, was questioned, and answered, among other things, as follows:

"Mr. Erskine: Q. Now, Mr. Tevis, did Mr. Hanford deliver to the United Properties Company within 30 days from February 24, 1911, the certificates of stock which he agrees to deliver in offer No. 1? A. I believe that he did; I cannot say positively he did so within 30 days, but my impression is that he did; that is my best recollection.

"Q. Were the certificates for bonds, which were issued to him for the shares of stock which he delivered, issued to him before or after he delivered the shares of stock to it? A. I cannot answer that question. It seems to me that the certificate book would be the best evidence of that. My impression is that the certificates were delivered after he delivered the stocks and bonds.

"Q. Now, I call your attention to the fact that the original certificates were dated February 16, 1911, while this meeting was held on February 24, 1911. Now, isn't it a fact, Mr. Tevis, that while they were filled out and prepared on February 16, 1911, they were not delivered to him until after he made the delivery of stocks? A. I believe that is correct. I would like to alter my testimony in one particular, with reference to the delivery of the stocks and bonds, that he was supposed to have made. There were certain stocks, preferred and common shares of stocks in the traction company, that he agreed to deliver.

"Q. Let me interrupt you for a moment. You are referring now to offer No. 2. I am only asking you about offer No. 1. A. Probably that is so.

"The Witness (continuing): The United Properties Company received and kept the shares of stock which Mr. Hanford delivered to it, and I believe they still have them. The certificate book of the United Properties Company, which I have, is the first book kept by it. Certificates Nos. 45, 46, 47, and 48, shown me, I should say were certificates which were part of the certificates issued to Mr. Hanford in return for those stocks, and they were included in the 10,411 certificates, for $1,000 apiece, that were issued to him; that is my impression. I believe that number was issued to him.

"The Court: Q. When you say that number, you are speaking now of the four you have just shown him, or of the 10,411?

"Mr. Erskine: The 10,411 for $1,000 each; that would make $10,411,000.

"Mr. Henshall: Will you direct Mr. Tevis' attention to the fact that you are dealing exclusively with offer No. 1?

"Mr. Erskine: Yes; I have not referred to offer No. 2 at all.

"The Witness (continuing): Interest was paid upon the certificates by the United Properties Company and the directors knew that the company was paying that interest. When any certificates of the original issue were surrendered and new ones issued, interest was paid on the new issue and the interest was paid to and including January, 1913. The books from which these certificates were issued, and to which they were returned when they were surrendered, were kept in the office of the company, and the directors knew they were kept there. I never heard of any resolution adopted by the directors of the United Properties Company disaffirming or disapproving of the issuance or reissuance of any of these certificates. I was a stockholder in the company. I can identify one of the triplicate originals of the minutes of

the stockholders' meeting of the United Properties Company, and this book is a triplicate original of the minutes of the stockholders' meeting of the company."

The record shows that Hanford delivered to the plaintiff in error the shares of stock specified in his accepted proposition, receiving from the latter in return, among other things, certificates for 10,411 first mortgage bonds, of $1,000 each; that those certificates were subsequently transferred by Hanford to various persons, such transferees thereafter surrendering them to the plaintiff in error, receiving therefor similar certificates in their own names. The certificate held by the defendant in error, upon which this action was based, was one of them.

The transactions last referred to occurred during the years 1911, 1912, and 1913, and the record shows that interest was paid by the plaintiff in error on the certificates issued to Hanford, and on the reissued ones, as above stated, including that of the defendant in error. Not only do the records of the board of directors of the plaintiff in error disclose these things, but the record in the present case shows that on the 5th day of December, 1911, at a meeting of the stockholders of the plaintiff in error, at which a large majority of the stock was represented, this resolution was unanimously adopted:

"Resolved, that all the acts, contracts, and proceedings of the officers, directors, and committees of this corporation since the first meeting of the incorporators of this corporation, which meeting was held in the city of Wilmington, state of Delaware, on the 31st day of December, 1910, to this date, be and they are hereby in all respects ratified, confirmed, and approved, and declared to be the acts and deeds of this corporation."

Upon such a record we think it is idle to contend, either that the certificate in question was not authorized or was not ratified. That none of the bonds called for by the certificate were delivered is conceded.

The judgment is affirmed.

UNITED PROPERTIES CO. OF CALIFORNIA et al. v. BURKHARDT (two cases).

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

Nos. 3191, 3193.

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

Actions at law by Edmund J. Burkhardt against the United Properties Company of California. Judgments for plaintiff, and defendant and others, trustees, bring error. Affirmed.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. Upon the authority of United Properties Co. of California et al., plaintiffs in error, v. Mary Ellen Kibbe, defendant in error, No. 3192, 274 Fed. 757, just decided, the judgment in each of the above-entitled cases is affirmed.

CROSS v. RAMDULLAH. *

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3596.

1. **Landlord and tenant ⟸33—Oral agreement of lessor, in consideration of lessee's remaining in possession following lessor's breach of contract, held supported by sufficient consideration.**

Where a lessee of rice lands, on failure of the lessor to furnish sufficient water for irrigation purposes as required by the lease, signified his intention of exercising his option to terminate the lease, but was prevailed on not to do so, a subsequent oral agreement of the lessor that, if the lessee would continue in possession of the land and care for the crops planted he would repay all rentals on lands failing to produce normal crops, relinquish all claims for rentals not paid on such lands, and pay the expenses incurred by lessee in planting and caring for the rice on nonproducing lands, was not invalid for want of consideration.

2. **Frauds, statute of ⟸131(1)—Oral agreement of lessor held not to "alter" or modify written lease, within statutory prohibition.**

Where a lessor of rice lands failed to furnish sufficient water for irrigation as required by the lease, whereupon the lessee signified his intention of exercising his option to terminate the lease, but was prevailed on by the lessor not to do so, a subsequent oral agreement, prior to the expiration of the term, that, if the lessee would continue in possession of the land and care for the crops planted, lessor would repay all rentals on lands failing to produce normal crops, relinquish all claims for rentals not paid on such lands for the year, and pay the expenses of planting and caring for the rice thereon, was not an alteration of the written lease within the purview of Civ. Code Cal. § 1698, providing that a written contract may not be altered, otherwise than by a contract in writing or an executed oral agreement.

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

3. **Appeal and error ⟸1064(2)—Court's allusion to oral agreement as modification of written lease not prejudicial, where question of existence of agreement left to jury.**

In an action by a lessee of rice lands for damages for the failure of the lessor to furnish sufficient water for irrigation purposes, as required by lease, the court's allusion in his instructions to an oral agreement of the lessor, as a modification of the written lease, was not prejudicial error, where the question as to whether such agreement had in fact been made was left to the jury.

4. **Appeal and error ⟸1050(1)—Admission of hearsay testimony that purchaser of land told lessee he might continue in possession held not prejudicial.**

In an action by a lessee of rice lands for his wrongful exclusion therefrom, following the execution of a contract for the sale thereof by the lessor to a third party, the admission of hearsay testimony that the latter told plaintiff he was anxious to have him continue on the land, and for him to tell the lessor so, was not reversible error, being harmless, where plaintiff further testified that, following such conversation, he saw lessor, who said he could not continue the old lease, but would give him another on a different rental charge, such purchaser testified as to his version of the conversation, and lessor testified that he sold the land, but claimed that the purchaser had told him to cancel the leases.

5. **Landlord and tenant ⟸95—Lessor not empowered by executory contract of sale to cancel leases.**

A contract by a lessor to sell leased lands, which provided that title thereto was to be clear of incumbrances, except lessees' leases; that,

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

*Rehearing denied October 10, 1921.

when the balance of the purchase price was paid, lessor would turn over to the purchaser all moneys received by him on account of the leases and assign the latter; that the balance of the purchase price should be paid and title conveyed within 30 days after irrigation bonds were voted and issued, but that, if they were not voted within 6 months, the agreement was to terminate; that the balance due should be paid on or before a date on which the rentals were available, on which date the purchaser should pay to the lessor all amounts due on advances made by him to tenants on the land, and the lessor turn over to the purchaser all mortgages securing the same and the tenant's leases—was not a contract of sale within the lease reserving to lessor the right to sell the leased lands at any time during the life of the lease; the purpose or intent of the parties not being to make a present sale, nor to disturb the lessees' possession, the title not having passed, and, the purchaser being willing to have lessee remain in possession, the lessor having suffered no inconvenience by not being able to render possession, so that lessor was not empowered by reason of such contract to cancel the leases.

6. **Parties ⟸19—One of several colessees, hiring lessor to harvest crop, may enforce contract without assignment from other colessees.**

A lessee of rice lands, who with his colessees hired the lessor to harvest and take care of the crop, may sue in his name alone for damages for such lessor's negligence in so doing, regardless of any assignment of their causes of action by such colessees; the contract being personal with lessee.

7. **Landlord and tenant ⟸132(3)—Measure of damages for wrongful exclusion from leased rice lands stated.**

In a lessee's action for his wrongful exclusion from leased rice lands, for the irrigation of which the lessor failed to furnish sufficient water, plaintiff could recover the profits which ordinarily, naturally, and in the usual course of proper cultivation the lands would have produced from growing a crop of rice during the time of such exclusion, to determine which the jury should ascertain what would have been the probable production on such lands during such time, assuming they were properly prepared, planted, cared for, and harvested, and the value of the crop in the markets, deducting the cost and expense of cultivation, harvesting, and marketing, and the rent that would have been due under the lease, in view of Civ. Code Cal. § 3300, declaring the measure of damages for a breach of contract to be the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, which in the ordinary course of things would be likely to result therefrom; the rule that the proper measure of damages is the difference between the rent agreed to be paid and the actual rental value being applicable only where there has been a total failure to furnish water, and not where the lessee is excluded from the land.

8. **Contracts ⟸353(5)—Instruction on burden of proof as to understanding of contract, identity of which is in issue, held correct.**

In an action by a lessee of rice lands for breach of the lessor's contract to harvest, thresh, sack, and haul to destination the crop grown, where the testimony was conflicting as to whether a written contract, of which profert was made by defendant, was the one signed and executed by plaintiff, the court did not err in instructing the jury that the paper being produced by defendant, having been drawn in his office and its terms dictated by his attorney, the burden was on him to show that its contents and the meaning of its terms were fully made known to plaintiff, and that it was duly executed by him, but that, if the document was in its present form when signed by the parties, it would be formally sufficient to constitute a contract, and the burden would be on plaintiff to show that his signature was induced by defendant's misrepresentation.

9. Contracts ⇐349(7)—Evidence of cost of performing written contract inadmissible.

In a lessee's action for lessor's breach of a contract to thresh the crop grown on the leased premises, evidence as to the cost of threshing it and of the equipment purchased with which to do so was properly denied as irrelevant; the issue being as to the extent of lessee's liability for the services performed by lessor under the written contract.

10. Witnesses ⇐275(6)—In action for exclusion from leased premises following sale, cross-examination as to other leases made subsequent to sale admissible.

In an action for wrongful exclusion of a lessee from the leased premises following sale to a third party, where there was evidence that lessor might have leased portions of the land claimed to have been sold, subsequent to such sale, and taken mortgages back from the lessees, the overruling of an objection to cross-examination of lessor as to what were the terms of such leases, to which he replied, "If there was a lease, it would be in the form of my regular lease," was not erroneous.

11. Witnesses ⇐275(4)—Defendant testifying to irregular banking transaction might be asked as to his knowledge of similar transaction for a fraudulent purpose by another.

Where, in an action for wrongful expulsion of a lessee following sale by lessor, there was evidence that lessor had leased a portion of the lands after such sale, and the lessor, in explanation, testified that, though a crop mortgage on the lands sold, which with a note, was given him for his accommodation, and to permit the execution of which he verbally turned over the crop to the mortgagee, recited that he had given the latter a lease on the land, he had never executed such lease, and that he hypothecated the note to a bank, giving it his personal guaranty, he might be asked whether he did not know that that was a method used by an official of another bank of covering withdrawals and having them apparently secured by such methods for the purpose of deceiving the bank examiner.

12. Landlord and tenant ⇐48(1)—Evidence as to availability of water for irrigation purposes held sufficient for jury, in action for lessor's failure to furnish quantity required by lease.

In an action by the lessee of rice lands for the lessor's failure to furnish sufficient water for irrigation, though the lease provided that the lessor did not assume any responsibility for furnishing any specified quantity of water, but only that water should be furnished in the quantity available from a certain irrigation canal, *held*, that the court did not err in refusing a nonsuit.

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

Action by one Ramdullah against P. B. Cross. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action on the part of the defendant in error to recover damages in relation to several leases of real property, made by plaintiff in error to defendant in error and another or others, for the seeding, growing, and production of rice. Reference will be made herein to the parties as plaintiff and defendant.

The leases as set forth by the first count are four in number, bearing date, respectively, as therein stated, February 28, March 13, April 2, and February 13, 1918. The term of each lease is two years. The rent reserved is $50 per acre for the term, payable $6 per acre on the execution of the lease, $25 per acre December 1, 1918, and $19 per acre December 1, 1919. The $6 per acre on each lease was paid as stipulated. The lessees, other than Ramdullah, assigned to him prior to the commencement of the action.

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

Immediately upon the signing of the leases, and thereafter, lessees entered into possession of the premises and planted the same to rice. A chattel mortgage was given the lessor, empowering him to take possession of the rice as soon as threshed, and to store and sell the same, and out of the proceeds to pay himself the balance of the rental due and account to lessees for the surplus. It is alleged that about June 1, 1918, defendant agreed with the lessees that he would charge and collect rent only for those acres described in the leases which produced a fair and normal crop of rice; that such a crop was produced upon 300 acres only of the land, and that was all that was harvested; that, when the rice was matured, plaintiff employed defendant to harvest it, under certain terms for performing the service; that on deduction of the rent due, and the expenses of harvesting the crop, there was left due plaintiff from defendant a large sum of money, to wit, $59,025, for which recovery is sought.

The second count is predicated upon alleged negligence on the part of defendant in harvesting and caring for the crop.

The third is predicated upon the alleged failure of defendant to furnish water for the irrigation of the lands covered by the leases, in compliance with the stipulated requirements, and it is alleged that upon defendant's failure so to do by the 25th of April, 1918, or to deliver or furnish any water until June 1, 1918, the lessees notified defendant of their desire and intention to terminate the leases, and that thereupon defendant agreed and promised that, if lessees would continue in possession of the land and care for the crops of rice planted, if said lands did not produce a normal crop of good rice, defendant would repay lessees all rental moneys on the lands so failing to produce, and would relinquish all claims for rentals for the year 1918 on such lands as failed to produce a normal crop, and would also pay to lessees all moneys which had been expended or might thereafter be expended by lessees on the nonproducing lands. It is then further alleged that 425 acres of the lands failed to produce any crop of rice whatever, and judgment is claimed for the rental advanced thereon and for the money expended in planting and caring for the crop, which failed by reason of the failure of plaintiff to deliver the water on the lands as required under the leases.

The fourth count pertains to the alleged wrongful exclusion of the lessees from the lands leased for the year 1919.

The fifth has relation to plaintiff's employment of defendant to harvest the crop grown under a subsequent lease, of date July 9, 1918, and defendant's alleged failure to account for the proceeds obtained for the crop.

The sixth is predicated upon defendant's alleged negligence in harvesting and taking care of the rice grown on the premises under the leases, whereby much of it was allowed to deteriorate, to the plaintiff's damage.

The seventh count is for damages arising upon the alleged failure of defendant to furnish the amount of water stipulated to be furnished under the lease of July 9, 1918.

Bacigalupi & Elkus, of San Francisco, Cal., Frank Freeman, of Willows, Cal., and John S. Partridge, of San Francisco, Cal., for plaintiff in error.

Claude F. Purkitt, of Willows, Cal., and John W. Preston and Robert Duncan, both of San Francisco, Cal., for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). The first assignment of error relied upon by defendant is predicated upon the court's admission, over objection, of testimony adduced by plaintiff for establishing an alleged oral agreement between the parties in modification of the original contracts of leasing, and the instructions of the court submitting to the jury the question whether such an agree-

ment had in fact been entered into. By reference to the leases, which are made a part of the first count, it will be found that the lessor agrees that the water shall be made available by the 25th of April of each year, and that, in the event it is impracticable to supply water by that date, the lessees shall have the option of terminating the leases, by serving notice upon the lessor of their election so to do, in which case the lessor agrees to pay to the lessees the cost of work already done by them and 10 per cent. of such cost in addition, which shall be received by the lessees in full satisfaction of all damages and demands. It is further provided that—

"If the said lessees do not exercise said option and give the notice herein provided for, then they shall be deemed to have waived their right to terminate said lease, and shall be deemed to have waived any and all claims against the lessor on account of his failure to supply water."

It will be noted that no specific time is fixed within which the lessees are to declare their election to terminate the leases. There is evidence, however, tending to show that lessees were prevailed upon not to terminate their leases, as others had done, by the promise that water would eventually be furnished for successful irrigation of the rice crops, and the situation seems to have remained in statu quo until about June 1, 1918, when the lessees signified their intention of abandoning the premises, whereupon the defendant, it is alleged, promised and agreed that, if lessees would continue in possession of the land and care for the crops theretofore planted, the defendant would repay all rentals on lands failing to produce normal crops, and relinquish all claims for rentals not paid on such lands for the year 1918, and would pay to lessees the expenses incurred by them in planting and caring for the rice on nonproducing lands. In this proposition lessees concurred. The agreement was oral, and it is claimed that it is invalid for two reasons, namely, that there was no consideration to support it, and that it is within the statute of frauds, "being a lease for more than one year."

[1] As proved to be the case, the defendant was able to furnish water for the proper irrigation of only about 300 of the 725 acres covered by the leases. Some such result was probably in the minds of the parties June 1st. The situation was that defendant was at the time in default, to the manifest injury and damage of the lessees, for which he had incurred a heavy liability to them. Obviously, it would inure to his benefit to have the lessees remain on the land and care for the crop. The waiver, therefore, on the part of the lessees, of the right of exercising their option to terminate the leases, constituted a sufficient consideration moving to the defendant, the lessor. On the other hand, the promise of the augmented payment to the lessees for the injuries they would sustain, above that provided for by the leases in case they exercised their option, was sufficient consideration moving to the lessees to support the promise. In the adjustment, defendant would receive his full rental for the acres for which he would be enabled to supply an adequate amount of water, which proved to be 300; otherwise, he would lose all, and be rendered liable for the payment of the stipulated damages, namely, the cost of work already done by lessees and 10 per cent.

added. So it is plain that the alleged promise or agreement was attended with sufficient consideration to uphold it, or render it valid and binding upon the parties.

[2] The second objection is predicated upon the postulate that the alleged new promise or agreement is an alteration of the written leases, within the purview of section 1698 of the Civil Code of California, which provides that—

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

That the oral agreement was not executed must be conceded, for the action is to compel observance of the agreement on the part of the lessor. The purpose of the statute was doubtless to prevent the alteration or modification of contracts which the law requires to be in writing, and which are invalid unless so evidenced, by oral agreement between the parties, unless such agreement were subsequently wholly executed, which means executed on the part of both parties thereto. Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159.

Regarded as an alteration or modification of the leases, the alleged oral promise or agreement must fail. But should it be so regarded? It was entered into to meet a situation that had arisen and for a compromise and adjustment thereof to suit the purposes of the parties. The leasing was for a term of two years, the major part of which in time was yet to run. The effect of the agreement, if made, which was for the jury to determine, was not to alter the terms of the leases in any respect, nor to modify the stipulations therein contained, but to take care of the situation that had then arisen, and enable the parties to harvest the crop which would eventually be produced for the year 1918; and it was to be performed within a year. The agreement did not contemplate a change that was to be imposed upon the contracts of leasing for future observance. Its single purpose was to meet an emergency, leaving the leases, when that was disposed of, to run on as they were written. We are impelled to the conclusion that the alleged promise or agreement must be regarded as a new and independent agreement, and not as an alteration or modification of the leases, within the meaning of section 1698 of the Civil Code. Such a conclusion was reached in Stockton Combined H. & Agr. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565, where the oral agreement was to settle a loss under an insurance policy, although founded upon the policy. See, also, Pearsall v. Henry, supra, to a like purpose.

[3] In his instructions the learned judge of the trial court alluded to the agreement as a modification, but that could by no means have affected the defendant injuriously, as the question as to whether the agreement had in fact been entered into was left to the jury to determine.

[4] It is next urged that the court erred in admitting evidence of conversations between Ramdullah and one Obear, and in its instructions to the jury with regard to the cancellation of the leases. We are dealing now with the first four leases. There is a stipulation in the leases as follows:

"It is further mutually understood and agreed that the lessor hereby reserves the right to sell any portion or all of said lands at any time during the life hereof, or any continuation hereof, it being agreed, however, that possession of the land sold shall not be given to the purchaser until the lessees have had time to harvest and remove the season's crop growing thereon at the time of said sale, and thereupon said lease shall be terminated at the option of the lessor. Should a sale be made before rice has been planted thereon, and after the land has been prepared or partially prepared for planting, the lessor agrees that he will pay to the lessees the cost of such work in preparing said land as may then have been done."

It will be noted that the two leases first made bear date, respectively, February 13 and February 28, 1918. The second two bear date March 13 and April 2, 1918. On March 4, 1918, the defendant entered into a contract with W. H. Obear, whereby Obear agreed to buy and defendant to sell certain described real property, containing 1,055.08 acres. The contract covers only 375 of the 725 acres of the lands described in the leases. To be more exact, it covers all the lands described by the last three leases, but not more than 50 acres comprised by the first. On March 8, 1919, defendant notified lessees as follows:

"Gentlemen: Your leases Nos. 32, 33, 34, and 42 are hereby canceled for 1919. The lands embraced in these leases have been sold to Mr. W. H. Obear."

Plaintiff, while a witness in his own behalf, was asked what Obear said to him about the sale at a time in San Francisco, and was permitted to answer, over objection that it called for hearsay testimony, which is assigned as error. Witness related in effect that Obear told him that he had bought the land, but that so far as he was concerned he was anxious to have witness continue on the land, and for him to go back and tell Cross about it, that he (Obear) had no objections. Witness further related that he immediately saw Cross, who said he could not continue the old lease, but would give him another upon a different rental charge. Obear was later called as a witness for plaintiff, and gave his version of the conversation. Cross was subsequently called, and insisted that he had sold the land to Obear, but claimed that Obear had told him to cancel the leases. If it be considered that there was technical error in admitting the testimony, because hearsay, it is obvious that it was entirely harmless, and therefore not reversible error.

[5] The more serious question relates to the instruction of the court touching the effect of the alleged sale to Obear as to authorizing or entitling the defendant to terminate the leases. The court instructed as follows:

"As to the third defense, that the cancellation was had because a part of the land had been sold, it is sufficient for me to advise you that the transaction between defendant and Obear, looking to a sale of a portion of these lands, as disclosed in the evidence, was not such as under the terms of the leases authorized their cancellation by defendant."

By the terms of the contract, the title to the property was to be good and merchantable, free and clear of incumbrances, excepting, among others, "leases for a term of two years, under the terms of which the tenants agree to pay as rent therefor, the sum of $25 per acre, or more."

The consideration to be paid was $5,000 in cash, and the balance of $53,029.40 as stipulated.

Among other provisions of the contract, it was agreed that when the balance of the purchase price was fully paid, defendant would turn over to Obear all moneys received by him on account of the leases, less $1 per acre, and would also assign the leases to Obear. The balance of the purchase price was to be paid and the title conveyed within 30 days after certain irrigation bonds were voted and issued by the irrigation district; but it was further understood that, if the irrigation bonds were not voted within 6 months, the agreement was to terminate, and defendant was to return to Obear the $5,000 paid on the purchase price.

The subsequent or supplemental agreement, of date May 31, 1918, is in modification of the first, but it contains nothing that might affect the present controversy, unless it be a provision making the balance due payable on or before March 1, 1919—that is, as soon as the rentals for the land were available, but not later than that date; and it was further provided that on or prior to that date Obear should pay to defendant all amounts due on advances made by the latter to tenants on the land in connection with their tenancy and the handling of their crops, and that defendant should turn over to Obear all mortgages securing the same and the leases of the tenants.

From a careful scrutiny of these agreements, it is obvious that it was not the purpose or intent of the parties to make a present sale of the lands, and, further, that it was neither their design nor purpose at any time to disturb the possession of the lessees, even in the event of a completed sale in pursuance of the agreements. Furthermore, it was problematical whether the agreements would ever terminate in a consummated sale by transfer of the title, but in any event the lessees were not to be disturbed, for they were expressly excepted from the assurance against incumbrances.

From Obear's testimony, it would seem that he so understood the transaction. When approached by Ramdullah touching whether Ramdullah would be permitted to stay on the land another year, he replied, "Yes; you have a lease, haven't you, for two years? I don't know of any objection why you cannot stay there;" and further that he had no objection to Ramdullah's staying there. He also testified that he was surprised when apprised of the fact that defendant had canceled the leases. The defendant testifies that Obear told him to cancel the leases "at the time it became a binding agreement to buy and sell; that was September, 1918."

The allusion is presumably to the time when it is claimed the irrigation district bonds were voted. They were, in fact, according to defendant's testimony, issued and sold on September 13th, but we are not impressed that the incident has any peculiar or material bearing upon the immediate controversy. The contract was not a present sale. It was not so intended by the parties, and they did not so treat it. Thenceforward, from the date of the contract, Obear was the only person authorized to cancel the leases, if any one, and he was not disposed to do it, and made no attempt in that direction. Defendant, however, for

some purpose of his own, did attempt to cancel them, and says that he did so at the request of Obear, recognizing his want of authority otherwise. He had agreed to sell subject to the leases, and reserved to himself no authority respecting them, and it is doubtful whether he could cancel the leases at all without authority from Obear in writing; the transaction being one concerning real property.

But, beyond all this, it is clear that the agreement, considering the intention of the parties and its purposes, is not one of sale within the meaning of the above-quoted clause in the leases, and defendant was not empowered by reason thereof to cancel the leases.

"Not until the sale had been consummated," says the court, in Lewis v. Agoure, 8 Cal. App. 146, 148, 96 Pac. 327, 328, "could the lessee be compelled to relinquish possession upon notice and payment of the amount provided to be paid. Unless a sale had actually been made, which necessarily included a conveyance of the ranch, the lessee might well deny the right of the lessors to cancel his lease, and compel him to deliver up the possession of the premises."

As we have above indicated, the true intendment of the contract is that the lessees should not be disturbed; but, however that may be, the title did not pass out of the defendant to Obear, and defendant suffered no inconvenience by not being able to render possession on account of the leases. The trial court was right in its instruction.

[6] Another assignment of error is predicated upon the alleged insufficiency of the assignment by his colessees of their cause of action, to authorize Ramdullah to prosecute the action in his name alone. The objection is directed to the second count, which charges negligence on the part of the defendant in harvesting and taking care of the rice crop. It appears by the complaint that the plaintiff—that is, Ramdullah—hired the defendant to do the harvesting, and the second count relates to a breach of that contract. The contract being personal with Ramdullah, he certainly has a right to enforce it, regardless of any assignment to him from another or others.

[7] The next question presented is whether the court adopted the measure of damages applicable. This relates to count 4 of the complaint, whereby damages are sought by reason of the excluding of the lessees from the premises by the lessor for the year 1919, which is the second year covered by the four leases. The court instructed as follows:

"The rule of damages for such wrong is that plaintiff would be entitled to recover the profits which ordinarily, naturally, and in the usual course of proper cultivation these lands would have produced from growing a crop of rice thereon in the year 1919. That you will determine by ascertaining, from all the evidence in the case bearing upon the subject, what the probable production in rice would have been on these lands during the year, assuming that the land had been properly prepared, planted, cared for, and harvested, and the value of such crop in the markets for that year, deducting therefrom the cost and expense of cultivation, harvesting, and marketing, and the rent that would have been due under the terms of the leases."

The contention of counsel for defendant is that the proper measure of damages was the difference between the rent which Ramdullah and his associates had agreed to pay and the actual rental value of the

lands for the year 1919, and it is urged that the measure adopted by the court is too speculative and uncertain by which to ascertain the damages sustained by the lessees, if any. The Supreme Court of California has spoken on the subject, and has declared that in a case of leasing, where the lessor has refused to let the tenant into possession as covenanted under the lease, the measure of damages is in substantial accord with the instruction given in the instant case. Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479.

The doctrine of this case has been recently reaffirmed by the California District Court of Appeal, Third District, in Parkinson v. Langdon, 36 Cal. App. 80, 171 Pac. 710. There the lessee agreed to crop the land to beans, which he failed to do after being let into possession, and the action was one sounding in damages for breach of the obligation to plant and care for the crop. The court discusses the statute (section 3300 of the Civil Code), which declares that the measure of damages for a breach of an obligation arising from contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom," and is of the opinion that the proper measure of damages applicable was the "profits which would ordinarily and naturally, and in the usual course of things, have been derived from performance." The like rule was applied in an earlier case, where the action was to recover for damages sustained for breach of contract to furnish water for irrigation. Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253.

The rule that counsel contend for is held to be applicable where there has been a breach of contract to furnish water for irrigation purposes, and there has been a total failure to deliver. Briles v. Paulson, 170 Cal. 408, 149 Pac. 804. See Crow v. San Joaquin & K. R. Canal & Irrigation Co., 130 Cal. 309, 62 Pac. 562, 1058, and Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366. These cases, however, are to be distinguished from those previously cited. Where there has been a total failure to deliver water, the lessee would perhaps be adequately compensated by the difference between the rental value of the land with water and such value without. But where the lessee is excluded from the land, and is allowed to have no use of it at all, and that is the ground of complaint, it seems ill suited to the usual, natural, and legitimate consequences to say that the only compensation to which he is entitled for a breach of the covenant for possession during the term is the difference between the stipulated rental and the rental value of the land. It might happen, and often would, no doubt, that there was no difference in that respect; but the rule would afford an inducement for the landlord, who fancied that he had made a bad bargain, to breach it or force the tenant to pay the better rental. Such, we are impressed, is not the law applicable here, where the leasing is for the growing of a specific product. It must be supposed that in such a case the parties had in mind the loss of profits that would ensue by a failure in production. Such a loss is the proximate, natural, and consequential result of a breach which entails nonproduction. That the loss might in some in-

stances be difficult of ascertainment does not vitiate the rule which makes it the measure of damages. Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62, 64.

[8] Another alleged error: The lessees employed the defendant to harvest, thresh, sack, and haul to destination the rice crop grown under the leases for the year 1918, the contract for which all parties agree was in writing. The defendant produced what he claimed to be the contract, and a controversy arose touching whether the paper so produced was the one signed and executed by the lessees; the lessees claiming that the one signed by them consisted of a single sheet, whereas the one of which profert was made contained several sheets bound together with a cover. About this there was a direct and insistent conflict in the testimony, and the court submitted the question involved for the determination of the jury. It is not disputed that the controversy was one for the jury, but it is insisted that the court erred in instructing that the burden was upon the defendant to show that the Hindus knew what they were signing. What the court instructed was:

"The paper being produced by the defendant and having been drawn in his office and its terms dictated by his attorney, the burden is cast upon him to show that its contents and the meaning of its terms were fully made known to plaintiff and his associates before they signed it, and that it was duly executed by them; otherwise, it has not been established. * * * If, however, the document was in its present form when signed by the parties, it would be formally sufficient to constitute a contract, and the burden would then be on the plaintiff to show that the signatures of himself and his associates were, as claimed by him, induced by misrepresentation of the defendant or his agents."

We think, when the entire instruction is construed as a whole, it is not subject to the criticism directed against it. We find no exception to that part of the instruction wherein it is claimed that the court told the jury that they should consider the character and contents of the papers themselves, in determining the issue presented to them.

[9] It was sought to show the cost to defendant of threshing the crop and the cost of the equipment purchased with which to do the work, which the court denied as irrelevant. In this there was no error. It is admitted by all that there was a written contract for doing the work, and the issue presented was respecting the extent of plaintiff's liability for the services performed by defendant under the contract.

[10] Further error is predicated upon the court's ruling in permitting plaintiff to propound to defendant, while a witness in his own behalf, certain questions on cross-examination, to understand the relevancy of which requires some exposition of the record. It was developed in the course of the cross-examination that defendant might have made a lease or leases, on portions of the land that he claimed to have sold to Obear, subsequent to the sale, and taken mortgages back from the lessees, and he was asked for the terms of the leases, if he remembered, to which he replied:

"If there was a lease, it would be in the form of my regular lease."

There was an objection to the question, which was overruled, and error is assigned. The mere statement of the proposition is enough to demonstrate want of merit in the assignment.

[11] On further cross-examination, defendant testified that one Hechtman had given him a crop mortgage on the Obear land for his accommodation; that he had turned the crop over to Hechtman to enable him to execute the mortgage; that the turning over of the crop was merely verbal; that the mortgage recites that he had given Hechtman a lease on the land, but that he (defendant) had never executed any lease to him; that Hechtman gave him, with the chattel mortgage, a note for $45,000, and that the whole was for defendant's accommodation; that defendant hypothecated the note to the Capitol National Bank and received the money, but gave the bank his personal guaranty of payment. Thereupon he was asked:

"Don't you know that that was one of the methods used by Frank Brush, in the Santa Rosa National Bank, of covering up his withdrawals of money from the bank, and having them apparently secured by just such methods as this, and that that was done for the purpose of deceiving the national bank examiner?"

The witness answered, "No;" but there was an exception noted to the question.

As the trial court remarked, the latitude in cross-examination is very wide; but, further than this, the court exercises a legal discretion in such matters, and we do not think that there was any abuse of its discretion in allowing the question to be answered. It is urged that the question was propounded to create a prejudice against the defendant; but it must be conceded that the transaction narrated was somewhat irregular, to say the least, and the inference which the question suggests was rather a natural one. The instant controversy is not affected by the court's ruling touching the effect of the Obear agreement.

[12] Another error is predicated upon the court's refusal to grant a nonsuit as to the seventh count of the complaint, on the ground that there was not sufficient evidence to support it for the jury. The count relates to the lease of July 9, 1919, which contained a stipulation as follows:

"Lessor does not assume any responsibility for furnishing any specified quantity of water, but only agrees that water shall be furnished in accordance with the quantity that is available from the main canal of said Provident Irrigation Syndicate or Cross project."

Ramdullah testified that he did not get enough water, and in consequence the rice did not mature, except on about 350 acres, which produced a crop fit for harvesting; the failure to produce a crop on the balance of the 1000 acres was due to the fact that the water was irregular and insufficient, and that the man in charge of the ditches said he wanted the water to take down to the land of Kim & Porter.

McDaniel, the person in charge of the ditches, relates that Kim & Porter, who owned the land to the south, told him that they would have to have water, and Hudson, who had charge for Cross (the defendant), directed him to give Kim & Porter eight second feet. This resulted

in a shortage for Ramdullah. So it appears that water was available, but that defendant chose to place it elsewhere.

The evidence was sufficient for the jury, and the nonsuit was properly denied. The seventh, eighth, and tenth assignments, relied upon by counsel for defendant in their briefs, have been examined, and we find no error pertaining thereto. The subject of the eleventh assignment has been previously taken care of in this opinion.

Affirmed.

AMERICAN TRADING CO. v. STEELE.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3585.

1. **Parties ⇐21—Defendant corporation held properly named as interested party.**
   In an action for breach of a contract of employment, defendant's claim that it was a different entity from a corporation of the same name, with which plaintiff's original contract was made, *held* without merit, where the contract was authorized by the defendant through its vice president, and both corporations recognized plaintiff's employment.
2. **Master and servant ⇐7—Contract of employment held modified by subsequent agreement.**
   Where plaintiff's contract was for employment as a chief accountant at defendant's Shanghai office, a later contract for plaintiff's temporary employment at defendant's Tokyo office *held* a modification of the original contract, leaving the parties subject to all consistent conditions of the original contract, including a clause providing that the contract was conditioned on plaintiff's work being efficient and satisfactory.
3. **Courts ⇐365—Decision of state court as to construction of employment contract followed.**
   Where a contract for employment was entered into in California, but was to be performed at Shanghai, and its construction was to be governed by law of California, decisions of courts of that state, if they have spoken, are binding on the federal court.
4. **Master and servant ⇐55—"Efficient and satisfactory" service construed.**
   A contract under which plaintiff was to perform the duties of a chief accountant in an "efficient and satisfactory" way *held* not to mean that the work must be done to the satisfaction of the employer.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Efficient; Satisfactory.]
5. **Appeal and error ⇐842(1)—Breach of contract held question of fact, not reviewable.**
   The District Court's finding that an employee had not breached his contract, which contained a clause that he was to perform in satisfactory way, was one of fact, which the Circuit Court of Appeals will not disturb, where the evidence tended to support such finding.
6. **Pleading ⇐166—Plaintiff held not required to answer defendant's allegations.**
   Under Carter's Ann. Code Civ. Proc. Alaska, § 69, as adopted by Act June 6, 1900, providing that defendant may have judgment on the pleadings, if plaintiff fails to reply to new matter in the answer, it is essential that the new matter be material and constitute a defense, and where the practical issue is already tendered by complaint and answer, it cannot be material; hence, where plaintiff alleged that he was wrong-

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

fully discharged, it was not necessary that the reply to defendant's allegation that plaintiff was inefficient and insubordinate, and performed his work unsatisfactorily.

7. **Arbitration and award ⟸57—Award held not to bar suit.**
In an action for breach of an employment contract, an arbitrator's award, which was not definite and did not adjust the matters referred for arbitration, *held* not to bar the employee's action, since an award is void unless sufficiently definite and exact, so that nothing further remains to fix the rights and obligations of the parties under the submission.

8. **Master and servant ⟸41(1)—Measure of damages for breach of contract.**
Where scarcely a year of a three-year contract for plaintiff's services as chief accountant had expired when his action for breach was instituted, the measure of damages was prima facie the contract earnings subject to recoupment on the part of defendant.

9. **Master and servant ⟸42(1)—Reduction of damages for breach of contract not required.**
Where plaintiff's three-year contract for employment as chief accountant at Shanghai was breached in less than a year, plaintiff was not required to reduce his damages by accepting employment as a bookkeeper, which would injuriously affect his future career, nor was he under obligation to go to America for the purpose of finding employment.

10. **Appeal and error ⟸842(11)—Finding as to mitigation of damages a question of fact, and conclusive.**
In an action for breach of an employment contract, the finding of the District Court on the question of mitigation of damages was one of fact for that court, and conclusive on the Circuit Court of Appeals.

11. **Master and servant ⟸41(6)—Employer has burden of showing other employment.**
In an action for breach of a contract of employment, the burden was upon the defendant employer to show that the employee might with reasonable effort have obtained employment elsewhere.

12. **Appeal and error ⟸173(11)—Appellant cannot claim set-off where claim not made in trial court.**
In an action for breach of an employment contract, defendant cannot on appeal insist that the trial court failed to give credit for a sum admitted to be due from plaintiff where defendant claimed no such amount in its answer as a set-off or counterclaim and the trial court's finding as to the amount plaintiff was entitled to recover being supported by evidence.

13. **Appeal and error ⟸1047(1)—Trial ⟸98—Defendant entitled to ruling as to admissibility of evidence but failure to make ruling not vital unless incompetent evidence admitted.**
Although defendant was entitled to the ruling of the trial court at some stage of the proceeding touching the admissibility of certain testimony, so that it might have the opportunity of reserving exceptions, the mere failure to make such rulings is not vital, unless the court did in fact admit incompetent and irrelevant testimony.

14. **Appeal and error ⟸1047(1)—Reservation of rulings as to admissibility of evidence, until final findings, held harmless.**
In an action for breach of an employment contract, the trial court's reservation until final findings, of rulings touching the admissibility of plaintiff's testimony as to character and efficiency of his services, objection being based on the proposition that plaintiff was subject to dismissal in pursuance of defendant's independent judgment, *held* harmless, where such proposition is found to be unsound and the testimony consequently admissible.

In Error to the United States Court for China; Charles L. Lobingier, Judge.

Action by A. T. Steele against the American Trading Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action to recover damages for breach of a contract of employment. The contract is embraced by a letter, addressed to Steele, the defendant in error (plaintiff below), as follows:

"San Francisco, Cal., May 27, 1918.

"Mr. A. Tilton Steele—Present.

"Dear Sir: Confirming the writer's conversations with you during the past few days, we have employed you as follows:

"Position.—Chief accountant of our Shanghai office, the duties of which office you are to take up as quickly as possible, proceeding herefrom for Shanghai within about 30 days.

"Duration of Employment.—Three years from July 1st next, or earlier if the time of your departure from San Francisco for Shanghai hereunder be earlier. Should you not leave San Francisco for Shanghai hereunder prior to July 1st next, your salary will commence on July 1st.

"Compensation.—Two hundred and fifty ($250.00) dollars U. S. gold per month for the first year, and for the second and third year adjustments of salary to be made at the end of the first and second year, as may be mutually agreed; your compensation, however, not to be less than ten thousand ($10,000.00) dollars for the entire period of three (3) years.

"Satisfactory Service.—The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.

"Transportation to Shanghai.—In addition to salary as herein provided, we will provide you with first-class transportation to Shanghai.

"Bond.—It is a condition of your employment that you give any bond the company may require, the company paying the premium thereon.

"Yours truly,

"American Trading Company (Pacific Coast),
"Louis A. Ward, Vice President and Manager.

"Confirmed and accepted. A. Tilton Steele."

While on his voyage to Shanghai, plaintiff was intercepted by cablegrams from Tokyo by the American Trading Company, notifying him that there was a probability of his being required in the Tokyo office for a few months before going to Shanghai, and to be prepared to leave the ship at Yokohama. Plaintiff conformed to the instruction. On his arrival in Tokyo he received this further letter:

"Tokyo, Aug. 27, 1918.

"A Tilton Steele, Esq.—Present.

"Dear Sir: We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this office.

"Compensation.—The compensation provided for in your original contract, made with Mr. L. A. Ward, vice president and manager of the American Trading Company of the Pacific Coast on May 27th, calls for a salary of $250.00 gold per month, or a salary of not less than $10,000.00 gold for the three years' period of your contract. We have arranged that you are to receive $250.00 gold at exchange 50, which is the equivalent of yen 500.00 per month, together with an additional allowance of yen 150.00 per month to cover any additional expenses which you may be put to, owing to the change in your plans. The two items above mentioned will make a total of yen 650.00 per month, which you will receive while you are in the employ of our Tokyo office.

"Term of Employment.—As explained to you, we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday, which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

"Traveling Expenses.—Any legitimate traveling expenses incurred by you on behalf of the company will be refunded to you.

"General.—It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

"We remain, dear sir, yours very truly,

American Trading Company,
"D. H. Blake, Vice President."

Plaintiff at once entered into the service of the American Trading Company as accountant, and while in such service he received the following letter:

"Tokyo, March 19, 1919.

"A. Tilton Steele, Esq., American Trading Co., Tokyo—Dear Sir: With reference to our conversation of a few days ago, we beg to confirm what we told you at that time, to the effect that we had received word from Mr. Burns, agent of our Shanghai office, that, as he had made satisfactory arrangements with Mr. Manley to remain with the company, he did not want you to come to Shanghai.

"We also confirm our statement that, as soon as Mr. Boyd returns to his position in Tokyo, probably about the end of April, we shall have no further use for your services here.

"We cannot say what your recourse will be under your contract, but, as intimated the other day, the writer will be glad to render you such assistance as he can in order to effect a mutually satisfactory settlement; but before anything can be done in this connection it will be necessary for you to make some suggestions in the premises.

"We remain, yours very truly, American Trading Company,
"D. H. Blake, Vice President."

As required, plaintiff quit the service about May 3, 1919. Claiming that the defendant breached its contract by his wrongful dismissal from its service, plaintiff seeks by this action to recover damages in the amount of the balance due him as salary to the end of his term of employment.

The defendant, by its amended answer, sets up that it is a Maine corporation, and an altogether different entity from the American Trading Company (Pacific Coast), with which plaintiff's contract for services was made; that the controversy has been settled by an award under an agreement for arbitration; and, by the tenth paragraph thereof: "That the alleged services rendered by the plaintiff herein to the defendant were neither satisfactory nor efficient, as required in the contract alleged in plaintiff's petition, * * * and that the said plaintiff in the performance of his alleged duties was inefficient, negligent, and insubordinate to his superiors."

The cause was tried to the court, and determined in favor of plaintiff by written opinion, without the rendition of a verdict, either general or special.

Fleming, Davies & Bryan, of Shanghai, China, and Garret W. McEnerney, of San Francisco, Cal., for plaintiff in error.

Chickering & Gregory and Donald Y. Lamont, all of San Francisco, Cal., and Jernigan, Fessenden & Rose, of Shanghai, China, for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). It will hardly be questioned that the decision of the court is tantamount to a general verdict upon the facts, and it will be so treated in our consideration of the controversy.

[1] The first question presented relates to whether the action is against the real party to the contract. The testimony shows that the

American Trading Company (Pacific Coast), with an office in San Francisco, is a Virginia corporation, and that the American Trading Company, with offices at Tokyo and Shanghai, is a Maine corporation. Louis A. Ward was vice president and manager of the American Trading Company (Pacific Coast). D. H. Blake was vice president of the American Trading Company, with office at Tokyo. W. A. Burns was agent of American Trading Company at Shanghai. It is further in evidence that the American Trading Company (Pacific Coast) was authorized by the defendant company, through one Sutcliff, vice president at New York, to enter into the contract with plaintiff for his services at Shanghai, and the contract was entered into in pursuance thereof. This is confirmed by the testimony of Mr. Burns, the agent at Shanghai. Furthermore, the contract has been treated as that of the American Trading Company, with offices at Tokyo and Shanghai. It will be noted that Steele was employed as "chief accountant of *our* Shanghai office," and Blake, in his letter of March 19, 1919, speaks of Burns, agent of "our Shanghai office." Further, Mr. Blake says, in his statement delivered to Mr. Potter, the arbitrator, "Mr. Steele was originally employed on behalf of our Shanghai office." So both the San Francisco and the Tokyo office recognized the employment of Steele for the Shanghai office, and it could make little difference whether he was employed by the one office or the other; he was employed for the Shanghai office, with the authority of the central office at New York, and the company represented at Shanghai is responsible under the contract. Defendant is therefore properly named as the interested party.

[2] A question is presented respecting the effect the contract of August 27th has upon the original contract. We construe this as a modification of the original contract, to govern while plaintiff was engaged for the Tokyo office, leaving the parties subject to all the conditions of the original contract not inconsistent therewith or repugnant thereto. The clause, therefore, pertaining to "satisfactory" service, as follows:

"The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way"

—was operative and binding in Tokyo, as well as in Shanghai. It is insisted by counsel for defendant that the legal effect of the clause is to accord to defendant the right and authority to exercise its independent judgment respecting whether plaintiff's services were unsatisfactory or inefficient, and that it could discharge him at its pleasure.

[3] The contract having been entered into in California, its construction would be governed by what the courts there have determined, if they have spoken on the subject. If they have not, then this court will exercise its judgment in the premises. The latest utterance of the Supreme Court of California having a bearing upon the subject is that of Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 Pac. 428, 6 A. L. R. 1493. The defendant in that case was engaged in the manufacture of brick, and plaintiff was employed by him as an "expert glazeman" for a term of three years. The contract contained

a clause to the effect that the plaintiff would not hold the company liable in case, for any reason, the company was unable to turn out enameled and glazed brick in quantities equal to the then present quality and satisfactory to the company. The court concluded in its holding that—

"The addition of the phrase, 'and satisfactory to the Pacific Sewer Pipe Company,' implied a complete satisfaction, and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract, if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promisor is involved, and that his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented."

The court distinguishes some other cases previously decided by it, but cites none that was deemed to settle the specific question.

There seems to be a practical concurrence of opinion that, in contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party sole judge of such satisfaction, without regard to the justice or reasonableness of his decision, and a court or jury cannot say that the party should have been satisfied where he asserts that he is not. 13 Corpus Juris, 675. See, also, 9 Cyc. 618, 619. Apt illustrations of the subject-matter of the kind of contract within the rule are given in Cyc., as, for instance, a suit of clothes, a bust of defendant's husband, a set of artificial teeth, and the like.

The case of American Music Stores v. Kussel, 232 Fed. 306, 146 C. C. A. 354, L. R. A. 1916F, 882, cited by counsel, is also illustrative, where the contract was to perform services to the satisfaction of the employer. Many cases are cited, and the contracts involved are practically all specific in the stipulation that the service or the thing to be done is to be to the satisfaction of the employer.

There is another line of authorities which seem to hold that a contract to do work, not involving personal taste or feeling, to the satisfaction of the adversary party, means that the work must be so done that the adversary party, if a reasonable man, would be satisfied therewith. 3 Page on Contracts, § 1390. But, after all, the true meaning of the contract is one for construction, depending upon the nature and character of the thing stipulated to be done, as well as the chief purpose the parties had in mind, to accomplish the end designed.

"Where," says the court in Frary v. American Rubber Co., 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644, "the chief thing the parties have had in mind was to effect some definite purpose or end, of the performance of which others could judge just as well as the parties could, and which involved no considerations strictly personal, the stipulation that it should be done to the satisfaction of the party has been generally held not to be controlling."

To a like purpose, see McNeil v. Armstrong, 81 Fed. 943, 27 C. C. A. 16, where the distinction is characterized between the two classes of cases.

[4, 5] In the case at bar the employment was conditioned upon the work being done "in an efficient and satisfactory way"—not to the satisfaction of the employer. The services to be performed were those of an accountant. They were not of a character personal to the employ-

er, unless made so by apt stipulation; nor were they addressed to the judgment of a particular person or to the employer solely. They were such, considering the end to be accomplished, that others could as well judge of the character of performance as the employer. The expression "efficient and satisfactory way" is by no means the equivalent of "satisfactory to the employer," and, if the parties had desired that the latter meaning should be incorporated in the contract, it would have taken but a stroke of the pen so to express it. That not having been done, we must take it that the plain meaning of the expression used was the one intended. The trial court was therefore not in error in its construction of this clause in the contract. Its finding that plaintiff has not breached the contract in the light of this clause is one of fact, which it is not in the province of this court to disturb; the evidence being such as tends to support it.

Defendant further insists that it was entitled to judgment dismissing the action, upon the pleadings, in pursuance of its motion to that effect. The motion was interposed after the plaintiff had put in his evidence. The ruling of the court was reserved until final consideration, but the motion was eventually denied.

[6] It is urged that section 69 of the Alaska Code, as adopted by Act of Congress of June 6, 1900 (31 Stat. 343), is applicable for determining the question presented. But conceding, without deciding, that the Alaska Code is controlling in the United States Court for China, we are of the opinion that plaintiff is not precluded by his failure to reply to the tenth paragraph of the answer. The plaintiff in his complaint alleges that defendant "wrongfully, improperly, and without cause or reason, on or about March 17, 1919, dismissed and discharged the plaintiff," and thereby breached its contract of employment with plaintiff.

Paragraph 10 of the answer alleges that the services rendered by plaintiff "were neither satisfactory nor efficient, as required in the contract, * * * and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors." By the provision of section 69, supra, the defendant is entitled to judgment on the pleadings, if the plaintiff fails to reply to new matter in the answer constituting a defense. Upon principle, it is essential that the new matter be material and constitute a defense to the action set up by the complaint. If the practical issue were already tendered by the complaint and answer, then, of course, it could not be material, because it would be tantamount to a presentation of the same issue twice.

Under the contract, as we have construed it, the defendant had the right to discharge plaintiff for inefficiency, or for having done his work in an unsatisfactory way, and even, it may be, for insubordination. But when plaintiff alleged that he was wrongfully and improperly discharged, without cause or reason, he opened the way for defendant to show to the contrary, to the very extent that plaintiff was inefficient and insurbordinate, and that he did his work in an unsatisfactory manner, so there was no need of further presentation of the issue in the pleadings. Watkinds v. Southern Pac. R. Co. (D. C.) 38

Fed. 711, 4 L. R. A. 239; Persse v. Gaffney, 23 Colo. 245, 47 Pac. 293; Dueber v. Wolfe, 47 Wash. 634, 92 Pac. 455; Muskogee Vitrified Brick Co. v. Napier, 34 Okl. 618, 126 Pac. 792.

This disposes of the question on a legal assumption most favorable to the defendant; but it is doubtful whether a reply is required at all under the practice prevailing in the China court. The trial court was of the view that it is not so required. We do not have access to the rules. The provisions of section 5 of the act creating a United States Court for China, however, lend color to the view. 34 Stat. 814, 816 (Comp. St. § 7691).

[7] The next question presented relates to the alleged arbitration. Is it a bar to plaintiff's recovery? The agreement for submission is singularly brief. It is:

"We, the undersigned, agree to the arbitration of our differences by the Honorable Mr. Potter."

This makes it necessary that we examine the negotiations of the parties looking to the arbitration, to ascertain what their differences were, and what was to be submitted for adjustment.

By plaintiff's letter to Blake of May 2, 1919, it is specifically stated that the "award must be considered as binding to both parties in the matter of the main issue involved in the case, viz. the amount of compensation to be paid to me at the Tokyo office of the company in full settlement of all my claims against the company under the two agreements I have with the company." Blake, by his letter of even date in response to plaintiff's letter, practically conforms to the latter's proposition, and concludes "that his award should be binding on both parties, and shall be settled in Tokyo." The controversy submitted thereon was the amount of compensation to be paid plaintiff in full settlement of all his claims against the company under the two agreements between the parties. Each party submitted to the arbitrator a statement of the case. The arbitrator by his decision found:

First, "that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement;" and, second, "that Mr. Blake should pay Mr. Steele in full, until such time as Mr. Steele can secure first-class passage back to San Francisco, less any indebtedness that may be proved that Mr. Steele owes Mr. Blake."

It is at once obvious that the award decides nothing as to compensation to which Steele was entitled under the original agreement. It leaves wholly unadjusted the differences arising at the Tokyo office, and awards Steele nothing except payment in full up to the time he could secure passage back to San Francisco, less any indebtedness he owed to Blake.

There is nothing definite in either finding; nor is there any adjustment or settlement of the matters referred for arbitration. In other words, the award settles practically nothing of the controversy submitted by the parties for adjustment. The disposition under the award must be sufficiently definite and exact that nothing further remains to fix the rights and obligations of the parties under the submission, and that the party against whom it is made can perform or pay it without further ascertainment of rights or duties; otherwise,

it is void. 5 Corpus Juris, 139. The award of the arbitrator is therefore not a bar to the present action.

A further question is presented touching the measure of damages to be applied in a case like this. Scarcely a year of the three-year contractual period had expired when the action was instituted, and it is contended, on the one hand, that the measure of recovery should be limited to the period of time intervening between the date of discharge and the date of trial; while, on the other, it is urged that the measure of relief is compensation at the contract rate for the entire unexpired period of the term, with deduction of any amount the plaintiff has otherwise earned in the meantime.

Judicial opinion is not in accord upon whether an action can be presently maintained on a contract of the kind for damages arising on account of the unexpired portion of the term, but the weight of authority undoubtedly sustains the right of action. The action is not one upon the contract to recover wages or salary, but for a breach of the contract, which has for its remedy the damages sustained by a repudiation of the contractual relations (Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953), and the question turns upon the correct measure of damages to which the employee is entitled.

In Pierce v. Tennessee Coal, etc., Railroad Co., 173 U. S. 1, 16, 19 Sup. Ct. 335, 341 (43 L. Ed. 591), in which a contract somewhat similar, though not the counterpart of this, was involved, the court says:

> The party suing "would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract," and, further, "in assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future."

The court in this case approves the language employed in East Tennessee, etc., Railroad v. Staub, 7 Lea (Tenn.) 397, as follows:

> "But the rule of damages in such cases is what would have come to the plaintiff under the contract had it continued, less whatever the plaintiff might earn by the exercise of reasonable and proper diligence on his part; and, of course, in ascertaining this, we must look to a time subsequent to the breach, and in some cases to a time subsequent to the bringing of the suit."

The court in Roehm v. Horst, supra, quotes an expression of an English court, in Hochster v. De La Tour, 2 El. & Bl. 678, as follows:

> "In either case [referring to the time when the right of action accrued], the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

The English case, like that at bar, was one of employment. The action was really begun prior to the commencement of the term of employment; the defendant having declined to avail himself of plaintiff's services, and having repudiated the contract. The Roehm Case was one for the purchase of hops, and there was a repudiation of the contract prior to the stipulated time for delivery of certain quantities of the hops. The court held that an action would lie at once upon the breach for damages for failure to perform.

American China Development Co. v. Boyd (C. C.) 148 Fed. 258, is a case of employment, and the court held, following the authorities above referred to and others cited, that the action would lie, although instituted prior to the expiration of the term, and that the plaintiff was entitled to recover prospective damages consisting of the contract price unpaid, in the absence of proof by defendant that plaintiff might have obtained other employment.

The Supreme Court of California declares the rule, as approved by a number of authorities cited, to be as stated in Lally v. Cantwell, 40 Mo. App. 50, namely:

"The measure of damages is the contract price, although the master may recoup the damages by showing that the servant either earned, or by reasonable exertion might have earned, money in other employment during the contract period." Seymour v. Oelrichs, 156 Cal. 782, 802, 106 Pac. 88, 97 (134 Am. St. Rep. 154).

[8] However, the rule approved as stated in the headnote of the case is that the measure of damages is prima facie the contract earnings subject to recoupment on the part of defendant as stated in the Missouri case. This, we are impelled to believe, is the better rule respecting the measure of damages in a case like this. By plaintiff's testimony it appears that he endeavored to secure employment of the nature of the service he was to render for defendant in the Orient, and was unable to secure any such. In this connection, he said:

"I could get many a position as bookkeeper, but not as a chief accountant. Lots of positions as bookkeeper are vacant here."

He further asserted that, to accept a position inferior to chief accountant would serve to injure his likelihood of obtaining that for which he was fitted, and therefore that he did not feel justified in embarking upon a subordinate or indifferent calling.

[9] It is insisted that he could have gone back to America and obtained the employment he desired. The court below weighed the evidence, and stated its view thus:

"We cannot think that a party, whose contract has been broken, is obliged, in order to reduce his adversary's damages, to accept employment which would affect injuriously his own future career."

[10, 11] In this we concur; and the court might with propriety have gone further, and declared that the plaintiff was under no obligation to go to America for the purpose of finding employment such as he had been required to relinquish, in order to diminish the damages sought against his adversary. Suffice it to say, however, that the question of mitigation of damages was one of fact for the court under the evidence, and its findings are conclusive. It should be noted, also, that in view of the Boyd Case, supra, the burden was cast upon the defendant to show that plaintiff might, with reasonable effort, have obtained employment elsewhere, and if it failed in its substantiation of the fact it cannot complain.

[12] As another ground of error, defendant insists that the court failed to give it credit for the sum of $507 (Mexican), which it is urged plaintiff admitted to be due defendant. Defendant has claimed no such

amount in its answer, as a set-off or counterclaim to plaintiff's demands, and the finding of the court in its conclusion as to the amount which plaintiff is entitled to recover, there being evidence to support it, precludes further inquiry here.

[13] Error is also predicated upon the court's reservation of its rulings touching the admissibility of certain testimony until it made its final findings. The defendant was entitled to the ruling of the court at some stage of the proceeding, so that it might have the opportunity of reserving its exceptions; for, if the court based its findings upon incompetent or irrelevant testimony, it would be subject to reversal. The mere failure to make the rulings, in our opinion, would not be vital, unless the court did in fact admit incompetent and irrelevant testimony.

[14] There are but two assignments of error insisted upon in defendant's briefs respecting the admission of testimony. These both relate to plaintiff's testifying to the character and efficiency of his services rendered while working for the defendant, and the objection urged is based upon the proposition that plaintiff was subject to dismissal in pursuance of defendant's independent judgment. We have found the proposition to be unsound, and it follows that the testimony was admissible, so the defendant has not been injured by the action of the court in reserving its rulings.

Appellee's motion to dismiss the writ of error is without merit.

Finding no reversible error in the record, the judgment is affirmed.

BEGERT v. PAYNE, Liquidating Agent.

(Circuit Court of Appeals, Sixth Circuit. July 19, 1921.)

No. 3496.

1. **Trial ⟸178—Plaintiff entitled to benefit of inferences on motion for directed verdict.**
   On a motion by defendant for an instructed verdict, it is the duty of the trial judge to give plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, guided only by sound processes of reasoning and applicable principles of law.

2. **Trial ⟸140(1)—Credibility of witnesses is for jury.**
   The credibility of witnesses is peculiarly a question for the jury.

3. **Trial ⟸143—Evidence contradicting prima facie case does not authorize directed verdict.**
   Where plaintiff produces material evidence sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the trial judge to take the question of its effect and weight from the jury; the testimony not being contrary to reason or to natural and physical laws.

4. **Trial ⟸169—When verdict properly directed stated.**
   A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in plaintiff's favor, he would regard it as his duty in the exercise of a sound judicial discretion to set the verdict aside; the test being whether there is such an utter absence of substantial evidence as to make it his duty as matter of law to

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

set the verdict aside, independently of the exercise of discretion, and without reference to how greatly the court may think the conflict in the testimony to preponderate in defendant's favor.

5. Railroads ⟨⟩350(7)—**Evidence held to make question for jury as to ringing of bell.**
In an action for injuries sustained in a crossing collision, evidence, though negative in character, *held* sufficient to make a question for the jury as to whether the bell on the engine was ringing.

6. Evidence ⟨⟩584(1)—**Testimony of employees of defendant neither disregarded nor accepted as conclusive.**
In an action for injuries sustained in a crossing collision, the testimony of the train employees that the bell was ringing should not be discredited merely because of their employment, nor accepted as conclusive merely because they were in a position giving them better means of knowledge than other witnesses.

7. Railroads ⟨⟩340(2)—**Liable for injury from concurrent negligence of trainmen and another.**
If the negligence of those in charge of a train colliding with an automobile in which plaintiff was riding was a proximate cause of the collision, plaintiff is entitled to recover, even though the driver of the automobile was also negligent, unless his negligence is imputable to plaintiff.

8. Judgment ⟨⟩251(2), 256(1)—**Recovery not defeated by negligence of plaintiff, or another imputed to her, when not pleaded or found.**
In an action for injuries sustained in a crossing collision, relief cannot be denied plaintiff because of her negligence, or that of the driver of the automobile in which she was riding, where contributory negligence was not pleaded, and the court, in directing a verdict for defendant, made no finding thereon.

9. Negligence ⟨⟩136(30)—**Driver's negligence held not clearly imputable to passenger as matter of law.**
The negligence of the driver of an automobile was not so clearly imputable as matter of law to an employee of the driver, riding in the rear seat on an errand of her own, and testifying that she had nothing to do with driving the car and had never driven one, as to warrant the affirmance of a judgment on a directed verdict for defendant, where the question of imputed negligence had not been considered by the trial court.

10. Railroads ⟨⟩350(21)—**Passenger not negligent as matter of law in not attempting to make driver stop.**
Where cars standing on a side track obstructed the view of the main track at a railroad crossing, one riding in the rear seat of her employer's automobile, and having no authority over him, was not guilty of personal negligence as a matter of law in not attempting to make him stop the automobile within the 8 or 9 feet between the two tracks; she not having seen the approaching train.

11. Railroads ⟨⟩346(5)—**Inference of automobile driver's freedom from negligence.**
In an action for injuries in a collision between a railroad train and an automobile, there is an inference of the automobile driver's freedom from negligence in the reasonable use of his senses of sight and hearing, coexistent with the presumption of due care on the part of the engineer.

12. Railroads ⟨⟩350(9)—**Attempted warning held not conclusive of railroad's freedom from negligence.**
In an action for injuries sustained in a crossing collision, if cars standing on a side track and obstructing the view required the train crew to use additional care, the attempt of a third person to warn the automobile driver of the train's approach *held*, under the evidence, not controlling on the question of the driver's negligence, and not as a matter of law to relieve the railroad from the consequence of its alleged negligence.

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

Action by Martha Begert against John Barton Payne, as Liquidating Agent, etc. From a judgment for defendant, plaintiff brings error. Reversed, with instructions to award new trial.

R. B. Newcomb, of Cleveland, Ohio (Newcomb, Newcomb & Nord, of Cleveland, Ohio, on the brief), for plaintiff in error.

Thomas M. Kirby, of Cleveland, Ohio (Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. The automobile, in which plaintiff in error (hereinafter called plaintiff) was riding on the Lincoln Highway, through the village of East Union, Ohio, was struck at a crossing by a passenger train of the Pennsylvania Railroad; plaintiff receiving serious personal injuries. The two other occupants of the automobile were killed. The highway at the point in question runs east and west; the railroad, substantially north and south. The automobile was traveling east; the colliding train came from the north. The automobile (left-hand drive) was being driven by one Kraus, plaintiff's employer, who alone occupied the front seat. The right-hand side of the back seat was occupied by plaintiff; the left-hand side by the driver's mother, who was thus on the same side of the approaching train as was the driver. All three were bound for Orrville; the driver and plaintiff each on a separate and personal errand. The side curtains were on, but plaintiff testified that the "view to look out through the curtains (apparently through a 'sort of isinglass') was not interrupted."

At the point of collision the highway was about 55 feet wide, having in its center a brick pavement 11½ feet wide. There were two tracks, the westerly being a side track, extending both north and south of the highway; the easterly being the main track. The automobile thus had to cross the side track before reaching the main track, on which the collision occurred. A few feet west of the side track, and a short distance north of the highway, was an elevator. At the time of the collision there was on the side track a string of freight cars extending north from a point within the 55-foot roadway and only a few feet north from its paved portion. There was testimony that these cars filled practically the entire length of the side track to the north, estimated by some of the witnesses as from 300 to 500 feet. There were also freight cars on the side track south of the highway, as well as a warehouse and coal bin. A little west of the elevator (and thus on the north side of the highway) was a dwelling house, and farther west (about 15 rods from the crossing) was a store. Beyond the freight cars to the north, and several hundred feet from the crossing, was a piece of woods. The track ran practically straight for about a quarter of a mile north of the crossing, and could be seen at intervals during a distance of a quarter of a mile by one approaching on the highway from

the west, but only at intervals, by reason of the woods, the freight cars, the elevator, the dwelling house, and the store.

At the southeast intersection of the highway and the railroad, and opposite the box cars on the south part of the side track, was a passenger station, with a platform extending to the south line of the highway. There was testimony that had there been no cars on the side track, one driving east on the highway, when on a line even with the side of the elevator, could see 50 to 100 feet to the north on the main track, and beyond the point where the elevator would obstruct the view could see north on the main track to the woods, but that with the box cars upon the side track the nearest point at which a view of the main track to the north for a considerable distance could be had would be perhaps a quarter of a mile from the crossing, and that one could not see around the end of the nearest box car until the front wheels of the automobile were 5 to 10 feet from the main track.

The grounds of negligence relied upon were: (a) That the train was operated without sounding the whistle or ringing the bell, or giving any warning of the train's approach to the crossing; (b) negligently placing the box cars upon the side track and in the highway, thereby blocking the view of the approaching train from the automobile; (c) that the engine crew approached the highway crossing without having the train under proper control, when it knew that the view of the train was blocked by buildings and box cars standing upon the side track; (d) running over the crossing without signal or warning of approach.

At the close of the testimony the trial judge directed verdict for defendant, upon the ground that no question of fact for the jury was presented respecting defendant's alleged negligence; the court stating that in his opinion there was no substantial conflict in the evidence over the proposition that both the whistle and bell were sounded, and, in effect, that if the presence of the box cars in the highway called for additional care in operating the train, the evidence showed the exercise of additional care in the sounding of whistle shortly before the crossing was reached. The court laid stress upon the testimony that a volunteer, who apparently saw the train coming, tried to give warning of its approach. The court further said that according to the "almost undisputed testimony" the automobile approached the crossing at a higher rate of speed than that of the train.

[1-4] We think the trial court clearly erred in directing verdict for defendant. It is a commonplace that, upon a motion by a defendant for instructed verdict, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury. If the plaintiff produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence would authorize the trial judge to take the question of its effect and weight from the jury (Rochford v. Pennsylvania Co. [C. C. A. 6] 174 Fed. 81, 83–84, 98 C. C. A. 105); this rule being subject (so far as material here) only to the limitation

that testimony contrary to reason or contrary to natural and physical laws cannot support a verdict. Rochford v. Penn. Co., supra; Penn. Co. v. Whitney (C. C. A. 6) 169 Fed. 572, 576, 95 C. C. A. 70. A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion, to set the verdict aside. The test is whether there is such an utter absence of substantial evidence as to make it his duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the court may think the conflict in testimony to preponderate in favor of defendant. We deem it unnecessary to do more than refer to the decisions of this court. Nelson v. Ohio Cultivator Co., 188 Fed. 620, 629, 112 C. C. A. 394; McIntyre v. Modern Woodmen, 200 Fed. 1, 121 C. C. A. 1; Hettler Lumber Co. v. Olds, 221 Fed. 612, 615, 137 C. C. A. 336; Richards v. Mulford, 236 Fed. 677, 679, 150 C. C. A. 9.

[5] Plaintiff seems now to concede that the whistle was blown about 1,400 feet from the crossing, and again for the station stop, but insists that it was not again sounded within 700 feet of the station. There was substantial conflict in testimony whether the bell was ringing as the train approached the crossing. While there was abundant testimony that it was ringing, not only did plaintiff testify that she was looking and listening from the time the store was passed until the collision, and that she heard no bell or whistle and saw no engine or train; [1] but other witnesses, who were in position to have heard the bell, if it had been ringing, testified that they were listening for it, but failed to hear it. Others still who testified to hearing the bell, were confronted with written statements to the effect that they heard no bell. Again, while both the engineer and fireman testified that the bell (which was operable automatically) was ringing for a considerable time before and up to the time of the collision, and the engineer testified to turning on the automatic ringer at the whistling post, the fireman does not so testify, and both the engineer and fireman say the latter had his hand on the bell rope. Moreover, the engineer testified that, upon leaving the engine after the collision he turned off the automatic ringer. There was, however, testimony that the bell was ringing continuously after the collision, and after it might be inferred that the engineer had left the engine.

[1] She testified: "As I passed the grocery store I did look between the grocery store and elevator, between the houses. I did not see any train coming. The last time I looked north was as we were approaching the elevator, on the west side and to the north of the elevator. I did not see any train at that time. As we passed the elevator, and before we came to the box car, I looked up to the north, but you can't see. I know where that driveway is between the elevator and the cars that were on the side track. I don't know as I looked through the driveway to the north. That would be the last opportunity to look until we got almost onto the track. I don't remember if I looked at that point or not. Naturally I would be listening at all times. I was looking, and I will say positively I was listening as I approached the crossing from the time I passed the grocery store until I was struck."

[6] In this conflict of the testimony it cannot be said that the jury might not reasonably conclude that the engineer was mistaken about the automatic ringer being on, and possibly that he turned it off when he supposed he was turning it on, and finally turned it on after the collision, supposing he was turning it off, and such theory might well account for the conflict in testimony, including that of a witness who testified that he heard the bell after the collision, but was unable to say that he had heard it before that time. True, the testimony of the train employees should not be discredited merely because of their employment; but it is equally true that it is not necessarily to be accepted as conclusive merely because the employees are in position which should give them better means of knowledge. Means of knowledge should be taken into account. Other things being equal, affirmative testimony is better than negative; but in the case we have here these questions, in our opinion, were addressed merely to the weight of the testimony. Hales v. Mich. Central R. R. Co. (C. C. A. 6) 200 Fed. 533, 536, 118 C. C. A. 627.

We think plaintiff presented substantial testimony at least to the effect that the bell was not ringing when the crossing was approached. Her testimony to this effect cannot, in our opinion, be said as matter of law, to be contrary to reason or to physical and natural laws. It was open to the jury to find that she was in a position where she could have heard the bell if it were ringing. The credibility of her testimony was thus for the jury; and this is so, even if the jury might think that she was mistaken about the whistle. As already said, her testimony as to nonringing of the bell was corroborated by other testimony.

[7, 8] We therefore think it could not be said, as matter of law, that defendant was not negligent and that the driver's negligence was the sole proximate cause of the collision. This being so, plaintiff had the right to go to the jury on the question of defendant's negligence as a proximate cause, and if finding were had in her favor to recover from defendant even if the driver were also negligent [2] (unless his negligence was imputable to plaintiff), provided plaintiff is not to be charged with negligence directly contributing to the collision. However, contributory negligence was not pleaded; and the grounds of the court's conclusion did not embrace a finding of plaintiff's personal negligence, or of a negligence on the part of the driver imputable to plaintiff. Therefore, as the case stood below, relief cannot be denied plaintiff merely because of her own or the driver's negligence. The judgment for defendant must accordingly be reversed.

[9] Defendant insists, however, that as a matter of law, in view of plaintiff's testimony, the driver's negligence was imputable to her. If this were clearly so, we should deem it our duty so to declare, for the reason that the case must be tried again, and perhaps on further pleadings. But the proposition is not clearly right. The case does not fall within the decision of this court in Hurlburt v. Erie R. Co., 221

[2] Hales v. Mich. Central R. R. Co., supra, 200 Fed. at page 537, 118 C. C. A. 627.

Fed. 911, 137 C. C. A. 481. There the wife, who apparently sat beside her husband, was participating with him in looking out for the train, in connection with and for the benefit of his driving of the horse; while here the plaintiff says she had nothing to do with driving the car and had never driven one, and it does not appear that the driver knew that she was looking or listening. The confusion and peril incident to driving an automobile "from the back seat" are proverbial. Not only has the District Court not considered this question, but pertinent evidence on a new trial may not be the same as in the record here.[3]

[10, 11] As the case must be tried again, we may add that upon this record plaintiff cannot be declared, as matter of law, guilty of personal negligence. She cannot be conclusively charged with negligence in not attempting to make the driver stop his automobile within the 8 or 9 feet between the two tracks. Not only had she not seen or heard the train, but she had no authority over the driver, and her interference might of itself have precipitated a collision. We find it unnecessary to consider whether the trial court rightly held the driver negligent. Plaintiff's testimony does not, to say the least, conclusively show him negligent. She testified that the automobile's speed was reduced a quarter of a mile back from the crossing from 16 to 20 miles an hour, until as it neared the crossing, and just before the accident, it had about half that speed. If her testimony were believed, it was open to inference that the bell was not rung; and the inference of the driver's freedom from negligence in the reasonable use of his senses of sight and hearing is coexistent with the presumption of due care on the part of the driver of the engine. Rothe v. Pennsylvania Co. (C. C. A. 6) 195 Fed. 21, 26, 114 C. C. A. 627; New York, etc., R. R. v. Moore (C. C. A. 2) 105 Fed. 725, 727–728, 45 C. C. A. 21. The question of the driver's duty to stop before going on the track may be one of fact, even if sight were cut off, provided hearing was not interfered with.

[3] That the rule of imputed negligence (in case of a passenger not strictly for hire) is not thoroughly settled in defendant's favor is manifest. For example: In the pleasure riding cases in the Circuit Court of Appeals for the Third Circuit (Brommer v. Penna R. R. Co., 179 Fed. 580, 103 C. C. A. 135, 29 L. R. A. [N. S.] 924, and Hall v. West Jersey, etc., Co., 244 Fed. 104, 156 C. C. A. 532), the respective plaintiffs, who were sitting on the front seat with the drivers, were declared guilty of personal negligence contributing to the accident, although not on the theory of imputed negligence, but on the ground that they had better opportunity than, and were under equal duty with, the driver to look out for the safety of the party. On the other hand, in Southern Ry. Co. v. Wright (C. C. A. 9) 248 Fed. 261, 160 C. C. A. 339, the deceased, who was riding on and paying for the use of a motor truck (for the purpose of trying it out with a view to its purchase), was by a divided court held a passenger (and so not chargeable with the driver's negligence), although he directed the general route of the truck. In Bramley v. Dilworth, 274 Fed. 267, decided by this court June 7, 1921, it was held, confirming in this respect the holding of the District Court, that the driver's negligence was not imputable to the injured plaintiff, who was riding on the back seat of the automobile and took no part in operating the car in which he was being carried as one of a party of friends, another of whom had possession and charge of and was driving the car. See, also, Toledo, etc., Co. v. Mayers, 93 Ohio St. 304, 112 N. E. 1014; Commissioners v. Bicher, 98 Ohio St. 432, 121 N. E. 535.

L. E. & W. R. R. Co. v. Schneider (C. C. A. 6) 257 Fed. 675, 677, 168 C. C. A. 625. The question of the driver's negligence as an affirmative defense may not arise on a new trial. It will not arise in case his alleged negligence is held not imputable to plaintiff, and, should it arise, the evidence will perhaps be more full and satisfactory than in the present record.

[12] As the trial court did not pass upon, or submit, the question whether the obstruction occasioned by the presence of the freight cars called for the exercise of unusual care on the part of the train crew in crossing the highway, we do not find it necessary to discuss that question. We content ourselves with saying that, if additional care were required of the train crew, the voluntary attempt by one in the road (which may or may not have been seen, or, if seen, not have been understood) to warn the driver of the train's approach, would not, as the evidence now stands, necessarily control the question of the driver's negligence; nor would it, as matter of law, operate to relieve defendant from the consequence of its alleged negligence.

For the error in directing verdict for defendant, the judgment of the District Court is reversed, with instructions to award a new trial.

KRAUTER v. SIMONIN.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 199.

1. **Sales ⇐387—Modification of terms of payment held question for jury.**
In an action for breach of a contract to accept and pay for a quantity of cocoanut oil, an alleged modification of the terms of payment, being denied by plaintiff, was a question of fact for the jury.

2. **Sales ⇐319—Remedies of seller on buyer's breach of contract stated.**
A seller, under the common law and Personal Property Law N. Y. §§ 85, 128, 129, 132, 142, on breach of the buyer's contract to accept and pay for goods sold, may indemnify himself by storing or retaining the property for the buyer, and sue him for the entire purchase price, sell it as agent of the buyer, and recover the difference between the contract price and the price so obtained, or keep it as his own and recover the difference between the market price at the time and place of delivery and the contract price.

3. **Sales ⇐174—Seller need not show that he had goods in stock, where buyer breached contract before date fixed for delivery.**
In an action for breach of a contract to buy cocoanut oil, where defendant failed to give shipping instructions and to furnish a bank credit, as agreed, it was not necessary for the plaintiff, in order to show readiness to deliver the oil, to establish that he had it in stock; defendant's breach of contract excusing further performance by plaintiff, of whom was required only such readiness as was necessary to enable him to make delivery at the time fixed for delivery, such oil being obtainable in the market at the time fixed for delivery.

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

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

Action by Isaac M. Simonin, trading as C. F. Simonin's Sons, against Sigmund Krauter. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert P. Levis and Max E. Sanders, both of New York City (Gerald B. Rosenheim, of New York City, of counsel), for plaintiff in error.

Travis, Spence & Hopkins, of New York City (Charles M. Travis, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On July 16, 1919, the defendant in error agreed to sell and deliver to the plaintiff in error 1,000 barrels of Ceylon grade cocoanut oil, not to contain over 7 per cent. free fatty acid, at a price of 20 cents per pound net cash, without discount. The plaintiff in error agreed to furnish a 90-day confirmed bank credit for documents, payment to be made against an f. a. s. railroad bill of lading, Philadelphia weighmaster's weight certificate and certificate of analysis. By a supplemental agreement on December 1, 1919, there was a substitution of "refined edible cocoanut oil at a price of 24 cents per pound to be made within one month of December 1, 1919." In other respects the contract of July 16, 1919, was confirmed. The complaint alleged that on March 5, 1920, the defendant in error delivered to the plaintiff in error 100 barrels of refined edible cocoanut oil, for which he paid, in accordance with the terms of the contract of December 1, 1919, and again 136 barrels thereof which the plaintiff in error refused to accept or pay therefor. It alleges that thereafter repeatedly from December 15, 1919, to May 23, 1920, the defendant in error notified the plaintiff in error that he was ready to deliver, in accordance with the contract of December 1, 1919, the other 900 barrels and demanded shipping instructions. On the occasion of each demand, the plaintiff in error requested not to ship, but to hold the oil subject to his orders, and on May 20, 1920, the defendant in error notified the plaintiff in error that he would no longer extend the time for delivery beyond May 21, 1920. He failed and refused to give shipping orders or instructions, or to furnish the confirmed bank credit, as required by the contract of December 1, 1919, and it is further alleged that the defendant in error was ready, able, and willing to perform, and has performed, all the terms and conditions of the contract, and damages are demanded in the sum of $15,000.

The answer admitted the making of the contract. It alleges that on July 17, 1919, by mutual consent, the requirements of the contract for a 90-day confirmed bank credit for documents was waived. It is alleged further that toward the end of January, 1920, the defendant in error delivered the balance of 900 barrels and agreed to store them for the plaintiff in error, who agreed to pay for them from time to time as he removed them from the warehouse, and until their removal to pay interest on the purchase price, storage charges, and premiums on insurance. It is further answered that the plaintiff in error was ready, able, and willing to perform, and has performed, all the terms

and conditions, but that the defendant in error failed and refused to comply, and insisted upon immediate payment of the purchase price and the shipment of 900 barrels, and refused to wait for payment until such time or times as the 900 barrels or portion thereof would be removed.

[1] The questions of fact presented by the proofs offered under these pleadings were fairly and accurately submitted to the jury in a charge to which no exception was taken that presents error. The jury have resolved these findings of fact in favor of the defendant in error. The assignments of error urge that the court should have granted the motion of the plaintiff in error to dismiss the complaint, for the reason that the defendant in error failed to establish that he was ready, able, and willing on May 21, 1920, to deliver 900 barrels of refined edible cocoanut oil, and further that the testimony was sufficient to establish that the defendant in error delivered and the plaintiff in error accepted the oil during December, 1919, or January, 1920, and therefore the defendant in error has no cause of action for nonacceptance. This alleged modification of the contract, which constitutes the defense interposed, was denied by the defendant in error, and was therefore a question of fact for the jury.

[2] The defendant in error, upon breach of the contract, had the choice of endeavoring to indemnify himself by storing or retaining the property for the plaintiff in error and then to sue him for the entire purchase price, or he could sell the property, acting as an agent for this purpose of the plaintiff in error, and recover the difference between the contract price and the price obtained on such result, or he could keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price. He could do this both under the common law and under the Personal Property Law of New York state. See sections 85, 128, 129, 132, 142, of the Personal Property Law (Consol. Laws, c. 41).

[3] The evidence was sufficient to warrant the jury in finding that the defendant in error was at all times ready, willing, and able to perform his obligation of contract by delivery of the oil. It was not necessary to establish that he had the oil in stock. He may have purchased it in the market and resold it to the plaintiff in error. The plaintiff in error breached the contract, as the jury may have found, by his failure to give shipping instructions and to furnish the bank credit. This excused the further performance on the part of the defendant in error, and the readiness and willingness required of the defendant in error at the time of the breach consisted only of such readiness and willingness as must be necessary to enable the defendant in error to make delivery, not at the time of the breach, but at the time fixed for delivery, if the breach had not occurred. If the buyer commits an anticipatory breach of the contract prior to the delivery date, the seller is not obliged to show, in order to recover, that he had the goods of contract, quantity, and quality ready for delivery at the time of the breach; for, had the breach not occurred, he could have subsequently purchased or acquired the goods, so as to

comply with his obligations to deliver on the date fixed in the contract. This contract was not for the sale of any particular oil which the defendant in error was to manufacture or which he had in stock. It was simply a contract for the sale of 1,000 barrels of refined edible cocoanut oil. He could have supplied this oil from any source, and the evidence is clear that such oil was obtainable in the market at the time that delivery was made necessary under the contract; and it further appears that the defendant in error had on hand approximately 1,500 to 1,700 barrels of refined oil and was refining oil at the rate of from 50 to 300 barrels per day.

We find no error in the record, as presented by the assignments of error, which requires our interfering with the result below.

The judgment is affirmed.

PENN BUILDERS & SUPPLY CO. v. BRAEBURN STEEL CO.

(Circuit Court of Appeals, Third Circuit. August 13, 1921.)

No. 2659.

1. **Shipping ⟸58(2)—Finding that sinking was due to unseaworthiness held sustained.**
   Finding that sinking of a boat while being loaded with coal at charterer's tipple was due to its unseaworthiness, and not to negligence of charterer in loading, *held* sustained by the evidence.
2. **Shipping ⟸42—Warranty of fitness of boat for known use by charterer implied.**
   There is an implied warranty by the owner of a boat of its general fitness for the known use for which it was chartered.
3. **Shipping ⟸54—Charterer not liable for sinking of boat due to unfitness for known use.**
   There is no liability of the charterer of a boat for its sinking due to no negligence of the charterer, but to lack of its general fitness for the known use for which it was chartered, of which there was an implied warranty by the owner.

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

Libel in admiralty by the Penn Builders & Supply Company against the Braeburn Steel Company. From a decree for respondent, libelant appeals. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

W. L. G. Gibson, John G. Frazer, and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. On December 2, 1919, libelant entered into a charter party with respondent, whereby it demised for an indefinite term one derrick boat and two flats. The flats were to be loaded with coal at respondent's chute on the west side of the Allegheny river and towed to its plant on the east side by the libelant. The re-

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

spondent was to pay $50 per day for the derrick boat, $10 each per day for the flats, and $7 for towing the flats across the river. The loading of the flats on the west side of the river was to be done by the respondents, and the towing and unloading by libelant. The libelant, according to a verbal agreement, was to furnish an engineer and fireman to operate the derrick boat. After being unloaded at the plant, the flats were towed back by libelant to the tipple or chute. On December 6, 1919, one of the flats, after four loads had been taken across the river in it, and it had been returned to the tipple for another load, sank while being loaded.

The libelant alleged in its libel:

> That the "vessels when delivered to respondent were in good order and condition and seaworthy in every particular," and that the respondent "so negligently, carelessly, and improperly loaded the said flat, by placing coal it was loading in the center of the flat, instead of distributing it over the flat, as is the proper and correct manner of loading, the flat collapsed in the center, thereby causing the ends to raise up, and wrecking and damaging the same, causing the same to fill with water and sink."

The respondent denied these allegations and averred:

> That the "flat sank by reason of leaks therein, which existed prior to the time the said flat was brought to respondent's plant, and by reason of the failure of the employees of the libellant to take proper care of said flat or pump the water out of same, in order to prevent said flat from sinking when its condition was called to their attention."

[1] The issue, therefore, between the parties was: To what was the sinking of the flat due—negligence in loading, or unseaworthiness of the flat when chartered? The learned trial judge found that the sinking was due to unseaworthiness and the neglect "of libelant, whose duty, under the circumstances, was to put and keep it in condition fit for its intended use." The libelant admits that if the "flat sank by reason of unseaworthiness at time of delivery to respondent it cannot recover." If, however, the flat sank because of the negligence of the respondent in loading, the libelant may recover, and the judgment of the District Court should be reversed.

The testimony here and there was conflicting, but it supports the following conclusions of fact: The flat was old and leaked. The first load of coal was distributed evenly over the bottom of the boat, but at the suggestion of libelant the coal was run down through a chute and left in cone-shaped piles, so that it could be more easily unloaded. The first pile was placed somewhere between 5 and 8 feet from the lower end of the flat, which, when that pile was completed, dropped down with the current, and another pile was put on, and so on until the flat was loaded. The day before the flat sank, Mr. Newman, who was in charge of the loading for respondent, noticed ice and water in it, and called this to the attention of Mr. Warner, in charge of the derrick boat for the libelant, who said he would bring up the large siphon the next time and bail it out. The flat was taken over next day, apparently in the same condition, for loading. About 2 o'clock in the afternoon, when the third pile was on, Mr. Newman saw water around the piles. He called the libelant and told it to come over and get the flat. At half past 4 he went back and found 18 or 20 inches of water

in it. The captain of the towing boat was there, and said that he could not take the flat across the river, and that it should be siphoned out. The derrick boat came over about 5 o'clock and began to siphon the water out, when Mr. Newman went home, leaving the two men still pumping. After working for about an hour and a half with the small siphon, during which time they kept practically even with the water, they went home, leaving the flat slightly grounded on the shore side. In the morning the flat was sunk. With the use of the derrick boat, the libelant unloaded what coal it could from the flat, and then, at the direction of Newman, to move it away so that he could get another flat under the chute to load, took it about a mile down the river, where it stuck on a bar and was allowed to remain there unfastened until the river rose and carried it some 7 miles down to Logan's Ferry, where Mr. Warner, for libelant, caught and tied it. There it "remained in a sunken condition until swept away and destroyed by ice when the frozen river broke up the following spring."

The first pile of coal put into the flat on the fourth trip, when it sank, was 8 feet from the end, appellant says; but it was only 5 feet according to appellee. Whatever the fact may be, it is undisputed that coal was shoveled from that pile toward the end of the flat, to the place where libelant contends the first pile should have been placed. The placing of this pile is the essence of the negligence charged. It is also undisputed that the flat had about 4 inches of water and ice in it when the first pile of coal was put in, and by the time the third or fourth pile was in it was leaking fast. The appellee suggested that this was due to the thawing of the ice by the coal, which, coming from the mines, was warmer than ice. But, be that as it may, we are satisfied that if this flat, 100 feet long and never loaded to more than half its capacity since chartered to the respondent, had been seaworthy and reasonably fit for the use for which it was chartered, there was nothing in the manner of loading to cause it to leak so fast and sink. Without attempting a further detailed review of the testimony, a careful study of it satisfies us that it amply sustains the ultimate conclusion of fact, found by the learned trial judge, that the flat was unseaworthy.

[2, 3] The charter party does not contain an express warranty of seaworthiness of the flat, but in the absence of express warranty, general fitness for the use, if known, for which it was chartered, was implied on the part of the owner, and it incurred the risk of loss or injury, not due to negligence of the charterer, to the boat incident to that use. Walling v. Porter Gildersleeve Co. (D. C.) 222 Fed. 1002; Arundel Sand & Gravel Co. v. Naylor & Co., 242 Fed. 494, 155 C. C. A. 270. The libelant towed the flats from side to side of the river, and knew the use for which they were chartered. It therefore incurred the risk, and must bear the loss of the flat in question.

The decree of the District Court is affirmed.

SAPERSON v. BURSTEIN.

In re LOOBY'S, Inc.

(Circuit Court of Appeals, Third Circuit. August 18, 1921.)

No. 2688.

1. **Corporations ⟸430—Where officer negotiates, to pay personal debt, unauthorized note, corporation may recover amount from third person, accepting it with notice.**
   Where an officer executes a note in the name of the corporation without authority, and negotiates it to pay his personal debt to a third party, who accepts note with knowledge of the facts, the corporation can recover the amount of the note from the third party.

2. **Bankruptcy ⟸145(1)—Amount of notes of purchaser of corporation, executed in corporation's name to former owner, who used proceeds to pay corporation's subsequent indebtedness, not recoverable from former owner by trustee in bankruptcy.**
   Where it was agreed between owner of a corporation and purchaser of its business, to enable purchaser to retain lease, that purchaser should buy the fixtures, lease, and merchandise on hand, and that the owner of the corporation should pay the existing indebtedness and transfer the corporate stock to the purchaser, and such owner, in part payment of the amount due from purchaser, took notes executed by purchaser in the name of the corporation in an amount much less than the amount of indebtedness assumed, discounted the notes, and used proceeds to pay the balance of the corporation's indebtedness, so that as a result of the transaction the indebtedness of the corporation was the amount of such notes, instead of the much greater indebtedness assumed, the corporation's trustee in bankruptcy could not recover amount of notes from former owner, on theory that he took the corporation's unauthorized notes to pay personal debt of such purchaser.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Willard W. Saperson, trustee in bankruptcy of Looby's, Incorporated, against Harry Burstein. Judgment for defendant, and plaintiff brings error. Affirmed.

Hepburn, Carr & Krauss, of Philadelphia, Pa. (Simon Fleischmann, of Buffalo, N. Y., of counsel), for plaintiff in error.

Bertram D. Rearick, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This was an action brought by a trustee in bankruptcy of a bankrupt corporation to recover money in payment of two notes made by the corporation and indorsed by the defendant.

The corporation, Ryan's, Incorporated, operated a retail store in Buffalo. The name was changed to Looby's, Incorporated, which was adjudicated a bankrupt on May 16, 1917, and the defendant was elected trustee shortly thereafter. There were 150 shares of capital stock of the corporation, of the par value of $100 each. Of these the defendant owned 118 shares, his son 2, and A. J. Dransch the remaining 30 shares.

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

James M. Looby desired to have the business and location in Buffalo of the corporation. In order to retain the lease on the location, it was agreed on May 14, 1916, in a written instrument between him and the defendant, that Looby should purchase all the stock and merchandise, and Burstein should pay the indebtedness of the corporation. For the fixtures and lease he was to pay $9,500 and 85 per cent. of inventory price of the merchandise on hand. The inventory amounted to $9,218.93, 85 per cent. of which was $7,853.46. This, together with adjustments on some bills due the corporation and on insurance policies, amounted to $8,267.85, making in all $17,767.85. A payment of $500 was made by Looby at the execution of the agreement, leaving a balance of $17,267.85.

On July 31, 1916, Looby paid $13,000 in cash, and paid the balance with two notes, one for $2,000, and one for $2,267.85 signed by the corporation and indorsed by Looby and George A. Keating, his associate. The capital stock at the same time was transferred to Looby and his associates. The new stockholders were made directors, and Burstein and Dransch executed a written guaranty that there were no outstanding debts, and agreed to pay any existing bills that might appear. The $13,000, the proceeds of the two notes after discount, and the balance, $1,135.66, to the credit of the corporation in bank, were deposited to the credit of the defendant in a bank in Buffalo, with written authority to it to pay from that account all outstanding debts of the corporation of that date. The debts amounted to $12,898.87, and were paid out of that account.

Shortly after these notes were given, and the stock of the corporation was transferred to James M. Looby and his associate, the name of the corporation was changed from Ryan's, Incorporated, to Looby's, Incorporated. The notes, given on July 31, 1916, matured in four months, and were paid out of corporate funds.

[1] The trustee instituted this suit to recover from the defendant the amount of the two notes, on the theory that James M. Looby executed them in the name of the corporation without authority, and negotiated them to pay his personal debt to the defendant, who accepted them with knowledge of these facts. This theory is sound in principle and finds support in the cases of Odd Fellows v. Velenchick Bros., 73 Pa. Super. Ct. 153; Manhattan Web Co. v. Aquidneck National Bank (C. C.) 133 Fed. 76. If the facts of the case support the theory, the judgment must be reversed.

It is to be observed that fraud in the case was not charged, proved, or even hinted. The transaction, which has been described as "crudely carried out," was conceived by the parties as the best means of effecting a sale of Ryan's, Incorporated, to Looby, and at the same time of preserving the desirable lease on the property. Not a detail in the entire transaction was concealed from any one. Every person who had any interest in Ryan's, Incorporated, or Looby's, Incorporated, not only knew the facts, but approved them.

[2] The assets, which seem to be fairly estimated, of Ryan's, at the time this transaction began, according to the facts as they appear from

the stipulation, were $17,767.85, which was made up as follows: Fixtures and lease, $9,500; merchandise, etc., $8,267.85; and "hand money," $500. The liabilities were $12,898.87. Its real value, therefore, was $4,868.98. In the transaction its indebtedness was reduced to $4,267.85, represented by the notes. In other words, the defendant paid on the indebtedness of the corporation $8,631.02 of his own money, and paid the balance of its indebtedness with the proceeds of the two notes, which the corporation met at maturity. Instead of owing small bills aggregating $4,267.85 to various creditors, the corporation owed the entire amount to the bank, which discounted the notes. At the beginning of the transaction the corporation was worth $4,868.98, the difference between the assets and liabilities; at the close it was worth $13,500. It was benefited by the transaction to the extent of $8,631.02. The facts, therefore, do not support the theory upon which proceedings were instituted. Neither the corporation as it originally existed, or with its changed name, nor those who thereafter became creditors, have any ground for complaint because of the transaction.

It follows that the judgment of the District Court must be affirmed.

MORAN TOWING & TRANSPORTATION CO. v. CRANFORD CO.

(Circuit Court of Appeals, Second Circuit. June 8, 1921.)

No. 233.

Admiralty ⇐117—Decree not reversed because of exclusion of competent testimony, there being trial de novo on appeal.

The Circuit Court of Appeals will not reverse a decree because of error in excluding competent testimony in an admiralty case, thus presupposing that such testimony would have proved the point, for in an admiralty suit on appeal there is a trial de novo.

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

Libel by the Moran Towing & Transportation Company against the Cranford Company. Decree for libelant, and respondent appeals. Affirmed.

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 and William F. Purdy, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This libel was filed in personam by the appellee, seeking to recover damages for breach of contract which resulted in injury to the scow Geraldine on August 17, 1916. The appellant was engaged in the construction of a subway under Flatbush avenue in the borough of Brooklyn, New York City. On May

28, 1914, it executed a contract with the appellee, whereby the appellee agreed to provide scows and dumpers and receive excavated material at appellant's slip on Gowanus Canal, near Ninth street, in the borough of Brooklyn, city of New York. The contract provided that the appellant would provide a berth at its dock for the loading of the scows and dumpers, where "there will be sufficient depth of water to float scows and dumpers at all stages of the tide."

The theory of the libel is that the appellant's slip was not of ample depth, and that, beginning with the removal of the dirt from the pier, it became necessary from time to time to dredge out the slip because the excavated material, in loading, would drop into the canal. On August 15, 1916, the scow Geraldine was placed alongside the appellant's dock on the Ninth street slip for the purpose of receiving excavated material. The loading was commenced on the 16th and was continued on the 17th; on the afternoon of the 17th the scow was found grounded and leaking. She had six inches of water in her and proved to be two-thirds loaded. She grounded first at the bow, and there was considerable leaking at the stern. About 15 or 20 minutes after she had grounded, a tug tried unsuccessfully to pull her away into deep water. She settled further and continued to leak rapidly. The pumping proved unavailing, and eventually her bottom planks and other parts amidships broke. It proved that the bottom at this point was too shallow at low tide, and this was the cause of the damage.

The contract between the parties provided that the libelant was "to supply the necessary boats, known as dumpers and derrick scows, and bring them alongside of the dock of the Cranford Company, in a position to receive the earth, sand, and gravel, and, when the same have been loaded and trimmed aboard the said scows by the Cranford Company, dispose of said earth," and further "the Cranford Company agrees that they will provide berth at its dock for the loading of the above-mentioned boats, where there will be sufficient depth of water to float scows and dumpers at all stages of the tide." There was sufficient evidence to warrant the finding of the District Judge below that the cause of the injury was the failure to carry out the provisions of the contract requiring appellant to provide a berth with water of sufficient depth to float scows and dumpers at all stages of the tide.

Hope for success on this appeal is based upon alleged error committed below in the trial court excluding testimony offered by the appellant tending to show that shallowness of the slip was caused entirely by the leakage of the excavating materials from the scows and dumpers which came to the slip. The contract provided that the obligation to keep a sufficient depth of water was upon the appellant and failure to carry out the provisions of the contract made the appellant primarily liable. Healey v. Moran Towing Co., 253 Fed. 334, 165 C. C. A. 116. It is contended that the court excluded testimony offered by the appellant tending to show that the appellee's boats leaked the materials which were placed upon them, and that this filled up the bottom of the slip. This court will not reverse a decree because of error in excluding competent testimony in an admiralty case, for that would presuppose that the testimony offered would have actually

proved the point sought to the satisfaction of the court. If counsel felt aggrieved by the exclusion of this testimony, they could have moved before this court to take such testimony, for in an admiralty suit on appeal, there is a trial de novo.

The appellee's duty under the contract was to deliver the boats alongside the dock in a position to receive the earth, and if it became necessary thereafter to shift the scow, it was the duty of the appellant to do so, and to load and trim the scow, and then provide sufficient water at all tides to permit reasonably safe navigation. We think the court below committed no error in granting a decree to the appellee.

Decree affirmed.

ABERNATHY et al. v. FIDELITY NAT. BANK & TRUST CO. et al. HAGERMAN v. SAME. SWOPE et al. v. SAME.

(District Court, W. D. Missouri, W. D. June 28, 1921.)

Nos. 163, 207, 215.

1. Municipal corporations ⟸484(2)—Decree in proceeding for local improvement held not res judicata as to reasonableness of basis of taxation.

A decree of the circuit court in a proceeding under Kansas City Charter, art. 8, § 28, to establish a taxing district for a local improvement, determining the validity of an ordinance passed by the city, was not res judicata, so as to prevent landowners from raising the question as to the reasonableness of the basis of taxation.

2. Municipal corporations ⟸450(1), 463—Benefit district and assessments held arbitrary and unreasonable.

Benefit district, created to meet expense of local improvement, consisting of an approach to a park, and assessments on property within such district, *held* arbitrary and unreasonable.

In Equity. Bills by Walter L. Abernathy and another, by B. Haywood Hagerman, and by Felix H. Swope and others, respectively, against the Fidelity National Bank & Trust Company and others. Decrees for complainants.

Warner, Dean, Langworthy, Thomson & Williams, of Kansas City, Mo., for complainants Abernathy.

Marley & Reed, of Kansas City, Mo., for complainant Hagerman.

Scarritt, Jones, Seddon & North, of Kansas City, Mo., for complainants Felix H. Swope and others.

Justin D. Bowersock, of Kansas City, Mo., for defendant Fidelity Nat. Bank.

Miller, Camack & Winger, of Kansas City, Mo., for defendants Standard Inv. Company, Delap, and Meriwether.

Clarence S. Palmer, of Kansas City, Mo., for defendant Kansas City, Mo.

VAN VALKENBURGH, District Judge. These cases involve the validity of certain tax bills issued against the property of complainants to pay for the grading of Meyer boulevard, from the Paseo east to Swope Park. These bills are based upon proceedings instituted under

section 28 of article 8 of the charter of Kansas City, Mo. This section provides that where, in the grading of a street, there is an unusual amount of filling, or cutting or grading away of earth or rock, so that the expense imposes too great a burden on land situated in the benefit district, consisting of property abutting upon the street to be improved, as provided in section 3 of article 8, then the cost may be assessed against the property located within a larger benefit district to be fixed by the city council.

Section 28 further provides for the enactment of an ordinance authorizing the improvement, and that the city shall file a proceeding in the circuit court of Jackson county, Mo., in the name of the city, against the respective owners of land chargeable, and that the prayer of the petition shall be that the court find and determine the validity of the ordinance, and the question of whether or not the respective tracts of land within the benefit district shall be charged with the lien of the work. Service of process shall be governed by the provisions of section 11 of article 13 of the charter, which provide for service by publication. After such court proceedings have been disposed of, it is provided that the city may then enter into a contract for the work contemplated, and that after the work has been completed the estimate of the cost thereof, and the apportionment of the same against the various lots, tracts, and parcels of land within the benefit district, shall be made by the board of public works according to the assessed value thereof, exclusive of improvements, with the assistance of the city assessor, who shall, on demand of the board of public works, cause an assessment to be made of the value of the lands to be charged with the cost of such grading, and shall deliver such assessment to the board of public works, who shall apportion the cost according to the value thereof fixed by the city assessor.

Meyer boulevard, from the Paseo to Swope Park, is a broad highway, being 220 feet wide at its narrowest point, and 500 feet wide as it approaches the park. Provision is made for parkways between the driveways, so that of the total area of the boulevard only about 11 acres are taken up by the driveways, and the remaining 20 acres consist of grass parkways. The grading includes the entire area. The benefit district extends approximately one mile in length, and lies between Sixty-Third and Sixty-Seventh streets, a width of approximately four blocks, which area includes the land taken for the boulevard itself. The grading cost, for which the tax bills were issued, was substantially $97,000. The total assessed valuation of the benefit district, specially made for the purposes of this improvement, was $378,955. The rate of assessment to total assessed value is thus found to be approximately 26 per cent.

It appears from the evidence that the city assessor, in assessing the value of the property in the benefit district, assessed all of the property at substantially the same value per acre, and that all the property was assessed for this special purpose at a value several times that at which it is and was assessed for general tax purposes. This will appear concretely from a consideration of the tracts belonging to complainants.

Tract No. 2, belonging to Gertrude M. Brown, was assessed for general tax purposes in the year 1915 at $4,750, for 1916 at $4,750, and for 1917 at $5,000; in 1916, for the purposes of this grading, at $25,960. The tax bill against this property for this grading was $6,693.40. Tract No. 3, belonging to Felix H. Swope, was assessed for general tax purposes in the year 1915 at $6,240, for 1916 at $6,240, and for 1917 at $6,240; in 1916, for Meyer boulevard, at $25,440. The tax bill against this property for this grading was $6,558. Tract No. 8, belonging to Felix H. Swope, was assessed for general tax purposes in the year 1915 at $4,470, for 1916 at $4,470, and for 1917 at $4,320; in 1916, for Meyer boulevard, at $29,250. The tax bill against this property for this grading was $7,540.20. Tract No. 11, belonging to B. Haywood Hagerman, was assessed for general tax purposes in the year 1915 at $12,480, for 1916 at $12,480, and for 1917 at $10,350; in 1916, for Meyer boulevard, at $48,535. The tax bill against this property for this grading was $12,511.60. Tract No. 14, belonging to Carrie S. Abernathy, was assessed for general tax purposes in the year 1915 at $6,400, for 1916 at $6,400, and for 1917 at $6,400; in 1916, for Meyer boulevard, at $24,920. The tax bill against this property for this grading was $6,424. Tract No. 15 belonging to Carrie S. Abernathy, was assessed for general tax purposes in the year 1915 at $6,000, for 1916 at $6,000, and for 1917 at $6,000; in 1916, for Meyer boulevard, at $24,570. The tax bill against this property for this grading was $6,333.80.

It will thus appear that for the year 1916 these tracts, in the aggregate, were assessed for general tax purposes at a value of $40,340; that in the following year, after the Meyer boulevard improvement, which is claimed to have added value in the way of benefits, had become a fixed fact, the same assessor assessed this same ground for general tax purposes at an aggregate of $38,310, more than $2,000 less than the previous year; that in 1916 these same tracts, in the aggregate, for the purposes of this grading, were assessed at $188,680, a little less than five times the value at which they were assessed during the same year for general tax purposes. It further appears that the tax bills issued against these tracts, for this improvement, aggregate $46,061, nearly $6,000 more than the assessed valuation for general tax purposes in 1916, and nearly $8,000 more than they were assessed for the same purposes in 1917. It further appears that these tracts, practically unimproved suburban property, were assessed to pay almost one-half of this entire improvement, at an average rate of over $350 an acre.

Meyer boulevard, with its heroic proportions, was conceived for the purpose of establishing an inspiring approach to Swope Park, the great playground of Kansas City, and incidentally as a thoroughfare into which, directly and indirectly, the boulevard system of Kansas City might discharge the throngs of pleasure seekers and pleasure drivers who visit that park. It is altogether an appropriate and desirable enterprise for the gratification of the public at large, and its chief

value is to the public at large, and to the city property to which it is tributary, and only very incidentally to the locality through which it passes. Notwithstanding this fact, the board of public works assessed no part of the benefits against the city at large, nor against the property of the city, which would indirectly effect the same purpose, although that seems to have been contemplated by section 28, by the ordinance authorizing the improvement, and by the petition filed in the circuit court. That court, as shown by its order, may well have contemplated, and undoubtedly did contemplate, that a portion of the whole cost would be charged against the city. The board of public works, however, imposed the entire burden upon the private property within the benefit district.

Many points are urged by complainants against the regularity of the proceedings and the validity of the tax bills. It is claimed that the method of apportionment provided for in section 28 of article 8 of the charter is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the Fourteenth Amendment to the federal Constitution; that the tax assessed against the property in question exceeds the special benefits received to such an extent as to result in the taking of the property without due process; that this is a general public improvement, and not a local one; that the benefit district is unreasonable; that the circuit court proceeding is an essential step in the grading procedure, and was not followed with sufficient strictness, in that a suit was not brought in the name of Kansas City, and the parties charged were not named; that that proceeding was, in effect, a moot one, without recognition in the judicial procedure of the state, binds no one, and that the decree entered cannot be urged as res adjudicata. They also claim that the benefits were not apportioned equitably, and with a due regard for actual benefits.

Defendants reply that the grading is of such a nature that its cost may lawfully be charged against a local benefit district; that the benefit district is a reasonable one; that distribution of cost in proportion to assessed valuation is a proper method of apportionment; that the amount of benefit to the particular tracts in question cannot be inquired into in this proceeding; that the suit in the circuit court is such a proceeding as comports with due process of law and affords sufficient opportunity to be heard on the questions involved; that section 28 was duly complied with; that all questions raised, or which could have been raised, in the circuit court proceeding, are now res adjudicata; and, chiefly, that, if a legislative body charges the cost of an improvement upon lands which it deems to have benefited therefrom, the courts must accept the legislative determination.

Both parties, in exhaustive and learned briefs, have cited abundant authority to sustain their several contentions and each of them, regard being had for the special facts, circumstances, and emergencies which control the cases cited. It will serve no useful purpose, and it is beyond the limit of practical possibility in this memorandum, to analyze, discuss, and distinguish the authorities adduced and the doctrines there announced. I am of opinion that the charter section involved is

susceptible of such arbitrary application as to amount, if such be the course pursued, in view of presumptions generally indulged and of the development of decisions, seeking carefully to preserve and not too greatly to hamper the exercise of municipal sovereignty for the common good, to a burden upon private property almost, if not quite, to the point of confiscation. It may be that the suit as entitled would be held to conform analogously to city condemnation proceedings in general, but it must be confessed that the provisions for notice and hearing approach very closely to the frontier of judicial recognition. The proceeding in the circuit court is a mere adjunct to the legislative action of the council, and the issues made in that suit, if not wholly abstract in their nature, at least fall far short of contemplating a complete adjudication upon all matters with which those whose property is to be taken for public use are vitally concerned. "It may well be doubted," as said by Mr. Justice Brewer in Tregea v. Modesto Irrigation District, 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395, "whether the adjudication really binds anybody."

However, I do not feel justified in going so far as to declare the charter section itself to be wholly unconstitutional and void; nor is this necessary. Counsel for defendants concede the settled rule to be that a state Legislature, and, of course, a city council, may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the Fourteenth Amendment, unless its action is palpably arbitrary or a plain abuse. They say:

"This legislative power is, however, not unlimited. It is subject to the limitation that its exercise must not be arbitrary or unreasonable."

It must be admitted that:

It the statute providing for the tax "is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact." Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523; Kansas City Southern Ry. Co. et al. v. Road Improvement Dist. No. 6 of Little River County, Ark., 255 U. S. —, 41 Sup. Ct. 604, 65 L. Ed. — (Supreme Court of the United States, decided June 6, 1921).

[1] The defense contends, however, that complainants herein cannot raise this question because of the circuit court proceeding. To this I cannot agree. Finally, defendants concede that the fairness of the assessor's valuation remains open to the consideration of whether it was arbitrary and unreasonable. I think this may be properly considered in connection with the action taken in defining the benefit district, and that when these two questions are disposed of it will be unnecessary to consider the other criticisms made and the defenses interposed.

What was done in this case appears clearly from the evidence, as well as from common knowledge of procedure. It was desired to establish this super-boulevard, and it was realized that the expenditure would be entirely too burdensome if charged against the abutting property, as is usual in grading proceedings. Therefore resort was

had to section 28 of article 8, which was intended to relieve in a situation of this sort. But merely adopting the form prescribed by section 28 does not necessarily afford such relief in practice.

Next, as appears from their testimony, the municipal representatives, boards and council, felt themselves more or less circumscribed and limited by physical conditions. They did not feel justified in going beyond Sixty-Third street on the north and Sixty-Seventh street on the south, because of their conception of such physical conditions. They therefore deemed themselves confined to the restricted benefit district established. Now, while we may say that this involved the exercise of judgment and discretion in excluding property which was left out, all of which, in the condemnation proceeding, was deemed to be benefited by the establishment of this boulevard, there was very little exercise of judgment and discretion as to reasonable benefits respecting the territory included. The dominant idea was that the boulevard must be established in any event, and this benefit district was arbitrarily selected to produce the funds. Although the improvement was primarily of benefit to the city at large, assessment against the city or its property was not considered, because of the well-known fact that the city had no funds which could be spared for this purpose.

But the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of this grading. This would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district. Therefore an arbitrary assessment was made, presumably with the assistance of the same assessor who makes the assessments for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation. Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty to 40 per cent. on city property would be the lowest acceptable figure. This property, for this improvement, is charged with considerably more than its entire assessed valuation for general tax purposes. It sufficiently appears that these tax bills amount to more than one-third of the actual value, and that the benefit to complainants' property, if any, is negligible. Such assumed benefit is entirely speculative, and bears no reasonable relation, in any view, to the amount of the tax.

It appears that Meyer boulevard lies to the south of these tracts and furnishes no direct thoroughfare to the city, which lies almost entirely to the north and west; besides, ample routes to the city, for all purposes, already exist. Swope Parkway, itself a very broad and commanding boulevard, runs along the eastern boundary, and Sixty-Third street, up to that time a recognized thoroughfare, bounds most of these tracts upon the north.

[2] I find, for the reasons stated, as disclosed by the record, that both the benefit district and the assessment were arbitrary and unreasonable, and that the tax bills unreasonably exceed any possible benefit to this restricted benefit district. The court is not unmindful of the necessity of recognizing liberal power in municipalities to provide

for public improvements, even such as that under consideration, although this is not of the class, under the circumstances disclosed, which is essential to the public health and safety, which sometimes calls for the exercise of more arbitrary and summary municipal power. To uphold this proceeding would be a practical recognition that the power of the city in such matters is unlimited and that its exercise is not open to individual challenge in any case.

In Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the Supreme Court of the United States said:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

To this may be added the language of the Supreme Court of Missouri in McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440:

"The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

And finally, the language of Judge Agnew in the Washington Avenue Case, 69 Pa. 352, 8 Am. Rep. 255, is pertinent and applicable to the principle here involved:

"In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried, step by step, into the exercise of illegitimate powers without perceiving the progression, until the usurpation becomes so firmly fixed by precedents, it seems to be impossible to recede or to break through them.

This case is cited with approval in Norwood v. Baker, 172 U. S. 285, 19 Sup. Ct. 187, 43 L. Ed. 443. The court is further mindful of the fact that the improvement has been made, the work has been done, the money has been spent, and much of it probably has been advanced upon the faith of the validity of this proceeding; but this is always the case, and we must not lose sight of the fact that one of the arguments made in support of the insistence that complainants in this and similar cases have not been denied due process of law is that all defenses of this nature may be made in a suit upon the tax bills, or in proceedings like those at bar for the protection of those whose lands are taken or taxed for public purposes. In fact, complainants are practically remitted to this remedy.

It follows necessarily, then, that the present status of the parties, who are charged with knowledge of the law and of the power of public officers, can, and should, have no controlling influence upon this decision.

The relief prayed by petitioners will be granted, and decrees to that effect may be prepared and entered.

WILSON v. MILLER, Alien Property Custodian, et al.

(District Court, E. D. New York. July 27, 1921.)

1. **War ⟸12—Attorney may collect from property in hands of Alien Property Custodian for services to an alien only up to October 6, 1917.**
   Section 9 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), amended June 5, 1920, to provide that a debt shall not be allowed under this section against property in the hands of the Alien Property Custodian, unless it was owing to and owned by claimant prior to October 6, 1917, was within the valid powers of Congress as applied to an attorney's inchoate lien for services in defending a claim against the property subsequent to October 6, 1917.

2. **War ⟸12—Attorney may not collect from property in hands of Alien Property Custodian for services rendered after October 6, 1917.**
   Notwithstanding section 7 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), providing that an enemy or ally of an enemy may defend by counsel any suit in equity or action at law, under section 9 (section 3115½e) an attorney may not recover from property in the hands of the Alien Property Custodian for legal services rendered since October 6, 1917, because his claim is not an interest, right, or title in the property conveyed, or a debt owing from an alien enemy accruing prior to October 6, 1917, and if the services were rendered to the alien or to the property, they were unlawful, except as they were directly in defense of an action.

3. **War ⟸12—Attorney may collect from property in hands of Alien Property Custodian on claim assigned by his former partner.**
   Where a claim for services as an attorney rendered prior to April 30, 1915, had been acquired by plaintiff from his former law partner on the dissolution of the partnership prior to October 6, 1917, plaintiff may recover on such claim against property of the alien in the hands of the Alien Property Custodian, although assignment of the claim by plaintiff's former partner was made in April, 1919; it not being an assignment prohibited by section 7 and 9 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½d, 3115½e), and being in no way by or on account of the alien enemy.

4. **War ⟸12—Assignment of property in hands of Alien Property Custodian by alien enemy conveys no rights.**
   An alien enemy's consent, assignment, or acquiescence in an attorney's claim for services in defense of property now in the hands of the Alien Property Custodian can give the attorney no title to the property.

5. **Interest ⟸39(5)—Attorney for alien enemy entitled to interest from date of rendering bill.**
   An attorney for an alien enemy, whose property is in the hands of the Alien Property Custodian, is entitled to interest on the amount allowed by the decree from the date when he presented the bill, or brought it to the attention of the alien in the usual manner between attorneys and clients.

At Law. Action by Edward H. Wilson against Thomas W. Miller, as Alien Property Custodian, and others. Judgment for plaintiff for part of the amount sued for.

Edward H. Wilson, of New York City, in pro. per.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., Dan Hightower, Jr., Sp. Asst. Atty. Gen., and Ralph Copland, Asst. U. S. Atty., of New York City, for defendants.

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

CHATFIELD, District Judge. Since the trial of this action, Mr. Thomas W. Miller has been appointed Alien Property Custodian, and Mr. Frank White Treasurer of the United States, and the proper substitution of parties will be considered ordered upon the record.

The plaintiff seeks to recover from property in the hands of the Alien Property Custodian $3,750 for services rendered, of which $750 is for services prior to May 1, 1915, and one-half of the balance for services rendered prior to October 6, 1917. These services were rendered in defending an action brought against the alien corporation, which retained the plaintiff and his predecessors in interest as its attorneys at law. Since the property has been taken by the Alien Property Custodian, the action has been upon the court calendars in this city, and the plaintiff herein was bound, under his duty as attorney, to see that the litigation was not allowed to go by default, and to turn matters over to the Alien Property Custodian, which he has done.

[1] On June 5, 1920, subdivision 9 of the statute known as the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), was amended to provide:

"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." Chapter 241, Act June 5, 1920 (41 Stat. 977).

The plaintiff had made no claim prior to this amendment and his rights were changed thereby, as the amendment was within the valid powers of Congress. The plaintiff had an attorney's lien, inchoate, which had not attached or affected the property as it was turned over to the Alien Property Custodian; but since the date of this turning over he has, in so far as the litigation could be conducted under the Trading with the Enemy Act, been protecting from the claim in litigation property belonging to or held by the United States, through the Alien Property Custodian. This litigation apparently could not be prosecuted during the war, but the Alien Property Custodian had the right to do what was necessary to protect or preserve the property—that is, the rights in litigation—and apparently by acquiescence or stipulation this work has been done by the plaintiff under section 7, chapter 106, Act Oct. 6, 1917, 40 Stat. 416 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d).

[2] "An enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him." But his claim for services to the Alien Property Custodian, since October 6, 1917, cannot be a claim or lien against any government property, or against the specific property in question, so long as the property is in the hands of the Alien Property Custodian, as it is not an "interest, right or title in the property" conveyed, or "a debt owing" from the alien enemy and accruing prior to October 6, 1917, but is in connection therewith. If the services rendered by the plaintiff since October 6, 1917, when the Trading with the Enemy Act was passed, have been rendered to the property, or to the enemy alien owner of the property, then these services have been contrary to the provisions of the Trading with the Enemy Act, except in so far as they have been directly in de-

fense of the action. The plaintiff has been at all times loyal and working in conjunction with the government; but, so long as the present status is continued, his claim for services cannot be recognized as against the property, in so far as these services have been rendered since October 6, 1917.

[3] As to the services rendered before that time, the claim presents unusual features. The amount of $750 is claimed for services rendered prior to April 30, 1915, by the plaintiff and his former law partner. This claim belonged to and was owned by the plaintiff prior to that time, and has not been acquired by him since October 6, 1917, although by the arrangement between the partners, entered into on May 1, 1915, Mr. Wilson, the plaintiff, was to receive the whole of this claim as a part of his share of the partnership property. The release or assignment evidencing this fact, made on the 9th day of April, 1919, by Mr. Wilson's former partner, was not an assignment such as is prohibited by sections 7 and 9 of the Trading with the Enemy Act, and was in no way by or on account of the alien enemy.

[4] Since May 1, 1915, the plaintiff as an individual has rendered all the services for which compensation is claimed, and was entitled on October 6, 1917, if on that date his services as attorney had been terminated, to be paid the value of the services up to that time. He roughly estimates that these amounted to the sum of $1,500. This is too large a proportion, but the amount can be determined. It is true that consent or assignment or acquiescence in this claim by the enemy alien, signed May 11, 1920, could give the plaintiff no title. Such an evasion of the statute would be palpable, and would open the door to the transfer of any property in the hands of the Alien Property Custodian, if the alien enemy could be reached and wished to become a party to a scheme to withdraw the property from the hands of the Alien Property Custodian and place it in the hands of some friendly individual.

The only purpose which could be effectuated by such consent, or of the default decree against the enemy alien, is to estop the enemy alien, if in the future the plaintiff is in a position to litigate this claim with the enemy alien, from contesting the amount of the claim. In this sense, consent of the enemy alien might be of some evidential value as to the amount of the claim, but the plaintiff cannot obtain title by the default decree, and in fact does not seek to do so.

Prior to the amendment of June 5, 1920, the plaintiff could have claimed such rights against the property in the hands of the Alien Property Custodian as he was entitled to prior to June 5, 1920, if these rights were not acquired through any relations with the enemy. After June 5, 1920, the plaintiff could claim no rights, without reference to the manner of acquiescence, which had not been acquired prior to October 6, 1917.

As to the $750 claim, the amendment of June 5, 1920 (chapter 241, 66th Session of the Congress), therefore, gave the plaintiff no greater rights, and took away no rights, in this particular case, other than those which he had previous to that time. His claim for $750, subject to any opposition which the Alien Property Custodian may wish

to make to the amount of the claim, and his claim for $1,500 for services as attorney prior to October 6, 1917, are allowable, and the plaintiff may have a decree therefor, upon determination of the amount in any manner which may be ordered. The balance of the claim by the plaintiff will be dismissed without prejudice to any future presentation thereof which may be allowable according to law.

[5] The plaintiff is entitled to interest upon the part of the claim allowed only from the date when the amount of his claim was liquidated and bill rendered; that is, from the date of May 20, 1920, when the plaintiff as attorney presented the bill or brought it to the attention of the alien and treated it as a liquidated amount, in the usual manner between attorneys and clients.

As to the course of this litigation in the future, the plaintiff is still under the obligation of doing his duty by the litigation, to the extent, at least, of seeing that the Alien Property Custodian is put in a position where the property rights involved may be protected. But any claim of compensation therefor by the plaintiff, as against the property in the hands of the government, will depend upon the relations between the Alien Property Custodian and the plaintiff as his representative.

CHARLESTON DRY DOCK & MACHINE CO. v. O'ROURKE et al.

(District Court, E. D. South Carolina, at Charleston. August 11, 1921.)

1. **Injunction ⇐101(3), 146—Employer held entitled to preliminary injunction to restrain unlawful interference by striking employees, notwithstanding denial of unlawful acts; Clayton Act does not forbid injunction against unlawful acts.**

   In a suit by a dry dock company, employing a large number of workmen, against officers and members of unincorporated organizations of striking employees, where, though such acts were denied or disclaimed by defendants, the showing made established that as a direct consequence of the strike and in pursuance of the intentions, threats, and acts of defendants, property of complainant had been destroyed and injured, and certain of its employees had been intimidated, assaulted, and beaten, complainant *held* entitled to a preliminary injunction to restrain such unlawful acts in the future; for the Clayton Act does not prohibit injunction against striking employees in cases where unlawful intimidation or other unlawful acts exist.

2. **Injunction ⇐102—Threatened invasion of private rights, though by a criminal act, may be enjoined.**

   The fact that a threatened invasion of a complainant's rights will constitute at the same time an offense against the criminal laws is no bar to relief by injunction at the instance of a private party.

In Equity. Suit by the Charleston Dry Dock & Machine Company against J. R. O'Rourke and others. On motion for preliminary injunction. Granted.

Moffett & Hyde and Paul M. MacMillan, all of Charleston, S. C., for complainant.

Jos. A. Patla, of Charleston, S. C., for defendants Doar and Clair.

H. L. Erckmann, of Charleston, S. C., for all other defendants.

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

SMITH, District Judge. This is a motion for a temporary injunction, of which due notice has been given, and counsel for all parties to the cause have appeared and been heard. The motion has been made upon the bill of complaint and the affidavits thereto annexed and the affidavits filed on behalf of the defendants.

The bill of complaint alleges that the complainant is a citizen of the state of Delaware, engaged in the operation of a large dry dock and shipbuilding plant in the city of Charleston, in the operation of which it has invested as the value of its plant a sum exceeding $1,250,000, and that the defendants are all citizens of the state of South Carolina and are members of three associations, viz., International Association of Machinists, Local No. 183, International Brotherhood of Boilermakers and Iron Shipbuilders, Local No. 50, and the International Brotherhood of Blacksmiths and Helpers, Local No. 454, all of which are unincorporated associations, and that the defendants were in the employ of the complainant in the operation of its plant and the carrying on of its work up to July 15, 1921; that on the 15th of July, 1921, the defendants, together with others constituting a majority of the employees of the complainant, left the employ of the complainant, or, in common parlance, "went on strike," and made certain demands as a condition of their return to work. The complainant refused to agree to all those demands, and thereupon the defendants placed pickets around the property of the complainant and carried on a systematic course of intimidation over the other workmen of the complainant, for the purpose of preventing any workers remaining in complainant's employ, and of rendering it impossible for complainant to carry on its work; that their attitude has not simply been that of peaceful persuasion, but they have assumed a hostile and assaulting attitude towards the complainant's workmen, actually assaulting and beating and inflicting bodily injuries upon some of them, and indulging in threats of injuries and battery upon others if they continued to work; that all this has been the result of a conspiracy between the defendants and their confederates and associates, to prevent the complainant obtaining workmen, and to inflict injury upon it, so as to compel it to accede to the demands of the defendants.

[1] The defendants submit an affidavit denying that they have exercised or contemplated any violence. They admit that they did leave the employ of the complainant and made certain demands and conditions, to be acceded to by complainant before they would return to work. They deny any intention to use violence, and insist that they desire only to conduct their strike in an orderly and peaceful fashion, using peaceful and persuasive methods. A consideration of all the affidavits, however, satisfies this court that the condition of affairs complained of in the bill is a direct sequence of the differences between the complainant and its workmen, and of the strike initiated and conducted by the defendants, or a great many of them, with others. In no other way can the acts of violence narrated in the affidavits or the injuries done to the plant and property of the complainant be accounted for. While it may be impossible to identify any particular

individual as the one who shot out the lights, or committed the other acts against the property of the complainant, calculated to injure its property and harass and obstruct it in its operations, yet it is manifest that these acts, as well as the acts of violence upon the persons of its employees and the threats extended to them, are the sequence of the strike and are in pursuance of the intentions, threats, and acts of the defendants.

The fundamental basis of this free government is that its citizens shall be free—free to own their own property, and perform their own tasks, and follow their own lives, in pursuit of their own happiness, as each sees fit, provided only that the laws of the republic are observed. The moment any number of citizens, relying on greater physical strength, assume to themselves, by violence or intimidation, to prevent another citizen from exercising his legal rights, or by unlawful coercion, inducement, or persuasion attempt to put an end to the freedom of another citizen, by depriving him of the power to use his own labor and enjoy his own property as allowed by law, at that moment the ordered freedom of the republic is destroyed and the despotism of a lawless mob substituted.

The difference between a mob of lynchers, who put a helpless captive to death without trial, and a mob of so-called strikers, who beat a helpless fellow workman because he differs from them in opinion as to how he shall exercise his undoubted legal rights, is one of degree, and not of kind. In either case, it is an essential law of a free people that is violated. Nothing may be more base and cowardly than the assault of a number, relying on the strength of their numbers, upon an unprotected individual, whose helplessness is taken advantage of to compel him, by physical maltreatment, to yield up his legal rights, unless it be the willful failure of the guardians of the peace to afford protection to the weak, or of the courts to award the shield of the law's enforcement.

[2] Whatever may have been supposed to be the ancient rule that an injunction could not issue from a court of equity to restrain the commission of a crime, it may be regarded as settled in this country, since the decision in the case of In re Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092, that the fact that the threatened invasion of plaintiff's rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party.

In the case of Hitchman Coal & Coke Co. v. Mitchell, 245 U. S., 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, the Supreme Court of the United States has held that the act of any one intending to do that which is calculated in the ordinary course of events to damage, and which does in fact damage any person in his property or trade, is malicious in law and actionable, if done without just cause or excuse, and an injunction will lie from a court of equity to prevent the act, and the same principle is affirmed in the case of Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286.

The statute of Congress enacted October 15, 1914, generally called the "Clayton Act" (38 Stat. 730), does not prohibit injunctions in cases such as the present, where unlawful intimidation or other unlawful acts exist. Application of that act is clearly stated by the Circuit Court of Appeals for the Sixth Circuit, in King et al. v. Weiss & Lesh Mfg. Co. (C. C. A.) 266 Fed. 257.

The three associations named are all unincorporated associations. An injunction, which means punishment for disobedience, cannot issue against a nonexistent legal entity, such as an unincorporated association. As in the case of a copartnership, the writ is to the members as individuals. Where they act as an association, that is but evidence of the joint as well as the individual action of the parties. If it be so, as claimed by some defendants, that the acts complained of were done without their knowledge, then no harm will be done by an injunction against doing what they do not claim a right to do.

It is therefore ordered and adjudged that the complainant is entitled to a temporary injunction in this case, enjoining the defendants and each and every of them, and all persons knowingly acting with knowledge of this order, until the further order of the court, from:

(1) Interfering or attempting to interfere, by violence, threat, assault, or intimidation, with complainant's employees, or any of them, for the purpose of causing or inducing any of complainant's employees to quit his employment or cease work at complainant's plant.

(2) Interfering or attempting to interfere with complainant's employees without complainant's consent, and for the purpose of knowingly and willfully bringing about the breaking, by complainant's employees, of their contracts of service and leaving its employment.

(3) Knowingly and willfully persuading, inducing, or violently causing complainant's employees, present or future, to leave complainant's service, and especially from knowingly and willfully inducing, persuading, or forcing, or compelling by threats or other intimidation, such employees, present or future, to leave complainant's service without complainant's consent.

(4) Trespassing on or entering upon the grounds or premises of complainant for the purpose of interfering therewith, or hindering or obstructing its business, or with the purpose of compelling or inducing by threats, intimidation, violence, or abusive language or persuasion, any of complainant's employees to refuse or fail to perform their duties as such.

(5) Compelling or inducing, or attempting to compel or induce, by threats, intimidation, or violence, or abusive language, any of complainant's employees to leave its service, or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person, desiring to seek employment from complainant, from so accepting such employment.

(6) From assembling about or picketing the shop or place of business of the complainant under such circumstances or in such numbers as to menace the peace or produce intimidation by reason of the very fact of numbers.

A writ of temporary injunction will issue, enjoining the defendants and each and every of them, and all other persons acting with knowledge of this order, according to the terms of this order. It is further ordered that the complainant do within five days file its bond in this court, with surety to be approved by the judge of the court, or, in his absence, by the clerk thereof, to the defendants in the sum of $5,000, conditioned for the payment of all such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby.

ZELLER v. AMERICAN INTERNATIONAL CORPORATION.

(District Court, E. D. Pennsylvania. August 3, 1921.)

No. 8064.

Public lands ⇐167—Statutory action to determine right to land patent ejectment in form, but not in substance.

An action brought under Act Pa. April 3, 1792, § 11, 3 Smith's Laws, p. 70, providing for an action to determine priority of right to a patent for "unknown" state lands, which, properly brought in the form of an action in ejectment, differs from ejectment in that plaintiff is not required to allege or prove title in himself.

At Law. Action by Frank M. Zeller against the American International Corporation. On rule by defendant for judgment on the pleadings and motion by plaintiff to remand to state court. Rule for judgment discharged, and motion passed.

James Wilson Bayard, of Philadelphia, Pa., W. Roger Fronefield, of Media, Pa., Louis B. Runk, of Philadelphia, Pa., Ralph J. Baker, of Harrisburg, Pa., Clarence W. De Knight, of Washington, D. C., and Nicholas H. Larzelere, of Norristown, Pa., for plaintiff.

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The rule is by defendant; the motion by plaintiff. The facts are clear enough, but there seems to be such a difference in the statement of them that we give our version with some feeling of diffidence. If we have the wrong concept, either party may move for a reargument.

1. The rule for judgment is based upon the record situation that the plaintiff has brought his action in ejectment for lands in the possession of the defendant and claimed by it to be its property, and that the statement of claim shows no right of possession, much less right of ownership to be in the plaintiff.

It is idle to discuss the legal merits of the question as thus presented, because the very capable counsel for plaintiff frankly admits that, if such is the question before us, it admits of but one answer. The real question, therefore, is not the merits of the question suggested by this presentation, but what the question to be decided is.

The plaintiff presents a wholly different question. It will appear out of an outline fact statement. Parties known to this record as Black and Bohlen owned an island in the Delaware river, which has since become known to the whole world as Hog Island. Adjacent to it, or part of it (as the fact may be), is a tract of land to which the plaintiff, or some one, has given the name of "New Providence island." The Blacks and Bohlens sold and agreed to convey all the lands referred to by "a good and marketable title" to the defendant. The defendant was willing to accept title to the part which we have called "Hog Island" (to distinguish it from the part which we have called "New Providence Island"), but raised the question of whether the grantors had the title called for by the contract to the other part of the land to be conveyed. An amicable action was brought, really with the objective of clearing up the title. In this action the grantors asserted title, basing it upon the averment that the lands (the title to which was in dispute) were accretions to the lands to which they admittedly had title. The defendant set up title to the lands in dispute to be in the commonwealth. This was based, because it must have been so based, upon the fact that the New Providence lands were not mere gradual accretions to the Hog Island lands, but a separate and independent island formation, which had arisen out of that part of the bed of the river which had been abandoned by the United States as part of our navigable waters. No question is raised of the disputed lands being within the territorial limits of Pennsylvania, and this will, in this discussion, be assumed to be the fact.

The court disposed of the case before it by the ruling that, whether the vendors had or had not title, they had not a title so far marketable as that the vendees were obliged to accept it under the agreement of purchase.

The plaintiff, in the meantime, had sought to avail himself of the provisions of an act of assembly which gives the right to the discoverer of before unknown island lands to apply for a patent therefor. The state officials denied him a patent and his right to any of the claims he presented. The defendant then made a similar application. Caveats were filed by each of the parties against the other. What is known as the "board of property," acting for the state, decided in favor of the application of defendant and directed a patent to issue to it. The present plaintiff then brought the action, in the instant case, under the provisions of the act of assembly. It is in the form, and admittedly properly so, of a common-law ejectment, and subject, we assume, to the regulations of the Practice Acts. Previously, however, the plaintiff had instituted common-law actions in ejectment independently of the action authorized by the act of assembly, to which reference has several times been made. These actions were decided against the plaintiff by the trial court (court of common pleas of Delaware county), and the judgments affirmed by the Supreme Court of the state on appeal, 114 Atl. 778. The gist of the ruling was that under the law of Pennsylvania ejectment determined directly, not the title to lands, but the right of possession, although indirectly and consequentially it did, of course, settle the title; that in such actions the plaintiff must recover, if at all, on the

strength, as the expression is, of his own title, not the weakness of the title of the one in possession, or indeed the absence of any show of title; and that the plaintiff had not averred any title to be in him. Influenced thereto by some expressions in the opinion accompanying the ruling of the Supreme Court, the plaintiff in the present action has, since it was brought, applied to the court of common pleas of Dauphin county for a writ of mandamus, directed to the proper state officials, requiring them to take the action favorable to the plaintiff, which he claims under the state law to be his right.

This recital of the fact situation makes clear why counsel for plaintiff admits that, if the present action be, as counsel for defendant views it, common-law ejectment, the plaintiff is out of court, and the defendant to have the right to judgment.

Counsel for defendant is wholly wrong in his view of what the true nature of the action is. It is, it is true, in form ejectment, because the act of assembly directs that this shall be its form. Its real nature nevertheless is the equivalent of a feigned issue to determine to whom a patent should issue, the question having first been made a judicial question, and the mode of determining it determined by the Act of Assembly. The decision of the issue raised determines the whole controversy, a determination in the way of which there are otherwise technical obstacles.

We will enter into the discussion by first taking a more or less a priori view of the subject of inquiry, and finding to what this view leads, and then subjecting the soundness of the conclusions reached to the test of the statutory enactments and the adjudged cases. At the risk of stating merely the clearly obvious, we begin with the double observation that the title to all lands commonly designated as unseated is in the commonwealth, and that no appropriate and adequate mode of settling controversies between rival private disputants over the title to lands, the legal title to which is in the commonwealth, is afforded by the laws of Pennsylvania. Because of this latter fact it has always been deemed necessary in ordinary actions in ejectment to show title out of the commonwealth before showing title by descent or occupation under a claim of ownership. Neither of the parties to this controversy can show a paper title beginning with a grant from the state or antedating its title. Indeed, if the plaintiff be right, neither of them has any paper title whatever, or had when the controversy arose.

The second observation made is that it was necessary, or at least desirable, for the state to establish a system to avoid or regulate disputes which would otherwise arise over the possession of what we will call, for want of a better expression, newly created lands. A claim of more or less merit might belong to one who had discovered, occupied, and improved such lands. Whatever weight such a claim to consideration might have as against the state, it would have acknowledged merit against another claimant who had done nothing except to discover the weakness or want of title in the occupier of lands and who sought to profit by his discovery through securing title from the state and by means of this ousting a prior occupant. At the same time the interests of the state demanded that a reward be held out to those who were the

first to disclose to the state the fact that there were lands belonging to it, which, if neglected, might be occupied by some one, and the otherwise just claim of title by the state be imperilled or at least embarrassed. It was well, therefore, to follow the policy adopted in escheats and qui tam actions.

This situation prompted the passage of the act of 1792. Its purpose and legal intendment is that the discoverer of lands, which have no other owner than the state, who first brings the existence of the land to the notice of the state, shall be rewarded by a patent on application, etc. This was a wise and just thing to do. It was recognized, however, that the right to thus apply for a patent was a privilege open to abuse. The hearing thereon must often be ex parte, and be conducted in the absence of others who had good claim of right to be heard. The difficulty thus presented was solved by the grant of a patent to the first applicant, and then subjecting the justice of his claim to judicial investigation, the event of which determined the right. There was accordingly given the right to institute an action for this purpose, and in order not to put the person, who was in possession under a claim of ownership, to any disadvantage, he was admitted to the right to institute an action without the necessity of surrendering his possession, the formality of which was necessary, if he brought common-law ejectment. All which remained was to provide the required machinery in the form of an appropriate action. The closest analogue at hand was common-law ejectment, modified in the feature noted. That there would have been propriety in the occasion for such a law, and in having it take this form would, we assume, be admitted. The only inquiry left is: Was such a law passed? The plaintiff asserts it was; the defendant asserts that the only remedy given is the writ of ejectment known to the common law of Pennsylvania.

The answer to the question raised must be found in the statute itself. There have been a number of such statutes, some general and some relating to islands in the named rivers of the commonwealth. The industry of counsel has resulted in the agreement that the question now presented is to be determined by Act April 3, 1792, § 11 (3 Smith's Laws 70). This, as we read it, provides that, "when any caveat is determined by the board of property," a patent shall be withheld for six months, "within which time the party against whom the determination of the board is may enter his suit at common law, but not afterwards; and the party in whose favor the determination of the board is shall be deemed and taken to be in possession" for the purpose of trial (however the actual possession may be), but such "supposed possession shall nevertheless have no effect upon the title," etc. If no suit is brought, the patent shall issue to the applicant; but, if suit is brought, the patent shall issue to the successful party, and in either event shall pass a good title, etc.

The meaning of this statute is so far beyond any need of the statute being construed that in construing it we have merely quoted it verbatim, paraphrasing its language only for brevity. The conclusion, in consequence, is clear that the plaintiff in the present action is not called

upon to show title upon which alone he could recover in a common-law ejectment, but merely his right to a patent as against the defendant. The real purpose of the enactment seems to us to be this: The state might, of course, convey whatever title it held to the grantee of its choice. The result of this might, however, be an injustice to the occupier, and give an unfair advantage to the grantee, who thereafter would recover, not on the merits of his claim of title as against the occupier, but wholly because of the inability of the occupier to assert any title as against the commonwealth or its grantee.

This opinion has already reached such a length that we will not extend it by any discussion of the cases to which we have been referred, but will content ourselves with the citation of the leading ones as evidence that we have had them in mind, and that none of them are in conflict with the conclusions reached. Act July 3, 1792 (3 Smith's Laws, 70); Zeller v. American Inter. Corp. (Pa.) 114 Atl. 778 (not yet [officially] reported); Blaine's Lessee v. Crawford, 1 Yeates (Pa.) 287; Bell's Lessee v. Levers, 3 Yeates (Pa.) 23; Ruggles v. Gaily, 2 Rawle (Pa.) 232; Rose v. Klinger, 8 Watts & S. (Pa.) 178; Carothers v. Dunning's Lessee, 3 Serg. & R. (Pa.) 373; Hunter v. Howard, 10 Serg. & R. (Pa.) 243; Shoenberger v. Baker, 22 Pa. 398; Wilson v. Altemus, 2 Watts & S. (Pa.) 255.

Independently of the conclusion indicated above, the position of the defendant being that the plaintiff can in no event recover without the showing of a patent to him, or evidence of a title good with title out of the commonwealth, and indeed (as we understand the position of counsel for defendant) that the plaintiff is concluded by the refusal of a patent to him, the logic of the case, as now presented, is that we should not, in any event, rule it against the plaintiff, but await the result of his efforts to compel the issuance of a patent to him.

The rule for judgment is discharged.

2. Respecting the motion to remand, we have been left in some doubt whether the plaintiff has withdrawn it, or is asking that the right of defendant to have the case here tried be determined. We accordingly do not dispose of the motion now, but give leave to the plaintiff to withdraw it, or to set the case down for reargument upon this motion.

SIDNEY SPITZER & CO. et al. v. MONROE COUNTY et al.

(District Court, S. D. Alabama. July 29, 1921.)

1. Counties ⇐190(2)—Counties in Alabama may not make special levy in excess of 2½ mills.

Under Const. Ala. § 215, providing that no county shall levy a tax in any one year in excess of one-half of 1 per cent. of the taxable property therein, provided that to pay any debt contracted for the erection of public buildings, bridges, or roads it may levy and collect "such special taxes, not to exceed one-fourth of 1 per cent., as may have been or may be authorized by law," and Code Ala. 1907, § 134, which limits the authority of a county board to levy special taxes to a tax not exceeding

one-fourth of 1 per cent., a county board is without power to levy a special tax to pay for road work in excess of one-fourth of 1 per cent., though the excess is to be taken out of the general tax of one-half of 1 per cent.

2. **Counties ⊜190(1)—County board not authorized to anticipate surplus in general fund by levying special tax.**
Code Ala. 1907, § 5766, authorizing the court of county commissioners or boards of revenue of any county to transfer to the road fund any surplus of the general fund, does not give them power to anticipate a surplus and apply it in advance to a road debt by levying it as a special tax.

3. **Counties ⊜190(1)—County boards not authorized to split general levy.**
Code Ala. 1907, § 1335, requiring payment to the cities within a county of one-half of so much of a special tax as was collected on property located in such cities, confers no authority on a county board in levying taxes to split the general levy of 5 mills and levy a part as a special tax.

4. **Counties ⊜190(2)—Taxing powers of counties are conferred and limited by statute.**
A county has no power of taxation except such as is conferred by statute, to be exercised subject to the conditions and limitations prescribed.

5. **Estoppel ⊜62(3)—County held not estopped by acts of officers.**
A county *held* not estopped to assert the invalidity of a contract made by the county board, which it had no power to make, by the act of its officers in pleading such contract as a defense to an action against it.

6. **Counties ⊜111(1)—Contract to levy special tax binding.**
A county *held* bound by a contract made by its board of revenue, based on a valuable consideration, to levy a special tax for the payment of county warrants held by complainants, which levy the board had authority to make, and also *held* bound to apply the proceeds of a similar levy which had been made and collected to the payment of such warrants.

In Equity. Suit by Sidney Spitzer & Co. and others against Monroe County and others. On motion to dismiss bill. Denied.

G. W. L. Smith, of Brewton, Ala., for plaintiffs.

F. W. Hare, C. L. Hybart, and Barnett, Bugg & Lee, all of Monroeville, Ala., for defendants.

ERVIN, District Judge. The bill in this case was filed by three parties who are nonresidents of Alabama, against Monroe county, Ala., the board of revenue of said county, and the tax collector and treasurer, and various other county officials. It sets up that plaintiffs had become the owners of some $191,000 of interest-bearing warrants which had been issued by Monroe county in payment for construction of roads through the county, and that some portion of these warrants are past due and the balance will fall due at regular future installments.

That on February 25, 1920, an agreement was entered into between plaintiffs and the board of revenue of Monroe county which was amended July 13, 1920, whereby for a valuable consideration the said board agreed to levy the special tax of 2½ mills for the purpose of paying plaintiff's warrants, and that said board at the same time also agreed to levy a special tax of 1½ mills on the dollar out of the 5-mill general tax for the years 1920 and 1921, to pay the principal and interest on the said warrants.

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

That the said board duly levied the taxes as agreed, for the year 1920, but that in the early part of 1921 said board undertook to change both of the levies so as to deprive plaintiffs of the benefit of both, said 2½ and said 1½ mill taxes, whereby the obligation of the contract between plaintiffs and defendant was impaired.

It is sought to compel the said board of revenue to revoke the levies they had made for the year 1921 and to make said levies for the year 1921 as they had agreed to do.

It is further sought to compel the treasurer and the tax collector to segregate the amount collected under this levy and to pay the same over to plaintiffs and to forbid them from paying the proceeds of these levies to any one other than the plaintiffs.

The defendants move to dismiss the bill for want of equity on the ground that so far as the county board undertook to make the levy of 1½ mills out of the 5-mill tax, that said agreement was void for want of power in said board to make such agreement, and further because the bill sought to deprive the board of its discretionary powers in making such levies and appropriations. The matter was argued before me at length and briefs filed by all parties and taken under submission.

[1] Local Acts 1915, p. 394, creates the board of revenue for Monroe county, Ala., and gives it all the authority, jurisdiction, and powers which are now held or may hereafter be conferred on county commissions or like bodies in the state. Section 13 reads as follows:

"That said board of revenue is hereby given legislative, judicial, and executive powers in the matter of building, maintaining, changing, establishing and abolishing public roads, bridges and ferries. It may establish, promulgate, and enforce new rules, regulations, and laws not inconsistent with the general and special laws of this state, which are necessary to make, improve, and maintain a good system of public roads, bridges and ferries in said county."

Not one word is said as to taxation. The board is expressly limited in the new rules, regulations, and laws that it may pass to such as are not inconsistent with the general or special laws of this state.

What powers as to taxation then are held by the boards of revenue or county commissioners in the state?

Section 215 of the Constitution says:

"No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

The "such special taxes" undoubtedly refers to the one-fourth of 1 per centum authorized as a special tax.

It is exceedingly doubtful from the way this provision reads if a county may now even under legislative authority levy any special taxes at a higher rate than one-fourth of 1 per centum for the express purpose of paying its road debts.

The Constitution authorizing the levy by the county of a special tax reads:

"Any county may levy and collect such *special taxes*, not to exceed one-fourth of one per centum, as *may have been or may hereafter be authorized by law.*" (Italics mine.)

The only authorization by law I find for the board to levy a special tax is in section 134 of the Code, which limits the authority of the board to levy a special tax not to exceed one-fourth of 1 per centum. The Constitution in giving the Legislature the power to authorize the levy by the county of special taxes limits that power to the rate of one-fourth of 1 per centum, and the same Constitution limits the right of the county to levy such special taxes only as "may have been or may hereafter be authorized by law." It therefore follows, it seems to me, that the board had no power to levy any special tax beyond the rate of one-fourth of 1 per centum: First, because the power of the Legislature to authorize the levy was limited by the Constitution to that rate; second, because there is no statutory authority anywhere shown giving the board the right to exceed that rate. The contracts by which the board bound itself to levy 1½ mills out of the general tax of one-half of 1 per centum was therefore unauthorized and void, and the county is not bound by this contract made by the board as its agent.

[2] In view of the contention that certain provisions of the Code and certain acts of the Legislature have conferred upon the county board the power to make this levy, I will proceed now to discuss these provisions and their effect, leaving out of view the constitutional limitation just referred to.

Code of 1907, § 134, provides that a special tax of not exceeding one-fourth of 1 per centum shall be levied for the purpose of paying any debt for building roads, etc. Section 3313 of the Code says:

"The court has authority—* * * (2) To levy a general tax, for general, and a special tax, for special county purposes, according to the provisions of this code."

Section 5766 says:

"The court of county commissioners or boards of revenue of any county of the state may transfer to the road fund of the county any surplus of general funds of the county in the county treasury or any part of such surplus whenever in the judgment of said court or board it will promote the interest of the county to make such transfer."

Sections 5765 and 5767 confer general superintendence of and jurisdiction over the building and maintenance of the public roads, bridges, etc., in their respective counties, and section 5767 concludes:

"To such courts or boards the powers of the state pertaining to the construction, maintenance, and improvement of the public roads, bridges, and ferries are delegated when not otherwise provided by law."

These are the general provisions in the Code, and they are not added to by the special act creating the board of revenue for Monroe county found in the Local Acts of 1915, p. 394, where section 13 of the act, after conferring on the board powers practically the same as in sections 5765 and 5767, concludes as follows:

"It may establish, promulgate, and enforce new rules, regulations, and laws *not inconsistent with the general and special laws* of this state, which are necessary to make, improve, and maintain a good system of public roads, bridges and ferries in said county." (Italics mine.)

We see by this limitation so put on the general powers conferred, that the Legislature did not intend to invest this board with any greater powers than that possessed by other like boards, nor did it intend to give it power to do any acts beyond those recognized by the existing laws. Both the Constitution and statutes provide for a general and a special tax to be levied by county boards.

The statute, Code, § 5766, provides for the contingency of an excess in the levy for general current expenses so that such excess may be tranferred to the road fund and so be applied to the unpaid county debts for roads, bridges, etc.

There is no statutory authority I have seen authorizing this county to split the general tax of five mills into special levies, and in the absence of such special authority the board had no power to do it.

Again, the Legislature, having provided this way of applying a portion of the five-mill tax to the payment of the county's debts, have thereby forbidden any other way of accomplishing this purpose by the county board; the only discretion given is as to what portion of the excess should be transferred.

It will not do for the board to say, as we were authorized to transfer the excess and so pay the county's debts, we will do the same thing by levying a portion of this tax as a special tax.

The Legislature having provided not only that a portion of the general tax might be so applied, but how it could be done, the board was bound by the method provided, and had no discretion as to the method to be followed.

Again, the Legislature provided that the excess or unused portion of the general tax levied might be used by transferring it to the bridge and road fund; this did not confer on the board the power to estimate in advance that there would be a surplus and how much such surplus would be and apply it in advance to the road debt by levying such estimated excess as a special tax.

The power conferred was to use some portion or all of the unexpended tax money in a special way, and not to anticipate the current expenses of the county and appropriate the estimated excess.

The broad general powers conferred on the county boards by the Code and the special acts do not mention taxation, nor do they include it; they must be read in connection with the provisions found in the Constitution and the Code regulating the levy and the rate of taxation, and when so read and construed there is no conflict.

They must also be read in the light of the decisions declaring the powers of such boards as to taxation.

[3] It is true that the Legislature has undertaken to give authority to certain counties to split the five-mill tax in making the levy, and it is held in Commissioners of Calhoun County v. Anniston, 176 Ala. 605, 58 South. 252, that—

"There is nothing offensive to the Constitution in the act authorizing the levy of the tax, since the same is within the constitutional limit of one-half of one per cent., authorized to the county."

Such acts seems to have been recognized by the Alabama Supreme Court in a number of cases, but the very fact that the Legislature has passed them shows that the boards in the absence of such legislative authority had no power to do so.

The expressions used in the decisions passing on these special acts must be construed in the light of the questions they were considering, and not as holding that the boards had such power in the absence of the special acts. "The generality of the language used in an opinion is always to be restricted to the case before the court, and it is only authority to that extent." Southern Railroad Co. v. St. Clair County, 124 Ala. 504, 27 South. 29.

An expression used by the court in Board of Revenue of Jefferson County v. Birmingham, 172 Ala. 153, 54 South. 762, "Whether or not so much of the act, or so much of section 1335, as requires the payment to the municipality of one-half of the tax levied for a specific purpose, under subdivision 'a' of section 215 of the Constitution, is valid, we need not decide, as that question is not involved," is significant. The court was then passing on the effect of a special act and of section 1335 of the Code of Alabama requiring the payment to the cities located in the counties of one-half of so much of the special tax as was collected on the property located in such cities. It is here contended that these provisions give this board the right to split this one-half of 1 per cent. tax.

I cannot, however, agree to this because these acts were not written to confer additional power on the county boards as to the levy of taxes, but solely to give the cities a portion of such special taxes as might legally be levied and collected by the counties.

In its practical results there is no difference between a special tax and the special application of the whole or a part of the general tax for a particular purpose. Neither can be done in the absence of a law sanctioning it.

[4] Whatever power the county possesses or duties it is required to perform originates in the statute regulating it or declaring the duty. Southern Railroad Co. v. St. Clair County, 124 Ala. 495, 27 South. 23.

"The municipal corporations of a state having no inherent power to tax must take such power as is conferred upon them under the conditions and limitations that may be prescribed, and only for such purposes as may be expressed. This is fundamental. The authority is not only a delegated authority conferred by the state, but it is to be assumed that the state has given all it intended should be exercised, and the grant, like that of all special and limited grants, is to be strictly construed. Express power to levy a particular tax is a negation of the power to lay others." Cooley on Taxation (3d Ed.) 554; Phœnix Carpet Co. v. State, 118 Ala. 143, 22 South. 627, 72 Am. St. Rep. 143.

It is urged upon me by the defendant that when a county has authority to levy a given rate of tax for general county purposes, no holder of county warrants can demand that they shall carve a special tax out of this general fund for the benefit of the holders of such warrants unless the statute requires it. Grand County v. King, 67 Fed. 202, 14 C. C. A. 421; Harper v. Daniels, 211 Fed. 57, 129 C. C. A. 242; Rollins v. Grand County, 199 Fed. 71, 117 C. C. A. 583.

It will be noticed that this ruling is based upon the fact that the courts have no power to require the county boards to exercise the discretion which is given them by law as to how they shall do what the law authorized them to do.

Under the facts alleged in this bill, if the county board of Monroe county made a contract as alleged, upon valuable consideration, then they have lost the discretion with which they were vested by the statute, and if they had the power to make this contract, the court could compel them to carry out its terms. But as I find that the board did not have this power, it necessarily follows that their contract by which they agreed to make this levy of 1½ mills out of the 5-mill general tax, for the benefit of the plaintiff, was not binding on them, because of the want of power on the part of the board to make the levy or to contract to do so.

[5] In the bill filed in this cause it is set up that the county board is estopped to deny its agreement to levy a 1½-mill tax out of the 5-mill general tax for the benefit of the plaintiff, because in a bill filed by a taxpayer against the defendant it was set up as a part of its defense that it had arranged for a levy of a special tax which would include this 1½-mill in settlement of its debts to plaintiff, and that on the hearing it got the benefit of this representation in its answer.

The question then arises whether the ordinary rule of estoppel, which applies to individuals and forbids them from denying a state of facts which they have set up and gotten the benefit of in legal proceedings, applies to municipal corporations. In City of Demopolis v. Marengo County, 195 Ala. 214, 70 South. 275, the Supreme Court of Alabama passing upon the defense of voluntary payment held that this defense does not apply to an unauthorized payment by the county board, and quoted from the Village of Ft. Edward v. Fish, 156 N. Y. 363, 50 N. E. 973, as follows:

"That the doctrine of voluntary payment applies to individuals who have power to do as they wish with their own, but it does not apply to an agent of a municipal corporation who pays out its money without power, to one who accepts it with knowledge. * * * Such a payment is not voluntarily made by the corporation, but by its agent in excess of his authority and in defiance of its rights."

In the Demopolis Case the court before referring to this question had already said:

"A county is, in one sense, a corporation, and in that sense it has its officers or agents, who, when acting within the authority conferred upon them by law, may legally bind the county. In another sense a county is a political subdivision of the state, created for the purpose of aiding the state in the administration of the government of the state. In this latter sense a county is an arm of the state; its officers are public officials, and are officers holding

office under the laws of the state within the meaning of our Constitution; and their compensation is fixed by law. When, within the scope of their powers as fixed by statute, the county commissioners of a county are dealing simply with the business affairs of the county, such commissioners are, in fact, the agents of the county, considered as a corporation, and they may bind the county just as the agents of any other corporation may bind the corporation of which they are the agents, so long as they act within the actual scope of their authority. When, however, the members of the court of county commissioners of a county act in the other and broader field—when they leave the realm of business and are acting in their capacity as 'officers holding the office under the laws of this state'—their acts can confer no more rights upon persons claiming through such acts than do the acts of any other public official, or set of public officials, of the county or state. It may be well to bear this distinction in mind, for the act of a public official, no matter what his apparent authority may be, which he is not authorized to perform, is void, not merely voidable, and confers no rights of any sort upon any one. 'All who deal with officers or agents of the government must inquire at their peril into the extent of their powers.'"

It seems to me the same reason which excepts municipal corporations from the rule as to voluntary payments must necessarily apply to the doctrine of estoppel because if the reason applies the rule should also apply.

Finding therefore that the acts of the county board so far as it undertook to agree to levy a 1½-mill tax out of the general 5-mill tax it was authorized to levy for county purposes, as a special tax to pay the plaintiff's debt, was void for the lack of authority of the board to make such levy or agreement, I think for the same reason the fact that the county may have gained a benefit by setting up this fact in its answer does not estop them in this suit.

[6] Under the views I hold as to the agreement of the county board to carve 1½ mills from the general 5-mill tax, I would sustain the motion of the defendant to dismiss but for the fact that the bill shows that the county board agreed not only to carve out this special tax of 1½ mills, but that it would levy the special tax which it was authorized to levy of one-fourth of 1 per centum or 2½ mills to be used in the payment of plaintiff's debt, and that it had failed to carry out this agreement, and had undertaken to use the levy of this special tax so as to deprive the plaintiffs of the proceeds of this levy.

Under the case of Board of Revenue v. Farson, 197 Ala. 375, 72 South. 613, L. R. A. 1918B, 881, the agreement of the county to levy this tax for the benefit of the plaintiff being upon a valuable consideration, plaintiff acquired rights in this levy that the county board had no right to try and deprive him of by any subsequent change of the levy so as to appropriate the money to other purposes.

The bill also charges that the county officials are seeking to deprive plaintiffs of the money raised on the special levy of 4 mills which was made for the plaintiffs for the year 1920. This levy having been made and the money collected under it thereby such money is appropriated to the purposes of the levy and plaintiffs are entitled to have it paid over to them in satisfaction pro tanto of their warrants. Farson v. Bird, 197 Ala. 384, 72 South. 550.

Under these two charges the bill has equity, and therefore the motion to dismiss the bill will be denied.

WATER, LIGHT & POWER CO. v. CITY OF HOT SPRINGS, S. D.

(District Court, D. South Dakota, W. D. July 13, 1921.)

1. **Electricity ⇐11—Cities in South Dakota may make valid contracts fixing rates of electric company.**
The statutes of South Dakota (Pol. Code 1903, § 1229) which authorize municipal corporations, to provide for lighting streets and public grounds, to regulate openings for laying gas or water pipes, and the erection of electric light poles, and provide that any company organized for the purpose of manufacturing gas or electricity "has the right, by consent of the city council, to lay down pipes or string wires on poles in the streets and alleys of any city in this state, subject to such regulations as such city may by ordinance impose," confer no power upon a city to regulate or change rates to be charged for electric current, and a city, in granting a franchise to an electric company, may by contract, accepted by the company, fix maximum rates of charge for a stated term, which contract is valid and binding during the term, regardless of the fact that the rates so fixed are or may become confiscatory.

2. **Constitutional law ⇐205(1)—Franchise ordinance and contract with electric company not grant of special privilege or immunity.**
The provision of Const. S. D. art. 6, § 12, that "no law making any irrevocable grant of privileges, franchises or immunity shall be passed," *held* not violated by a city ordinance granting a franchise for a term of years to an electric company, including a contract fixing rates to be charged by the company.

In Equity. Suit by the Water, Light & Power Company against the City of Hot Springs, S. D. On motions by defendant to dissolve preliminary injunction and to dismiss bill. Motions granted.

Helm & Lewis, of Hot Springs, S. D., and M. F. Harrington, of O'Neill, Neb., for plaintiff.

Martin & Mason, of Deadwood, S. D., for defendant.

ELLIOTT, District Judge. [1] It appears by the bill of complaint filed in the above-entitled case that plaintiff is the holder of franchises in the city of Hot Springs, S. D., for the furnishing of electricity for heat, light, and power, and for water. The rights of the parties are dependent upon a construction of their relations in the light of the provisions of the statutes of the state of South Dakota and the Constitution of said state, as they existed in August, 1913. At that time the city of Hot Springs was duly organized as a municipality under the general law of the state of South Dakota, and as such was vested with the powers granted by the general statutes of the state as they existed at that time, as hereinafter quoted and referred to.

It is alleged that in August, 1913, the defendant adopted and passed a franchise in favor of and granting rights to the plaintiff, which franchise fixed certain rates for light and power and fuel. A copy of the franchise is annexed to the bill, and it is unnecessary for me to include an analysis of its provisions here. On the 30th day of July the defendant passed, adopted, and put in force, as it did the franchise just referred to, another franchise whereby it fixed the charges for

water, and a copy of that franchise is also annexed to the bill. Both of these franchises were to be operative for a period of 20 years, and also contained a provision giving the defendant the right to purchase the property of the plaintiff, and a provision with reference to extensions in the event purchase was not made.

It is further alleged that the city council of defendant now threaten to disallow increased rates, and to compel the plaintiff to furnish light, power, fuel, and water at the respective rates named in the said franchises. Then follow allegations as to the value of the property, income therefrom under the conditions that exist, with proper allegations showing the inadequacy of the prices named in the franchise to return a profit upon the actual investment, and therefore the allegation that the rates named in the franchises are confiscatory, and that to compel plaintiff to furnish either light, power, fuel, or water at the rates named in the franchise will deprive it of its property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, and will not furnish it any reasonable return upon the actual, fair, just, and reasonable value of its property.

The bill of complaint was presented to this court by the plaintiff, with a prayer for an injunction, pending litigation, restraining the defendant from interfering with the plaintiff in the collection of its increased rates until the further order of the court. No notice had been given the defendant, but, owing to the distance counsel were from the residence of the court, plaintiff's counsel being at O'Neill, Neb., and Hot Springs, S. D., and the defendant and its counsel being at Hot Springs, S. D., the court signed such order, instead of an order to show cause, with the understanding with counsel for the plaintiff that they would take the matter up with counsel for the defendant and agree with them upon a date, meeting the convenience of both, for the presentation of a motion to modify or discharge the order of injunction, or such other motions as defendant might see fit to make.

Pursuant to that understanding, counsel appeared before the court on the 24th of June, 1921, and counsel for defendant filed a motion to dissolve and discharge the temporary injunction issued herein, for the various reasons therein stated, among others: (1) That the court is without jurisdiction to grant such injunction; (2) that it is apparent upon the face of the bill of complaint upon which the temporary injunction was issued that there was no jurisdiction in this court to hear, try, or determine the alleged cause of action set forth in the bill of complaint, or to issue the temporary injunction; (3) that the said bill of complaint upon its face does not state facts sufficient to constitute a cause of action in equity against the defendant.

At the same time defendant also filed a motion to dismiss the bill of complaint filed herein for all the reasons stated in said motion, upon the following grounds: (1) That the court is without jurisdiction to hear, try and determine the alleged cause of action; (2) that it is apparent upon the face of the bill of complaint herein that the bill of complaint herein does not state facts sufficient to constitute a cause of action against the defendant; (3) that it is apparent upon the face of the bill of

complaint that such bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

It was thereupon agreed by and between counsel that the motions should be presented together. After hearing counsel for the plaintiff and defendant upon the issues involved, briefs were filed, and such motions are now to be determined.

Upon the motion to dissolve and discharge the temporary injunction, defendant made a showing as to the value of the property, its income, etc., disputing the facts stated in the bill of complaint, wherein it is alleged that the rates as fixed by the ordinances are confiscatory. Certain other proofs were filed by the plaintiff, sustaining the allegations of the bill.

I am of the opinion that upon this motion the court cannot determine this issue. This is the material issue upon which plaintiff's demand for relief is founded, and there not only appears a reasonable ground for the allegation, but it appears that the plaintiff herein is acting in the utmost good faith. If the plaintiff has stated a cause of action, I am of the opinion that the plaintiff is entitled to the protection of the order pending litigation. I therefore do not think that this showing as to the value of the property and income, in support of the motion for dissolution and discharge of the injunction, should be seriously considered at this time.

The other ground stated in the motion to dissolve and discharge the injunction, and defendant's motion to dismiss the bill of complaint (which under our old practice would have been a demurrer), both raise the question of law which is determinative of the right of the plaintiff to proceed in this action.

The defendant, in presenting its motion, contends that the ordinances were contracts, and therefore the maximum rates which the ordinances fix were susceptible of continued enforcement against the plaintiff, although their operation would be confiscatory; and therefore further contends that the defendant city has a right to enforce the ordinance rates in consequence of the contracts, without reference to whether such rates were in and of themselves confiscatory. The defendant contends that under the provisions of law, hereinafter quoted, with no statutory or constitutional prohibition, the defendant had the power to enter into the contracts with the plaintiff, fixing the rates for a definite time, named in the ordinances, governing both the plaintiff and the defendant during the time therein named, and that the enforcement of such rights is controlled by the obligation resulting from the contracts, and therefore the question of whether such rates are confiscatory becomes immaterial. The motion of the defendant to dismiss admits all of the material allegations of the bill of complaint which are well pleaded, and there is no technical objection as to the sufficiency of the pleadings to raise the issue. It follows that the rates herein involved are conceded to be confiscatory, for the purpose of these motions.

The rates, then, cannot be enforced, unless they are the result of and secured by a contract obligation. The existence of a binding contract as to the rates named in the ordinances set forth in the bill of

complaint, therefore, is the single issue upon which the determination of defendant's motions must depend. The determination of this issue depends, first, upon the question of the power of the parties plaintiff and defendant to contract on the subject; and, second, if they had such power, whether they exercised it. There has been no contention made that the plaintiff had no contractual power. This reduces the issue to the question: Had the defendant, under the laws and provisions of the Constitution of South Dakota, such power?

Consideration of what the various states have held, under circumstances similar to those set forth in the bill of complaint, but adds to one's confusion. The real question to be determined here is: What were the rights of these parties under the statutes and Constitution of this state? Incidentally, it may be mentioned here that, upon the showing of the defendant upon its motion to dissolve and discharge the injunction, it was shown that in addition to the allegations set forth in the bill, that the plaintiff or its predecessors in interest, at the time of the passage of the ordinances in question, filed their acceptances in writing, and this, it was conceded by all parties, should be taken into consideration by the court in determining this issue. No formal stipulation was entered into to that effect, but I deem it of sufficient importance, if this decision be reviewed, that counsel should stipulate that fact, or amend the bill of complaint to show it, so it may be considered by the appellate court from the same viewpoint. This latter element should be added to the statement heretofore made.

Defendant's contention is that the enactment of these ordinances, granting the franchises and naming the rates to be charged, and the actual acceptances in writing of the same by the utility corporation, constitute contracts, binding as such upon both the defendant and the utility corporation, the predecessor of the plaintiff. The plaintiff resists this contention, and denies there is any power conferred by statute upon the city council to enter into contracts upon the subject of rates.

The plaintiff, in support of its position, presents a long list of authorities holding that, although the governmental agencies have authority to deal with the subject-matter, fix and enforce reasonable rates to be paid public service 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 corporation. The defendant, in support of its motion, presents just as many authorities holding that, where the public utility corporations and the governmental agencies deal, they have the power to contract as to rates, and to exert that power by fixing by contract the rates to govern during a particular time; that the enforcement of such rates is through the obligation resulting from the contract, and, therefore, the question of whether such rates are confiscatory becomes immaterial. Both are right in their contentions. The real question here is: Under which of the two well-defined classes of cases do the facts in this case place the plaintiff and defendant herein?

The first thought, when this question is presented for determination, is: What has the Supreme Court of South Dakota determined with reference to the power and rights of municipal corporations under the circumstances presented here? The defendant contends that the Supreme Court of South Dakota, in City of Watertown v. Watertown Light & Power Co., 42 S. D. 220, 173 N. W. 739, has determined the question at issue here in favor of the defendant.

This was an action brought by the plaintiff city to restrain the defendant from putting into effect a new schedule of rates for electrical current furnished by the defendant company. The franchise contained a maximum rate, and it was also provided that the company should furnish such services (under reasonable regulations, to be approved by the city council of such city), and that the utility company might make rules and regulations not in conflict with the provisions of the franchise or the laws of the state, subject to the consent of the city council of said city. Prices were regularly fixed, and thereafter the company sought to increase such prices. The court held that the provisions of the special charter, under which the city of Watertown was operating, "gave it implied authority to contract for the furnishing of electrical current to its people." This being the determination of the Supreme Court of South Dakota, it becomes important to know just what the provisions of this Watertown special charter were, and what, if any, differences there are between the provisions of such charter and the general laws governing the plaintiff and the defendant at the time they entered into this relation in 1913.

The provision contained in the Watertown charter, construed by the Supreme Court of the state, as above stated, is as follows:

"To provide for the lighting of streets and public grounds, the laying down of gas pipes, and erecting of lamp posts for conveying electric lights, telegraph and telephone lines, and to regulate the distribution, sale and use of gas or other illuminative fluids."

The powers of municipal corporations, under the laws in effect in 1913, are as follows:

(1) "To provide for the lighting of the same"—i. e., streets and public grounds. Rev. Pol. Code 1903, § 1229, subd. 11.

This provision, it will be observed, corresponds with the first clause in the special charter:

(2) "To regulate the openings therein for the laying of gas and water mains and pipes." Rev. Pol. Code 1903, § 1229, subd. 13.

This provision corresponds to the second clause of the Watertown charter, "the laying down of gas pipes."

(3) "To regulate * * * erecting gas or electric lights." Supra, subd. 13.

This corresponds to the third clause of the Watertown charter, "and erecting of lamp posts for conveying electric lights, telegraph and telephone lines."

(4) That any company organized for the purpose of manufacturing gas or electricity has "the right by consent of the city council * * * to lay down

pipes, or string wires on poles, in the streets or alleys of any city in this state, subject to such regulations as such city may by ordinance impose." Supra, subd. 13.

The last clause of the provision in the Watertown special charter is as follows:

"And to regulate the distribution sale and use of gas or other illuminative fluids."

Those of us who are familiar with the securing of the special charters by act of the Legislature for the cities of the state in the early days know by experience that these powers in the special charters were almost universally taken by the persons drawing the bill from the recitals of powers in the general statutes of the state.

There is no substantial difference in the provisions of this Watertown charter and the general provisions above quoted, and with which they have been compared. The final clause of the general statute differs in form from the Watertown charter, as above stated. In substance, however, there is a grant of the same authority as was given in the charter, to wit:

"To regulate the distribution, sale and use of gas or other illuminative fluids."

This provision of the statute is general in character, and clearly includes the particulars enumerated in the Watertown charter. The word "regulation," as used in the statute, certainly includes something more than the manner of laying of pipes, or erecting gas or electric lights, or of stringing wires on poles, since the power to regulate this had already been expressly provided for. What other regulations could a city adopt than those enumerated in the Watertown charter concerning the "distribution, sale and use of gas or" electricity? So much for the similarity of the statute of the state and the provisions of the Watertown charter.

In the determination of this issue, however, one must not only construe the language of the statute itself in determining the powers, but must go farther and determine from an examination of the statute the absence of power. There is an entire absence from the Watertown charter, and the statutes of the state in force in 1913, of any power to regulate or change rates. No such power existed in the Watertown charter, nor can it reasonably be construed to be within the provisions of the statutes above quoted. It was this lack of power in the Watertown charter which was decisive of the issue in the Supreme Court of the state. It is this lack of power in the provisions of the state statute of South Dakota that must be decisive of the issue presented here.

The Supreme Court of South Dakota in City of Watertown v. Watertown Light & Power Co., supra, recognized the two classes of power residing in a municipality—one, purely governmental in its nature; the other, partaking of administrative or business nature. This same distinction is drawn by Judge Sanborn in Re Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614. The Supreme Court of the state determined, in the Watertown Case, that—

"To the first of those belongs the police power, and in the exercise of such police power a city council can in no manner bind its successors; but a city has full power, when authorized either by the Constitution of the state or by legislative enactment, to contract for the rendering of public service by individuals or private corporations, and in such contract fix the rates to be charged for such service. The granting of a franchise fixing a maximum rate is a contract, and, when the franchise itself does not reserve to the city future control of the rates to be charged for service, or the Constitution or statute under which the city acted in granting the franchise does not reserve to such city future control over such rates, including the power to change same, such franchise becomes a binding contract, no more subject to impairment than would be the contract of individuals."

In the case at bar these franchises do fix a maximum rate, and are contracts, because the franchises themselves do not reserve to the city future control of rates to be charged for service, nor do the statutes or Constitution of the state of South Dakota, under which the defendant acted in granting the franchises, reserve to the city future control over such rates, nor is there any power in the statutes, as they then existed, given to the city to change these rates. The relation between the plaintiff and defendant was and is, therefore, contractual, and such a contract cannot be impaired by an amendment of the laws or of the Constitution. We are not, therefore, concerned with the powers of municipalities as they have been developed since that time in this state.

In construing this provision of the Watertown charter, the Supreme Court of the state said:

"It follows that, in a case such as this, the public service corporation has the absolute contractual right to charge such rates as to it may seem best, so long as it keeps within its contract by not charging in excess of the price fixed thereby. * * *"

It may be noted that the opinion in the Omaha Case, supra, was made the basis of this decision of the Supreme Court of this state, and special reference was made thereto. I am therefore of the opinion that the Supreme Court of this state has determined the issue presented here in favor of the defendant.

There is no statute of this state in positive terms prohibiting any abridgment of the right to regulate and fix charges of public service corporations, either by ordinances, resolution, or contract. Such a statute existed in the state of Iowa, controlling the decision in Re Southern Iowa Electric Co. v. Chariton, 255 U. S. ——, 41 Sup. Ct. 400, 65 L. Ed. ——. In section 725 of the Iowa Code of 1897, quoted in the opinion, the powers of the municipality are enumerated as follows:

"Sec. 725. *Regulation of Rates and Service.*—They shall have power * * * to regulate and fix the rent or rates for water, gas, heat and electric light or power, * * * and these powers shall not be abridged by ordinance, resolution or contract."

Thus, in Iowa, the legislative power to fix rates was conferred by this section upon the city council, was a continuing one, and could not be abridged or bartered away by contract or otherwise. It is said by the Supreme Court of Iowa in Woodward v. Iowa R. & Light Co., 178 N. W. 549, that—

"There was a time in the history of our legislation when the right of contract as to rates was conferred by statute upon the city council. * * * By the revision and codification of 1897, the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases."

The court then proceeds to give the reasons for this change. That is the situation in this state. It cannot be contended there is anything in our statutes or Constitution which abridges or denies the council of the defendant the right to make the contract in question here. Of course, under the statute of Iowa, as it has been construed by the Supreme Court of that state (and must necessarily be construed), the opinion of the Supreme Court of the United States denied the city council the power to make the contract. However, that can have no application to the situation that obtains here, considering the legislation of the state and the lack of legislation.

In San Antonio v. San Antonio Public Service Co., 255 U. S. ——, 41 Sup. Ct. 428, 65 L. Ed. ——, the city moved to dismiss the bill for want of jurisdiction, because it presented no substantial federal question, as it showed on its face that the parties were bound by the five-cent fare provision of the franchise ordinance as a contract subject to be enforced, even though the rate was confiscatory, and moreover because the bill otherwise stated no ground for equitable relief. The court overruled the motion. It reviewed the history of the case, and decided that:

"In view of the controversy as to the contract growing out of the enforcement of the half-fare law, terminated by the ruling of this court in the Altgelt Case, as well as of all the subsequent dealings between the parties, the existence of a contract as to the five-cent fare was not established, and hence the attempt to enforce it, because of the confiscation to result, gave a cause of action under the Constitution of the United States"—citing San Antonio Pub. Service Co. v. San Antonio (D. C.) 257 Fed. 467.

The Supreme Court of the United States in that case said:

"* * * 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-cent 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, art. 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."

I quote the foregoing to show that the Supreme Court relied entirely upon the prohibition above set forth, which does not obtain in the statutes of the state of South Dakota. In this opinion, however, the Supreme Court of the United States still recognizes the right of contract, as follows:

"Where, however, the right to contract exists, and the parties, the public on the one hand, and the private [owner] on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate." San Antonio v. San Antonio Public Service Co., supra, 255 U. S. ——, 41 Sup. Ct. 431, 65 L. Ed. ——.

In this case the Supreme Court recognized the attitude of the parties themselves, and their evident interpretation of their relation, the city council assuming the right to control, and contrasted the ordinances of the city enacted subsequent to the date of the franchise with the position the city attempted to maintain in the record in the case then being considered.

I submit that in my judgment there is an entire absence from the franchises, or the laws and Constitution of the state of South Dakota, of any power in the defendant city to change or control the rates in question, construing such laws and the Constitution as they existed in August, 1913, when this relation was entered into. If the facts disclosed that either the ordinances in question or the statutes or a provision of the Constitution reserved to the city the power to change or control such rates, that power would be inconsistent with the idea that the city could not change or control them so that they might always be just.

[2] My attention has been called to the fact that our South Dakota Constitution provides:

"No * * * law * * * making any irrevocable grant of privilege, franchise or immunity shall be passed." Const. S. D. art. 6, § 12.

It has been held, however, that a contract for gas or water creates no special privilege or immunity contravening such constitutional provision, and this was held in Omaha Water Co. v. City of Omaha, supra, upon which the Supreme Court of this state relied, and to which special reference was made in City of Watertown v. Watertown Light & Power Co., supra.

In Columbus R., L. & P. Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1649, the Supreme Court says:

"Whether these ordinances constituted such contract depends upon the proper construction of the statutes of Ohio in force at the time and the terms of the ordinances in question."

This, I think, is precisely the situation here. These two elements were considered in the Watertown Case, and determined in favor of the defendant in this action. The federal Supreme Court, in Columbus R. L. & P. Co. v. Columbus, supra, then quoted from the opinion of that court in Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, the following:

"No reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

In the Home Telephone Co. Case, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, the general statute reserved to the city power "to regulate the sale and use of gas and electric light, and to fix and determine the

price of gas and electric light." No such power was reserved to the city defendant in the case at bar, when the Water, Power & Light Company obtained its franchises. I may add here, however, that it is reserved to cities under the Revised Code of 1919, in section 6169, subd. 18; but even in that reservation there is this addition:

"And to grant franchises and rights to persons, associations or corporations for such purposes, and to regulate the same."

This statute, of course, is not germane to the issue presented here. I am therefore of the opinion that the city was authorized to enter into the relation with the plaintiff and its predecessors set forth in the bill of complaint, and that that relation is contractual, and that there is an entire absence of abrogation of power by the Legislature to the municipality to regulate rates, and therefore that the motions of the defendant to dismiss plaintiff's complaint, and to dissolve and discharge the temporary injunction, should be and are sustained, with exceptions to the plaintiff.

MUSKEGON BOILER WORKS et al. v. TENNESSEE VALLEY IRON & R. CO.

(District Court, M. D. Tennessee, Nashville Division. May 16, 1921.)

No. 64.

1. **Creditors' suit ⊜59—Complainant entitled to costs, including counsel fees.**
One jointly interested with others in a common fund, who brings and prosecutes a suit for its preservation and administration, as in a general creditors' suit is equitably entitled to reimbursement of his costs, including reasonable fees of his counsel, to be paid either out of the fund itself or by proportionate contribution from those receiving the benefit of the litigation, but such counsel fees may be awarded directly to his solicitors.

2. **Creditors' suit ⊜59—Allowance of fees to complainant's counsel.**
Fees allowable to counsel for complainant in a creditors' suit include reasonable compensation for services rendered after the appointment of a receiver in discharge of his duty, acting in behalf of all creditors standing in a similar position to complainant, to prosecute the suit to final distribution and to defend and otherwise protect the fund; but such fees are to be based only on the fund applicable to claims of creditors of the same class as complainant, and the fund on which others have superior liens cannot be subjected to such payment.

3. **Creditors' suit ⊜59—Basis of allowance of counsel fees.**
Where counsel for complainant in a creditors' suit are also employed by interveners under contracts for special fees, while the general allowance to them from the fund recovered of fees for their services in recovering the same is not to be diminished by the total of such special fees, the amount of the claims of the separate clients from whom they receive special compensation is to be taken into consideration by way of a general deduction in determining the total fund on the basis of which their fees should be fixed.

In Equity. Suit by the Muskegon Boiler Works and others against the Tennessee Valley Iron & Railroad Company. On exceptions to

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

report of special commissioner on allowance of fees to complainants' solicitors. Exceptions sustained in part.

Fowler & Fowler, of Knoxville, Tenn., and Dan. E. McGugin, of Nashville, Tenn., for exceptant.

Joseph Higgins and L. R. Campbell, both of Nashville, Tenn., for solicitors.

SANFORD, District Judge. The Special Commissioner has reported the reasonable fee of plaintiffs' solicitors, Messrs. Campbell and Higgins to be $40,000; to which report exceptions have been filed. After careful consideration of the arguments and briefs of counsel, my conclusions, briefly stated, are:

[1, 2] One jointly interested with others in a common fund who brings and prosecutes a suit for its preservation and administration, as in a general creditors' suit, is equitably entitled to reimbursement of his costs, including reasonable fees of his counsel, to be paid either out of the fund itself or by proportionate contribution from those receiving the benefit of the litigation. Trustees v. Greenough, 105 U. S. 527, 532, 26 L. Ed. 1157; Central Railroad & Bkg. Co. v. Pettus, 113 U. S. 116, 122, 5 Sup. Ct. 387, 28 L. Ed. 915; Hobbs v. McLean, 117 U. S. 567, 582, 6 Sup. Ct. 870, 29 L. Ed. 940; Harrison v. Perea, 168 U. S. 311, 325, 18 Sup. Ct. 129, 42 L. Ed. 478; Central Trust Co. v. Ingersoll (6th Circ.) 87 Fed. 427, 429, 31 C. C. A. 41; Burden Co. v. Ferris Co. (5th Circ.) 87 Fed. 810, 31 C. C. A. 233; Central Trust Co. v. Light Co. (2d Circ.) 233 Fed. 420, 421, 147 C. C. A. 356; Buell v. Lumber Corporation (D. C.) 201 Fed. 762, 768; 22 Cyc. 1361. Such counsel fees may, however, be awarded directly to the plaintiffs' solicitors. Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, supra; Harrison v. Perea, 168 U. S. at page 325, 18 Sup. Ct. 129, 42 L. Ed. 478. This is substantially the established rule in Tennessee. Moses v. Ocoee Bank, 1 Lea (Tenn.) 398; Elec. Light Co. v. Gas Co., 99 Tenn. 371, 388, 42 S. W. 19. Such reasonable fee includes compensation for services rendered by counsel for the plaintiff after the appointment of a receiver, in discharge of his duty, acting in behalf of all creditors standing in a similar position to the plaintiff, to prosecute the suit to final distribution and to defend and otherwise protect the fund. Burden Co. v. Ferris Co. (5th Circ.) 87 Fed. at page 812, 31 C. C. A. 233, supra. Such fees, however, are to be based only on the fund applicable to claims of creditors of the same class as the plaintiff, and the fund on which others have liens superior to such claims cannot be subjected to such payments. Buell v. Lumber Corporation (D. C.) 201 Fed., supra, at page 769.

[3] A difficult question arises, however, as to the controlling principles in fixing the fees of plaintiff's solicitor when he represents not only the plaintiff in the general suit, but also intervening creditors of the same class, under special employment, and is to receive fees from his separate clients in addition to the general fee allowed by the court. The exceptant here insists that the amount of reasonable fees to which plaintiffs' solicitors would otherwise be entitled are to be diminished by the amount of the fees which they have received or will receive

from such separate clients. No authority, however, is cited supporting this contention, in this precise form. And I think it clear upon principle that as the plaintiffs' solicitors as counsel for such separate clients are necessarily charged with some special duties in reference to the claims of such clients, including the filing of their claims, attention to their proper allowance, and, ordinarily the receiving and paying over thereof, their reasonable fees for conducting the general proceedings in behalf of all general creditors should not be diminished by the full amount of the fees which they are to receive from individual clients, including compensation for services rendered such clients specially, as distinguished from those rendered to all creditors generally. On the other hand, however, it is clear that in determining the reasonable compensation of plaintiff's solicitors, the amount of the individual claims as to which they have been specially employed under contracts for separate fees, is to be taken in consideration. This question is ruled by Central Railroad v. Pettus, 113 U. S. at page 127, 5 Sup. Ct. 387, 28 L. Ed. 915, supra, in which it was held that in fixing the general compensation of plaintiff's solicitors, there should be excepted from the amount of the claims with reference to which such compensation should be fixed, the claims of the plaintiffs and other unsecured creditors who had special contracts with such solicitors for fees or had settled with them. While this case did not involve the matter of claims as to which no special contract or settlement had been made as to the amount of the fees, the principle upon which the decision is based applies, in my judgment, with equal force, to all claims which plaintiffs' solicitors specially represent and as to which they are to receive separate fees from their individual clients. So also as shown in 22 Cyc. 1361, note 24, it was held in Ohio Valley Bank v. Cummings & Co., 21 Ohio Cir. Ct. R. 782, that in fixing the fees of plaintiffs' attorneys chargeable to the general fund the court should take into consideration the fact that the attorneys represented general creditors who were "also liable to them for fees in the matter." This conclusion also appears to be sound upon principle, independently of authority, since the solicitors for the plaintiff, representing also individual creditors who have employed them specially owe a duty to them in looking after the suit, the contesting of unauthorized claims and the like, as well as a general duty in behalf of all creditors in whose behalf the suit is filed; and the services which they render in the prosecution of the suit are rendered in the discharge of their twofold duty to general creditors in the conduct of the suit and to their individual clients. Thus, in the present case, it is conceded that plaintiffs' solicitors are in some instances to receive and have received from individual clients a ten per cent. fee. Clearly it was not contemplated that the services to be rendered such clients, on a ten per cent. basis, should be merely the filing of the individual claims and matters arising in reference to them alone, without any general attention to the case to such extent as was necessary to protect the interests of such individual clients. And if plaintiffs' solicitors had represented not only the plaintiffs in the general creditors' suit but also all the other general creditors in the case, they would, in

conducting the suit, have been discharging practically the same duty as plaintiffs' solicitors which they owed to their individual clients, constituting the entire body of creditors; and manifestly if they were first to be paid a reasonable fee for their entire services out of the general fund and then were to receive the same aggregate amount of fees from their individual clients separately, they would receive in effect double compensation for the same services. It is impossible to lay down any general rule in this matter, as each case must rest upon its own facts, further than to say that the relative amount of duty dicharged in behalf of general creditors and of separate clients would seem to depend approximately upon the pro rata amount of the creditors whom the solicitors represent specially as compared with the total amount of the claims which they represent generally; and this is, I take it, the reason underlying the ruling in Central Railroad v. Pettus.

I therefore conclude, in accordance with the rule stated in Central Railroad v. Pettus, and for the reasons above stated, that while the amount of fees to which plaintiffs' solicitors would otherwise be entitled is not to be diminished, ipso facto, by the amount of fees which they are to receive from all their clients separately, the amount of the claims of separate clients from whom they are to receive or have received special compensation is to be taken into consideration by way of a general deduction in determining the total fund on the basis of which their fees should be fixed.

The following are the chief considerations in support of the claim of the plaintiffs' solicitors: (a) This suit brought into court a very large fund for the benefit of general creditors, which otherwise would probably in large measure have been dissipated. (b) The plaintiffs' solicitors gave careful, constant, able and efficient attention to the conduct of the suit and to the details of the many matters arising therein from time to time. (c) The litigation has been of very great benefit to general creditors.

The principal considerations tending to a reduction in the amount of fees of plaintiffs' solicitors are, on the other hand, these: (a) The litigation appears to have been a friendly litigation instituted, not as an antagonistic suit, but, as it inferentially appears, with the approval and consent of the defendant company itself; the defendant's counsel having in fact suggested the selection of plaintiffs' solicitors, furnished them with the bulk of the information on which the bill was filed, and the defendant having admitted the allegations of the bill and consented to the appointment of a receiver. (b) There were no difficult or complicated matters litigated in the suit itself, other than the suits defended by Mr. DeWitt, one of the receivers, who acted as their counsel; the conduct of the suit having principally involved attention to details of the claims filed, the presentation of a claim against the government and negotiations and settlements between different classes of creditors as to their claims and plan of reorganization, and the investigation of accounts and matters connected with the making of the special master's report, most of which were settled outside of court and did not involve any active litigation in the court. The

principal disputed matters as to which the plaintiffs' solicitors gave attention outside of court was the claim against the government in behalf of the special class of creditors known as the government creditors, as to which there was a special employment of counsel, including these solicitors, by the government creditors directly interested. (c) While plaintiffs' solicitors gave diligent attention to these matters, the fundamental and principal work connected therewith, as shown by the testimony, was done by Mr. DeWitt, who gave close and most unremitting attention to these details of these matters, and by the special master, who gave painstaking attention to the many claims and accounts in connection with the making of his report. (d) Furthermore the plaintiffs' solicitors not only represented the creditors filing the bill, whose claims aggregate a very large sum, but also many other creditors, whose claims aggregated a very large percentage of all general creditors, with some of whom plaintiffs' solicitors had special contracts as to fees, and from whom, as it appears, that they have received, or are to receive separately, large compensation, either in money or in stock in the reorganized corporation, in some cases equal to ten per cent.

After careful consideration of these and other matters appearing in the record, I conclude, under all the circumstances, bearing in mind the rule stated in Central Railroad v. Pettus, that as insisted in the first exception to the Special Commissioner's report, the reasonable fee for plaintiffs' solicitors to be awarded as a charge upon the fund as part of the costs of the cause, does not exceed the sum of $20,000 in the aggregate; that is, $10,000 to each of the two solicitors. The first exception to the Special Commissioner's report will accordingly be sustained.

The second exception, to the effect that this compensation should be diminished by the sums received or to be received by plaintiffs' solicitors from their individual clients, must be overruled.

I may add that I have not overlooked the fact that the plaintiffs' solicitors, both at the bar and in their brief, offer to abate their claim for fees to the extent of the claim of the exceptant, that is, as I construe it, to abate their claim proportionately to the amount of the exceptant's claim to the total general claims. This does not, however, affect the action to be taken. The exception operates, in law, in my judgment to the benefit of all general creditors alike. And even if this were not so, I am of opinion that when the question of the reasonableness of fees allowed as part of the costs, is brought to the attention of the court, it should, independently of any exceptions to the master's report, and in the discharge of its own duty, fix and allow such fees only as are in its judgment reasonable and proper.

A decree will be entered in accordance with this opinion.

TERRACE et al. v. THOMPSON, Attorney General of Washington.

(District Court, W. D. Washington, S. D. July 25, 1921.)

No. 132-E.

1. **Injunction ⊜85(2)—Severity of punishment for violation of statute ground of equity jurisdiction to determine validity.**
   A provision of a civil statute subjecting any person violating it to a year's imprisonment for an act otherwise lawful, *held* to justify a resort to equity to determine its validity.
2. **Aliens ⊜10—State may prohibit aliens from acquiring lands.**
   A state may lawfully prohibit the acquiring of lands by aliens if there is no treaty to the contrary.
3. **Treaties ⊜11—Are paramount to state laws.**
   If a state Constitution or statute conflicts with a treaty, it is either void or suspended during the existence of the treaty.
4. **Aliens ⊜13—Japanese treaty does not give right to lease agricultural lands.**
   The provision of article 1 of the treaty between the United States and Japan (37 Stat. 1504), that citizens and subjects of each contracting party "shall have liberty * * * (in the territories of the other) to own or lease and occupy houses, manufactories, warehouses and shops, * * * to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade," *held* not to give the right to lease agricultural land, but to leave each state in the United States free to grant or prohibit such right to Japanese subjects.
5. **Aliens ⊜13—Farming not incidental to trading in farm products.**
   The leasing of land for farming purposes is not incidental to trading, either wholesale or retail, in farm products.
6. **Constitutional law ⊜206(1)—Right to convey land to one prohibited from acquiring it by laws of state not a privilege or immunity.**
   The Fourteenth Amendment to the Constitution *held* not to give a citizen the right to sell or lease land to an alien prohibited by the laws of the state from acquiring land by purchase or lease.
7. **Aliens ⊜10—Statute prohibiting ownership of land held valid.**
   The Alien Land Act of Washington, which prohibits the purchase or lease of land by any alien who has not in good faith declared his intention to become a citizen, *held* constitutional and valid.

In Equity. Suit by Frank Terrace and Elizabeth Terrace, his wife, and N. Nakatsuka, against Lindsay L. Thompson, Attorney General of the State of Washington. On motion for preliminary injunction. Denied.

James B. Howe, E. Heister Guie, and Dallas V. Halverstadt, all of Seattle, Wash., for complainants.

Lindsay L. Thompson, Atty. Gen., pro se.

Before GILBERT, Circuit Judge, and CUSHMAN and NETERER, District Judges.

CUSHMAN, District Judge. The bill alleges that the complainants Terrace, owners of certain lands in this district, desire to lease such lands to the complainant Nakatsuka, a subject of Japan, who desires to lease them from them, and that he is engaged in farming and trad-

ing wholesale and retail in farm products; that such lease will be prevented by defendant's enforcement of chapter 50, Laws of Washington 1921, commonly known as the "Alien Land Bill." It is alleged that the result will be that the complainant Nakatsuka—

"if he is prevented from leasing land for the purpose of producing such farm products for such trade, * * * will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the treaty hereinafter mentioned."

It is alleged that the act in question is contrary to the Fourteenth Amendment to the Constitution of the United States, to article 1 of the treaty with Japan (37 Stat. 1504), and to section 33, art. 2, of the Constitution of the state of Washington.

[1] The act provides, not only for the forfeiture of the lands affected, but that whoever conveys lands to an alien shall be guilty of a gross misdemeanor, the punishment for which may be a year's imprisonment in jail. This, we conclude, is such a severe punishment as to prevent persons affected from resorting to the courts to determine the validity of the statute in question, and that, therefore, the remedy at law is not sufficient. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The remedy at law is also inadequate as to the complainant Nakatsuka. Raich v. Truax (D. C.) 219 Fed. 273, at page 283.

Rast v. Van Deman & Lewis, 240 U. S. 342, 355, 368, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455, and Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691, have no application. In those cases the statute attacked required the payment of a license fee. In such cases an adequate remedy at law exists, because, after payment of the license tax, suit can be had for its repayment. For the same reason McCormack Bros. Co. v. Tacoma (D. C.) 201 Fed. 374, is inapplicable, as well as for the further reason that the plaintiff in such case was a corporation which could not be imprisoned for failure to pay the license, being only liable for the payment of a small fine. In such a case the remedy at law would not, necessarily, be inadequate.

The Constitution of the state of Washington provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." Section 33, art. 2.

The act in question defines "land" as follows:

"'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery

to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen." Laws 1921, c. 50, p. 156, § 1 (b).

Under the foregoing language, it is not necessary to consider the question of whether at common law a leasehold interest is personalty or realty, for, without doubt, by the foregoing, it is intended to include leases of agricultural lands.

The act also provides:

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens." Section 1 (a).

There is nothing in the bill as to the length of time for which complainant Nakatsuka desires to lease the lands, or for which it will be necessary to lease them.

There is no allegation in the bill as to whether the complainant Nakatsuka has or has not declared his intention to become a citizen of the United States. All that is disclosed by the bill touching his eligibility for citizenship is the allegation that he is a subject of the Emperor of Japan. There is a possibility that, included among the subjects of the Emperor, there are Caucasians, or "white persons."

Congress has, by section 2169, R. S. (U. S. Comp. Stat. § 4358), limited the right of naturalization to those aliens being "free white persons, and to aliens of African nativity and to persons of African descent."

We feel justified in considering the bill as though it were alleged that Nakatsuka had the prevailing ethnological characteristics of his fellow subjects, and that he had not declared his intention to become a citizen. He is, therefore, not a "white person," within the meaning of section 2169, R. S. (U. S. Comp. Stat. § 4358). In re Young (D. C.) 198 Fed. 715; In re Saito (C. C.) 62 Fed. 126; In re Geronimo Para (D. C.) 269 Fed. 643.

Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file, a declaration of intention to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so "in good faith."

[2] A state may lawfully prohibit aliens acquiring land within its boundaries, if there is no treaty to the contrary. Chirac v. Chirac, 2 Wheat. 259, 272, 4 L. Ed. 234; Hauenstein v. Lynham, 100 U. S. 483, 484, 25 L. Ed. 628; De Vaughn v. Hutchinson, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Blythe v. Hinckley, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557.

[3] If a state Constitution or statute conflicts with the treaty, it is either void or suspended during the existence of the treaty, for by article 6 of the Constitution of the United States it is provided:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made*, or which shall be made, *under the authority of the United States, shall be the supreme law of the land*, and the judges in every state shall be bound thereby, *anything in the Constitution or laws of any state to the contrary notwithstanding.*"

See Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97; Carneal v. Banks, 10 Wheat. 181, 6 L. Ed. 297; Hopkirk v. Bell, 3 Cranch, 454, 2 L. Ed. 497; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568; Chirac v. Chirac, 2 Wheat. 259, 4 L. Ed. 234; Hauenstein v. Lynham, 100 U. S. 483, 488, 25 L. Ed. 628; Missouri v. Holland, 252 U. S. 416, 434, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984; In re Stixud's Estate, 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850; State ex rel. Tanner v. Staeheli (Wash.) 192 Pac. 991.

[4] This brings us to the question of the terms of the treaty with Japan with which the act is alleged by the bill to conflict. The only portion of the treaty material to be considered is that part of article 1 providing:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." 37 Stat. at L. p. 1504.

The lasting impression created by the foregoing language is that it was intended to withhold the right to own or lease agricultural lands. This impression becomes fixed upon consideration of the fact that this, in substance, was true at common law. Coke upon Littleton, bk 12b.

A law of California (Laws of 1913, c. 113) is, in its general purport, similar to the act here in question, although by section 2 of that act aliens were permitted to lease lands for a term of not over three years. A controversy arose concerning the validity under the treaty of the California act between the Department of Foreign Affairs for the Empire of Japan and our own Secretary of State. In the progress of the exchange of views between the officials so representing the two governments, the Secretary of State found the act not to violate the treaty and, in part, said:

"This treaty was based upon a draft presented by the Imperial Government. In article I of this draft there is found the following clause: '3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for RESIDENTIAL, COMMERCIAL, INDUSTRIAL, MANUFACTURING and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property there is no reference to the ownership of land.

The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (article 1) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops' and 'to lease land for residential and commercial purposes.' IT THUS APPEARS THAT THE RECIPROCAL RIGHT TO LEASE LAND WAS CONFINED TO 'RESIDENTIAL AND COMMERCIAL PURPOSES,' AND THAT THE PHRASES 'INDUSTRIAL' AND 'OTHER LAWFUL PURPOSES,' *which would have included the leasing of* AGRICULTURAL LANDS, WERE OMITTED.

"The question of the ownership of land was, in pursuance of the desire of the Japanese government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective states. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject, Baron Uchida said: 'In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the states, reserving, for the future, however, the right of maintaining the condition of reciprocity with respect to the separate states.*'

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from states in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that state for agricultural purposes for a term not exceeding three years, *may be held to go beyond the measure of privilege established in the treaty, which does not grant the right to lease* AGRICULTURAL LANDS AT ALL; and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the states the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual states. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted." Letter of William Jennings Bryan to Viscount Chinda July 16, 1912, "Annex No. 7," pp. 17 and 18. "Controversy—United States and Japan—California Question," Congressional Library JV 6888 C2 J4. (Italics ours.)

In the case of Sullivan v. Kidd, decided January 3, 1921, 41 Sup. Ct. 158, at page 162, 254 U. S. 433, at page 442 (65 L. Ed. ——), the court said:

"While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the government, charged with the supervision of our foreign relations, should be given much weight."

A clear intention being shown not to supersede, in the particular now in question, the state's authority to regulate the rights of title and

possession in lands within its boundaries, that intent may not be defeated by the claim now made that complainant Nakatsuka's business of farming is incidental to his business as a wholesale and retail trader in farm products, for there is no more reason for considering farming an incident of the latter than for considering the latter an incident of the former. The language of the treaty is:

"And generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects. * * *" 37 Stat. at L. 1504.

[5] In the most liberal construction of this language that may be indulged in, it cannot fairly be said that truck farming is incidental to trading, either wholesale or retail, in the products of a farm, any more than conducting a sheep ranch or growing mulberry trees is incidental to the dry goods trade. Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Joyce v. Auten, 179 U. S. 591, 594, 21 Sup. Ct. 227, 45 L. Ed. 332; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 245, 22 Sup. Ct. 120, 46 L. Ed. 171. Buchanan v. Warley, 245 U. S. 60, 73, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201, is, no doubt, authority supporting the right of Terrace to invoke this treaty provision, were the act in conflict with the treaty, but it is not.

[6] Aliens may only come to the United States upon such conditions and terms as our government sees fit to impose. By the treaty, the right to lease real estate in the United States for agricultural purposes is withheld. Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628. It might have been, by Congressional enactment, prohibited (U. S. v. De Repentigny, 72 U. S. [5 Wall.] 211, 18 L. Ed. 627); but, by the treaty, it was neither granted nor prohibited. It was merely withheld, which left the state free to prohibit it. The United States might have excluded all of the subjects of Japan; but rather chose to admit them, withholding the right to lease agricultural lands, thereby recognizing the right of the state to prohibit it, or regulate it. That purpose is not to be defeated by allowing the citizen landowner the broad construction of his rights under the Fourteenth Amendment for which contention is made. The citizen landowner may sell to whom he pleases; but he may not sell to one who is rightfully forbidden the right to buy.

That the Fourteenth Amendment was not intended as an instrument to accomplish the end here sought, is shown by legislation early enacted by Congress to give effect to the Fourteenth Amendment, the primary purpose of which was the enfranchisement of the slaves. Slaughterhouse Cases, 16 Wall. (83 U. S.) 36, 21 L. Ed. 394; Buchanan v. Warley, 245 U. S. 60, at pages 76 and 78, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. By the amendment, members of the enfranchised race were made citizens of the nation and state of their residence, a privilege at present denied to the subjects of Japan.

"In giving legislative aid to these constitutional provisions Congress enacted in 1866 chapter 31, § 1, 14 Stat. 27 (Rev. Stats. § 1978), that: '*All citizens* of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, *purchase, lease, sell, hold, and convey real and personal property.*

"And in 1870, by chapter 114, § 16, 16 Stat. 144 (Rev. Stats. § 1977), that: "*All persons* within the jurisdiction of the United States shall have the same right in every state and territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other." Buchanan v. Warley, 245 U. S. 60, at page 78, 38 Sup. Ct. 16, at page 19, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. (Italics those of this court.)

These statutes show that Congress then understood the Fourteenth Amendment did not forbid the state the right to deny ownership of lands within its boundaries to aliens.

[7] The act of 1897 (U. S. Comp. Stats. §§ 3490–3495), prohibiting the ownership of land by aliens in the territories of the United States, provides that the denial of such rights shall not apply to any alien who shall become a bona fide resident of the United States. By section 3491, Comp. Stats., Congress gave all alien bona fide residents, including the Japanese, rights denied by the act in question; but it is limited to the territories and has no application in the states. The court in Buchanan v. Warley, supra, holding the state statute unconstitutional, accentuated the fact that the discrimination of the statute was "solely because of color," and, again, "this interdict is based wholly upon color, simply that and nothing more."

In the course of the controversy between the State Department and the Minister for Foreign Affairs of the empire of Japan over the validity of the California statute under the treaty already mentioned, the legal adviser for the State Department said:

"* * * The statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship." "Annex No. 8," p. 24, "Aide Memoire, Wash. July 16, 1913," "Controversy—United States and Japan—California Question."

Still less does the Washington act discriminate against the Japanese, for it provides that—

"'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States."

The prohibition by this definition is made applicable to all aliens, both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from In re Ah Chong (C. C.) 2 Fed. 733. In the latter case, Judge Sawyer held invalid a California law providing:

"* * * All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shellfish of any kind, for the purpose of selling or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon

conviction by a fine of not less than $25, or by imprisonment in the county jail for a period of not less than thirty days." 2 Fed. at page 734.

Of this act, the court says:

"* * * To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish ad libitum, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nation'; and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation;' and such discriminations are in violation of articles 5 and 6 of the treaty with China, cited in full in Parrott's Case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The Fourteenth Amendment of the national Constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution." 2 Fed. at pages 736 and 738.

The present case is not only to be distinguished from the Chong Case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands, but the case is to be further distinguished because of the fact that the treaty with Japan does not contain, as to land ownership, the "most favored nation" clause or any language of such import.

The fourteenth article of the treaty contains the general favored nation clause:

"*Except as otherwise expressly provided* in this treaty the high contracting parties agree that, *in all that concerns commerce and navigation*, any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional." 37 Stats. at L. 1507. (The italics are those of this court.)

In view of the limitation of this clause to "all that concerns commerce and navigation," it is clear that the privileges secured by article 14 do not apply to the limited rights granted by article 1, already quoted, in which the right to lease land is limited to that for residential and commercial purposes.

Neither Guinn and Beal v. United States, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916A, 1124, nor Myers v. Anderson, 238 U. S. 368, 35 Sup. Ct. 932, 59 L. Ed. 1349, have any application to the present controversy, for, if it be granted that the present law is aimed primarily at the so-called yellow or brown races of the Orient, the result is the same. There is no restriction upon the authority of Congress to discriminate in the matter of the eligibility of an alien to become a citizen because of color. The Fifteenth Amendment provides that the right of a citizen of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. The Fourteenth Amendment made the negroes citizens.

It is obvious that the objection on the part of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship. In re Ah Yup, 1 Fed. Cas. 223, No. 104. It is this disqualification put upon them by the federal government to which the state objects, and not their color, although the federal government may have made their race color the irrefutable evidence of disqualification for citizenship.

Congress, in withholding the right to citizenship from these Oriental races, no doubt recognized, as statesmen long have done, that it was of the essence of its duty to insure the perpetuation of our own type of civilization. It has been well said:

"The last two generations have seen an enormous change in the vision of life wider and deeper than it has ever been comprehended before, and as our knowledge has grown, the narrow utilitarianism has shriveled off us, and we see the use and value and nobility of lands and ages far outside the scope of our forefathers. * * * We do not look on them as wrong in differing from ourselves. We begin to understand that they are each adapted to the country and people to which they belong, and we are not so certain that we can improve everybody by trying to make them imitate us."

The sympathetic and temperate view here expressed, no doubt, should restrain us from forcing our civilization upon alien types. Yet it lessens no jot or tittle the duty of the court to hold impregnable the barrier erected by Congress to preserve, in its purity, our own type of civilization. The more homogeneous its parts, the more perfect the union. It may be that the changes wrought in the Orient in the last 50 or 75 years now warrant a different policy; but there is no law or treaty that yet has said "the twain shall meet," or that, if citizenship be accorded these Orientals, the danger is past of our becoming a "mechanical medley of race fragments."

It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare

of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged.

This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The "free-necked man," or "freeman," was synonymous with "freeholder." They were interdependent. A freeman had a vote in determining tribal policies, and no one was a freeman without an estate in lands. Green's History of the English People, book 1, chapter 1, subhead "The Land." The recognition of this principle has run throughout the history of our race and its governments. Section 33, article 2, of the Constitution of the state of Washington, provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, *under mortgage or in good faith in the ordinary course of justice in the collection of debts*; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

In Oregon Mortgage Co. v. Carsten's, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, it was held that an alien corporation, which had taken a mortgage, had the right to take a deed to the mortgaged land from the citizen mortgagor. As the above section excepts from its prohibition lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts," the court held that this exception did not require "a proceeding in court in the case of a mortgaged debt." Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762, was also an alien mortgagee case, in which the court held that the incapacity to own land can only be shown at the suit of the state.

State ex rel. Winston v. Morrison, 18 Wash. 664, 52 Pac. 228, was a suit in which the court held a 99-year lease of real estate amounted to "ownership," as that word was used in the above-quoted section. In State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430, the holding was the same as to a 49-year lease. In State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686, it was held that an alien corporation could not acquire real estate in the state of Washington by eminent domain.

Abrams v. State of Washington, 45 Wash. 327, 88 Pac. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, hold that the grantor in a deed of real estate to an alien could not recover the real estate; that the state alone could invoke rights on account of the disability of the grantee under the above section, and that, the alien having died before the state sought to escheat the lands, the heirs, although themselves aliens, were entitled to inherit the lands, as well as citizens, under the express exception in the Constitution; and that the state, to succeed, must proceed while the lands were still in possession of the alien wrongfully acquiring them. In State ex rel. Atkinson v. World Real Estate Commercial Co., 46 Wash. 104, 89 Pac. 471, it was held that, as the alien had conveyed the lands prior to the institution of proceedings to escheat, the state had lost such right. Prentice v. How, 84 Wash. 136, 146 Pac. 388, was a decision to the same effect.

In State ex rel. Tanner v. Staeheli (Wash.) 192 Pac. 991, decided September 3, 1920, the lands were escheated, although the alien had, at the time of acquiring the land, believed himself a citizen, and had in good faith exercised the rights and privileges of citizenship, and had, after the proceedings of the state to escheat, filed his declaration to become a citizen. State ex rel. Tanner v. Rychen (Wash.) 193 Pac. 220, decided November 1, 1920, is a decision to the same effect.

From the foregoing, it is clear that the Supreme Court of Washington has held the common law only changed by this constitutional provision to the extent plainly expressed therein. The exceptions in the constitutional provision constitute a grant to the alien, and, of course, are not subject to legislative change or limitation, at least by the state. But it does not follow, because the Constitution prohibits alien "ownership" of lands with certain exceptions, that, the Constitution not having defined what shall constitute ownership, the Legislature may not do so. The Legislature is not bound to leave the courts to speculate upon that subject. In fact, the act of the Legislature but follows the common law:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc. upon office found, the king shall have it. But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandise or trade. But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof neither his executors or administrators shall have it, but the king; for he had it only for habitation as necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation; and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft. Pasch. 29, of the raigne of queene Elizabeth." Coke upon Littleton, book 1, chapter 1, 2b, subhead "Of Fee Simple."

The most the act in question does is no more than to invoke a rule of strict construction against the alien as to the meaning of the word "ownership" as appearing in the Constitution.

We find the other questions raised as to the validity of this statute to be without merit.

The preliminary injunction prayed is denied.

GILBERT, Circuit Judge, and NETERER, District Judge, concur.

DOCK CONTRACTOR CO. v. NIAGARA FALLS POWER CO.

NIAGARA FALLS POWER CO. v. RAYMOND CONCRETE PILE CO.

(District Court, W. D. New York. July 15, 1921.)

Nos. 1845, 1861.

Pleading ⊂=236(7)—Party held entitled to amend to set up newly discovered facts.

In actions involving the question of breach of a contract for excavation work, the contractors *held* entitled to amend their pleadings to set up that the estimate of the quantity of material to be excavated, furnished by the other party prior to the signing of the contract, was so variant from the quantity now claimed in its pleading to have been embraced in the contract that the minds of the parties never met in a valid contract.

At Law. Actions by the Dock Contractor Company against the Niagara Falls Power Company and by the latter Company against the Raymond Concrete Pile Company. On motions by plaintiff in the first case to amend complaint, and by defendant in the second case to amend answer. Motions granted.

Griggs, Baldwin & Baldwin, of New York City (Adelbert Moot, of Buffalo, N. Y., and Peter F. McAllister, of Ithaca, N. Y., of counsel), for Dock Contractor Co. and Raymond Concrete Pile Co.

Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Edward F. Franchot, of Niagara Falls, N. Y., of counsel), for Niagara Falls Power Co.

HAZEL, District Judge. These are motions to amend the complaint of the Dock Contractor Company (causes of action 2 and 3), and the answer of the Raymond Concrete Pile Company in the above-entitled actions. The affidavits show that the Dock Company and the Concrete Pile Company, its assignor, on June 29, 1918, agreed with the predecessor company of the Niagara Falls Power Company, the Hydraulic Power Company of Niagara Falls, N. Y., to make certain excavations at Niagara Falls, N. Y., preparatory to enlarging the power plant there. Payment for the work at first was to be made on the cost plus basis, but later this arrangement was modified by mutual consent, so that the work of excavation would be compensated at a unit price basis upon figures submitted by the Niagara Falls Power Company. It appears that a proposed contract and specification were prepared and submitted by the Power Company to the engineer of the Dock Company, and after an inspection thereof by him the contract or writing was signed and returned to the Power Company. It

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

contained a provision that the work of excavation and materials furnished were defined and described with more particularity in the specification plans and drawings on file in the office of the engineer of the Power Company; that the contract should be construed with reference thereto and that the plans and specification formed a part thereof. It was provided that if the Dock Company should fail and neglect to promptly and diligently prosecute the work the Power Company reserved the right to terminate the contract and itself complete the excavation and work using such materials, tools and appliances belonging to the contractor as were then upon the premises.

Performance of the contract by the Dock Company or its assignor was in progress when, on September 9, 1918, the Power Company terminated the contract or writing on the ground that the work was not progressing promptly and with diligence, and, seizing the material, supplies, and appliances that had been used by the contracting company in the performance of the work, it completed the excavation. Objection to the termination of the contract was made by the contracting companies orally and in writing, and their right and capacity to complete the work within the time limit was asserted. At such time it is claimed about 16,000 cubic yards of excavation had been removed. The contracting company received and accepted payment for the work performed upon the basis set forth in the contract, amounting to $34,436.61.

Concededly the material question of fact in both actions is whether the contracting company, before the termination of the contract, performed its work of excavation with promptness and diligence, supplying the materials and enough workmen to efficiently do the work within the time limit, or whether there was a breach in this particular. The moving papers contain testimony tending to show that the copy of the specification delivered to the Dock Company by the engineer of the Power Company before executing the contract misled the former and its assignor, since the quantity of material to be excavated was stated at approximately 9,480 cubic yards at the power house site, while in the original specification the quantity is given as approximately 49,480 cubic yards. It is further asserted that the Dock Company and the Concrete Pile Company first learned of the variance between the original specification (kept by the Power Company) and the carbon copy or duplicate given to the Dock Company, as to the approximate quantities of material to be excavated, from the pleadings of the Power Company in these actions, and the contention is that the contracting companies, in signing the contract, relied upon the representations of the Power Company contained in the copy specification with respect to such quantity of excavation to be done and adjusted the work accordingly, and hence they should be permitted to amend their pleadings and allege the facts as to any misrepresentations made by the Power Company or its predecessor company, or as to any misleading figures in the specification, and to plead that there was no meeting of the minds of the parties at the time the contract was made; that in fact no binding contract was entered into as to the amount of work to be performed because of mutual mistake,

and instead of alleging a right of recovery for damages under a valid contract they should be permitted to plead recovery on a quantum meruit and for the materials furnished.

The Power Company, however, opposes the proposed amendments mainly on the ground that equitable defenses only are included therein, and not any defenses that are pleadable in an action at law. It is contended that the amendments are not proposed in good faith, as may be inferred from the fact that nearly double the quantity of material given in the copy specification was excavated, and besides that it was known and thoroughly understood that the concrete substructures of the power house were in the main to be completed by November 1, 1918, and that it was necessary to excavate solid rock approximately 180 feet long, 110 feet wide, and 27 feet deep before the concrete foundation could be placed; that the contracting company new, or was supposed to know, that approximately 50,000 cubic yards had to be cleared to complete the increase of power development required of the Power Company by the United States for utilization during the war.

It may be as contended that the verity of the affidavits of McMenimen, upon which the motion to amend the pleadings is largely based, is open to challenge, in view of existing facts and circumstances; but any such question is not for present determination, nor in my opinion is it intended by the amendments to complaint and answer to blend legal and equitable causes of action and defenses. The simple proposition is whether the facts and circumstances set forth in the moving papers are of such a nature as to warrant submitting them to the jury for determination as to the making by the parties in controversy of a binding contract. There must, of course, be mutuality in such an agreement, and whether that essential element was present at the time the contract was executed and delivered, or whether it manifested itself in the progress of the work of excavation, must be ascertained from the transaction in its entirety.

This is not a case, I think, where the Dock Company was obliged to sue in equity for cancellation of the contract because of either fraud, misrepresentation, alteration, concealment, or mutual mistake as to the amount of rock to be removed, since the Power Company concededly rescinded the contract before any mistake or misrepresentation, or alteration of contract, was discovered by the contracting companies. As long as the agreement was under performance, the contractor in my opinion was bound by its provisions; that is, he could not abandon the work because of mistake or misrepresentation without repudiating the contract or suing in equity for its cancellation. But if the contractors, from preliminary conversations and the figures in the specification, actually believed that the excavation involved approximately 9,481 cubic yards, and not approximately 49,481 cubic yards, and began work under the mistaken belief that the first-mentioned amount was the approximate estimate, then it may be that a question of fact arises as to the meeting of the minds of the contracting parties. The determination of that question depends upon previous and contemporary transactions. Brawley v. U. S., 96 U. S. 168, 24 L. Ed. 622.

It is doubtless true that a mere variation as to the amount of rock

to be excavated or changes in the work as it progressed would ordinarily be at the risk of the contractor; but in support of the claim of the contractor parties that the figure 4 was prefixed to the figures 9,481 in the original specification without notice, McMenimen swears that he personally made the estimate upon which the work was undertaken before the contract was signed, and that he talked to the engineer of the Hydraulic Power Company as to the amount of excavation that would be required, and he states that he was led to believe there would be approximately 10,000 cubic yards. What was actually said to lead to that belief does not appear; but it is fair to presume that what was said would tend to corroborate the assertion that he expected that the amount of rock that would have to be removed would be in the neighborhood of 10,000 cubic yards. It is not disputed that the figure 4 was added to the original specification after the contract was signed, although that it occurred designedly is denied.

It is a general rule, as stated by Judge Rogers in Whitcomb v. Shultz, 223 Fed. 268, 138 C. C. A. 510, that—

"When one is induced by fraudulent misrepresentations of a material kind to enter into a contract, it is agreed that he ordinarily has several remedies, and among them is the right to defeat the enforcement of the contract when sued on in a court of law. * * * Fraud vitiates all contracts. Courts of law and courts of equity as a general rule have concurrent jurisdiction in cases of fraud."

Cases not infrequently arise wherein, because of failure of the minds of the parties to agree upon certain terms of the contract, or upon certain conditions embodied therein, by mistake or by misrepresentation, or otherwise, courts have determined that no binding contract eventuated. If it is proven that there was in fact no binding contract, the contracting company would not be barred from recovering the reasonable value of the work actually performed. Vickery v. Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810; The Stanley H. Miner (D. C.) 172 Fed. 486; Pacific Mutual Life Ins. Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752; Manchester St. Ry. v. Barrett (C. C. A.) 265 Fed. 557. It is not believed that in this case a situation is presented where the fraud, misrepresentation, and mistake, if there was any, must first be determined as a separate issue. The claim that there was no meeting of the minds of the contracting parties would seem to obviate any such necessity. It may be, as contended by counsel for the Power Company, that an inference is not unwarranted from the conduct of the contractor of an intention to waive the mistake in the figures and any representation in relation to the quantity of rock to be removed, and to continue the work to completion; but this inference is not to be drawn by this court.

It is also contended that the proposed amended answer of the Concrete Pile Company contains ambiguous and equivocal allegations. It is perhaps not free from the criticism of redundancy, but since it apprises the adverse party with sufficient clearness of the claim which it will be required to meet—viz. that the minds of the contracting parties

never met "as to even the approximate amount of work to be performed or the time within which it could be performed, * * * that said guaranty never in fact became a binding contract; * * * that relying upon representations as to the amount of work," etc., it guaranteed that the Dock Company would excavate 9,481 cubic yards—I will not sustain the objection. The proposed amendments are within the sound discretion of the court, and they are allowed because a denial of the request would preclude testimony in relation to the essential grounds for recovery and of defenses.

The motion is granted; service of amended answer and amended complaint within 15 days.

A. BOURJOIS & CO., Inc., v. KATZEL.*

(District Court, S. D. New York. December 13, 1920.)

No. 19–233.

1. **Trade-marks and trade-names and unfair competition ⇐85(2)—Plaintiff's mark and package held not a fraud on public.**
   Where a domestic corporation had purchased the United States trade-mark rights of a foreign manufacturer of face powder, and was purchasing the powder in bulk from the foreign corporation and packing it in this country in boxes bearing the trade-mark, on the back of which was a statement that the product was made in France and packed in the United States by a domestic corporation, and the evidence showed that the boxes were identified by the public as the domestic corporation's product, the use of the trade-marked boxes was not a misrepresentation in the nature of a fraud on the public.

2. **Trade-marks and trade-names and unfair competition ⇐67—Trade-marks are entitled to strongest protection.**
   A trade-mark has come to be recognized as a property right of immense and incalculable value, whose proprietor is entitled to the strongest protection at the hands of the proper court.

3. **Trade-marks and trade-names and unfair competition ⇐29—Product manufactured abroad cannot be sold here in competition with purchaser from foreign producers of the United States trade-mark.**
   A domestic corporation, which purchased the United States trade-mark of a foreign corporation and engaged in the business of buying the product of the foreign corporation, packing it in this country in trade-marked packages and selling it to the public, can prevent another from purchasing the product already packed in the foreign country and reselling it here in the foreign producer's package, which bore a trade-mark substantially identical with the United States trade-mark.

4. **Trade-marks and trade-names and unfair competition ⇐85(2)—Statute prohibiting importation of fraudulently marked articles does not affect rights between private parties.**
   Act Feb. 20, 1905, § 27 (Comp. St. § 9513), which was in the nature of a customs regulation, to prevent the American public from being deceived by simulated names or trade-marks, concerns only the action of the government through its proper officials, and does not affect a suit between private parties to determine the right to sell trade-marked articles in this country.

In Equity. Suit for injunction by A. Bourjois & Co., Incorporated, against Anna Katzel. On motion for preliminary injunction. Granted.

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

*Order reversed 275 Fed. 539.

Briesen & Schrenk, of New York City (Hans v. Briesen, of New York City, of counsel), for plaintiff.

John B. Doyle, of New York City (John R. Rafter, of New York City, of counsel), for defendant.

MAYER, District Judge. The plaintiff, a New York corporation, is the exclusive owner of certain registered trade-marks for face powder; these trade-marks consisting of the word "Java" and the various labels, which are carried by plaintiff's boxes and serve to identify them as plaintiff's products. Defendant's boxes, as will appear infra, are, with two differences, exact duplicates of plaintiff's boxes.

In 1912, the firm of E. Wertheimer & Cie. of France, Successeurs of A. Bourjois & Cie., also of France, had established in the United States the business in Java face powder in boxes and under labels substantially the same as those in controversy. The trade-mark "Java" was considered and favorably recognized in Wertheimer et al. v. Batcheller Importing Co. (C. C.) 185 Fed. 850. The plaintiff corporation was organized in 1913, and for a consideration, involving, inter alia, the obligation to pay $400,000, bought the entire business then and theretofore carried on by A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs, in the United States, viz. the entire good will of said business in the United States, and any and all trade-marks, trade-names, and trade-mark rights relating thereto in the United States, and also the sole and exclusive right to manufacture and sell in the United States any and all toilet preparations then or theretofore made by the French concern. This transfer of trade-marks included the transfer of the registered trade-mark "Java," the top and other labels of the boxes, and all of the trade-marks which the plaintiff has subsequently used were registered. Thus all of these trade-marks and labels are, so far as the United States is concerned, exclusively the property of the plaintiff. It appears from the papers that during the time plaintiff has been in this business it has expended substantial sums of money for advertising, and, in brief, by reason of its business methods, it has succeeded in creating a wide market in the United States for its products, and the boxes of face powder here under consideration are associated in the public mind with the plaintiff corporation. In other words, it appears that plaintiff has built up, not only an extensive and important business, but also an excellent business reputation for the character of its goods, and that the plaintiff depends in greatest measure upon its trade-marks to prevent invasion of its rights.

Plaintiff, apparently from its inception, has bought and is continuing to buy the powder in bulk from the French firm, A. Bourjois & Cie., and then puts up this powder in the boxes containing the trade-mark inscription. Plaintiff, however, may buy its powder from any house, and will obviously do a favorable business in connection with its trade-marks, so long as it satisfies the public, because one of the assets plaintiff has developed is the assurance to the public of the responsible character of any merchandise, which appears upon the market under plaintiff's trade-marks or in the "get-up" of plaintiff's packages. Two

outstanding features of plaintiff's package are the words "Poudre Java" and "A. Bourjois & Cie."

On the argument of the motion, certain papers were inspected by the court, which fully satisfied the court that the box or package of defendant was the genuine box or package of the French firm of A. Bourjois & Cie., and that defendant had bought abroad the face powder contained in the genuine boxes or packages put up by the French firm. These boxes or packages, the product of A. Bourjois & Cie. in France, were imported by defendant into this country.

The two differences referred to, supra, were as follows:

(1) At the beginning of its business, plaintiff New York corporation put the product out under the name of "Poudre de riz de Java." As rice is regarded as a deleterious ingredient for face powder, plaintiff dropped the words "de riz" and adopted the words "Poudre Java." Under this latter name, plaintiff has marketed its goods for about four years last past. An inspection of plaintiff's and defendant's boxes would at once show that this difference is slight, and that the ordinary purchaser would not stop to distinguish between the boxes, and, if defendant's box were a counterfeit or imitation, a court of equity would at once issue its injunction. In addition, if the plaintiff is right as to the undesirable nature of a rice ingredient, a label containing the words "de riz" might unfavorably affect the sale of plaintiff's product, if the purchaser associated the package with plaintiff.

(2) The second difference is that on the back of plaintiff's box or package are the following words:

"Trade Marks Reg. U. S. Pat. Off. Made in France—packed in the U. S. A. By A. Bourgois & Co., Inc., of New York, Succ'rs in the U. S. to A. Bourjois & Cie. and E. Wertheimer & Cie."

These words are so situated and so printed as fairly to come to the attention of the purchaser, and one of affiants, who has sworn that this package is regarded by the public as plaintiff's product, is the buyer in the perfumery department of the large establishment known as B. Altman & Co.

[1] As the defendant's box or package is manufactured and sold in France, the words just quoted do not appear upon it. It is urged by defendant that plaintiff's product is a misrepresentation, and in the nature of a fraud upon the public, in that it gives the impression that it is manufactured and put up in the original packages in France; but opposed to this argument are the affidavits submitted by plaintiff, which are convincing upon the point that the boxes are identified by the public as plaintiff's product, and further, as appears supra, plaintiff has been careful to state upon its box or package that, while the product is made in France, it is packed in this country by the American firm as successors in the United States to A. Bourjois & Cie. and E. Wertheimer & Cie.

There remains for consideration, then, the important question in the case, which seems to be one of first impression, and that is whether, because defendant's box is a genuine article made and sold by the French concern, it can be said to constitute an infringement of the

trade-marks of plaintiff, when plaintiff is the exclusive owner of these trade-marks in the United States.

[2] In approaching the subject, it must be remembered that "the right of property in trade-marks has come to be recognized as of immense and incalculable value," and that the "proprietor of a trade-mark by virtue of the manufacture or offering for sale of his goods is entitled to the protection which the highest powers of the court can afford." Scandinavia Belting Co. v. Asbestos & Rubber Works, 257 Fed. 937, 169 C. C. A. 87.

In Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, the court, in discussing common-law trade-marks, points out that redress is based upon the party's right to be protected in the good will of the trade or business; and the English rule that a trade-mark is not the subject of property, except in connection with an existing business, prevails generally in this country. In Scandinavia Belting Co. v. Asbestos & Rubber Works, supra, the court held that the owner of a registered trade-mark can restrain its use by another, though no loss of sales is shown, and though there may be no fraud between the original seller and buyer of the infringing article.

This is but another way of saying that, where a trade-mark is used in connection with the business of a merchant, and the product sells on the strength of the trade-mark, and because it is associated in the public mind with the plaintiff's product, such a trade-mark is entitled to the strongest protection at the hands of the proper court.

[3] Defendant's trade-mark is genuine, in the sense that it was not spurious at the place of origin, and that no change has been made since it was sold; but it is genuine as matter of law only if defendant has the right to sell within the territory where plaintiff is the exclusive owner of the trade-mark; and, under the doctrine of the Hanover Star Milling Company Case, supra, where, also, plaintiff has established a business in the product in connection with the trade-mark.

The case at bar is obviously stronger than that considered in the Hanover Star Milling Company Case. In the case at bar plaintiff has expended a large sum for the acquisition of the trade-mark title and rights and a large sum for the advertisement of its business. Plaintiff had corralled the American market before defendant's boxes were brought into the American market. If, now, the original French boxes or packages can lawfully be permitted to compete with plaintiff's boxes or packages, it can be readily seen that plaintiff's business may be destroyed, and, in any event, impaired. The question, on its face, is one involving business interests in a large way. If an American business concern buys all of the rights, as in the case at bar, of a business established here by a foreign concern, and then the foreign concern is nevertheless at liberty to compete with the American concern, the result will be that the purchase of rights, under such circumstances, will give little or no protection; and the foreign concern, as well as the domestic concern, will be seriously injured in the long run, because American capital certainly will not be invested, and foreign concerns will find it difficult to sell the rights which they have developed in this country.

It should be said in justice to A. Bourjois & Cie. of France that there is nothing in the record which justifies the conclusion that this competition has been undertaken with their knowledge or consent, and it should be said in justice to defendant that thus far defendant has relied upon what she regards as her legal rights. The question is one of law, which calls for definite and prompt settlement.

[4] In support of the position of defendant, the case of Fred Gretsch Mfg. Co. v. Schoening et al., 238 Fed. 780, 151 C. C. A. 630, is cited. That case involved a construction of section 27 of the Act of February 20, 1905 (Comp. St. § 9513). That section was in the nature of a customs regulation, to prevent the American public from being deceived by simulated name. In other words, simulated trademarks were to be excluded from importation, so as to safeguard the American public; but there is nothing in that section which was intended to or purported to pass upon the question as to whether any given trade-mark was valid as matter of law as between contending parties. Under section 27, the customs authorities may only exclude an article "of imported merchandise which shall copy or simulate the name of any domestic manufacture. * * *" Thus, if an article is genuine, in the sense of defendant's box, it may be imported into this country, and cannot be stopped at the door of the custom house; but whether or not the article may be marketed here under a particular trade-mark is a question to be determined in ascertaining the rights of parties, quite irrespective of section 27 of the Act of February 20, 1905. Section 27 concerns the action of the government, through its proper officials, in carrying out the safeguarding measures erected by the Congress. The case at bar concerns the rights of private parties, and those rights depend upon rules of law in respect of which section 27 is wholly irrelevant.

In the Gretsch Case the question here presented did not arise. There was no situation, such as this, where the original owner of the business and its trade-marks had completely parted therewith to a vendee, who had proceeded upon the strength of his ownership to develop an American market.

For the reasons thus outlined, I am of the opinion that plaintiff is entitled to the exclusion of defendant's boxes from this market, and the motion for a preliminary injunction is therefore granted.

Addendum.

Under the Clayton Act (38 Stat. 730) it will be necessary for plaintiff to give security. This amount will be fixed upon the settlement of the order. On the other hand, as the question is novel and defendant is a small dealer, and as the court gathered on the argument that the plaintiff was more concerned with a settlement of the question of law than it was with the sale of the small amount of merchandise in defendant's possession, the injunction will be suspended on defendant's giving security on appeal in a nominal amount, and provided also that, if defendant intends to appeal, she shall do so promptly.

Submit order on two days' notice.

AMERICAN ENGINEERING CO. v. FREDERICK ENGINEERING CO. et al.

(District Court, D. Maryland. August 8, 1921.)

No. 216.

Patents ⇐328—778,812, for underfeed stoker, held valid and infringed.

The Taylor patent, No. 778,812, for an underfeed stoker, claims 1, 2, 3, and 5, *held* not anticipated, valid, and infringed.

In Equity. Suit by the American Engineering Company against the Frederick Engineering Company and the Frederick Iron & Steel Company. Decree for complainant.

Fish, Richardson & Neave, of Boston, Mass., and Edwin F. Samuels, of Baltimore, Md., for plaintiff.

N. Rufus Gill & Sons, of Baltimore, Md., Jonathan S. Green and E. W. McCallister, both of Pittsburgh, Pa., for defendants.

ROSE, District Judge. The plaintiff, the American Engineering Company, charges the defendants, the Frederick Engineering Company and the Frederick Iron & Steel Company, with uniting, the former to make and the latter to sell, underfeed stokers, in infringement of its patent, No. 778,812, issued December 27, 1904, to one Taylor. The defenses are invalidity and noninfringement.

There is no question that the plaintiff, its predecessors and its licensees, in accordance with what it and they claim to be the teachings of the patent, have manufactured and sold stokers containing an aggregate of 40,000 retorts, rated to develop 4,000,000 horse power, and for which they have received some $29,000,000. If these structures are covered by the first, second, third, and fifth claims of the patent in suit, as plaintiff says they are, defendants infringe, for the difference between the stokers turned out by defendants and those marketed by the plaintiff and its various licensees are for the purposes of this case without legal significance. Defendants knew precisely what they were doing. The Frederick Iron & Steel Company, during the World War, when plaintiff's facilities were overtaxed, was employed by the latter to make parts of its stokers for it. One of the organizers and the manager of the other defendant came to it, fresh from one of plaintiff's licensees, where he had been engaged in making the licensed stokers, and some years earlier he had been in the employ of one of plaintiff's predecessors.

The defense of noninfringement rests upon the contention that what plaintiff itself makes is not the stoker described in the patent, and covered by the claims in suit, to which is added the assertion that, if the patent and claims be given a construction broad enough to cover the devices made by plaintiff and by defendants, they are invalid for lack of patentable novelty.

For thousands of years, men have fed fires by throwing fuel upon them. Eighty years or more ago it was suggested that, under some conditions, it might be better worth while to push the combustibles up

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

into the flames from below. Where coal was used, the underfeed had the great advantage of securing the burning in large part of the gases which it gives forth as it approaches ignition, and thereby turning to profitable use valuable heat-producing material which would otherwise be wasted, to the pollution of the adjacent air. For something like a half century, nothing that counted for much was done to put this idea into practice. Inventors here and abroad obtained patents for various designs of underfeed furnaces, and in the 70's and the 80's some of these structures went into limited use; but it was not until the last decade of the expiring century that the underfed stoker became industrially important.

The plaintiff seems justified in its assertion "that its use on any extensive scale was made possible by three inventions," for each of which American patents were granted, viz. that to Jones, letters patent 470,052; to Roe, 566,871; and to Daley, 644,664. All of these were applied for in the five years between June, 1891, and March, 1896. Without pausing to analyze them in detail, it suffices to say that before Taylor came into the field there were in quite general use underfed stokers with retorts comparatively narrow in proportion to their length, and to a less degree to their depth. Into these the coal was fed by two or more pushers so arranged that the principal work was done by one of comparatively long stroke operating from the fuel receiving end of the retort, and by one or more auxiliary or secondary pushers of short stroke applying their force to the fuel at a point or points some distance from that at which it came into the receptacle. The pressure of these pushers caused the coal to rise in the retorts as well as to move along them. To support combustion, there were at the top or on the sides of the retort, passages through which air came, under pressure when that was desirable. On each side of those retorts, which were equipped for forced draft, there were dead plates upon which there was some burning of the coal, and upon which ashes and clinkers collected.

Such stokers were highly useful for many purposes, but they were not well suited to the requirements of those who wanted a continuous fire bed of relatively extended area, the demand for which is of this century. Boilers to develop 300 horse power were formerly as powerful as any one had use for. Now it is sometimes worth while to have them with a capacity 10 times as great. Until the Taylor stoker came upon the market, there was but little advantage in multiple retorts. They of course, could be put side by side, but because in part of the imperfect combustion which took place on the dead plates, and what was a more serious matter, in consequence of the necessary collection of ashes and clinkers on those plates, it was out of the question to get a continuous uniform fire bed across the entire width of the furnace. Its doors had to be opened every now and then, so that the residuum of combustion could by hand be raked off the dead plates. Every time this happened, the temperature went down. The permissible length of the retorts was limited by the effective reach of the hand operated rake or hoe.

Industry called for something at once more powerful and less wasteful. Men knew how to make an underfeed furnace, which could be automatically fed. What was wanted was one which would in addition clean itself, so that deposits of combustible material would not break up the continuity of the fire bed, or have to be removed in ways which wasted costly heat. There is no doubt that Taylor's stoker, in its commercial form, met these requirements, and there is equally little room to question that the ways in which the results are obtained were described in his patent. What he did was simple enough. He gave the retorts and the fire bed supported by them a slope downwardly from the end through which the coal came. The combined effect of gravity and the jarring of the pushers as they drove the fuel forward kept the ashes moving down hill until, at the end of the retort, they fell upon a dump grate, which could easily be manipulated from the outside without opening the furnace at all. For the dead plates, no longer needed to support the ash and clinker, he substituted twyer blocks with mouths flaring towards the retorts. Through these came air under pressure to supply the needs of combustion at the useful point. The tendencies of the coal, as it was pushed up and came under the influence of heat, to swell and to become somewhat sticky, caused it to a considerable extent to arch over the twyer blocks, and thereby aided in preserving the continuity of the fire bed, and to a considerable degree protected the blocks from the damage the burning coal, if always resting directly upon them, would do. It became practical to put side by side as many retorts as any one had use for. No matter how numerous they were, the fire bed would stretch over them all in an unbroken burning surface. As there was no occasion for rakes or hoes, the effective range of their usability no longer restricted the length of the retorts.

It is to these things that the claims in suit relate, and each and every one of them may be read upon defendants' devices. In the light of the disclosures of the prior art, are they invalid altogether, or must they be so narrowly construed that they will not cover defendants' structures? Many prior patents have been offered in evidence. It would serve no good purpose to discuss them. It is quite possible that defendants are right in their contention that every single element of the combination described in any of the claims in suit is to be found somewhere in the prior art, but I have not been able to discover in any one of them the combination itself, and that is what Taylor invented, if he invented anything. His patent has nearly expired. During all these years, it has been respected. Some of the most wealthy, powerful, and resourceful corporations in the country have preferred to accept licenses and pay tribute rather than risk litigation over it. Defendants, it is true, assert that all this is of little significance, because in their view the acceptance of licenses and the payment of royalties was all a part of a scheme to evade the provision of the anti-trust acts, but they have offered no testimony to support this charge, and it necessarily falls.

This opinion should not end without notice of a phase of the case as to which at the hearing there was much said. In the Taylor patent, there is described what he called a pivoted pusher, but which has been referred to less respectfully, but more strikingly, as a flapper. It has never been used in actual industrial operation by Taylor, by any of the succeeding owners of his patent, by the defendants, or by any one else. Defendants say that it could not have been made to work, and, as that is the only form of pusher shown in the patent, no operative device is disclosed, and the patent is therefore void. It is not as cheap a pusher to make or to maintain as those which everybody now uses. Perhaps it would cost more to operate, but I see no reason to doubt that it would work, if it was worth anybody's while to try it practically, and that is all the law requires. Taylor doubtless wanted, if he could, to escape the Jones and the Roe patents. Like other parents, he may have become especially attached to it as a somewhat peculiar child of his brains; but he did not in the claims in suit limit himself to it, as he did in the other claims not here in issue.

It follows that the claims in suit must be held valid and infringed. The usual decree for an injunction and an accounting may be drafted.

SANFORD RILEY STOKER CO. v. FREDERICK IRON & STEEL CO. et al.

(District Court, D. Maryland. August 8, 1921.)

No. 217.

Patents ⊜328—1,152,222, for improvement in underfeed stokers, held valid and infringed.

The Riley patent, No. 1,152,222, claims 3, 9, and 10, for an improvement in the underfeed stoker of the Taylor patent, No. 778,812, consisting of the addition of an extension grate at the foot of the Taylor retort, upon which the portion of fuel passing unconsumed through the retort may be efficiently burned under forced draft, *held* the invention of the patentee, valid, and infringed.

In Equity. Suit by the Sanford Riley Stoker Company against the Frederick Iron & Steel Company and the Frederick Engineering Company. Decree for complainant.

Louis W. Southgate, of Worcester, Mass., and Edwin F. Samuels, of Baltimore, Md., for plaintiff.

N. Rufus Gill & Sons, of Baltimore, Md., and Jonathan S. Green and E. W. McCallister, both of Pittsburgh, Pa., for defendants.

ROSE, District Judge. The plaintiff owns letters patent No. 1,152,222, issued August 31, 1915, upon an application made by one Riley five years before for various improvements in the Taylor underfed stoker, a general description of which will be found in the opinion this day handed down in the case of the American Engineering Company against the defendants herein. 274 Fed. 861. The Riley patent has 14 claims, most, if not all, of which are limited to somewhat precise

structures by the number of their elements and the rather detailed specification of their distinguishing characteristics. We are here concerned with but three of them, the third, the ninth, and the tenth. An element of every one of these is an extension grate at the foot or end of the Taylor retort, and intended to furnish a support upon which the portion of the fuel passing unconsumed through the retort may, under forced draft, be efficiently burned.

One of the defendants, the Frederick Iron & Steel Company was employed by the American Engineering Company, when the World War overtaxed the latter's facilities, to make parts of the Taylor stokers, equipped as they were with the Riley grates, for the making and selling of which the American Engineering Company held a license. The other defendant, the Frederick Engineering Company, was organized in 1920 for the purpose of turning to profitable use the skill and experience in the manufacture of stokers of a Mr. Lundgren, who, at one time, was in the employ of a predecessor of the American Engineering Company, and subsequently, for a number of years, was in the stoker department of the Westinghouse Electric & Manufacturing Company, also a licensee under the Riley as well as the Taylor patent. The advertising literature of the Frederick Engineering Company says that in the development of its stocker no radical change has been made from the general well-known type, "and that its design is the result of more than 12 years of specialized experience of this particular kind of stoker." In short, the defendants knew that there was a lucrative demand for the device. They had been making it, and they did not want to stop. They knew there were certain highly useful, if not essential, features in these stokers, as the public knew them, protected, as it was claimed, by patents under which they had no rights.

Naturally enough, they persuaded themselves that the patents were invalid, or must be so narrowly construed that they would not cover the stokers which the patentees and their licensees had been putting on the market, or that a few changes, unimportant to the ultimate users, would effectually avoid infringement. If they are correct in any of these respects, they have a right to do what they have done, and are doing, no matter how their attention was first drawn to the business, or how closely they copy plaintiff's commercial device. On the other hand, that the stokers, as they have been made and sold, have so greatly commended themselves to popular favor that the defendants do not deem it expedient to make any "radical change" in them may strengthen the presumption of novelty and utility in the patents, in accordance with the disclosures of which they have been made, if any such patents there are.

Before passing upon the defences of nonpatentability and noninfringement, attention should be given to still another ground upon which it is said that the patent in suit, or at all events the claims here in issue, are invalid. It is strenuously contended that the real inventor of an essential element of every one of them was not Riley, but one Wood. In 1908, the then owner of the Taylor patent, through an independent contracting corporation, installed three Taylor stokers, of

six retorts each, in the plant of the Electric Corporation of Lowell, Mass. It turned out that, under "peaked" or overload conditions, pressure could not be maintained, although there was an excessive consumption of coal. Much unconsumed coke passed through the retorts and piled up on the dump plates to an extent sufficient to clog the free operation of the retorts themselves. The frequent dumping of the plates was the only remedy, and that carried much valuable fuel into the ash pits. The Electric Corporation claimed that guaranties of economy and efficiency had not been fulfilled. The then owner of the Taylor patent had apparently had some prior experience with similar difficulties, for Riley, who was then in its employ, had for some time been thinking how they could be remedied. He believed that they could be in large part obviated, if means could be devised to continue highly efficient combustion upon the dump plates themselves. The fuel bed upon them would ordinarily be comparatively thin, and it appeared impracticable, and perhaps undesirable, to attempt to feed coal into them from below. The fire on them would, in its essentials, be an overfed one. Forced draft was required, if combustion was to be approximately complete. Grates must therefore take the place of mere dump plates, and they would have to be so constructed that they could be oscillated or otherwise moved sufficiently to dump the ashes off them into the pits.

In such a structure as the Taylor stoker it was not at first sight obvious how the air could be carried from the compressed air chamber under the retorts and the twyers to these grates and leave the latter still movable. Riley admits that up until about November, 1909, he had seen no solution of the problem thus presented, although he had given much thought to it. There were conferences between him and various representatives of the Electric Corporation, of whom Wood, then the engineer in direct charge of the operation of its plant, was one. At one of these interviews, Wood claims to have suggested the device of the claims in suit. Riley had with him a blueprint, and upon this Wood says he made certain marks with a red pencil, showing how to do what was wanted. This print is still in existence, and has been produced in evidence, and the red lines are visible upon it. Wood's story that he made them is corroborated by some of the others then present, although Riley says that he put most of them on with his own pencil, and that the idea they embodied was his. Whosever they were, much remained to be thought out and designed before a workable structure could be constructed. Whatever was the part Wood played at the conference in question, it is admitted that for all practical purposes he thereafter dropped out of the matter.

An extension grate, with forced draft as described in the patent, was put first under one of the Electric Corporation's boilers, and subsequently under the others. It gave satisfaction. In March of 1910 Riley applied for the patent in suit, and of course made the usual inventor's oath. Wood has never done anything to assert his rights, or even to advertise them, except to refer to them in some conversations with persons other than Riley, who had at the time been interested in the work done at Lowell. There is no reason to question

either his good faith or that of any of the witnesses, who after the lapse of some 11 years give more or less detailed and precise corroboration of the story he tells. His and their present belief that he, and not Riley, was the inventor of the patented grate, is doubtless genuine enough. It is not the first or the thousandth time that the world has applauded statesman, general, scientist, or patentee for a policy, a strategy, a discovery, or an invention to the credit of which some one else was entitled, in the latter's estimation and in that of his friends, nor will it be the last. It is sufficient here to say that if at this late date, and upon evidence no stronger than that here presented, another than the patentee can be held to have been the inventor, few valuable patents would be safe.

Little need be said as to the state of the prior art. Riley's contribution to its development was in a sense, perhaps, not a great one. It certainly does not suggest that it was the result of a flash of unusual genius. Nevertheless, it added much to the economy and efficiency of the now so generally used underfed stokers. The overwhelming majority of those installed in recent years have the Riley grate, and defendants have not felt that they could sell theirs without it; not, it is true in the precise form shown in the patent, but in one which one of the licensees under the Riley patent has preferred, there, however, being seemingly no reason to question that it embodies the invention of the claims sued on, whether it does or does not improve upon it. There is no close anticipation of the combination Riley devised, and nothing in the record sufficient to rebut the presumption of novelty raised by the patent itself.

It follows that the plaintiff is entitled to the usual decree for an injunction and for an accounting.

McKAY v. MESCH.

(District Court, D. Montana. July 12, 1921.)

No. 83.

1. **Mines and minerals ⇐44—General exception of known lode in placer patent effective.**
   Under the law as settled by the Supreme Court, the issuance by the Land Department of a patent for a placer mining claim is not conclusive that there is no known lode therein, and a general exception in the patent of any known lode may be invoked by any subsequent claimant of a lode, though the effect may be to lessen or wholly destroy the value of the placer claim.

2. **Mines and minerals ⇐43—Lode crossing placer claim held not excepted from the patent as a known lode.**
   A lode crossing a patented placer claim *held*, on the evidence, not identical with a lode known to exist prior to the patent and not excepted from the patent as a "known lode."

In Equity. Suit by Alexander McKay against Morie Mesch. Decree for complainant.

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

E. B. Howell, of Butte, Mont., and George R. Allen and Lyman H. Bennett, both of Virginia City, Mont., for plaintiff.

M. M. Duncan, of Virginia City, Mont., for defendant.

BOURQUIN, District Judge. This is a final hearing in a suit by plaintiff to quiet title to premises conveyed by placer patent issued upon an application made in December, 1900, against defendant's claim of a known lode at that date.

[1] In that behalf counsel contends, as he did in Barnard Realty Co. v. Nolan (D. C.) 215 Fed. 996, that the patent conveyed title to any known lode, is not subject to collateral attack, and any attack, direct or collateral, is barred by the six-year limitation of the act of 1891 (Comp. St. § 5114). The argument proceeds that in disposal of lands the Land Department has no more power than Congress by statute has given it; that any departmental act in excess of such power is void; that whether lands are subject to disposal, patentable, and of the character applied for, is the department's duty to determine at time of patent; that patent issued is presumptive that this duty has been in all things performed, conclusive against collateral attack, and open to disproof only in a timely direct action to vacate the patent, based on fraud or mistake, brought by the United States within the limitation aforesaid; that in any case the patent conveys the title, if the lands are open for disposal under general laws; that if, in the patent, the department inserts exceptions unauthorized, or general, undefined, and so broad that they may defeat the grant, they are void; that the placer statutes, in their general provision, construed in effect that placer patents shall not issue for known lodes, differ none from homestead and analogous statutes in like, but express, provisions that patents by virtue of them shall not issue for lodes or mineral lands; that the placer statutes thus furnish less warrant than the latter for the department's insertion in patents of general and undefined exceptions of known lodes, and the language of the placer statutes afford no ground for judicial construction different from the latter in respect to what the patents convey; that the exceptions so inserted in placer patents and in the patent herein are general and undefined, assume to except, not only known lodes, but in effect also 25 feet of placer land on each side thereof, and are broad enough to defeat the grant, as they on occasion have done (Clark Montana Realty Co. v. Ferguson [D. C.] 218 Fed. 965); that to construe the placer statutes to justify these exceptions, and thus to render the patents indefinite and on occasion void, contrary to the construction of the like homestead and analogous statutes, and contrary to the effect of patents by virtue of them, is insupportable upon principle; that upon application for placer patents, as in all other cases it is the department's duty as aforesaid, and it proceeds to perform this duty by taking evidence as to the character of the land and the existence or otherwise of known lodes, including affidavits by an officer of the United States, a deputy mineral surveyor, who examines the lands and reports in respect thereto; that, the lands thus found to be placer in character and known lodes non-

existent, the department sells and receives payment for the whole, and issues patent for the whole; that the rule of the Iron Silver Cases (109 U. S. 550, 3 Sup. Ct. 339, 27 L. Ed. 1028; 116 U. S. 697, 6 Sup. Ct. 601, 29 L. Ed. 774; 124 U. S. 382, 8 Sup. Ct. 598, 31 L. Ed. 466; 128 U. S. 680, 9 Sup. Ct. 195, 32 L. Ed. 571; Id., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214), in effect contrary to all the foregoing, is based on strained inference and construction of the placer statutes discordant with that of the homestead and analogous statutes, and was in part induced by the absence of any statute of limitation, by reason of which absence it was immaterial whether or not legal title to known lodes was conveyed by placer patents, for that suit to cancel the patent by the United States would not be ever barred. And for support appeal is made to Burke v. Railway Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

The contention and argument in the main are settled law, the principles of conveyances and grants, private and public, confirmed by numerous decisions of the Supreme Court. But so, too, is the exceptional doctrine in respect to the placer statutes and patents settled law by virtue of the Iron Silver Cases aforesaid. And although in his criticism of it counsel but voices, it is believed, the judgment of the major portion of bench and bar of the mining states at all times, lesser courts can but apply it. The Supreme Court created it; the Supreme Court maintains it; the Supreme Court alone can take it away. So far from the latter by the Burke Case, the Supreme Court, after citing and vindicating all the principles and cases that make against this exceptional doctrine, merely refers to it, but with approval.

If lodes were conspicuous upon the land, like a stone wall or growing trees, and so indubitably "known," general and undefined exceptions of them would be valid, and their existence easily demonstrated in any suit. But they are not. Too often it is that their existence, first discovered long after patent, is seized upon by the covetous and speculative to attack the patent, 10, 20, 40 years subsequent to its issuance, in the hope that the lode may before court or jury be given the character of a "known lode" by the recollections, real or imaginary, of ancient witnesses. And one defeated, another takes his place, ad infinitum. In consequence, placer patent titles to lands of great value are never finally quieted and are always doubtful, in theory at least. Instances have occurred where, upon such recollections, years subsequent to patent, lode after lode were so carved out until the entire premises had been held to have been excluded ab initio by the patent itself, rendering the latter a mere scrap of paper, conveying nothing. Such might be its fate in this and in any case.

[2] To proceed to the merits, however, the placer claim in the instant case is located for 2,700 feet along a creek, hills rising on both sides, and is 200 feet wide. The lode claim crosses the placer, northerly and southerly, at a somewhat acute angle, and is 1,400 feet long and 550 feet wide. It is surveyed for patent, and therein its lines do not cross or conflict with the placer, but follow the latter's lines as far as possible, save where the claimed lode line crosses the placer; and

there the lode claim survey also crosses the placer in a strip 25 feet on each side the lode line.

This 50-foot strip is equidistant from the side lines of the lode claim, connects the end portions of the latter, otherwise separated by the placer, and be it noted is the only conflict area, and for which alone the lode claimant defends. There is evidence tending to prove that for 20 years before the placer patent application in December, 1900, a lode that probably crosses the placer premises was known and was occasionally worked at some profit on or near the latter. It is not necessary to detail this evidence, nor to determine its sufficiency to give this lode the character of a "known lode" at the vital time to exclude it from the patent, because it does not appear to be the lode at the point of surveyed crossing of the placer and that is now claimed by defendant. On the contrary, it appears to be otherwise.

Despite some ambiguous opinions that they are one and the same lode, the facts demonstrate that the former lode crosses the placer at a point 150 feet south of the crossing of the latter lode, and, proceeding northerly, on a course 45 degrees westerly of the course of the latter. The workings permit no just inference that the lodes are one; the exposure of the former nearest any on the latter upon the surveyed crossing of the placer being 250 feet distant. Witnesses state their belief that the former lode, formerly known to them as the Octopus, is the lode now claimed by defendant as the Silver Bar. So it is, but only in part—the part south of the placer, and not including the crossing and lode thereon claimed by the defendant as the Silver Bar. Defendant's workings, plat, and testimony of themselves establish this. Where the former lode crosses the placer, defendant asserts no claim, and there is no conflict; and in respect to the latter lode, now claimed by defendant, there is no evidence it was known at the date of application for the placer patent.

This finding determines the case for plaintiff. Decree accordingly.

Ex parte KEREKES.

(District Court, E. D. Michigan, S. D. August 16, 1921.)

No. 7697.

1. **Habeas corpus ⟸59—Court bound to assume truth of allegations of petition, when uncontroverted.**
   The court is bound to assume the truth of uncontroverted allegations in a petition for a writ of habeas corpus.

2. **Habeas corpus ⟸3—Petitioner, who deserted after improper induction into army, not entitled to writ, where he did not avail himself of proper legal remedy.**
   Where a nondeclarant alien, a citizen of Austria-Hungary, was erroneously inducted into and retained in the military service of the United States during the war with Germany, after having been given an exempt classification by a draft board, but he did not avail himself of the proper legal remedy to obtain appropriate relief, and, on the

other hand, deserted, he is not entitled to the extraordinary writ of habeas corpus to procure his release from custody of the military authorities as a deserter.

3. **Army and navy ⊂=44(2)—Military authorities have jurisdiction of improperly inducted deserter.**

The military authorities have the power and right to arrest and bring to trial on the charge of desertion one who, after being inducted into the army and becoming subject to military law, defied the orders of his superior officers and deserted, though he had been inducted into the army improperly in the first place, having been accorded exemption under the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), in force during the war with Germany, as a nondeclarant alien.

4. **Habeas corpus ⊂=85(1)—Court will not assume military tribunal will deny fair hearing.**

The District Court of the United States will not assume, on petition for habeas corpus by one held in custody by the military authorities as a deserter, that the proper military tribunal to try the offense will deny to petitioner a full and fair hearing, or will deprive him of any rights to which he is entitled on account of having been improperly inducted into the army in the first place, after having been accorded exemption as a nondeclarant alien under the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), in force during the war with Germany.

Habeas Corpus. In the matter of the petition of Joseph Kerekes for a writ to secure release from custody on a charge of desertion. Petition denied, without prejudice to its renewal.

Asher L. Cornelius, of Detroit, Mich., for petitioner.

TUTTLE, District Judge. This is a petition for a writ of habeas corpus, to be directed to the commanding officer of the United States military post at Ft. Wayne, in this district, where petitioner alleges that he is now confined in the guardhouse upon a charge of desertion from the United States army. The material facts alleged in the petition are as follows:

That petitioner was, during the year 1917, and prior thereto, a citizen of Austria-Hungary, and that he has never declared his intention to become a citizen of the United States; that he came to the United States in 1917, and that at the time of his induction into the military service of the United States he understood the English language very imperfectly; that in June, 1917, he was required to register under the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), and was thereupon furnished with a questionnaire in the regular form, furnished by the draft board, containing an affidavit for the purpose of claiming exemption, which petitioner duly executed, claiming exemption from military service on the ground that he was a nondeclarant alien, being a citizen of Austria-Hungary, and duly filed said questionnaire and claim for exemption with the proper local draft board in the city of Detroit, where he resided; that thereafter said board classified petitioner in "class 5," the proper class for nondeclarant aliens, and for alien enemies; that afterwards, and during the latter part of August or the early part of Sep-

tember, 1917, petitioner was duly certified to the military authorities as being properly registered in "class 5"; that thereafter, and about the latter part of August, 1917, petitioner, having been notified to appear for physical examination, so appeared and informed those in charge of such examination of his exemption, but nevertheless he was ordered to submit to a physical examination, which he did to avoid arrest; that shortly afterwards he was ordered to appear for induction into the army, and, to avoid arrest, he obeyed such order, and was afterwards taken to Camp Custer under protest and compelled to take the oath in the army, which he did to avoid arrest; that at each step in his induction into the army petitioner protested that under the law he was not liable to military service; that his induction into such military service, after being placed in the proper classification, was a flagrant violation of his rights, of the rules of the War Department, and of the Selective Service Act; that shortly after being so inducted into such military service, and believing that his detention and confinement in such service was illegal, but not knowing any other means of securing his release, in December, 1917, without leave from the military authorities at Camp Custer, he then and there fled to escape further restraint and confinement in such military service, and was not apprehended until July, 1921; that he is now confined at said military post at Ft. Wayne, and is about to be court-martialed under the military laws as a deserter.

The petition concludes with a prayer for a writ of habeas corpus and a writ of certiorari, directed to the officer in charge of said post, directing the latter to produce said petitioner before this court for inquiry into the cause of his imprisonment and detention, and to certify to this court all the proceedings which have taken place before said officer and said draft board, in the possession or custody of such officer.

[1] While it is clear that, assuming, as this court is bound to do at this stage of the proceeding, the truth of the allegations in the petition, petitioner was erroneously inducted into, and retained in, the military service of the United States, from which his status as a nondeclarant alien exempted him under the express terms of the Selective Service Act, yet from such petition it is equally clear that he was actually inducted into such service; that he took, although unwillingly, "the oath in the army"; that about 3 months afterwards, without having, so far as appears from his petition, resorted to the proper procedure afforded by law for the purpose of obtaining release from such service, or having been denied an opportunity so to do, he "fled" from the army, "without leave," in order to escape, and "was not apprehended" until 3½ years later; and that he is now confined at a military post and is "about to be court-martialed under the military laws as a deserter."

It thus appears that the imprisonment from which petitioner asks this court to free him is not an alleged unlawful detention in the army as a soldier, but his confinement in the guardhouse preparatory to his trial under the military laws on a charge of desertion from the army.

[2] Even assuming that the real grounds for the release prayed

were his unlawful induction into, and retention in, the military service, the total absence of any showing, or, in fact, allegation, of an attempt to avail himself of the proper legal remedy for obtaining appropriate relief, makes it plain that he is not now entitled to the extraordinary writ of habeas corpus. Ex parte Blazekovic (D. C.) 248 Fed. 327.

[3] As already noted, however, it not only appears from, but is distinctly stated in, the petition that the detention from which petitioner seeks release is his confinement in the guardhouse upon a "charge of deserting from the United States army," and that "said confinement is by virtue of a military order for petitioner's arrest," and that he is about to be tried "under the military laws as a deserter." It is not claimed that the court-martial by which petitioner is thus about to be tried is without jurisdiction to proceed with such trial. Indeed, it seems apparent from the allegations in the petition that, as petitioner was inducted into the army and subsequently fled therefrom, without leave, in order to escape, the legality of such court-martial is not, and cannot successfully be, challenged on the ground of lack of jurisdiction. It cannot be doubted that the military authorities have the power and right, so essential to the enforcement of obedience to orders and the maintenance of necessary discipline, to arrest and bring to trial, on the charge of desertion, one who, after being inducted into the army and becoming subject to military law, defies the orders of his superior officers and deserts.

[4] If, then, the military authorities have jurisdiction to try the petitioner on the charge on which he is imprisoned, the question whether, under the facts and law involved, he is guilty of the crime of desertion, is a question to be determined by such authorities under the legal rules and principles applicable, and in conformity with due process of law. In re Scott, 144 Fed. 79, 75 C. C. A. 237; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127. It is not alleged by petitioner, and it certainly will not be assumed by this court, that the proper military tribunal will deny to petitioner a full and fair hearing or will deprive him of any rights to which he is entitled. Dillingham v. Booker, supra.

The petition must therefore be denied, without prejudice to its renewal if and when it shall appear hereafter to be necessary and proper.

THE LAKE ALLEN.

(District Court, E. D. New York. July 20, 1921.)

1. Shipping ⟸137—Damage to sugar cargo held due to unseaworthiness.

Damage to a cargo of sugar from leakage of sea water into a hold *held* due to unseaworthiness of the vessel by reason of structural defects, which manifested themselves under ordinary conditions of severe weather, and for which the vessel was not exempted from liability by Harter Act, § 3 (Comp. St. § 8031); it being shown that many of the rivets were not properly fitted or driven, allowing leakage around them, which defects should have been disclosed by a proper inspection.

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

2. Shipping ⇐143—Owner of chartered vessel primarily liable for damage to cargo due to unseaworthiness.

Where damage to the cargo of a chartered vessel was due to unseaworthiness, the owner is primarily and the charterer secondarily liable therefor.

In Admiralty. Suit by the St. Lawrence Sugar Refineries, Limited, against the steamship Lake Allen, the United States, claimant, and the Panama Railroad Company, impleaded. Decree for libelant.

Barry Wainwright, and Thacher & Symmers, of New York City (Earle Farwell and O. B. Wiren, both of New York City, of counsel), for libelant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (C. C. Hoffpauir, of counsel), for the United States.

Richard Reid Rogers, of New York City, for Panama R. Co.

CHATFIELD, District Judge. [1] This action is brought for damages to a cargo of Peruvian sugar, brought on the steamer Lake Allen from the Panama Zone to New York, in March, 1919. The sugar, which had been in a warehouse several years, was in dark, discolored bags of poor quality, but according to the testimony of the witnesses no damage has been traced to any source except wetting by salt water, particularly affecting the three lower tiers in the No. 3 hold of the vessel. According to the testimony, the sugar from the other holds did not show damage from salt water, while that from the lower part of No. 3 hold showed the presence of large quantities of salt and the loss of a large portion of the contents of many of the bags in these lower three tiers.

The Lake Allen was a vessel built at Detroit in the year 1918, brought through the Canal, refitted at Boston, where she was in dry dock, and the outside of her hull inspected and painted. She had made two or more voyages during the winter of 1918–19 before the voyage in question. She was under charter to the respondent, the Panama Railroad Company, and on the voyage in question experienced what apparently was severe, but not extraordinarily rough, weather. During the voyage, some water was found in the various holds, which, according to the captain, amounted to five or six inches each watch, but which was pumped out with a few minutes' pumping; and the testimony also shows that the pumps sucked when the level of the water in the bilges was reduced to about three inches.

After some severe weather south of Cape Hatteras, water was discovered in No. 3 hold, to a depth of some three feet. The discovery was also made that the pump in this hold had become stopped through cotton waste in the valve or intake, which was removed and the water pumped out. The presence of this water had not been previously ascertained, because the waste in the valve or intake caused the pump to fail to act, and the engineer supposed that the pump was sucking with no water present. The finding of the water caused the officers of the vessel to examine her. Upon reaching New York she was put in

dry dock and some 150 rivets repaired in the No. 3 hold. After being placed in the water, the chief engineer objected to the condition of the rivets, she was again placed in the dry dock, further search made, and some 300 more rivets in the various holds and in the tank cover replaced or repaired. According to an expert, who examined the vessel for the owners of the cargo of sugar at New York, some 80 rivets were discovered by him, in which either the head of the rivet was not concentric with the shaft of the rivet, or in which the rivet was not evenly hammered down against the side of the vessel, so that leakage was possible. He testifies that each one of the rivets which he so found defective was observed by him because seepage or moisture was at the time of examination present on the inside of the vessel, running down from the riveting in question.

According to the officers of the vessel, these rivets had worked loose under the strain of the weather encountered on the trip north. According to the expert produced by the libelant, these rivets had been improperly driven when the vessel was constructed, and had escaped detection when the vessel was inspected, later working loose or giving way under the vibration of the engines. This expert witness testifies that the defective rivets were so distributed and that the nature of their defects was such that strain from severe weather could not alone produce the result in question, as their condition was not caused by the mere strain or working of the plates, but rather through the vibration as it affected the individual rivet.

The leakage having resulted, therefore, from the structural defects, which manifested themselves under ordinary conditions of severe weather, it cannot be held that the damage was due to perils of the sea, within the exemptions of section 3 of the Harter Act (Comp. St. § 8031), unless due care to render her seaworthy be shown.

The vessel was unseaworthy, and the sole issue left is determination of responsibility therefor. In other words, has the owner or carrier (charterer) avoided liability by the stipulation that no liability shall result if due diligence has been used to make the vessel seaworthy? The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. In The Thessaloniki (C. C. A.) 267 Fed. 67, and The Ontario (D. C.) 106 Fed. 324, it was held that certificates of examination and proof of inspection and repair were sufficient to show due diligence, etc., and thus the presumption of unseaworthiness was rebutted. As a consequence, the accident was held due to a peril of the sea. In The Aggi (D. C.) 93 Fed. 484, The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, and Compagnie Maritime Française v. Meyer et al., 248 Fed. 881, 160 C. C. A. 639, casual inspections were held insufficient.

[2] In the case at bar inspection by tapping or examining the rivets should have shown the defect. The explanation seems to lie in the haste of construction and fitting for use. Further, while at sea, the clogging of a pipe seems to have prevented discovery of a defect which was (even then) causing leakage enough to make the cause an object of suspicion. These are not perils of the sea, and the libelant should re-

cover against the claimant, with the charterer as secondarily responsible therefor. Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349; Id., 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770; The Julia Luckenbach, 235 Fed. 388, 148 C. C. A. 650; Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522.

HUGHES v. SOUTHERN PAC. CO.

(District Court, S. D. New York. May 13, 1918.)

No. A64-21.

1. **Seamen ⇐12—Coastwise seamen, signing shipping articles, may be discharged only by master before commissioner.**
   While seamen in the coastwise service are not required to be shipped before a commissioner and sign articles, they may be so signed, as authorized by Act April 11, 1904 (Comp. St. § 8293), and when that is done the statutes relating to such contracts apply, and under Rev. St. §§ 4549–4551 (Comp. St. §§ 8338–8340), a seaman can only be discharged by the master in the presence of a commissioner.
2. **Seamen ⇐19—Acceptance of unauthorized discharge does not entitle seaman to unearned wages.**
   Libelant, who had signed shipping articles as assistant engineer, was told before the voyage commenced by the chief engineer, who had no authority to discharge him, that he was discharged to make room for another, and left the vessel, but before she sailed was notified that he was not discharged, and directed to report for duty, which he refused to do. *Held*, that he was not discharged, and was not entitled to recover a month's wages, under Rev. St. § 4527 (Comp. St. § 8318).

In Admiralty. Suit by George H. Hughes against the Southern Pacific Company. Decree for respondent.

Silas B. Axtell, of New York City (Arthur Lavenburg, of New York City, of counsel), for libelant.

Kirlin, Woolsey & Hickox, of New York City (C. R. Hickox and L. De G. Potter, both of New York City, of counsel), for respondent.

WARD, Circuit Judge. [1] Shipping articles constitute a contract executed by and between the master of a vessel, as agent for the owners, and each member of the crew shipped before a United States shipping commissioner. The master virtute officii employs and discharges the seamen (Rev. Stat. U. S. § 4511, schedule table A [Comp. St. § 8300]), and the seaman when discharged must be discharged before a shipping commissioner (sections 4549–4551 [Comp. St. §§ 8338–8340]). Any other discharge is wrongful.

Shipping of seamen in the coastwise trade is not covered by these regulations, but the master and seamen may voluntarily use shipping articles before a United States shipping commissioner, and in that case the foregoing sections of the United States Revised Statutes apply, and also section 4527 (section 8318), which is sued on in this case. Chapter 1140, Laws of 1904 (Comp. St. § 8293).

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

The libelant signed articles with the master of the steamship El Siglo before a United States shipping commissioner for a voyage from New York to Galveston and return, which ended September 20, 1917. September 24, at 9 a. m., he signed articles for a similar voyage as first assistant engineer. Between September 20 and 24 he worked aboard the steamer in port, at the request of the chief engineer, and for these services he was paid in full, receipting on the company's pay roll "in full for all demands against the steamship El Siglo and services rendered up to September 24, 1917." The respondent suggested that this is a release of any claim he might have for a wrongful discharge before or during the voyage signed for September 24. I think there is absolutely nothing in this claim.

The respondent claims that by its practice the superintending engineer, or in his absence his assistant, may ship and discharge seamen in the engine department of the company's steamers. This may be right, so far as the internal management of the company's business goes; that is, these officers may direct that a seaman shall be employed or discharged in the engine department, but the discharge, if he is employed under shipping articles before a United States shipping commissioner, must be in accordance with the direction of the law.

[2] A little before noon on September 24, Chief Engineer Nolan of the steamship El Siglo told the libelant that the old chief engineer was coming back to the steamer, and that he (Nolan) was to go out with him as first assistant engineer on the next voyage, so that there would be no further need for the libelant's services.

The libelant at once put his working clothes in his trunk, placed other belongings in a handbag, delivered the trunk to an expressman to be taken to the railroad station, where he intended to buy a ticket for his home in Chicago and check the trunk. He then went at once to the office of the superintending engineer, where he saw the assistant, Worrell, complaining that he had been improperly discharged. Worrell said that Nolan was going out as first assistant. Subsequently Worrell told Mr. Hebble, the superintending engineer, that the libelant had signed articles for the voyage, and Hebble at once sent a letter to the steamer, telling him that he was not discharged, but could go out as first assistant engineer. On the afternoon of the same day the libelant saw Mr. Hebble and was given this letter; but he refused to go, saying he had been "fired." Hebble said that he had not been discharged, and could go in accordance with his contract under the shipping articles. The libelant did not leave for Chicago until the 26th and could perfectly well have got his trunk from the station.

It is quite plain that the chief engineer of the steamer had no authority, either by law or by the company's practice, to discharge the libelant, and that the superintending engineer, when he had arranged to have Nolan go on the voyage as first assistant, did not know the libelant had signed shipping articles. I find as matter of fact that the libelant was not discharged, and he should have got his trunk back from the station and sailed on the voyage as first assistant engineer.

The libel is dismissed.

MINERALS SEPARATION, Limited, et al. v. BUTTE & SUPERIOR MINING CO.

(District Court, D. Montana. August 12, 1921.)

No. 8.

Patents ⇐318(3)—Standard for determining profits of infringer of process patent.

The standard of comparison by which is measured the profits for which an infringer of a process patent is accountable is the gain he made by use of the patented process, rather than any other which was open to the public and which he might have used, and his choice is not limited to the processes known at the date of the patent or when infringement commenced, but he was free to choose at any time during its continuance, and the best process, known and free, which he might then have used, furnishes the standard for subsequent infringement.

In Equity. Suit by the Minerals Separation, Limited, and others against the Butte & Superior Mining Company. On motion to determine standard of comparison for guidance of master in accounting. Granted.

See, also, 245 Fed. 577; 250 U. S. 336, 39 Sup. Ct. 496, 63 L. Ed. 1019.

Henry D. Williams, Lindley M. Garrison, and Wm. H. Kenyon, all of New York City, Odell W. McConnell, of Helena, Mont., and J. L. Templeman, of Butte, Mont., for plaintiffs.

J. Edgar Bull and John F. Neary, both of New York City, Thomas F. Sheridan, of Chicago, Ill., J. Bruce Kremer, of Butte, Mont., and R. W. Perkins, of New York City, for defendant.

BOURQUIN, District Judge. Plaintiffs' patent valid, and defendant having infringed it (250 U. S. 336, 39 Sup. Ct. 496, 63 L. Ed. 1019), the suit is in the final stage, and has been referred to a master to take and state an account. Therein plaintiffs move the court to determine a standard of comparison for the guidance of the master. The standard they contend for is processes known (1) at the date of patent; or (2) at the date infringement began.

Defendant resists specific and particular instructions to the master as calculated to embarrass the proceedings by vague determinations in respect to evidence before tendered, and maintains the proper standard is processes known at any time so far as subsequent infringement is concerned. The issue of relativity in time of standard and infringement has been exhaustively argued and briefed and, some time to be decided, better be decided now. There is no controlling decision in this circuit, the issue not having been expressly raised and determined in either Supreme Court or Circuit Court of Appeals. In several cases the Supreme Court's language is that the infringer accounts for—

"the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result."

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

See Coupe v. Royer, 155 U. S. 583, 15 Sup. Ct. 199, 39 L. Ed. 263. In McCreary v. Canal Co., 141 U. S. 466, 12 Sup. Ct. 40, 35 L. Ed. 817, it cites, without approval or disapproval, Mr. Justice Harlan's ruling in Turrill's Case (C. C.) 20 Fed. 912, that the standard is only that known at date of the invention infringed. Likewise does the Circuit Court of Appeals, in respect to a like statement in Walker on Patents. Fullerton, etc., Ass'n v. Mfg. Co., 166 Fed. 453, 92 C. C. A. 295. To review these and other cases would interest more than enlighten, for in the end the motion is decided by principle.

The rule of comparison is settled law, and contemplates that the infringer had a choice of processes, chose that of the patent, and gained an advantage over what would have been his had he chosen otherwise. Obviously his choice is made from processes existing at the time of choice; that is, at the time of infringement, from day to day, and as alternative presents itself. He is not limited in fact to the process of the patent and processes existing only at the date of the patent, and the principle of standards does not require nor sanction that he be so limited in theory. For the advantage he actually gains, and which as profits or savings he must render to the patentee, is only that of the invention over other processes he might have chosen in lieu of the invention and did not.

What the infringer thus gains is also what the patentee is presumed to thus lose, so far as accounting for profits is concerned, and equity is done when all such gains are taken from the infringer and given to the patentee; for thus the former loses nothing, he is not penalized, the latter is made whole, and he is not given gratuities nor rewarded beyond his present deserts, as otherwise would be the case. And it seems fairly clear that this is the import of the quoted language of the Supreme Court. The event to which the court refers is the infringement, and the time to which it refers is "then"—at that time, the time of the antecedent event. The Circuit Court of Appeals of the Seventh Circuit has likewise determined in Columbia, etc., Co. v. Kokomo Steel & Wire Co., 194 Fed. 108, 114 C. C. A. 186, and Judge Rellstab, of the Third circuit, likewise in American, etc., Co. v. Snyder (D. C.) 241 Fed. 274. To their collation of cases, and to their comment, little can be added.

In so far as the motion seeks a general and not a particular determination, it is granted. The standard of comparison that will govern the master is any standard (having in mind the distinction between processes and standard) that is duly made to appear, in respect to subsequent infringement.

THE TABOR.

(District Court, E. D. New York. July 20, 1921.)

Shipping ⊂=123—Damage to sugar cargo held due to improper dunnage.

Damage to the lower and outside tiers of bags of sugar from moisture *held* due to unseaworthiness of the ship, caused by failure to supply proper dunnage.

In Admiralty. Suit by the Warner Sugar Refining Company against the steamship Tabor. Decree for libelant.

Harrington, Bigham & Englar, of New York City (R. H. Loughran, of New York City, of counsel), for libelant.

Haight, Sandford, Smith & Griffin, of New York City (H. M. Hewitt, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The libelant seeks to recover for damage to sugar in bags which, according to the testimony, were a part of the lower tier, and in the wings or at the sides of the cargo hold upon the steamer Tabor, on a voyage from Cuba to the United States. The entire cargo stowed consisted of 8,000 bags of centrifugal sugar, marked "Cupey." The bill of lading showed that it was received in apparent good order and condition. At New York 278 bags were found to have lost part of their contents, with the sugar on the lower side of these bags in a more or less syrupy condition, and with stains upon the bags upon the lower or flat side, which according to the witnesses called by the libelant showed definitely the presence of moisture.

The vessel encountered no unduly severe weather. There is nothing in the case to show a bad condition before the sugar was placed upon the vessel, and the only evidence of negligence—that is, of unseaworthiness—is the testimony of one of the witnesses for the libelant that the dunnage or board casing under the cargo of sugar was thin and the boards themselves wet at the time the vessel reached New York.

Under section 3 of the Harter Act (Comp. St. § 8031) the vessel would not be liable on the bill of lading unless unseaworthiness be shown by improper stowage, due to lack of a supply of proper dunnage, and to the fault of the stevedores in placing the same. The claimant has presented no evidence contradicting this charge of unseaworthiness. No leakage was observed, and upon the record shown the damage must be attributed to the poor character of the dunnage.

The claimant upon the trial attacked the sufficiency of identification of the samples examined by the witnesses, and particularly opposed the contention that the loss of the sugar, in the form of syrup, was due to moisture. The libelant did not identify the samples, but proved that in centrifugal sugar, like this cargo, ordinary pressure from the upper tiers will not reduce the sugar in the lower bags to the form of molasses.

The carrier has not shown that the damage was caused by any one of the possible conditions excepted under the bill of lading.

The libelant may have a decree.

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

PLEWS v. BURRAGE.

(Circuit Court of Appeals, First Circuit. July 26, 1921.)

No. 1510.

1. **Action ⇐23—Plaintiff may plead equitable reply to legal defense.**
Under Act March 3, 1915 (Judicial Code, § 274b [Comp. St. § 1251b]), providing that in actions at law equitable defenses may be interposed by answer, plea, or replication, without filing a bill in equity, where a legal defense is set up in the answer, plaintiff by replication may meet it by an equitable reply, and where defendant pleaded a release of the cause of action sued on, plaintiff could by replication attack the settlement for fraud.

2. **Jury ⇐31(3)—Statute permitting equitable reply to legal defense not invalid.**
Act March 3, 1915 (Judicial Code, § 274b [Comp. St. § 1251b]), construed as permitting plaintiff to meet a legal defense by an equitable reply, does not violate Const. Amend. 7, relative to jury trials, and is not invalid; there being no constitutional guaranty of permanent circuity of action.

3. **Equity ⇐378—Submission of issues involved in equitable reply is discretionary, and preferable when issue simple.**
Under Act March 3, 1915 (Judicial Code, § 274b [Comp. St. § 1251b]), where defendant pleads a release, and plaintiff by replication alleges fraud and seeks equitable relief, whether the issues involved in the equitable relief should be submitted to a jury or determined by the court is a matter of judicial discretion, and where the issue is simple and eminently fit for submission, it should be left to the jury, as the statute is remedial, and should be liberally construed.

4. **Release ⇐24(2)—May be set aside in equity without previous tender of consideration.**
Previous tender of the consideration of a release is not necessary in equity before setting it aside for fraud.

5. **Release ⇐17(1)—Invalid when facts concealed.**
Where defendant agreed to pay plaintiff a specified portion of the profits on copper properties brought to his attention by plaintiff, defendant, in negotiating for a release of plaintiff's rights, could not legally conceal the facts known to him concerning the ore bodies in the properties, engineers' reports, advantageous methods of exploitation, and progress made in interesting powerful financial forces and experienced exploiters of such properties, and, where he did so, the settlement was invalid for fraud.

6. **Release ⇐17(1)—Representation as to opinions and intentions concerning properties in which party releasing had interest held material.**
Where defendant agreed to pay plaintiff a share of the profits on copper properties brought to his attention by plaintiff, representations by him in negotiating for a release of plaintiff's rights as to his opinion of the properties and intentions concerning their acquisition, contemporaneously with the consummation of a deal highly satisfactory to him for the exploitation of the properties by powerful financial interests, were material and highly important.

7. **Judgment ⇐713(3)—In suit to rescind assignment of option to purchase contract not conclusive in suit to set aside release made to holder of option.**
Defendant agreed to pay plaintiff a share of the profits on copper properties brought to his attention by plaintiff. Plaintiff gave R., defendant's agent, an option to purchase his contract for a comparatively small amount. Defendant demanded the option from R., and thereunder pro-

cured a release from plaintiff for the amount specified in the option. R. brought suit to rescind the assignment of the option for fraud, for the benefit of himself and plaintiff "as his interest may appear," having arranged with plaintiff to divide the proceeds. *Held*, that a judgment for defendant did not bar plaintiff's action to set aside his release for fraud and recover the profits due him, though both suits sought to make defendant liable on his original contract with plaintiff, as the suits were for different frauds, directed against different persons, with relation to different transactions.

8. **Limitation of actions ⟸104(1)—Statute inapplicable when cause of action concealed by defendant.**
Though plaintiff's cause of action to set aside a release of his rights under a profit-sharing contract, and to recover the profits due him, accrued more than six years before suit was brought, the statute of limitations was not a defense, where the cause of action had been fraudulently concealed by defendant.

9. **Release ⟸24(1)—Delay in repudiating not laches, when no disadvantage resulted.**
Where plaintiff's delay in suing to set aside a release of his rights under a profit-sharing contract and to recover the profits due him did not operate in any way to defendant's disadvantage, laches was not available as a defense, as such defense depends on the circumstances of the particular case.

10. **Release ⟸22—Plaintiff's attempt to recover profits released through third person's suit held to give defendant no right to complain.**
Where defendant, agreeing to pay plaintiff a share in the profits on certain copper properties, obtained a release from plaintiff by concealing facts plaintiff was entitled to know, he could not complain because plaintiff, before obtaining full knowledge, arranged with a third person to share the proceeds of a suit brought by him seeking to recover the same profits under an option given by plaintiff to the third person and assigned to defendant.

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

Action by Arthur S. Plews against Albert C. Burrage. Judgment for defendant on demurrer (271 Fed. 727), and plaintiff brings error. Reversed and remanded.

See, also, 260 Fed. 1018; 266 Fed. 347.

Sherman L. Whipple and Alexander Lincoln, both of Boston, Mass., for plaintiff in error.

Boyd B. Jones and Philip N. Jones, both of Boston, Mass., for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, J. Plews brings this suit at law on a written contract under which Burrage agreed to pay Plews 5 per cent. of all profits in stock or money accruing to Burrage out of his acquisition of copper properties brought to his attention by Plews. On a record made up of a declaration, answer, replication, and demurrer to the replication, the District Court was of the opinion that the crucial questions were close and doubtful, and therefore sustained the demurrer and entered judgment for the defendant. Although this unusual array of plead-

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ings covers about 80 pages, and has been argued by learned counsel at great length, yet, stripped of confusing details and irrelevant issues, the case falls within narrow compass. There is no dispute as to the making, or the terms, or the application of the contract to properties out of the acquisition of which Burrage derived large profits either in January, 1912, or January, 1913. This makes a prima facie case for the plaintiff. But defendant alleges and plaintiff admits that, shortly before February 28, 1912, Burrage personally and through his agent, Ross, paid Plews £500 for a settlement or informal release of Plews' profit-sharing rights under this contract. If valid, this settlement is a good defense. In his replication the plaintiff attacks this settlement as vitiated by Burrage's fraud, and offers to repay the £500. By his demurrer to the replication defendant urges:

(1) That as matter of procedure the action cannot be maintained, until by separate proceedings in equity the settlement is set aside.

(2) That the contract created no fiduciary relation, and that therefore Burrage's alleged failure, when settling with Plews, to disclose facts known to him and unknown to Plews, and material to the ascertainment by Plews of the value of his rights under the contract, was no fraud.

(3) That the affirmative oral and written misrepresentations alleged to have been made by Burrage to Plews involved merely matters of opinion, and not actionable fraud.

We think the replication on these points good, and the demurrer bad.

1. The case is as to procedure closely analogous to Manchester Street Railway v. Barrett, 265 Fed. 557, 559, in which this court recently sustained the District Court of the New Hampshire district in submitting to the jury in a personal injury case the question as to whether the release set up as a bar was voidable for fraud or the incompetency of the deceased victim of the accident. It cannot be successfully contended that such procedure is peculiar to the New Hampshire district, for G. L. Mass. c. 231, § 35, expressly provides for like procedure in this district. It reads:

"The plaintiff may, in reply to a defense alleged by the defendant, allege any facts which would in equity avoid such defense or which would entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defense."

[1] But, apart from state statutes and local procedure, we are constrained to regard the Act of March 3, 1915 (Judicial Code, § 274b [Comp. St. § 1251b]), as requiring us to approve the procedure here adopted by the plaintiff. That section reads as follows:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

We think the words, "In all actions at law equitable defenses may be interposed by * * * replication, without the necessity of filing a bill on the equity side of the court," mean that when, as in the present case, a legal defense is set up in the answer, the plaintiff has by replication the same right to meet such legal defense by equitable reply as a defendant has to set up in his answer an equitable defense to a legal claim set up in the declaration. We cannot believe that Congress intended to prevent circuity of action when a defendant, sued at law, has an equitable defense, and did not intend to prevent circuity of action when a plaintiff needs to interpose a reply grounded on equity in order to meet a legal defense set up in the answer. We are aware that a majority of the Court of Appeals of the Second Circuit reached a different conclusion in Keatley v. U. S. Trust Co., 249 Fed. 296, 161 C. C. A. 304; but our views as to the scope and meaning of this statute accord with those of Judge Learned Hand, who, dissenting, said:

"It seems to me that we should not construe so narrowly section 274b. The phrase, 'equitable defenses may be interposed by * * * replication without the necessity of filing a bill on the equity side of the court,' can only mean, I think, this: That where the defendant interposes a bar valid at law, the plaintiff may set up in his next pleading facts avoiding the bar in equity. The suggestion is that it might give the plaintiff the right to plead to the defendant's 'equitable defenses' set up in the answer, but that is independently provided for in the fourth sentence of the act. Besides, the defendant's answer to a suit in equity cannot properly be said to be interposed by 'filing a bill on the equity side of the court,' which is the language of the first sentence.

"So far as we may look to the purpose of the section I cannot think there is any doubt. Congress can hardly be thought to have any predilection for plaintiffs' suits in equity rather than defendants', and we must leave a capricious exception in practice, if we do not include a case like this. I agree that the language of the section is not what a Mitford or a Langdell would have used; but the purpose seems to me perfectly plain, and we ought, I think, to try to effect it if we can."

See, also, the Knickerbocker Trust Case, 247 Fed. 833, 837, 160 C. C. A. 55.

[2] Defendant's contention that, so construed, the statute is unconstitutional, is plainly untenable. The decision in Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, so far as now pertinent, is merely to the effect that legal and equitable remedies cannot be so blended in equity suits as to impair the constitutional right to jury trial given by the Seventh Amendment. Stockbridge v. Mixer, 215 Mass. 415, 102 N. E. 646, is to the same effect. Compare State v. Saunders, 66 N. H. 39, 76, et seq., 25 Atl. 588, 18 L. R. A. 646. There is no constitutional guaranty of permanent circuity of action.

[3] Whether issues of fact involved in such equitable relief should be submitted to a jury or determined by the court is, in our opinion, a question of judicial discretion. We are not able to accord with the view that the issue calling for equitable relief must first be tried by the court alone, sitting as a court of equity. Compare Union Pacific R. R. v. Syas, 246 Fed. 561, 158 C. C. A. 531. While the verdict of a jury may in the equitable issue be advisory only, yet when such issue is, as in this case, simple and one eminently fit for submis-

sion to a jury, we think the practice adopted in the Barrett and Knickerbocker Trust Cases, supra, is the preferable practice, and the one most consonant with the spirit and purpose of the statute. The statute is remedial, and should be liberally construed in favor of a single, direct, and speedy trial of all issues involved in the litigation.

We find it difficult to appreciate the importance apparently attached by learned counsel to mere form of procedure in this case; for, even if we were required to sustain the defendant's contention against combining equitable relief in a law suit, the most that could result would be an order made under the provisions of Judicial Code, § 274a (Comp. St. § 1251a), to amend the present law suit into a bill in equity. It seems to us too plain for argument that, assuming such amendment, the plaintiff, on the allegations in these pleadings, would be entitled to a trial of the issue of fraud concerning his settlement with Burrage, and prevailing on such issue, to an account under the contract. Compare Reid v. Shaffer, 249 Fed. 553, 161 C. C. A. 479, and cases cited.

Shortly stated, Burrage's position is not unlike that of an administrator who, falsely understating the amount of his decedent's estate, has obtained from an heir a receipt in full for his distributive share. It would hardly be contended that such receipt could be successfully interposed as a bar to a suit, at law or in equity, for the balance justly due.

[4] Our views as to proper procedure make it unnecessary to discuss the learned argument of counsel for defendant as to technical rescission in pure law suits. It has no application to the real case before us. Previous tender of the consideration of the settlement is, of course, not necessary in equity. Thomas v. Beals, 154 Mass. 51, 27 N. E. 1004; Twin Lakes, etc., Co. v. Dohner, 242 Fed. 399, 155 C. C. A. 175.

[5] 2. We cannot sustain the defendant's proposition that Burrage, when trading with Plews as to his rights as a co-profit-sharer, was under no duty of disclosure. A right to profits without a right to knowledge of their accrual is a contradiction in terms; the former, without the latter, is or may be worthless. A right to receive profits connotes a right to enforce payments; ignorance of their accrual may destroy both rights. Plews, in London, was entitled to 5 per cent. of profits, if they should accrue to Burrage, then in the United States, out of properties being exploited by Burrage and the Guggenheims in South America. The defendant's contention that he was under no obligation to disclose to Plews material facts as to the opinions of mining experts concerning these properties, the status of his negotiations for their acquisition, and the other salient facts as to the interest shown by powerful financial forces, like the Guggenheims, in the prospective purchase and development thereof, amounts to the proposition that, although Plews was admittedly entitled to 5 per cent. of profits thus made by Burrage, he must discover the accrual of such profits at his peril, and bring suit therefor before the running of the statute of limitations, or be forever barred. This theory makes a profit-sharing contract a trap—a means of legalized moral fraud; secret profits thus become legally acquired profits.

See Guggenheim v. Guggenheim, 95 Misc. Rep. 332, 159 N. Y. Supp. 333, and cases cited on page 342; Selwyn v. Waller, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, 160; Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732; Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005.

As stated by the court in Selwyn v. Waller:

"The rule against secret profits is not limited in its application to cases of agency, trusteeship, and the like strictly fiduciary relations. Its application to a case like this depends on the reciprocal good faith required of joint adventurers, and more precisely upon the mutual burdens and benefits which the relation necessarily implies are to be shared in the stipulated proportions."

There obviously could be no equality in trading positions between Burrage and Plews, if Burrage could legally conceal from Plews what he had learned as to the ore bodies in the properties, as to the engineers' reports, as to advantageous methods of exploitation, as to progress made in interesting powerful financial forces and experienced exploiters of such properties; Plews was at Burrage's mercy. See, also, Valdes v. Larrinaga, 233 U. S. 705, 709, 34 Sup. Ct. 750, 58 L. Ed. 1163; American Circular Loom Co. v. Wilson, 198 Mass. 182, 206, 84 N. E. 133, 126 Am. St. Rep. 409, and cases cited; Barnes v. Alexander, 232 U. S. 121, 34 Sup. Ct. 276, 58 L. Ed. 530; Hawkes v. Lackey, 207 Mass. 424, 432, 433, 93 N. E. 828; Bower on Actionable Nondisclosure, §§ 1, 3, 315; Hill v. Hall, 191 Mass. 253, 262, 263, 77 N. E. 831; Tate v. Williamson, L. R. 2 Ch. App. 55, 61; Reid v. Shaffer, 249 Fed. 553, 560, 561, 161 C. C. A. 479. See, also, the excellent statement of the principles underlying this duty of disclosure by Sanborn, J., in Trice v. Comstock, 121 Fed. 620, 622, 623, 57 C. C. A. 646, 61 L. R. A. 176.

We hold that if, as is alleged and by the demurrer admitted, Burrage procured a settlement with Plews as to his profit-sharing rights, concealing by silence from Plews facts material to enable Plews to judge of the value of those rights, such settlement is invalid for fraud.

[6] 3. As to the affirmative oral and written misrepresentations, we hold the allegations in the replication good and the demurrer bad.

Under the circumstances, Burrage's representations as to his opinion of the properties and intentions as to their acquisition were material and highly important. Some of the written representations are found in letters written by Burrage from Boston in January, 1912, contemporaneously with the consummation of a deal highly satisfactory to Burrage between him and the Guggenheims for the formation of the Chile Exploration Company, which, from advances made by the Guggenheims, was to repay to Burrage $40,819.73 previous expenses incurred by him, and bear the further expense of experimental investigation (which in fact aggregated about $175,000), one-half of the stock representing the expected profits of the undertaking to be Burrage's until the properties should be purchased and turned over to

another company, with such ultimate division of the stock as made Burrage's alleged profits some $20,000,000. The concealment of these facts, coupled with the affirmative representations made in these letters, was exactly calculated to induce Plews to do what he did do—settle with Burrage for his 5 per cent. of profits for the comparatively trifling sum of £500, about one-fourth of 1 per cent. of the alleged value of his interest. Compare Commonwealth v. Althause, 207 Mass. 32, 47, 48, 93 N. E. 202, 31 L. R. A. (N. S.) 999; Comstock v. Livingston, 210 Mass. 581, 583, 97 N. E. 106.

The rules as to opinions—ordinary trade talk—in dealings between would-be vendor and prospective purchaser, are not applicable to this transaction. Compare Lehigh Zinc & T. Co. v. Bamford, 159 U. S. 665, 673, 14 Sup. Ct. 219, 37 L. Ed. 1215.

[7] 4. The next defense pleaded is that Plews is barred by a final decree in Burrage's favor in what is described as the Ross-Plews suit, brought in the Supreme Judicial Court of Massachusetts, in May, 1913, and ended by final decree on December 3, 1918. The present suit was brought on July 25, 1918. This plea cannot be sustained. It is plain that the two suits are for different causes of action. The material facts as to the Ross-Plews suit are as follows: In September, 1911, Plews gave Ross, who was Burrage's agent and employee in Burrage's business of discovering and acquiring copper properties, an option to buy Plews' contract with Burrage for £500, if paid on or before February 28, 1912. This option was, on Burrage's demand, turned over by Ross to Burrage and taken up by him as above noted. Ross, in addition to a salary, also had a profit-sharing contract with Burrage, which Ross was induced to agree to release to Burrage on payment, at Burrage's option, of $100,000.

In 1913 Ross brought in the Massachusetts court two suits against Burrage, one to avoid his agreement as to his own profit-sharing contract (reported in 233 Mass. 439, 124 N. E. 267), and the other to rescind his assignment to Burrage of the option which he had obtained on Plews' contract and turned over to Burrage his principal. The second (or Ross-Plews) suit was entitled as brought for the benefit of himself and Plews, "as his interest may appear." Prior to bringing this suit Ross and Plews made an arrangement, contingent upon success in that suit, that one-third of the proceeds thereof should be paid over to Plews, two-thirds being retained by Ross, who was to pay all the expenses of litigation. This agreement is irrelevant. Ross never owned Plews' contract with Burrage. For present purposes, the option on it ran to Burrage, not to Ross. The crux of that case was Ross' contention that Burrage had obtained the assignment of Ross' option on Plews' profit-sharing contract by fraud upon him, Ross. The master, by final report filed on June 13, 1918, found Burrage guilty of no fraud on Ross in acquiring this option. This finding ended that case, and the contingent arrangements between Ross and Plews fell with it.

In that case no contention was made that Burrage had been guilty of fraud upon Plews, either personally or through misrepresentations or concealments of his agent Ross. But the crux of the instant case

is an alleged fraud by Burrage upon Plews in acquiring from Plews —not from Ross—a settlement for £500 of Plews' rights under this profit-sharing contract. The fact that the result sought in both cases is to make Burrage liable on his original contract, has no tendency to show that the two suits are for the same cause of action. It is, to repeat, clear that the suits are for different frauds, directed against different persons, with relation to different transactions. See Foye v. Patch, 132 Mass. 105; Harlow v. Bartlett, 170 Mass. 584, 49 N. E. 1014.

[8] 5. The defendant's plea of the statute of limitations is bad. The declaration alleges that the cause of action accrued on January 25, 1912, more than six years before this suit was brought, when the defendant became entitled as profits to 5,000 shares of the stock of the Chile Exploration Company; it also sets up fraudulent concealment, with ample specifications. But in oral argument the defendant's counsel asserts that Burrage's profits accrued not in January, 1912, but in January, 1913, when the properties were secured and turned over to the Chile Copper Company, at a cost of over $1,000,000. On either theory, therefore, the statute is not applicable.

[9, 10] 6. Although the defendant in the seventh paragraph of his demurrer pleads estoppel by laches, he has not argued it in his brief, and we infer does not now rely upon it. But, if wrong in this inference, it is clear that the defense cannot be maintained. Even if we assume that it is open in this case, as it may be if this case be regarded as technically in equity (see Wehrman v. Conklin, 155 U. S. 314, 329, 15 Sup. Ct. 129, 39 L. Ed. 167), there is nothing to indicate that Plews' delay in bringing this suit has operated in any way to the disadvantage of Burrage, or that Burrage, denying any obligation to disclose the material facts to his co-profit-sharer, is in any position to urge as a bar any delay by Plews short of the full period of the statute of limitations.

The doctrine of laches depends on the circumstances of the particular case. See O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636; No. Pacific R. R. Co. v. Boyd, 228 U. S. 482, 509, 33 Sup. Ct. 554, 57 L. Ed. 931. And it appears that Plews never discovered the full facts necessary to form a judgment as to his rights until the trial before the master of the two suits brought by Ross, on some date not definitely stated but presumably not long before the filing of the master's draft report on November 27, 1917. Burrage, concealing facts Plews was entitled to know, has no legal cause of complaint because Plews, before obtaining the full knowledge to which he was entitled, arranged with Ross to share the proceeds of the Ross-Plews suit if it should be successful. Promptly after decision in that suit by the master, and without waiting for the master's report to be confirmed by the court, the present suit was instituted.

The result is that the parties are at issue: (1) As to the validity of the settlement pleaded in bar of Plews' rights under the contract; (2) as to the fraudulent concealment of the accrual of the cause of action, if the plaintiff relies on the date he alleges, January, 1912, in-

stead of the date admitted by defendant, January, 1913; (3) as to the amount of damages or profits.

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

BALTIMORE & O. R. CO. v. WALTER S. NEWHALL CO.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1813.

1. **Patents ⟸235—Device not using element of patented device held not to infringe patent.**
   A patent on a plant for thawing frozen contents of cars by inclosed stalls in which hot air is introduced, which may be deflected by means of dampers to other stalls, is not infringed by a plant of the same construction, where the stalls are independent and separate, and no use is made of dampers for deflecting air currents.
2. **Patents ⟸238—Change in plan of construction of plant held to avoid infringement of patent.**
   Where a plant for thawing frozen contents of cars was being constructed to use dampers for deflecting air currents in such a way as to infringe a patent covering such a plant, but the plan of construction was changed by securely closing the openings left for the dampers with plates, there is no infringement of the patent, though the plates could be removed and the dampers mounted with little expense.
3. **Patents ⟸328—No. 1,044,230, claims 20, 23, for thawing apparatus, held not infringed.**
   Patent No. 1,044,230, claims 20 and 23, for plant for thawing frozen contents of cars, *held* not infringed.
4. **Patents ⟸310(10)—Filing of supplemental bill for infringement held unnecessary.**
   Where an interlocutory decree over a year before enjoined infringement of a patent, and the final decree provided that the injunction should continue, except with respect to a released plant, the filing of a supplemental bill for an injunction with respect to another plant was unnecessary.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by the Walter S. Newhall Company against the Baltimore & Ohio Railroad Company. From a decree for plaintiff (258 Fed. 650), defendant appeals. Reversed.

Arthur C. Fraser, of New York City (Duncan K. Brent, of Baltimore, Md., on the brief), for appellant.

Albert H. Bates, of Cleveland, Ohio, and Maurice B. Saul, of Philadelphia, Pa. (Bates & Macklin, of Cleveland, Ohio, Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., and Haman, Cook, Chesnut & Markell, of Baltimore, Md., on the brief), for appellee.

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

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

KNAPP, Circuit Judge. The appellee, Walter S. Newhall Company, plaintiff below, is the owner of letters patent No. 1,044,230, issued November 12, 1912, for an apparatus for thawing the contents of freight cars which have become frozen. This suit involves its use for thawing cars of coal in that condition. Briefly described, the apparatus consists of a train shed long enough to hold a number of cars and provided with doors for closing its ends. On top of the shed, at an intermediate point, is a blower house, in which air is heated and blown through appropriately arranged ducts or conduits, and the openings therein, and thereby directed against the bottoms and sides of the cars. The air is then sucked back into the blower house, to be again heated and driven through the ducts, and thus kept in constant circulation. The shed is made of sufficient width to cover the number of tracks desired to be used in connection with the thawing apparatus, and when built for more than one track is divided by partitions into as many compartments as there are tracks.

After protracted negotiations with plaintiff for the construction of a thawing plant at Curtis Bay, Md., the defendant rejected its proposals and in January, 1916, gave the contract to the Surety Engineering Company, which offered to build it for a smaller sum and to protect defendant from suits for infringement. The work was begun soon afterwards and appears to have been completed some months later. Claiming that the plant as built infringed its patent, plaintiff brought this suit in December, 1916. In the meantime defendant had decided to construct another thawing plant at Arlington, Staten Island, twice the size of the one at Curtis Bay. Plaintiff was a bidder for this work also, but was again underbid by the Surety Engineering Company, to which the contract was awarded in August of that year. The original bill, however, was confined to the Curtis Bay plant, as was the evidence at the first trial in the early part of June, 1917. On the 23d of that month the court below filed an opinion holding that 4 of the 23 claims of the patent were valid, and that two of them, 20 and 23, had been infringed. 243 Fed. 615. An interlocutory decree was entered on the 6th of September, enjoining defendant from further infringement of these claims, and providing for the taking of testimony in open court on the question of damages. The final decree of November 19, 1917, awarded plaintiff $5,500 for actual damages and $4,000 for litigation expenses, or a total of $9,500, which defendant subsequently paid without appeal. It was agreed that the damages then under consideration should be limited to the Curtis Bay plant, and that plaintiff should have the right to proceed thereafter in regard to the Arlington plant.

Accordingly, on February 1, 1919, plaintiff filed a supplemental bill relating to that plant, pleading the prior adjudication and alleging the same infringement as in the original bill, especially of claims 20 and 23. The answer denied infringement and set up other defenses. The result of the second trial was a decision, reasons for which are stated in an opinion, sustaining the charges of infringement as to the two claims mentioned, and awarding actual damages in the sum of $11,000, with $7,418.85 added for expenses, or a total of $18,418.85. For rea-

sons which may be omitted, this total was by stipulation reduced to $18,088.44, for which final decree was entered October 6, 1919. From that decree defendant appeals.

[1] The underlying question takes a two-fold form. To what extent, if at all, does the Arlington structure infringe the plaintiff's patent? And to what damages, if any, is the plaintiff entitled? The claims held to be infringed read as follows:

"20. In an apparatus of the class described, the combination of two train sheds side by side, individual hot air and return ducts for each shed, a blowing apparatus connected with the ducts of both sheds, and dampers adapted to restrict the action of such apparatus to either shed."

"23. In an apparatus of the clcass described, the combination of a train shed, a blower room located at an intermediate point at the top of the train shed, a pair of blowers in said blower room discharging in opposite directions, means for conducting air from such blowers through the train shed and returning it to the blowers, and means for heating such air."

It seems obvious that these claims would not be infringed by a thawing apparatus of the same general type as the one under review, if it were so constructed that each of the side by side sheds or stalls was wholly independent of the other and there was no opening in the partition between them; for the invention held valid and infringed is the device of dampers, consisting of sheet metal doors adapted to be positioned to deflect the air, by means of which the heated air from the fan of one stall can be diverted into the ducts of the adjoining stall as occasion may require. As the learned District Judge says in his opinion:

"With the dampers in place, claims 20 and 23 are infringed. Without these appliances, there is no infringement."

It appears to be conceded, and will be assumed, that if the Arlington plant had been built as originally designed and intended, and as contracted for, it would have infringed these two claims the same as does the Curtis Bay plant; for the specifications on which the contract was based state, among other things:

"Four separate duplicate units are provided. Each unit is primarily intended to serve one stall. The unit for stall No. 1, by an arrangement of dampers, can be made to serve stall No. 2. In like manner, the unit for stall No. 2 can be made to serve stall No. 1. A like combination will develop in the case of stalls Nos. 3 and 4."

But defendant asserts that the plant was not built in that way, with "an arrangement of dampers," or with any dampers at all, and it therefore becomes important to know what the facts are in that regard. As above recited, the contract was let in August, 1916, but the plant was not finished and turned over by the contractor until the latter part of December of the following year. In the course of construction openings were made where dampers were to be placed, with hinges on their frames on which the dampers were to be hung. The dampers themselves were fabricated for at least two stalls, though apparently not completed with corresponding hinges. They were once "stood in place" for a short time, "jammed and wedged in place," in stalls 1 and 2 only,

to permit an experimental test of the heating capacity of the furnaces, but were not otherwise used. They were never put in a normal or operative position, and certainly never employed to deflect heated air from one stall to another.

[2, 3] In July or August, 1917, after the decision in the Curtis Bay case, orders were issued to do away with the dampers altogether, and not long afterwards they were entirely removed. The openings were covered with plates of galvanized steel of the same material and thickness as the walls of the ducts, to which they were firmly bolted. It is not perceived that the work could well have been done in a more suitable or substantial manner. We cannot believe that defendant was bound, under the conditions then existing, to demolish this expensive building and erect another with solid partitions between the stalls; it was enough to close the openings securely, as it did, and to abandon definitely the plan and purpose of using dampers. True, the plates could be taken off and dampers mounted in a comparatively short time and at no great expense; but for all practical purposes the altered structure was as devoid of dampers as though originally so designed. Each stall became a separate and independent thawing apparatus, unrelated to the others except by proximity. As one witness says:

"You could take any one away without interfering with any of the others."

And as another witness says:

"So far as the operation is concerned they might have been built as four separate units, spaced apart."

In short, while the plant was still incomplete and unusable, the damper feature was wholly eliminated by an effective and permanent change of construction. The trial court finds that it "was never used in its infringing form by the defendant," and in point of fact it seems not to have been used in any form prior to January 1, 1918, when all the properties of defendant were taken over by the government.

Taking into account these facts, which are either undisputed or appear to be established by the clear weight of evidence, we are unable to see that the Arlington plant infringes or ever has infringed the plaintiff's patent. As we read the record, all that fairly can be said is that, if this plant had been built as designed and contracted for in August, 1916, it would have infringed the two claims which nearly a year later were held valid and infringed in the case of the Curtis Bay plant. But it was not so built. Shortly after the decision in that case was announced, and before the interlocutory decree was entered, and while the structure was so far from completion as to be incapable of use for thawing purposes, the original design was changed as respects the parts here in dispute, all dampers discarded, the openings left therefor closed up as effectually as was practicable, and the plant finished in a wholly noninfringing form.

As will be observed, the patent in suit has but limited validity. It does not cover a complete thawing apparatus, or even an essential element of such an apparatus; it is confined to the type in which dampers

are provided for deflecting the heated air from one stall to another. If that particular feature be left out, any one has the right to build a plant which otherwise copies the one at Curtis Bay. As the trial court decided, "without these appliances [dampers] there is no infringement," and we are convinced, after careful and repeated scrutiny of the evidence, that the Arlington plant did not have dampers at any stage of its construction, certainly not in any practical or substantial sense, and therefore has never infringed the claims in question. For of claim 23, which makes no mention of dampers but calls for a train shed and "a pair of blowers" discharging in opposite directions, it is enough to say, as the court below inferentially held, that the elimination of dampers in effect eliminated the pair of blowers, since without dampers the combination described in this claim would not be operative.

The conduct of defendant, in appropriating a general plan which Newhall appears to have originated, may not be commendable—it is not for us to judge—but if it had the right to do what it did, as we are constrained to hold, the plaintiff has no legal ground of complaint and must be denied an award of damages. And if it be argued that the original design shows intent to infringe, the sufficient answer is that the intent was not carried into effect, and that beyond doubt infringement cannot be predicated upon mere intention. Sheffield v. Foundry Co. (C. C.) 177 Fed. 713; Luten v. Town of Lee (D. C.) 206 Fed. 904.

[4] It is only needful to add that plaintiff had no occasion to file the supplemental bill for the purpose of preventing a threatened or potential infringement, for the interlocutory decree of September, 1917, a year and a half before, granted an injunction "against the defendant, its agents and employees, restraining further infringement of claims 20 and 23 of said patent"; while the final decree of November following, under which the Curtis Bay plant was to be released upon payment of the damages therein awarded, also provided, "but with that exception the injunction shall continue." The Arlington plant is manifestly covered by the injunction so granted and continued, and there is no suggestion that it has not been scrupulously obeyed by defendant.

It follows that the supplemental bill should have been dismissed, and the decree appealed from will accordingly be reversed.

In re EASTERN SHORE SHIPBUILDING CORPORATION.
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION v. WOOD.

(Circuit Court of Appeals, Second Circuit. June 15, 1921.)

No. 208.

Bankruptcy ⟸349—United States Shipping Board Emergency Fleet Corporation held not entitled to priority of payment.

The United States Shipping Board Emergency Fleet Corporation, incorporated under the general corporation law of the District of Columbia pursuant to Act Sept. 7, 1916, §§ 11, 13 (Comp. St. §§ 8146f, 8146g),

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

given the President's authority to construct, purchase, and requisition vessels under Act June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), by the President's executive order of July 11, 1917, was not entitled to priority of payment under Bankruptcy Act, § 64 (Comp. St. § 9648), and Rev. St. § 3466 (Comp. St. § 6372), of a debt due it from a bankrupt with whom the corporation made a contract as a principal, and not as the agent of the United States government, on the theory that the debt was one due to the United States, since, the corporation having been organized as a private corporation under the District of Columbia's general incorporation law, the government's ownership of the stock did not divest it of its character as a private corporation, in view of sections 607, 608.

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

In the matter of the Eastern Shore Shipbuilding Corporation, bankrupt. Petition of the United States Shipping Board Emergency Fleet Corporation, representing the United States, against Roger B. Wood, trustee in bankruptcy, for priority, denied, and petitioner appeals. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (Edward F. Unger, Asst. U. S. Atty., of New York City, and Henry J. Gibbons and Wm. Y. C. Anderson, both of Philadelphia, Pa., of counsel), for appellant.

Rosenberg, Ball & Marvin, of New York City (Godfrey Goldmark, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This case presents two questions of very considerable importance:

(1) Is the United States Shipping Board Emergency Fleet Corporation, organized under the laws of the District of Columbia for and on behalf of the United States in connection with the World War, such an agent of the United States that a debt due to it from the bankrupt is in fact and in law a debt due to the United States; and is the corporation as representing the United States entitled to claim whatever right of priority of payment the United States might be entitled to assert in the case of a debt owing to the government?

(2) If the court finds that the Fleet Corporation is such an agency, and may assert such rights to priority as the United States has, is the United States itself, under the Bankruptcy Act (Comp. St. §§ 9585–9656), entitled to the prior payment of ordinary debts due to it as against the general creditors of the bankrupt?

It may be said concerning the second question that there seems to be no authoritative decision determining whether or not the United States itself is entitled under the existing Bankruptcy Act to prior payment of debts due to it, as distinguished from unpaid taxes. This is rather remarkable, as the act has been in force since 1898. It will, of course, not be necessary for this court to consider the second of these questions, if we find that the Fleet Corporation is not such an agent of the United States that a debt due to it cannot be regarded as a debt due to the United States.

The first question which is here presented has received no consideration in any other case, at least in none which has come under our observation, or which has been brought to our attention. As contracts running into many millions of dollars have been entered into with the Fleet Corporation, and many of the contractors have been made bankrupt in attempting to perform them, and there are large sums due from them to the corporation, as well as to private creditors, the importance of the questions involved is readily appreciated.

It appears that on August 22, 1918, the United States Shipping Board Emergency Fleet Corporation entered into a contract with the Eastern Shore Shipbuilding Corporation, hereinafter referred to as the Eastern Shore Corporation, for the construction of six wooden harbor tugs for the United States. For each of these tugs the Eastern Shore Corporation was to receive $145,000, to be paid in ten installments as the work progressed. After the signing of the Armistice on November 11, 1918, the work under this contract was stopped, but was later resumed under supplemental agreements which it is not necessary to consider. In March, 1919, the Eastern Shore Corporation became involved in financial difficulties and receivers were appointed for it, and shortly thereafter, on March 20, 1919, it was adjudicated a bankrupt. At the time of adjudication none of the six tugs in course of construction was completed sufficiently to launch. The Eastern Shore Corporation had been paid by the Fleet Corporation under the contract on account $428,017.72. And after the adjudication of bankruptcy the Fleet Corporation was compelled to expend the additional sum of $135,161.65 in order to be able to launch the tugs and remove them from the bankrupt's shipyard. At the time of the bankruptcy the tugs were appraised at the sum of $100,000 and this was found to be their value by the referee in bankruptcy, who deducted that amount from the sum of $428,017.72, and allowed the balance of $328,017.72 as a general claim of the Fleet Corporation against the bankrupt's estate, but disallowed priority to said claim on the ground that the debt represented thereby is not a debt due to the United States. On petition to review the order of the referee, the District Judge affirmed it in all respects. On the appeal to this court no question is raised as to the amount due from the bankrupt. The only questions involved are those stated in the beginning of this opinion.

[1] The argument presented to us is that the Fleet Corporation, by virtue of its incorporation and organization under the acts of Congress and by virtue of an executive order of the President of the United States issued in pursuance of an act of Congress, was at the time of and in the transaction out of which this controversy grew, and still is, the appointee of the President of the United States, and the agent and representative of the United States, and that, the contract with the bankrupt having been made for and on behalf of the United States by the Fleet Corporation, as the appointee of the President and the agent and representative of the United States, the debt due thereunder is a debt due and owing to the United States, and therefore entitled

to priority of payment under the provisions of section 64 of the Bankruptcy Act (Comp. St. § 9648) and of section 3466 of the Revised Statutes (Comp. St. § 6372). The pertinent provisions of section 64 [1] and section 3466 [2] are found in the margin.

In determining the question of whether the Fleet Corporation is such an agency of the United States that a debt due to it is to be regarded as a debt due to the United States, it is necessary to examine the acts of Congress under which the Corporation came into existence. The Act of Congress of September 7, 1916, is entitled:

"An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign interstate commerce of the United States; and for other purposes." U. S. Stat. at Large, vol. 39, c. 451, p. 728.

The act created a board of five commissioners, to be appointed by the President. It authorized the board, with the approval of the President, to cause to be constructed and equipped, in American shipyards or elsewhere, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or army transports, or for other naval or military purposes, and also to charter, lease, or sell to any citizen of the United States any vessel so purchased or constructed. Section 11 of the act (Comp. St. § 8146f) provided for the formation of a Shipping Corporation, if found necessary. It reads as follows:

"That the board, if in its judgment such action is necessary to carry out the purposes of this act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed $50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the

[1] Section 64 of the Bankruptcy Act reads as follows:

"*Debts Which Have Priority.*—The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court; * * * and debts owing to any person who by the laws of the states or the United States is entitled to priority."

[2] Section 3466 of the Revised Statutes reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

interests of the United States and to carry out the purposes of this act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: Provided, that no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel, under such terms and conditions as may be prescribed by the board. * * *

"At the expiration of five years from the conclusion of the present European War the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section 7 and shall dispose of the property other than vessels on the best available terms, and, after payment of all debts and obligations, deposit the proceeds thereof in the treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section 10."

Section 13 of the act (Comp. St. § 8146g) provided for a bond issue not to exceed $50,000,000, to be used for the purpose of carrying out the provisions of the act. It contained the following among other provisions:

"The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the treasury to the credit of the board, and are hereby permanently appropriated for the purpose of carrying out the provisions of sections 5 and 11."

On April 16, 1917, in pursuance of section 11 above quoted, the Fleet Corporation, appellant herein, was organized under the laws of the District of Columbia. The corporate purposes were stated as follows:

"First.—That the corporate name of the company shall be United States Shipping Board Emergency Fleet Corporation and the object for which it is formed is 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 as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said subcharter four (4) of the incorporation laws of the District of Columbia."

On June 15, 1917, Congress conferred upon the President broad powers of control over contracts for the building, or purchase of ships or material. It authorized and empowered the President to exercise varied powers, and among them the power—

"e. To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

Another clause declared that—

"The President may exercise the power and authority hereby vested in him * * * through such agency or agencies as he shall determine from time to time: Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated and disposed of as the President may direct." Volume 40, Stat. at Large, c. 29, p. 182 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¼d).

Under this authority the President made an executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase or requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management, and disposition of such vessels, and of all others theretofore or thereafter acquired by the United States.

The Fleet Corporation's capital stock was fixed at $50,000,000. All of the stock, 500,000 shares, has been issued; the United States Shipping Board, for and on behalf of the United States, being the record holder of all the outstanding shares, except that the trustees of the company now are and always have had standing in their name as stockholders of record, 1 share of stock each, issued to them to qualify them as trustees. When any trustee resigned, the certificate of stock issued to him was indorsed and assigned to the United States Shipping Board and then was canceled, and a new share was issued to his successor. The certificates of stock issued to the Board certified on their face that the "United States Shipping Board on behalf of the United States is the registered owner of [the specified number] shares of the stock of this company." The Board held 499,993 shares; the remaining 7 shares being held by the seven trustees, each trustee holding 1 share.

From what has been said it appears that the Fleet Corporation was not created by a special act of Congress, but was formed pursuant to the general corporation law of the District of Columbia. Act March 3, 1901, U. S. Stat. at Large, vol. 31, c. 854, subc. 4, p. 1284. Section 607 of the act provides that a corporation organized under the act—

"shall be a body politic and corporate in fact and in name, * * * and be capable of suing and being sued in any court of law or equity in the District, and * * * be capable in law of purchasing, holding, and conveying any real or personal estate whatever which may be necessary to enable the company to carry on its operations."

Section 608 of the act declares that the stock, property, and concerns of a company incorporated under the act "shall be managed" by not less than 3 nor more than 15 trustees.

The business which the corporation was to be organized to carry on, as defined in the act of 1916, heretofore quoted in this opinion, was

"the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States." This definition of its business was repeated in the act of 1917, also heretofore quoted. It is again repeated unchanged in its certificate of incorporation, and it was declared in the last-named act that it was to have power "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 as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations" organized under the provisions of the statute. This language is repeated also in the certificate of incorporation.

It thus appears that the business of the Fleet Corporation was not peculiarly governmental in its nature, but was commercial and industrial, and that its powers were not essentially different from those possessed by private corporations. We think that no provision can be found either in the acts of Congress or in the charter of the company giving to the corporation or its stockholders any rights, privileges, or obligations different from those possessed by any other corporation formed under the laws of the District of Columbia with respect to its business.

It is true that all the stock, except a few shares issued to qualify the members of the board of trustees, is owned by the United States. But we do not think that fact is of controlling significance, especially in view of the provision on that subject in section 11 of the Act of September 7, 1916. While it was provided that the United States Shipping Board might, for and on behalf of the United States, subscribe to and purchase the stock, it was also provided that the Board might, with the approval of the President, sell any or all of the stock of the United States in the corporation, subject to the restriction that the United States was at no time to be a minority stockholder. The fact that the United States owns stock in a corporation does not invest the corporation with the character of sovereignty, or invest it with the privileges and immunities of the sovereign. In United States Bank v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, the Supreme Court in 1824, had before it the case of a corporation in which the state of Georgia was a stockholder. A suit was brought in a United States court against the corporation. Chief Justice Marshall, speaking for the court, declared that the state did not, by becoming a corporator, identify itself with the corporation, and that the Planters' Bank of Georgia was not exempted from being sued in the federal courts by the circumstance that that state was a corporator. He said:

"It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character,

so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank, in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter. We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that that state is a corporator."

In the above case the state of Georgia did not own all of the stock of the Planters' Bank, but that does not seem to us to be a material fact. In Salas v. United States, 234 Fed. 842, 148 C. C. A. 440, we had before us the question whether a conspiracy to defraud the Panama Railroad Company was a conspiracy to defraud the United States. We held that it was not, notwithstanding the fact that the United States owned the whole capital stock of the railroad company, and was solely interested in its profits or losses. We decided that—

"When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. * * * Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and is sued just like any other corporation, in its own name."

See, also, Lord & Burnham Co. v. Fleet Corporation (D. C.) 265 Fed. 955, 957, where it was declared that—

"Ownership by the government of all of the stock of the corporation does not change the situation, and it remains a corporation just the same as though it had a dozen or more stockholders."

The decision of the Supreme Court in United States v. Strang, 254 U. S. 491, 41 Sup. Ct. 165, 65 L. Ed. ——, rendered on January 3, 1921, appears to us to lead logically to the conclusion we have reached upon the matter now under consideration. The Criminal Code (section 41 [Comp. St. § 10205]) makes it a criminal offense for an officer or agent of any corporation, joint-stock company, association, or firm to be employed or act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. It appeared that Strang, while he was a member of a firm of ship outfitters, was at the same time employed by the Fleet Corporation as an inspector, and in that capacity signed and executed three separate orders to his firm for repairs and alterations on a steamship. He was tried on an indictment which charged him with a violation of the section of the Code above referred to. A demurrer to the indictment was sustained in the court below, and the Supreme Court affirmed. It was argued by the government that the Fleet Corporation was an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested

by Congress in the President and by him delegated to it; that the acts of the Corporation were the acts of the United States; that therefore Strang in placing orders with his firm in behalf of the Fleet Corporation acted as an agent of the United States. The court in its opinion said:

"The Corporation was controlled and managed by its own officers and appointed its own servants and agents, who became directly responsible to it. Notwithstanding all its stock was owned by the United States, it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of section 41."

It also added:

"The view of Congress is further indicated by the provision in section 7, Appropriation Act of October 6, 1917 (40 Stat. 345, 384) * * *—'Provided that the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment for the purposes of this section.' Also, by the Act of October 23, 1918 (chapter 194, 40 Stat. 1015), * * * which amends section 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock."

Congress by Act July 17, 1916, amended by Act Jan. 18, 1918, has provided for the creation of Federal Land Banks and Joint-Stock Land Banks. U. S. Stat. at Large, vol. 39, pt. 1, c. 245, p. 360 (Comp. St. §§ 9835a–9835z); U. S. Stat. at Large, vol. 40, c. 9, p. 431 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 9835w). Under section 5 of the act of 1916, it is provided that every Federal Land Bank shall have a subscribed capital of not less than $750,000. It is also provided that if, within 30 days after the opening of the subscription books, any part of the minimum capitalization of $750,000 shall remain unsubscribed, it shall be the duty of the Secretary of the Treasury to subscribe the balance thereof on behalf of the United States. It might be possible under this provision that the United States might hold none, or some, or all, of the stock of the Federal Land Bank. Is it possible that the question of whether these banks are to be regarded as private corporations or as a department of government, and as such invested with the attributes and privileges of the government of the United States, depends upon the number of shares of the capital stock the Secretary of the Treasury has subscribed for and holds on behalf of the United States? Can the answer be doubtful? And is it contingent upon whether the Secretary of the Treasury, acting under the authority which the act confers, has designated the bank as a depositary of public money and employed it as a financial agent of the government? The constitutionality of the legislation of Congress providing for the creation of these banks has recently been declared by the Supreme Court in Smith v. Kansas City Title & Trust Co., 255 U. S. ——, 41 Sup. Ct. 243, 65 L. Ed. ——, but the question whether banks so created are private corporations does not appear to have been raised.

Counsel for the appellant seem to attach importance to a statement made by the Supreme Court in The Lake Monroe, 250 U. S. 246, 254, 39 Sup. Ct. 460, 463 (63 L. Ed. 962), which reads as follows:

"The emergency shipping legislation [Act June 15, 1917] evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agencies to exercise new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board."

But surely the fact that the Fleet Corporation was employed as an agency of the President does not of itself clothe the agency so employed with the immunities of his office. A bank organized under the National Bank Act and employed by the Secretary of the Treasury under the act as a depositary of public money and, to use the language of the act, as "a financial agent of the government" does not on that account lose its character as a private corporation, and does not become immune from suit.

It cannot be seriously contended, although the argument was addressed to us, that inasmuch as the Fleet Corporation was an agent of the government it could not be personally liable on its contracts, as agents are not personally liable on contracts made by them within the scope of their authority. We are told that a contract made in the name of a public agent will be construed to be a contract of the government, and not of the agent. Huffcut on Agency (2d Ed.) p. 254. This is to lose sight of the fact that the Fleet Corporation contracted as a principal in its contract with the bankrupt. It designated itself throughout the contract as owner, and was careful to distinguish between itself as owner and the United States, and the debt due from the bankrupt under the contract is a debt due to it as a principal, and not to the United States.

In the case under consideration, in causing to be created under the general incorporation law of the District of Columbia an industrial corporation with a capital stock divided into shares and managed by a board of trustees, the United States, by subscribing for the whole amount of the authorized capital stock in excess of what was needed to qualify the members of the board of trustees, did not confer upon the company the privileges and the prerogatives of its own sovereign character. It did not transform the corporation into a department of government, or divest it of its character as a private corporation. If Congress intended that this corporation should become a department of the government, instead of a separate legal entity, we are unable to discover why it should have resorted to such an indirect and extraordinary method of accomplishing its purpose. It follows, therefore, that a debt due to the United States Shipping Board Emergency Fleet Corporation from the bankrupt herein is not in law a debt due to the United States.

The conclusion above announced makes it unnecessary to consider the second question mentioned at the beginning of this opinion: Whether the United States, under the Bankruptcy Act, is entitled to the prior payment of ordinary debts due to it as against the general creditors of the bankrupt.

The order is affirmed.

In re GENERAL FILM CORPORATION.

UNITED STATES v. KELLOGG.

(Circuit Court of Appeals, Second Circuit. June 8, 1921.)

No. 227.

1. Bankruptcy ⇐⇒341—Government's claim for taxes passed on in first instance by bankruptcy court and not allowed as matter of course.
Under Bankruptcy Act, § 64a (Comp. St. § 9648), claim of the government for taxes is not ordered paid in its entirety as matter of course and the trustee remitted to proceedings under Rev. St. § 3226 (Comp. St. § 6849) to have the money returned, but the bankruptcy court passes on and determines validity of the tax in the first instance; it not being a case where the trustee is seeking to maintain a suit for recovery of internal revenue taxes illegally assessed, the government and not the trustee being the moving party, and this notwithstanding the trustee moves that the government's proof of debt be reconsidered and rejected, a verified proof of debt in bankruptcy having probative force and making out a prima facie case requiring the objector to go forward.

2. Internal revenue ⇐⇒7—Additional payment to be made at end of year by lessee to lessors of films held rent, an expense of operation and not a declaration of dividends.
Under contract of the G. Film Company with ten manufacturers of moving picture films, each originally owner of one-tenth of G.'s common stock, whereby they were to lease to it their films at nine cents a foot plus a payment at the end of the year, such payment to be from G.'s net profits during the year in excess of a 7 per cent. dividend on preferred stock and a 12 per cent. dividend on its common stock, such payment to each to be such proportion of such balance as the number of feet leased by it to G. bore to the total number of feet leased by G. from all Patents Company licensees during the year, *held*, relative to the income tax of G., that such additional payments should be considered rent, an expense of operation, and not a declaration of dividends to the manufacturers, though the question is one of intent.

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

In the matter of the bankruptcy of the General Film Corporation. An order of the referee disallowing claims of the United States for taxes was affirmed by the District Court, and the United States appeals. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (E. F. Unger, of New York City, of counsel), for the United States.

Louis Weinberger and Max Sheinart, both of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. September 23 and December 23, 1919, the United States filed two proofs of claim against the General Film Corporation, bankrupt, under the Act of October 13, 1913, for income tax in the sum of $11,395 with interest in addition to the amount paid by the corporation for the year ending December 31, 1914, and for in-

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

come tax in the sum of $4,433.81 with interest assessed by the Commissioner of Internal Revenue in addition to the amount returned by the corporation for the year ending December 31, 1915.

The additional tax claimed for 1914 never was assessed, and the time for assessment seems to have expired. Chapter 16, L. 1913, sec. 2 (e), 38 Stat. L. 169. The additional tax for 1915 was assessed.

The trustee in bankruptcy objected to the allowance of the claims on the ground that the company had correctly returned and paid the tax upon its net taxable income for 1914 and had correctly returned the amount of its net taxable income for 1915. Macgrane Coxe, Esq., the referee, disallowed both claims, and Judge Mayer confirmed his report. The United States filed petitions to revise.

[1] The government's first proposition is that the only remedy open to the trustee for correcting any error is to pay the taxes and then proceed under Rev. Stat. 3226 (Comp. St. 5949) by appeal to the Commissioner of Internal Revenue and, if the Commissioner delay decision for more than six months, to bring suit. But Congress in the Bankruptcy Act of 1898 (Comp. St. §§ 9585–9656) has departed very considerably from the principles of public policy theretofore prevailing as to the rights of the sovereign. The Supreme Court pointed this out in Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

Section 64a of the Bankruptcy Act reads:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." Comp. St. § 9648.

We regard this section as binding upon the government because it is named therein and, while conferring priority, as giving the bankruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applies to taxes of all the persons mentioned, and we could not differentiate the government from the other persons in the absence of language justifying it.

But section 3226, U. S. Rev. Stat., could under no circumstances apply to the case under consideration because the trustee is not seeking to maintain a suit for the recovery of internal revenue taxes illegally assessed. Clinkenbeard v. United States, 21 Wall. 65, 22 L. Ed. 477; United States v. Nebraska Distilling Co., 80 Fed. 285, 25 C. C. A. 418.

The United States Attorney contends that the trustee by moving that the government's "proof of debt be reconsidered and rejected" has become the moving party and therefore bound to proceed under Rev. Stat. § 3226. But in bankruptcy a verified proof of debt has greater effect than the filing of a complaint. It has probative force and makes out a prima facie case, for which reason the objector is required to go forward. We said in Re Dresser, 135 Fed. 495, at page 498, 68 C. C.

A. 207, at page 210, affirmed Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584:

"We are dealing here with a statute the primary object of which is to collect the property of the bankrupt speedily and divide it equally among his creditors. Analogies drawn from pleadings in actions at common law and in equity furnish little assistance in the interpretation of such a law. If the doctrine be once established that a proof of claim in bankruptcy is entitled to no greater weight than a complaint in an ordinary action at law the most serious results will follow. Any vindictive or contumacious creditor can, by filing objections, compel creditors to come from distant states and even from foreign countries to testify in support of their claims before a word of testimony impeaching their validity has been adduced. No one disputes that in the absence of objection the proof of claim stands as sufficient warrant for the payment of a dividend based thereon. It is not then a mere pleading, confessedly it possesses some probative force. This being so, it is not easy to approve the logic which deprives it of all weight as evidence upon the mere filing of an objection. If the appellant's contention be sustained an efficient administration of the law might, as we have seen, be made difficult, if not impossible. We see no reason or necessity for such an interpretation of the law. On the other hand, a construction which requires the objector to offer some proof before subjecting the creditor to the expense and annoyance of presenting sustaining evidence seems to be in accord with the intent and purpose of the act and to present a simple, efficient and perfectly fair rule of procedure. In the vast majority of instances the claims of creditors are susceptible of the most simple verification. The trustee has the bankrupt's books at his disposal and can at any time call upon the bankrupt for assistance. In cases where exaggerated or fraudulent claims are filed there is no difficulty in ascertaining and proving facts sufficient to establish the true character of the claim, thus putting the claimant upon his proof."

[2] We come now to the merits. The question is one purely of law, viz., whether the amount which the trustee seeks to deduct from the bankrupt's gross income as an expense of operation is such or is, as the government claims, a distribution of net profits. April 21, 1910, the bankrupt had contracted with ten manufacturers of moving picture films to lease their films at 9 cents a foot plus a payment at the end of the year. Article 8 of the agreement regulating this additional payment reads:

"The party of the second part further covenants and agrees that it will, in addition to the leasing prices hereinbefore referred to, pay to the party of the first part, at the end of each year during the continuance of this agreement, the following share of the net profit realized by it during that year from the subleasing and leasing, as aforesaid, of 'Licensed Motion Pictures' to exhibitors and from the sale of 'Licensed Projecting Machines,' and from all other sources, to wit, such a proportion of the balance, if any, of such net profit, remaining after deducting therefrom the dividend of seven per cent. (7%) for that year on its issued preferred stock and an amount equal to a twelve per cent. (12%) dividend on its issued common stock, as the number of running feet of 'Licensed Motion Pictures' leased by it from the party of the first part during that year bears to the total amount of running feet of 'Licensed Motion Pictures' leased by it from all 'Patents Company Licensees aforesaid' during that year ('Licensed Motion Pictures' manufactured for or purchased by the party of the second part, as aforesaid, as well as 'Licensed Motion Pictures' leased to it by 'Patents Company Licensees aforesaid' produced from negatives made on its order, to be excluded)."

The common stock of the bankrupt was $100,000 in 10,000 shares of $10 each, and each of the ten manufacturers originally owned 1,000

shares. The government contends that this fact, together with the fact that the extra footage charge was to come out of the net profits after deducting 7 per cent. dividend on the preferred and 12 per cent. on the common stock, shows that the payment is really a declaration of a dividend to the manufacturers and not a payment of rent for the films leased from them. There is undoubtedly great force in this argument. On the other hand, the charge of nine cents a foot for the films was shown to be much below what they seem to have been worth, and the additional payment was not to be made to the manufacturers in proportion to the stock they held, but in proportion to the amount of film footage each had furnished the bankrupt during the year. They furnished different amounts and were entitled to their proportion of the surplus without any reference to the amount of their stockholding or even if they held no stock at all. The question is one of intention, and we are not disposed to disturb the construction which the referee and the court below put upon the contract.

Decree affirmed.

CLEAR CREEK OIL & GAS CO. v. FT. SMITH SPELTER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 9, 1921.)

No. 5581.

1. **Specific performance ⇐114(1)—Allegations of complaint held to form no basis for equitable relief.**
   Allegations of complaint praying for specific performance and damages for past violations *held* to form no basis for equitable relief; the nub of the complaint being that defendants will pay only four cents for gas when it is claimed that they should pay eight cents therefor, and they not being alleged to have refused to take the amount of gas which it is claimed they should take.

2. **Estoppel ⇐90(2)—Delay of defendants to indicate their attitude while plaintiff was drilling for gas on the assumption of a contract by them to take it at a certain price held not to work an estoppel.**
   In view of prior contracts by plaintiff to furnish defendants gas at four cents, they to have a preference, *held*, their delay for six weeks to indicate their attitude while plaintiff was drilling for more gas, on the assumption of a new contract by defendants and others to take it at eight cents, did not work an estoppel.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by the Clear Creek Oil & Gas Company against the Ft. Smith Spelter Company and others. From an adverse judgment, plaintiff brings error. Affirmed.

Joseph M. Hill and Henry L. Fitzhugh, both of Ft. Smith, Ark., for plaintiff in error.

Harry P. Daily and John P. Woods, both of Ft. Smith, Ark., and T. M. Mehaffy, of Little Rock, Ark., for defendants in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

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STONE, Circuit Judge. Plaintiff in error (called Gas Company) filed its petition against the Spelter Company, the Zinc Company, and the Athletic Company, praying specific performance of a contract and damages for past violations thereof. After overruling motion attacking the jurisdiction of the court as a court of equity, the court heard the evidence, and being then of the opinion that "the court as a court of equity is without jurisdiction of this cause, that the issue is solely an issue of fact, that the jurisdiction thereof is at law, and that this cause should be transferred to the law docket," made the order of transfer, allowing the Gas Company its exception. Thereafter, the case was tried to a jury. During the trial a settlement was made with the Athletic Company, and no recovery thereafter sought against it. From judgment on a verdict directed for the Spelter and Zinc Companies, the Gas Company has prosecuted this writ of error.

The contentions here urged by the Gas Company, as stated in the brief, are:

1. The complaint states a good cause of action for specific performance.

2. The plaintiff's remedy at law is inadequate, and a bill in equity is proper.

3. The complaint alleges a good cause of action based on an equitable estoppel, and the court should have given the relief, or, after it was transferred to the law docket, submitted the facts to the jury.

The Gas Company treats the first two points together as being related, and contends that it was entitled to a decree of specific performance. To understand this contention it is necessary to have in mind the following allegations made by it: It contended that it had separate agreements with the Spelter and Zinc Companies to furnish them with certain quantities of natural gas at 4 cents per 1,000 c. f., and giving them in the above order priority over other customers, and that it was obligated to make reasonable exploitations and explorations to assure the required quantities of gas; that its supply materially diminished, and controversies arose as to its duty to make further search for gas; that a suit was brought by other users to prevent cutting off of their supplies to comply with the claimed priority rights of the above companies; that before trial of the above suit, gas was discovered in large quantities by another driller on property near its leases, and the Gas Company at once commenced drilling a well near this new well, resulting in obtaining a good supply of gas and in proving that the new field was a valuable gas producer; that in this new field was an unleased tract of 160 acres belonging to Cazort, which was valuable for gas development; that during the trial of the above suit, a conference was held, the representatives of all parties except the Zinc Company being present; that it was then agreed that the Gas Company would contract for Cazort to drill three wells, it would drill four, and all parties would pay for gas furnished at 8 cents per 1,000 c. f., if consent of the Zinc Company to pay that rate was secured, and when 8,300,000 c. f. were furnished; that the Zinc Company had theretofore said that it would pay 8 cents if all others did; that, relying upon its ability to procure

the consent of the Zinc Company, it immediately set about carrying out its portion of the above agreement, and opened negotiations with Cazort; that it at once wired the Zinc Company of the situation and asked its approval; that the Zinc Company assured it that it would pay 8 cents if the other smelters did; that the Zinc Company afterwards expressed its willingness to pay 8 cents when the others did; that the Gas Company made the Cazort contract and itself proceeded to sink new wells; the Zinc and Spelter Companies knew that a valid contract existed, subject to consent of the Zinc Company, and knew that the Gas Company was proceeding to and making expenditures in carrying out that contract; that they, although so informed, remained silent during such activities for more than two months; that relying upon the existence of such a contract with the Spelter and Zinc Companies, the Gas Company refused customers, who made contracts elsewhere, so that it can no longer dispose of large quantities of its gas, except to these two companies; that if not disposed of to them, its gas will be drained by other producers and lost; that it is threatened with insolvency, unless the contract with these companies is carried out; that they refuse to pay more than 4 cents for gas.

On these allegations of fact, the Gas Company bases the following legal conclusions, entitling it to equitable relief: That the action of the two companies in thus remaining silent was a fraud upon it; that had they promptly repudiated the contract, the Gas Company would have discontinued its operations and saved itself serious loss; that legal remedy by shutting off gas or suing for breach of contract would be inadequate and produce a multitude of suits; that legal remedies would not relieve it from threatened insolvency; that where it has performed and the other party refuses performance on the ground of lack of mutuality, statute of frauds, lack of consideration, or other cause, it will be compelled to perform; that its damages are impossible of proof.

[1] The trial court overruled a motion aimed at its jurisdiction as a court of equity, but after hearing the evidence as a court of equity it decided the case was purely one at law for the recovery of money, and transferred the case to the law docket. We think the court was right, as the above allegations form no basis for equitable relief. The defendant companies are not alleged to have refused to take the amount of gas which plaintiff claims they should take, nor is there any doubt, in the evidence, that they are willing to and are taking such gas. The nub of plaintiff's complaint is that they will pay only 4 cents per 1,000 c. f., when it claims they should pay 8 cents therefor. If the difference in rate were paid by defendants, plaintiff would secure all it claims was due it, for failure to so pay is the only essential particular in which it complains that they have violated the contract, which it contends governs the parties. The only substantial questions in the case were whether the parties made a binding contract to pay 8 cents, and, if so, what amount should be recovered by plaintiff for their refusal to pay more than 4 cents. But if the allegations of the petition could have an equitable aspect, the evidence introduced in the equity case, not here preserved, may have been convincing as to the real character of the

controversy. Consolidated Fuel Co. v. Ry. Co. (8th Cir.) 250 Fed. 395, 162 C. C. A. 465, seems in point.

[2] The other grounds urged by the Gas Company are that—

"The complaint states a good cause of action on equitable estoppel, and the court should have given the relief, or after it was transferred to the law docket, submitted the case to the jury."

Whether the court should have given the relief sought, or should have submitted the case, depends upon the evidence. It claims estoppel based on its having proceeded with performance of its alleged contract without notice by the two companies that they recognized no such contract. The acts which it says the new contract imposed upon it, and which it performed, were to procure Cazort to drill three wells, and to drill four wells itself. The evidence is conclusive that immediately after the above conference, and before it had heard whether the Zinc Company would join in the contract, it made its contract for drilling four additional wells and wired Cazort concerning a contract which was later executed. The Gas Company claims, however, and offered to prove, that they could have canceled these arrangements had the companies promptly notified them of their refusal to recognize the contract when informed by letter of April 2d of the status and its attitude in claiming the existence of a contract. We have examined the evidence, giving particular attention to that indicated by counsel, and it seems clear that there was never any completed new contract, and in view of the undisputed relation of the parties and the existence of the earlier contracts, we do not think the delay of six weeks by the companies in indicating their attitude can, under the circumstances here present, possibly be construed into an estoppel.

The verdict was properly directed, and the judgment should be, and is, affirmed.

WABASH RY. CO. v. KOENIG et al.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1921. Rehearing Denied October 7, 1921.)

No. 5793.

1. **Abatement and revival ⇐9—Injunction suit by carrier attacking state-fixed rates held a class suit preventing action by shipper for overcharge.**
An injunction suit by a carrier against officers of a state and all shippers, though only one shipper was named, attacking a state-rate statute as unconstitutional, was a class suit binding on all shippers, so that, till reversal of a decree therein enjoining any steps to enforce the statute, shippers other than the one named could not institute action to recover charges collected in excess of such statutory rates.

2. **Judgment ⇐677—Decree dismissing, without prejudice, suit by carrier against shippers as a class, after holding it without merit, held conclusive on the main question therein, in subsequent action by shipper to recover overcharge.**
Decree of Supreme Court dismissing, without prejudice, injunction suit by carrier against shippers as a class, after holding it without merit, is

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conclusive on the main question therein, whether the state rates were confiscatory, in a subsequent action by a shipper to recover of the shipper overcharges paid during the period of the injunction suit; and this notwithstanding a decision and order of the Interstate Commerce Commission prior to the decree of the Supreme Court, holding that there was a discrimination against interstate commerce by reason of difference between interstate and intrastate rates, and ordering the removal thereof for the future.

3. Interest ⟸12—Recoverable on excess charges by carrier.
A shipper recovering excess charges of a carrier is entitled to interest thereon.

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

W. Koenig and others, doing business as Koenig, Buscher & Koenig, filed an intervening petition in a suit against the Wabash Railway Company, claiming a recovery for overcharges. From a decree in their favor, defendant appeals. Affirmed.

N. S. Brown, of St. Louis, Mo. (L. H. Strasser and Homer Hall, both of St. Louis, on the brief), for appellant.

Clifford B. Allen, of St. Louis, Mo. (Lee B. Ewing, of Nevada, Mo., on the brief), for appellees.

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

TRIEBER, District Judge. This is an appeal from a decree awarding appellees a recovery for charges for the transportation of grain between stations in the state of Missouri, alleged to have been in excess of the rates prescribed by the statutes of the state and the Railroad Commissioners of the State of Missouri under and by virtue of the laws of said state; that the rates prescribed by the acts of the Legislature and the Railroad Commissioners were attacked as unconstitutional by the appellant in an action instituted in the Circuit Court of the United States for the Western District of Missouri and the officers of the state, as well as the shippers enjoined from instituting any suits or taking any steps to enforce said acts of the Legislature; that appellees were not made parties defendant to said injunction suit, it was a class suit against all shippers, and by reason thereof included them; that said injunction remained in force and effect until February 6, 1914, at which time a decree was entered dissolving the injunction and dismissing the bill in said suit, without prejudice.

The material pleas in the answer so far as necessary for the determination of this appeal are:

1. That appellees were not parties to the injunction suit and therefore not in any way bound or restrained by the injunction, and that they had at all times the right to institute suits against the railroad company to recover judgment on any valid claims by reason of any unlawful rates or charges collected from them.

2. A denial that the rates charged and collected were without authority of law.

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

3. That the acts of the state of Missouri establishing freight rates were unconstitutional as being confiscatory.

4. That the rates fixed under the said laws of the state were void in violation of the Interstate Commerce Act of the United States (24 Stat. 379), as being unlawfully discriminatory between localities in the state of Missouri and localities in other states; that heretofore the Southwestern Missouri Millers' Club and the Merchants' Exchange of St. Louis, Mo., filed their complaints against appellant and other railroad companies before the Interstate Commerce Commission, wherein it was charged that the use by the shippers of Missouri and the charging of said statutory rates by the carriers in Missouri of grain between points in said state were unlawful, because they created an unlawful discrimination against interstate commerce, and on a hearing by the Interstate Commerce Commission, the charge was sustained. The opinion and order of the Commission is found in 34 Interst. Com. Com'n R. 351, 359. That in the proceeding before the Interstate Commerce Commission the Public Service Commission of the State of Missouri made itself a party, representing the state and every shipper therein, including appellees, and therefore they are concluded by the finding and order of the said Commission.

The petition was referred to a special master, who recommended that the petition of appellees be dismissed upon the ground that the Interstate Commerce Commission in the Southwestern Missouri Miller's Club Case, reported in 34 Interst. Com. Comn. R. 351, had decided that the Missouri state rates on grain were discriminatory and the appellant and the other railroads, parties to that proceeding, ordered "to abstain from charging, demanding, collecting, or receiving higher interstate rates for the transportation of grain and grain products from interior Missouri points to St. Louis, Mo., than the intrastate rates contemporaneously charged for the transportation of such commodities over their lines from said interior Missouri points to St. Louis." This order was made June 14, 1915. Upon the hearing by the court the exceptions to the special master's report were sustained and a decree for the amount of the overcharges entered.

[1] As to the plea that, appellees not having been parties to the injunction suit, they were not prevented from instituting proceedings, when the excess charges were made, it is sufficient to say that that action was against all shippers, although only one shipper was made a party defendant, and was therefore a class suit and binding on all parties. Hartford Life Ins. Co. v. Ibs, 237 U. S. 662, 671, 35 Sup Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765.

[2] Nor can the constitutionality of the Missouri acts, upon the ground that the rates were confiscatory, be raised in this action; the Supreme Court having held that the injunction proceedings to which appellant was a party plaintiff and appellees parties defendant by reason of that action having been a class suit, were without merit and the bill directed to be dismissed. The main question in that suit was whether the state rates were confiscatory. Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571. In Missouri v. Chicago, Burlington & Quincy R. R., 241 U. S. 533, 539, 36 Sup. Ct. 715, 60

L. Ed. 1148, the identical question, arising out of the same proceeding, was before the court, and it was held that the decree in the Missouri Rate Cases did not leave the matter open so that in a subsequent individual case, brought to recover excess fares, paid during the period covered by the company's injunction suit, the defendant can again attack the constitutionality of the law. This was reaffirmed in Minneapolis, St. P. & S. S. M. Ry. Co. v. C. L. Merrick Co., 254 U. S. 376, 41 Sup. Ct. 142, 65 L. Ed. —, and in the late case of Ex parte, In the Matter of Lincoln Gas & Elec. Light Co., decided June 1, 1921, 255 U. S. —, 41 Sup. Ct. 558, 65 L. Ed. —.

Does the decision by the Interstate Commerce Commission in the Southwestern Missouri Millers' Case, supra, change this rule? The report of the Commission in that case was filed June 14, 1915. The opinion of the Supreme Court in the Chicago, Burlington & Quincy Railroad Case was filed June 12, 1916, a year later, and the Lincoln Gas & Elec. Light Co. Case on June 1, 1921. Aside from this, the order of the Commission did not prescribe intrastate rates for the future; it only required that in the future interstate and intrastate rates should be alike. In American Express Co. v. Caldwell, 244 U. S. 617, 625, 37 Sup. Ct. 656, 660 (61 L. Ed. 1352), the Supreme Court, upon a finding that it was not shown that the interstate rate was not reasonable, held:

"The order [of the Commission] properly left to the carriers discretion to determine how the discrimination should be removed; that is, whether by lowering the interstate rates or by raising the intrastate rates or by doing both."

[3] That appellees are entitled to interest on the excess charges collected is conclusively settled in Arkadelphia Milling Co. v. St. Louis Southwestern R. R., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517.

The decree is affirmed.

AABY v. DYER.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 224.

1. **Principal and agent ⇐167—Letter held ratification of signing of charter party.**
   A letter from one in whose name a vessel was chartered, confirming the acts of the agent or person signing, *held* a ratification of the acts of such person.

2. **Admiralty ⇐117—Answer must be amended within 15 days after filing of apostles.**
   Where answer in libel proceeding was based on claim that signing of charter was without authority, libelee could not set up the defense that agent's consent that the steamer should go to another port to complete her loading was a new contract, made without notice to libelee, which discharged him from all liability under the original charter, even if authorized under bond to cover demurrage; the answer not being amended, and no application therefor having been made within 15 days after the filing of the apostles.

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

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

Libel in admiralty by E. B. Aaby against Fred M. Dyer. Decree for libelant, and respondent appeals. Affirmed.

Merchant, Olena & Merchant, of New York City (Abel Merchant, Jr., Henry D. Merchant, and Roscoe H. Hupper, all of New York City, of counsel), for appellant.

Haight, Sandford, Smith & Griffin, of New York City (John W. Griffin and Wharton Poor, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Alexander Cunningham, Charles T. Small, and W. A. Norton were negotiating for a steamer to carry a cargo from New York to England. Not having sufficient financial standing to obtain a charter, they applied to the respondent, F. M. Dyer, a dealer in investment securities, to assist them. Judge Learned Hand has found that he was financially interested in this transaction, and we concur in that conclusion. Dyer himself dictated and handed to the gentlemen before mentioned a letter as follows:

"April 15, 1916.

"Alexander Cunningham, Esq., Charles T. Small, Esq., W. A. Norton, Esq., 45 Broadway, New York City—Gentlemen: This letter will be your authority for using my name as guarantor for any chartered steamer for carrying of freight from New York to Europe.

"Yours truly, F. M. Dyer."

This letter Norton inclosed to George R. Manchester, agent for owners of the Danish steamer Avra, as his authority to sign the charter party in Dyer's name. The liability assumed by Dyer was as large as if he were to be the charterer. The letter was accepted as such authority, and the charter party was signed that day by Manchester as agent for owners and by Norton in Dyer's name.

May 19, 1916, McDonnell & Truda, who had been employed by Norton, representing Dyer, to load the vessel, wrote the following letter to Dyer:

"May 19, 1916.

"Mr. F. M. Dyer, % Messrs. F. M. Dyer & Co., 24 Broad St., New York City—Dear Sir: Confirming conversation had this p. m. between W. A. Norton, Esq., of 45 Broadway, representing Mr. F. M. Dyer, of the firm of F. M. Dyer & Co., 24 Broad street, by his written authority, and McDonnell & Truda, as loading agents, beg to advise we are prepared to receive Norwegian steamer Avra on Monday morning at 7 a. m., at either Pier B or C, Jersey City.

"It is our understanding that you desire us to act as loading brokers and agents for this steamer for one outward voyage from New York to Liverpool; said steamer being now in the port of New York and ready for loading on the 22d day of May, 1916.

"It is our further understanding that we are hereby authorized to collect all freight moneys on this steamer for all cargo she may carry, and to deduct therefrom, before any payment of said money is made to F. M. Dyer, a commission of 5 per cent. on the gross freight list on account of our handling steamer, said commission to cover our charges as loading agents.

"It is further understood that where it is necessary for us to pay brokerage to authorize brokers or freight brokers that said brokerage be paid by us

out of our 5 per cent. commission. In no case are we to pay any brokerage to Messrs. Alfred H. Post & Co.

"We are also instructed by you to secure a berth for this steamer, and also to engage clerks for the tallying and receiving of cargo, and also to employ a first-class stevedore to load cargo, all of which expense is to be paid by us for your account out of freight money collected.

"We are also to use our best endeavors to secure the best possible paying freight, provided that you do not receive sufficient freight from the people who are now booking freight for you, namely, Alfred H. Post & Co.

"We will also use our best endeavors to load this steamer, if possible, to her full cubic and dead weight carrying capacity. However, we do not assume any obligation as to the gross amount of freight to be procured or the date of dispatch of steamer.

"It is further understood that this steamer will leave Pier B or C on or before May 28th, even though she has not completed the loading of her cargo. It may be necessary that the said steamer go into the stream to complete her cargo.

"If the above is satisfactory, kindly confirm.

"Very truly yours, McDonnell & Truda,
"PMcD/B Steamship Agents.

"Accepted: W. A. Norton, for F. M. Dyer."

May 22, on Monday, Dyer replied:

"May 22, 1916.

"Messrs. MacDonald & Truda, 5 State Street, New York, N. Y.—Dear Sirs: Referring to your letter of May 19th, would say that the arrangements made between W. A. Norton, my representative, and yourself as loading agents are satisfactory in every way.

"I note that the steamer Avra will be at either Pier B or Pier C, Jersey City, Monday morning at 7 a. m. It is understood that she will leave on or before May 28th, even if she has to go into the stream to complete her cargo.

"All other conditions of your letter are confirmed as accepted by Mr. Norton.

"Yours very truly, F. Monroe Dyer."

[1] May 22, to conform to a requirement of the charter that the charterers "guarantee £2,000 demurrage immediately on arrival of the vessel," Dyer signed a bond as principal, with the American Surety Company of New York as surety, for that amount, which bond recited that he had entered into a written charter party for the Avra May 18, 1916. It is true that Dyer says he signed the bond without reading it, but all the same it was delivered to the agent of the owners of the steamer in accordance with the provision of the charter party. We agree with the court below that, if Dyer's letter of April 15, 1916, was insufficient to authorize Norton to sign the charter party in his name, he subsequently ratified what Norton did and made him his representative in relation to the steamer and her cargo throughout. From this time on Dyer took no part in any of the transactions, they being conducted by Norton as his agent and in his name.

The libel alleged that the loading of the cargo was finished at Philadelphia. This was because but a little over one-third of the cargo could be obtained in New York, and the amount subsequently loaded at Philadelphia increased the charterers' bill of lading freight by more than $60,000. The sole defense in the answer was that the charter party had been signed without the respondent's knowledge or authority and that he was under no liability at all to the libelant in the premises. The District Judge entered a decree in favor of the libelant, and his damages and costs were stipulated in the sum of $38,105.84. If the

steamer had not gone to Philadelphia, the damages would have been nearly $100,000.

[2] On the hearing before us the respondent contended that Norton's consent that the steamer should go to Philadelphia to complete her loading was a new contract, made without notice to Dyer, which discharged him from all liability under the original charter, even if authorized, and under the bond to cover demurrage. This defense, if good in law, is certainly most inequitable. However, we need not consider it, because, to avail of it, the answer would have to be amended, and under our rule in admiralty 7 (U. S. Comp. St. 1916, vol. 3, p. 2707), application for such amendment would have to be made within 15 days after filing the apostles, a period long since past.

Decree affirmed.

REGAL CLEANERS & DYERS, Inc., v. MERLIS et al.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 248.

1. **Corporations ⟸419—Within discretion of directors whether or not to defend suit.**
   As a general rule, a corporation can appear to defend a litigation only in its corporate capacity, represented by its properly constituted officers, so that, where a suit is brought against it, it is ordinarily within the discretion of the directors whether or not to defend.
2. **Bankruptcy ⟸43—Officer of corporation cannot file petition in bankruptcy without consent of directors.**
   There is no presumption of authority in an officer of a corporation to make and file a voluntary petition in bankruptcy, and he may not do so without the consent of the directors.
3. **Bankruptcy ⟸63—Directors of corporation may admit insolvency, though creditors, if in good faith.**
   Directors of a corporation may vote to admit its insolvency, even though they be creditors, if they do so in good faith.
4. **Bankruptcy ⟸89(1)—President of corporation may file answer to involuntary petition without authority of directors, where latter equally divided for and against adjudication.**
   Proceedings in bankruptcy being in the nature of proceedings in equity, in certain cases in which a stockholder may intervene and set up any defense which could properly be made by the corporation, while it is ordinarily beyond the power of the president of a corporation against which a petition in involuntary bankruptcy is filed to interpose an answer therein without authorization by the directors, yet where such a corporation was solvent, and its adjudication in bankruptcy might cause irremediable injury to stockholders, and two of its four directors favored its adjudication, the president, in the due performance of the duties of his office, might file answer as such officer in the proceedings, without first applying to the directors for authorization.

   Ward, Circuit Judge, dissenting.

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

Involuntary petition in bankruptcy by Charles S. Merlis and others, against the Regal Cleaners & Dyers, Inc. Motion to strike out the al-

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leged bankrupt's answer and the appearance of its attorneys denied, and petitioners seek to revise order. Affirmed.

Emanuel Sustick, of New York City, for petitioners.
Myers & Kutner, of New York City, for alleged bankrupt.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On January 10, 1921, the petitioners filed a petition in the District Court to have the Regal Cleaners & Dyers, Inc., a New York corporation, adjudged an involuntary bankrupt. The grounds alleged were insolvency and a preference and transfer made in fraud of creditors. An answer was filed, denying the allegations of the petition. It alleged that the petition was filed as a result of a conspiracy to accomplish the ruin of the alleged bankrupt corporation. It was verified by its president. A petition was then filed to strike out the answer from the files of the court below and the appearance made by the attorneys for the corporation, on the ground that the appearance of the attorneys and the verification and filing of the answer were unauthorized acts. It is conceded that the board of directors did not authorize the filing of the answer. There are four directors of the corporation, two of whom appear to want the corporation to be adjudicated a bankrupt, and two of whom oppose. The question presented is, under these circumstances, is it the duty of a president, and may he, without authorization from the board of directors, file an answer placing in issue the allegations of a petition setting forth acts of bankruptcy consisting of fraud and deceit to hinder and delay its creditors while insolvent?

[1, 2] Two of the petitioning creditors were directors of the alleged bankrupt. The claim of the two directors who are seeking to sustain the result below is that the petitioners, who are directors and creditors of the corporation, are dissatisfied with the conduct of the business and are seeking to dissolve the corporation. As a general rule a corporation can appear to defend a litigation only in its corporate capacity represented by its properly constituted officers. Central Union Trust Co. v. Marietta (C. C.) 48 Fed. 14. So where a suit is brought against a corporation, it is ordinarily within the discretion of the directors whether or not to defend. General Electric Co. v. West Ashville Imp. Co. (C. C.) 73 Fed. 386. There is no presumption of authority in an officer to make and file a voluntary petition in bankruptcy, and he may not do so without the consent of the directors. In re Jefferson Casket Co. (D. C.) 182 Fed. 689; In re Southern Steel Co. (D. C.) 169 Fed. 702.

[3, 4] There is no objection to directors of a corporation voting to admit its insolvency, even though they be creditors of the corporation, if they do so in good faith. Home Powder Co. v. Geis, 204 Fed. 569, 123 C. C. A. 94. Proceedings in bankruptcy are in the nature of proceedings in equity. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. In certain cases in equity, a stockholder may intervene and set up any defense which could properly be made by the corporation. Bronson v. La Cross, etc., R. R. Co., 69 U. S. 283, 17

L. Ed. 725. If there exists a defense to this petition, while ordinarily it is beyond the authority conferred upon a president of a corporation to interpose an answer, still circumstances may exist which, in equity, would require him filing an answer, although he has not the authority of a resolution of the board of directors of his corporation. If the company is solvent, for the president not to prevent such a result might cause irremediable injury, or perhaps total failure of justice to the stockholders. Under these circumstances, we think the president should, in the due performance of the duties of his office, verify and file an answer as such officer. Ordinarily he must make an earnest effort with the managing body of the corporation, the directors, to induce remedial action on their part, and this must be made apparent to the court. If he fails with the directors, he may then proceed. If he does not make request of the directors, he may show that a request would be futile. Such appears from the facts here. There is no showing that the directors have been requested and have refused, but it does expressly appear that two of the four directors are in favor of the adjudication in bankruptcy. Thus the vote is a tie. Under these circumstances, to apply to the directors for instructions would be futile. We think that the answer should be permitted to stand, and the issues as to the questions involved tried.

The order is affirmed.

WARD, Circuit Judge (dissenting). No more important corporate question can arise than whether a company against which a petition in bankruptcy has been filed shall resist or consent to an adjudication. It is quite inconceivable to me that the president by virtue of his office can commit the company either way, more especially in a case like the present, where he is one of four directors who are equally divided in opinion and who own the whole capital stock of the company in equal shares. The attitude of the company is to be determined by the board of directors and when the board of directors is equally divided the company can neither resist nor consent to an adjudication. Therefore I think the motion to strike the answer and the appearance of attorneys in support of it from the files of the court as unauthorized by the company should have been granted. This would have left the court under section 18e of the Bankruptcy Act (Comp. St. § 9602) either to make an adjudication as upon default or to dismiss the petition, if any fatal legal defects appeared on the face of it. The court below did not know, and we do not know, which of these contesting parties was right. The question was purely one of law, and it seems to me that a practice is approved which may hereafter lead to dangerous consequences.

McNAUGHT v. HOFFMAN.*

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3659.

1. **Trusts ⇐35(1)—Deed and contract held not to create trust in favor of third person.**

A deed of real property and a contract between the parties executed at the same time, providing that the grantee should pay to a sister of the grantor $50 per month and that, such payments being made, the deed should be effective until the marriage or death of the grantee, when the property should revert, construed together as parts of the same transaction and *held* to constitute a conveyance on condition subsequent, and not to create a trust in favor of the sister, enforceable by her.

2. **Contracts ⇐187(1)—When third person may enforce contract made for his benefit.**

Under Rev. Codes Mont. § 4970, providing that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it," as construed by the Supreme Court of the state, which construction is binding on the federal courts, a contract to come within the scope of the statute must be one wherein the promisor undertakes to pay or discharge some debt or duty which the promisee owes to the third person, and where no consideration passes from the third person, but the provision for his benefit is voluntary on the part of the promisee, he cannot maintain an action for its enforcement.

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

At Law. Action by Ollie N. McNaught against Sadie Hoffman. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error, as plaintiff, in her complaint in the court below set forth that she is the sister of Mary M. Smith, the owner of two town lots in Lewistown, Mont., on which there is a hotel known as the Hoffman House; that on March 14, 1910, Mary M. Smith conveyed said premises by deed to the defendant in error, and that contemporaneously with the deed, and as a part of the same transaction, the defendant and Mary M. Smith entered into a written contract as follows: "A written contract between two parties, Mary Smith, party of the first part, and Sadie Hoffman, party of the second part, concerning the deed to the Hoffman House, that no less than $50 per mo. be paid to Mrs. J. A. McNaught for an unlimited time, and the deed then will stand good until the marriage or death of the party of the second part, Sadie Hoffman, when it goes back to party of the first part, Mary Smith, if alive, if not, to her heirs." The plaintiff further alleged that the deed referred to in the agreement was the deed from Mrs. Smith to Mrs. Hoffman, and that there was no other consideration for the deed than the carrying out by the defendant of the conditions of the contract; that on the delivery of said papers the defendant entered into the possession and enjoyment of the premises, and paid to the plaintiff $50 per month until October 14, 1910, and has since failed and refused to make further payments. The defendant answered denying that the contract was part of the same transaction with the deed, and alleging that the contract was entered into at the request of Mary M. Smith and without any consideration, and with the distinct understanding that the phrase "unlimited time" was to be taken and understood by the parties to mean such time as might be necessary for said Mary M. Smith to make arrangements for some other source to care for and provide for the plaintiff; that on October 9, 1910, Mary M. Smith wrote to the defendant as follows: "Now, a little business, dear. We signed a contract while you were in Calif. When

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*Rehearing denied October 10, 1921.

I go back I will burn it up. You can have the Hoffman House, grounds and its furnishings, and when you are through with it, it can go to Mabel, for I feel you have earned it. It will always give you a support should you lease it, when you get too (lazy) to run it (not too old), so you need make no other deed"—which letter relieved the defendant from any other or further obligation under said contract. The defendant pleaded the statute of limitations to each of the plaintiff's causes of action. The plaintiff filed a replication, denying that the contract was without consideration, and alleging that the letter of October 9, 1910, was written without the plaintiff's knowledge or consent or acquiescence, and denying that it relieved the defendant from the obligations in the contract expressed, or that the contract was ever annulled or set aside. The defendant moved for judgment on the pleadings, and the plaintiff made a counter motion for judgment on the pleadings. The latter motion was overruled, and the former was granted, and judgment was entered for the defendant.

McIntire & Murphy and H. G. McIntire, all of Helena, Mont., for plaintiff in error.

Gunn, Rasch & Hall, of Helena, Mont., and Belden & De Kalb, of Lewistown, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The legal effect of the deed and the contract as between the parties thereto was determined by a judgment of the Supreme Court of Montana in Smith v. Hoffman, 56 Mont. 299, 184 Pac. 842, a suit brought by Mrs. Smith against Mrs. Hoffman seeking the cancellation of the deed for alleged breach of the contract to make the $50 monthly payments so provided for. The court held that under section 5031 of the Code of Montana the deed and the contract were to be taken together as parts of one transaction, that from the evidence the only consideration for the deed was the promise to make the $50 payments, that the deed was a grant upon condition subsequent, and that upon a breach thereof the plaintiff would have been entitled to a rescission but for the fact that she waived the condition subsequent, that Mrs. Hoffman's title constituted a life estate unless she should remarry, in which event her estate would terminate, with reversion to Mrs. Smith, her heirs and assigns. The court also held that so far as the suit pending therein was concerned, Mrs. Hoffman was justified in treating the letter of October 9, 1910, and another letter written a year later, as relieving her from the necessity of making any further payments to Mrs. McNaught. We agree with the Supreme Court of Montana in construction of the deed and the accompanying contract, and we hold that the instruments created in the grantee an estate upon condition subsequent, and that they had not the effect to create a trust in favor of the plaintiff herein. 39 Cyc. 65; Steele v. Clark, 77 Ill. 471; Marston v. Humphrey, 24 Me. 513; Riddle v. Beattie, 77 Iowa, 168, 41 N. W. 606; Birdsall v. Grant, 37 App. Div. 348, 57 N. Y. Supp. 705.

[2] And even if the letter of October 9, 1910, had not the effect to release the defendant herein from the necessity of making further payments to the plaintiff, the latter would still have no cause of action against the defendant. The right of a third party for whose benefit a

contract is made is regulated by section 4970 of the Revised Codes as follows:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The statute came before the Supreme Court of Montana for construction in McDonald v. American Nat. Bank, 25 Mont. 456, 65 Pac. 896, where the court said:

"To come within the meaning and scope of the section, the (executory) contract made expressly for the benefit of a third person must be one whereby the promisor undertakes to pay or discharge some debt or duty which the promisee owes to the third person; in other words, the third person must sustain such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promisee which raises the implication of a promise from the promisor directly to himself. There must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor."

That construction of the statute was followed in Tatem v. Eglanol Mining Co., 45 Mont. 367, 123 Pac. 28. It may be conceded that the rule so established in Montana as to the rights of third persons for whose benefit contracts have been made is opposed to the weight of modern authority. 6 R. C. L. 884; 13 C. J. 705. But it rests upon the construction of a state statute, and it is binding upon this court. In the case at bar, Mrs. Smith is the sister of the plaintiff, but that relation does not raise the implication that she owed a duty to the plaintiff which the defendant agreed to discharge, nor does it make the defendant's undertaking a promise to pay or discharge a debt which Mrs. Smith owed to the plaintiff. Nor was there any consideration passing from the plaintiff by virtue of which she may assert the existence of a promise in her favor.

The judgment is affirmed.

THE WESTERN PRIDE.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 214.

1. **Salvage ⇐34—Amount of award for towing 800 miles held not excessive.**
Where a vessel of the value of $1,830,000, in a helpless condition because of defects in machinery, was towed for a distance of 800 miles to enable her to get to port, although there was no evidence of immediate danger of loss of the vessel, but considerable skill was required of the salvors, and they had to undergo considerable danger, and their expenses for delay amounted to $11,000, an award of $50,000 salvage *held* not excessive.

2. **Salvage ⇐26—Difficulty and risk in handling a vessel to be considered in awarding salvage.**
In ascertaining the amount to be paid for salvage of a vessel, it is fair to consider the difficulty of safely handling the vessel, and the risk of injury to the salving vessel.

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

Libel by the Hogarth Shipping Company, Limited, against the steamship Western Pride, her engines, etc., claimed by the United States. From a decree for libelant, the claimant appeals. Affirmed.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (De Lancey Nicoll, Jr., and John Hunter, of New York City, of counsel), for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter and William O. Goddard, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] This libel was filed for salvage services rendered by the steamship Baron Polwarth and her crew from the 15th to the 21st of August, 1919. On the 4th of June, 1919, the Baron Polwarth left Gibraltar in ballast bound for Philadelphia. On June 15th at 4 a. m. she picked up an S. O. S. signal from the Western Pride which stated that she was at latitude 35 13′ N., longitude 59 30′ W. The Baron Polwarth replied:

"Going to your assistance, will be with you at 11 a. m. ship's apparent time; our position is 36 20′ N., 60 50′ W."

The Western Pride then wirelessed that her engines were totally disabled and that she wished a tow to New York or Norfolk. The Baron Polwarth replied that her destination was Philadelphia and received a message from the Western Pride that Delaware would be satisfactory. The course of the Baron Polwarth was changed from 73 W. to S. 43 E. and she sighted the Western Pride at about 9:30 a. m. on June 15th. The Western Pride signaled her engines were disabled but her steering gear was all right. She drew up to windward of the Western Pride, and because of the rough sea the master decided not to send a boat, but after several attempts, shot a line across to the Western Pride to which the crew of the Western Pride made fast a heavier line which was pulled back aboard the Baron Polwarth. This line was bent on the Baron Polwarth cable and hauled in until the cable from the Western Pride was pulled aboard. Cables of 4½ and 5 inches were shackled to the eye of the cable of the Western Pride. Then the towing commenced from a point about 35 54′ N. longitude, 59 48′ W. latitude, and continued to within a short distance of the Delaware Capes. However, after the lines were made fast, a strong S. W. wind was blowing and increased as the towing proceeded. On account of the weather, the engines were kept at half speed all the first day. The wind and sea increased, and at about 5:25 p. m. on the 15th, the starboard hawser parted at about ten feet from the shackle, the broken line was hauled in, and the remaining line readjusted. No further towing was attempted for nearly two days on account of the heavy weather. The engines of the Baron Polwarth were used from time to time to keep the vessels apart and avoid any danger of the propeller fouling the towing lines. The wind increased in velocity, and on the morning of the 17th there was a very heavy sea, and at about 3 o'clock

on this day the towing line again parted. The sea continued to be heavy, although the wind moderated some. The two vessels were kept from fouling, however, and the propeller was kept clear of the towing lines. At daylight, at about 7:35 a. m., a towing line was refastened and the towage proceeded. And at noon on June 17th, the vessels were making between five and six knots. When the vessels reached a point about 20 miles from the Delaware Capes, the master of the Western Pride, while his vessel was at longitude 72 42', latitude 38 18', and on the evening of June 21st, stated that his engines were in working order so that he could make about half speed, and requested that his vessel be cast off, and stated that she would proceed under her own power to New York. Later she signaled that she had received orders to make Norfolk and the Baron Polwarth cast off at about 11:35 p. m. on June 25th. The time lost consisted of four days, and the value of this time to the Baron Polwarth is given as $2,200 per day. The expenses incurred were $1,554.23, making a total of $10,354.23. The Western Pride's value was $1,830,000, and the Baron Polwarth's was $700,000. The district judge awarded a decree for $50,000.

At the time the Baron Polwarth reach the Western Pride, a strong wind was blowing from the S-SW. There was a rough sea, but after the line was shot across and the cables made fast, the weather permitted towing until it became rough at 5:40 p. m. on the 15th as stated above. The master of the Western Pride testified that she left Plymouth, England, on May 20, 1919, bound for Hampton Roads. It had taken her 17 days to reach the point where the Baron Polwarth came to her assistance, which was approximately 800 miles from the Delaware Capes. Her engine trouble developed on June 10th, 5 days before she was picked up. When, on the 15th of June, she sent out an S. O. S. for help, she was completely disabled. When she requested the Baron Polwarth to cast her off, she had make such repairs as permitted her to continue, and the master said he did so in order to avoid incurring any more expense than was necessary. When she was picked up, there was no other vessel about to render her assistance. And it is apparent that for several days thereafter she was unfit to proceed at sea. We think there was no evidence of immediate danger of loss of the vessel, but there was skill required of the salvors, and the peril to which they and their vessel was subjected required a substantial reward. The Western Pride was towed in all 806 miles. The Baron Polwarth was delayed about 4 days while engaged in salvage services. Computing the value of this time, together with the expenses, leaves a sum awarded as salvage amounting to $39,645.77.

[2] In ascertaining the value of the services, it is fair to consider the difficulty of safely handling the distressed vessel and the risk run of injury to the salving vessel. This court has said in the No. 92 (252 Fed. 117, 164 C. C. A. 229):

"The problem usually is not to award so little as to discourage salvage aid, nor so much as to encourage unnecessary or exaggerated service; and, as the trial court, in respect of the quantum has much the duty of a jury, the amount fixed by it will not be disturbed, if within those limits which define the maximum and minimum which reasonably should be awarded."

We think, under all the circumstances, that the award below for salvage services is not so excessive as to require our modifying the decree. The Kia Ora, 252 Fed. 507, 164 C. C. A. 423; Melderskin (D. C.) 249 Fed. 776; The Varzin (D. C.) 180 Fed. 892.

Decree affirmed.

PENNSYLVANIA CEMENT CO. v. BRADLEY CONTRACTING CO. et al.

(Circuit Court of Appeals, Second Circuit. June 30, 1921.)

No. 262.

Contempt ⇐66(2)—Order directing commitment held not appealable.

An order to the United States marshal to forthwith commit one to jail, to be there detained as and for a contempt of court, until he should comply with orders thereof, was not appealable, where prior orders had determined such person guilty of contempt and subject to imprisonment, being merely incidental to the prior orders.

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

Suit by the Pennsylvania Cement Company against the Bradley Contracting Company and Frank Bradley, as president, etc. From an order directing that he be committed for contempt of court, the last-named defendant appeals. Appeal dismissed.

Thomas Henry Keogh, of New York City, and Henry A. Foster, for appellant.

Leo Oppenheimer, of New York City (Samuel H. Kaufman and Milton P. Kupfer, both of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. October 5, 1918, the Bradley Contracting Company was, upon a general creditors' bill consented to by the company, put into the hands of receivers. The bill alleged that the company was solvent and that the receivership was necessary to prevent a waste and sacrifice of its assets and to accomplish a fair distribution of them among its creditors.

November 4 and December 3, 1920, respectively, the receivers entered into two contracts for the sale of two separate parcels of land belonging to the company; it being agreed in each case that the company should execute a deed in proper statutory short form, with the usual full covenants and warranty, and that the receivers would also give a quitclaim deed, if required. December 23, 1920, and January 7, 1921, the court entered an order in the case of each parcel approving the contract of sale, and directing the Bradley Company to execute such deeds, and authorizing the receivers to execute quitclaim deeds.

January 13, 1921, the officers of the company having refused to execute warranty deeds, the receivers filed a petition that they be punished for contempt. January 15 an order was granted requiring the officers

to show cause why they should not be punished for contempt. January 18 they filed an answer denying that the court had any jurisdiction of the subject-matter of the action—that is, of the receivership—or of the parties to the action, or of themselves as officers of the corporation, and alleging that all orders theretofore entered in the course of the receivership were void, and particularly that the order requiring them to show cause why they should not be punished for contempt should be quashed, annulled, set aside, and held for naught. January 25 Hough, J., entered an order concluding as follows:

"Ordered, adjudged, and determined that William Bradley, James Bradley, and Frank Bradley are guilty of a contempt of this court in having willfully and deliberately disobeyed the lawful orders of this court, filed herein on the 23d day of December, 1920, and on the 8th day of January, 1921, and in failing and refusing to execute deeds in accordance with said orders; and it is

"Further ordered, adjudged, and determined that William Bradley, James Bradley, and Frank Bradley be forthwith arrested by the marshal of this district, and be brought before this court, to be committed for the contempt aforesaid, and to be imprisoned by the United States marshal for the Southern district of New York until they shall obey the lawful orders of this court heretofore entered on the 23d day of December, 1920, and the 8th day of January, 1921, and shall execute the deeds provided for in said orders, or until further order of this court."

April 4 the defendant Frank Bradley was apprehended by the United States marshal. April 5 Judge Hough entered an order concluding as follows:

"Ordered, that the United States marshal for the Southern district of New York forthwith commit said Frank Bradley to the Ludlow Street jail, to be there detained as and for a contempt of this court until such time as said Frank Bradley shall comply with the orders of this court duly entered herein on the 23d day of December, 1920, and the 8th day of January, 1921, respectively, and until the further order of this court."

Bradley appeals from this order.

A proceeding by habeas corpus would have been appropriate to this order; but, as the order was merely incidental to the orders of December 23, 1920, and January 8, 1921, which pronounced Bradley to be in contempt, it is not appealable. If he be entitled to any relief, it can only be by review of those orders.

Appeal dismissed.

MATTHEY v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. August 10, 1921.)

No. 5464.

1. War ⟹4—Indictment for aiding and abetting insubordination need not allege the means employed or the particulars of the incitement, aid, or assistance.

The indictment for aiding and abetting in an attempt to cause insubordination, disloyalty, and refusal of duty in the military forces of the nations when it was at war, the conduct of the principal being set out, need not allege the means employed by the abettor or the particulars of

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*Rehearing denied November 8, 1921.

his incitement, aid, or assistance, but it is enough to charge, in general terms, that he knowingly aided and abetted the principal and induced and procured him to commit the principal offense.

2. Criminal law ⊂⊃1129(3)—Assignments of error on admission of evidence held insufficient.
Assignments of error on admission of evidence are insufficient; they giving no information as to the character of the evidence, or of the objections made to it, but referring generally and at large to the "shorthand report of the trial."

3. War ⊂⊃4—Evidence of aiding and abetting seditious utterance held proper.
Evidence on prosecution for aiding and abetting another in his seditious utterances *held* not to have gone beyond the proper limits, to show his unlawful intent and that his participation was not casual or inadvertent.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

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

E. M. Warner, of Muscatine, Iowa, for the plaintiff in error.

E. G. Moon, U. S. Atty., of Ottumwa, Iowa (John C. De Mar, Asst. U. S. Atty., of Des Moines, Iowa, on the brief), for the United States.

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

HOOK, Circuit Judge. Walter Matthey was convicted of aiding and abetting one Daniel H. Wallace in attempting July 25, 1917, to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States whilst it was at war with the Imperial German government. He contends that the indictment was bad and that the trial court erred in admitting evidence against him.

[1] The indictment, which was against Wallace, Matthey, and others jointly, set forth the conduct of Wallace, the principal, with undoubted sufficiency of detail. It charged that he delivered an address at a public meeting in Davenport, Iowa, largely attended by members of the various military forces of the United States, and that he advised and counseled his audience that they could not be taken, and should not go abroad and fight, but should resist and disobey the acts of Congress in the premises; also that he derided the people and armies of the countries with which the United States was associated and praised those of Germany. As to Matthey the indictment charged in general terms, without particulars, that he knowingly aided and abetted Wallace, and induced and procured him to commit the principal offense. It is the settled rule in criminal pleading that in such cases it is not necessary to allege the means employed by the abettor, or the particulars of his incitement, aid, or assistance. United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481.

[2, 3] The assignments of error upon the admission of evidence are wholly unsufficient. They give no information as to the character of

the evidence complained of or of the objections made to it, but refer generally and at large to the "shorthand report of the trial." Nevertheless we have examined the printed record before us which presumably is a reproduction of the stenographic report and find no error. The case of Wallace, the principal, was an aggravated one. His public address followed the lines of a previously prepared pamphlet the language of which was calculated to incite, not only general opposition to the participation of this country in the war, but also, which was of the essence of the offense, individual resistance to military orders, discipline, and service. There was substantial evidence that Matthey distributed some of the pamphlets as indicating the address to be delivered, helped get up the meeting, attended it, and applauded. The evidence against him did not go beyond the proper limits to show his unlawful intent and that his participation was not casual or inadvertent.

The sentence is affirmed.

UNITED STATES v. ONE HAYNES AUTOMOBILE.

(Circuit Court of Appeals, Fifth Circuit. July 25, 1921.)

No. 3664.

Internal revenue ⟸2—Statutory provisions repealed by National Prohibition Act.

Since the enactment of the National Prohibition Act, a suit cannot be maintained under Rev. St. § 3450 (Comp. St. § 6352), for forfeiture of a vehicle as having been used to remove and conceal distilled spirits whereon a double tax has been imposed under said Prohibition Act, with intent to defraud the United States of such tax.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by the United States against one Haynes automobile, Model 45, Type T, engine No. 35909. Judgment for respondent, and plaintiff appeals. Affirmed.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and William McL. Christie, Asst. U. S. Atty., of Jacksonville, Fla.

W. A. Hallowes, Jr., and Miles W. Lewis, both of Jacksonville, Fla., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. In this case a libel was brought to condemn the above-described automobile, under United States Revised Statutes, § 3450 (Comp. St. § 6352), on the ground that it was at the time of seizure being used in the removal, deposit, and concealment of distilled spirits, on which the taxes had not been paid, to a place other than one authorized by law, with intent to defraud the United States of the taxes thereon. The question presented is whether the libel can be sustained under Revised Statutes, § 3450; it being conceded that it

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does not allege facts sufficient to sustain it against demurrer or exception as not stating a case for forfeiture under the Volstead Act (41 Stat. 305). The acts charged to constitute the violation of law are alleged to have occurred since the Volstead Act took effect.

Section 3450 of the Revised Statutes provides for the forfeiture of any vehicle used to remove or conceal any goods or commodities whereon a tax has been imposed, when such removal or concealment is with intent to defraud the United States of such tax or any part thereof. It was designed to aid in the collection of the revenue, when the raising of a large revenue from the authorized manufacture and sale of intoxicants was a part of the financial policy of the government. Now there can be no lawful manufacture, sale, or transportation of such liquor for beverage purposes. No liquor revenue stamps or tax receipts can be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against 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.

Section 26 of the Volstead Act provides that, whenever intoxicating liquors, transported or possessed illegally, are seized by an officer, he shall take possession of the vehicle, etc., and arrest the person in charge and proceed as provided in said section 26 against said person and vehicle. Section 35 repeals all prior provisions of law to the extent of their inconsistency and no more. The Supreme Court of the United States has in the case of United States v. Yuginovich (June 1, 1921) 255 U. S. ——, 41 Sup. Ct. 551, 65 L. Ed. ——, decided that this provision of the Volstead Act must be construed in the light of the rule for construing penal statutes:

"That later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty."

It is evident that the tax, which it is claimed has not been paid, is the double tax and penalty directed by section 35 of the Volstead Act. Any manufacture, sale, or transportation of liquor for nonbeverage purposes, to be legal, must be under a permit as provided by the Volstead Act. The transportation of the liquor is clearly one which, if illegal, would violate the Volstead Act, and would subject the vehicle to forfeiture according to the provision of that act. It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under section 26 of the Volstead Act, with its provisions for preserving the rights of third persons, and still leave them subject to be forfeited under the more drastic provisions of Revised Statutes, § 3450.

The judgment of the District Court is therefore affirmed.

DAVIS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3640.

Indictment and information ⇐111(1)—Indictment need not negative exceptions in statute.

An indictment charging defendants with conspiracy to unlawfully transport, sell, etc., whisky in violation of National Prohibition Act, tit. 2, § 3, *held* not required to aver that the whisky was not to be used for nonbeverage purposes, especially in view of the express provision of section 32 that "it shall not be necessary in any * *. * indictment to include any defensive negative averments."

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Criminal prosecution by the United States against Robert Davis and O. A. Dodson. Judgment of conviction, and defendants bring error. Affirmed.

Albert Schoonover, of San Diego, Cal., for plaintiffs in error.

Robert O'Connor, U. S. Atty., and Herbert N. Ellis, Asst. U. S. Atty., both of Los Angeles, Cal., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted under an indictment which charged them with conspiring to commit the offense of knowingly, willfully, and unlawfully transporting, selling, bartering, furnishing, and possessing intoxicating liquor, namely, whisky, in violation of the National Prohibition Act of October 28, 1918 (41 Stat. 305). The indictment set forth overt acts, among which it was charged that on a date named, the plaintiffs in error did knowingly, willfully, and unlawfully advise, counsel, and abet Adolpho C. Olivas to knowingly, willfully, and unlawfully transport and attempt to transport 13 five-gallon demijohns of whisky containing alcohol in excess of one-half of 1 per cent. by volume, from Calexico, Cal., to the ranch of said plaintiff in error Davis, within the state of California.

The only error assigned is that the trial court, after the conviction of the plaintiffs in error, denied their motion in arrest of judgment, and the sole question presented to this court is whether the indictment charges an offense against the United States. It is contended that it is fatally defective, in that it fails to allege that the liquor, the transportation of which was the object of the conspiracy, was not to be used for nonbeverage purposes, under the provisions of section 3 of title 2 of the act. The plaintiffs in error cite authorities to the proposition that where a statute in defining an offense "contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted,

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it must be shown that the accused is not within the exception," citing 14 R. C. L. 188. But the text-writer so quoted goes on to say:

"On the other hand, if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

We think the present case comes clearly within the rule last quoted. That portion of the language of section 3, which defines the offense which it was alleged in the indictment it was the purpose of the conspiracy to commit, is entirely separable from that portion thereof permitting the use of intoxicating liquor for nonbeverage purposes. In addition to that fact, section 3 declares that all the provisions of the act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented, and section 32 provides that it shall not be necessary in any indictment "to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful." The case clearly comes within the rule of this court's decisions in Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570, and Hockett v. United States (C. C. A.) 265 Fed. 588.

The judgment is affirmed.

PETERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921.)

No. 3658.

Conspiracy ⇐47—Evidence held insufficient to sustain conviction of conspiracy.

In a prosecution for conspiracy falsely to make and alter United States War Savings Certificates and United States War Savings Certificate Stamps and to publish, utter, and sell the altered obligations, evidence that defendant had in his possession altered stamps, and that he had pleaded guilty to an indictment charging him with possessing altered stamps with the intention to pass and sell them, is not sufficient to sustain conviction of conspiracy to sell or alter such stamps.

In Error to the District Court of the United States for the District of Oregon; Chares E. Wolverton, District Judge.

Fred Peterson was convicted of conspiracy to make and alter certain obligations of the United States and to publish, utter, and sell the altered obligations, and brings error. Reversed and remanded.

Paul M. Long, of Portland, Or., for plaintiff in error.

Lester W. Humphreys, U. S. Atty., and John C. Veatch, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brings under review the judgment rendered against him upon his conviction under an indictment which charged him, together with five others, with a conspiracy falsely to make and alter certain obligations and securities of the United States, namely, United States War Savings Certificates and United States War Savings Certificate Stamps, and to publish, utter, and sell such altered obligations. The plaintiff in error and one Rossi were found guilty. At the close of the testimony motion was made for an instructed verdict in favor of the plaintiff in error, and the denial of that motion is assigned as error.

The contention of the plaintiff in error that there was no evidence to prove a conspiracy must be sustained. In the bill of exceptions which is certified to contain all the evidence offered or admitted on the trial which in any manner concerns the plaintiff in error or relates to any of the exceptions or rulings of the court therein, there is testimony that altered stamps were found in the possession of the plaintiff in error, and that he had pleaded guilty to an indictment which charged him with having in his possession such altered stamps with the intention to pass and sell them; but there was no testimony or evidence of any kind to show that he conspired with his codefendant, Rossi, or with any one, to steal or alter such stamps, or that there was any concert of action between the plaintiff in error and any of the defendants, or that there was a conspiracy.

The judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

THE MARGARET SPENCER.

(District Court, S. D. Florida. August 12, 1921.)

No. 1305.

Seamen ⇐21—Acts constituting "desertion."

Libelant shipped as cook for a voyage from Jacksonville, Fla., to Havana and return. At Havana he had a controversy with the master because of claimed delay in delivery of his mail, abused the master, and refused to obey orders, whereupon the master caused his arrest by the harbor police. On his release the vice consul refused his discharge and ordered him to return to the vessel, which he refused to do. *Held*, that such refusal constituted "desertion" under Rev. St. § 4596, as amended (Comp. St. § 8380) and a consequent forfeiture of wages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desertion (In Maritime Law).]

In Admiralty. Suit by John H. Barefield against the schooner Margaret Spencer. Decree for respondent.

Frank D. Brennan, of Jacksonville, Fla., for libelant.

W. F. Rogers, of Jacksonville, Fla., for claimant.

CALL, District Judge. John Barefield filed his libel against the schooner Margaret Spencer, claiming wages as cook, expenses, and

double pay for certain days because of delay in paying off and value of effects.

Claimant filed an answer denying liability and setting out affirmatively that Barefield deserted the ship in Havana before the termination of the voyage, the return of the ship, deposit of amount of wages in the custom house claimed to be due by claimant, and the conduct of libelant while at anchor in the harbor of Havana.

I find from the testimony the facts as follows: Barefield shipped as cook at Jacksonville, Fla., on the 23d day of December, 1920, upon the schooner Margaret Spencer, at a monthly wage of $150, for a voyage from Jacksonville, Fla., to Havana, Cuba, and return. That on January 28, 1921, while at anchor in the harbor of Havana, a controversy arose between the master and the cook in regard to the delay in receipt of mail by the cook. During the progress of this controversy, the cook cursed and abused the master, and refused to obey the orders of the master to go to his quarters. That the master had the cook arrested by the harbor police and confined in police jail of Havana Friday (28th) night. That Saturday morning the cook was released, and finally discharged from custody on Monday morning. That thereupon both master and cook went to the consul's office and made their statement of the matter; the cook demanding to be discharged and paid off. This demand was refused by the vice consul and he was ordered back to the vessel, and upon expressing a fear to do so, a letter was given him to the master to the effect that he was still a member of the crew. That from the time of the arrest by the harbor police the cook did not go aboard of said vessel, nor did he deliver the letter to the captain, but remained in Havana until after the vessel had sailed, and returned as a passenger, arriving after the arrival of the vessel. That on the official logbook of the vessel Barefield was marked as a deserter from January 31, 1921.

The decision of this case hinges on the question whether the libelant deserted the ship in Havana.

To constitute "desertion" in the sense of the word used in section 4596, R. S., as amended (Comp. St. § 8380), the seaman must quit the ship and her service, not only without leave, but without justifiable cause, and with intent not again to return to duty on the vessel. The Mary C. Conery (D. C.) 9 Fed. 222. Apply this rule to the facts of the instant case. The excuse given by the libelant for not going aboard when released from the police jail in Havana appears to me puerile. It is in effect that he could not get there; no money; no boat. Had he desired to go aboard, there were many ways for him to have done so, and this is the only reason for his not doing so, given in his pleadings and testimony. I can reach but one conclusion from the consideration of the evidence, and that is that libelant had fully made up his mind, whether from the fact of the unsatisfactory delivery of his mail, his arrest at the behest of the master, or some other reason not apparent, to be discharged in Havana and paid off there, which would have probably carried with it passage money to the point of the beginning of the voyage. Did he have justifiable cause for such action? I can find

none in the record before me. Even though the master did unreasonably delay the delivery of his mail, and this seems to have been the burden of his complaint, such delay would not justify or excuse insubordination, abusing and cursing the master, refusing to obey lawful commands, and refusal to return to duty upon being discharged from arrest.

After a full consideration of all the evidence, I can reach no other conclusion than that the libelant deserted the vessel in Havana Harbor and under section 4596, R. S., as amended, is liable to forfeit all or a part of the wages earned by him at the time of such desertion. His effects having been delivered to his wife and a part of the wages then due having been deposited with the customs authorities, and the vessel having already paid out a large amount in costs, it seems to me that the proper decree in this case would be one of dismissal of the libel, without prejudice to the libelant receiving the amount deposited with the customs authorities.

It will be so decreed.

JEWELERS' CIRCULAR PUB. CO. v. KEYSTONE PUB. CO.

(District Court, S. D. New York. July 13, 1921.)

1. **Copyrights ⇐5—Of jewelers' directory, containing cuts of trade-marks, held valid.**
   A directory of the jewelry trade, containing the names and addresses of jewelers, with their respective trade-marks, illustrated by cuts made from sketches or photographic copies of the trade-marks, *held* subject to copyright under Act March 4, 1909, § 5, subd. "a" (Comp. St. § 9521[a]), which copyright protected the cuts.

2. **Copyrights ⇐58—Of trade-mark directory held infringed.**
   A copyright of a trade directory containing cuts of trade-marks *held* infringed by a defendant, which clipped therefrom the cuts and, after submitting them for approval to the owners of the trade-marks, reproduced them in another similar publication.

3. **Copyrights ⇐53—Ownership of trade-mark gives no right to copy copyrighted picture of it.**
   The fact that one owns a trade-mark gives him no right to copy a picture of it copyrighted by another, nor can he give a third person the right to use the picture's copy.

4. **Copyrights ⇐71—Infringing copies not subject to seizure in hands of innocent bailees.**
   Where a defendant furnished to its customers for their use copies of a directory published by it, which infringed complainant's copyright, but retained title with the right to recall the books on demand, complainant *held* not entitled to a writ of seizure under the Supreme Court rules to take the books from the bailees, but required to enforce its right to their destruction under Act March 4, 1909, § 25, subd. "d" (Comp. St. § 9546[d]), through an order requiring defendant to recall the same.

In Equity. Suit by the Jewelers' Circular Publishing Company against the Keystone Publishing Company. Decree for complainant.

This case comes up upon exceptions to a report of Hon. E. Henry Lacombe, special master, filed June 9, 1921. Both parties except, but it will be necessary only to take up the defendant's exceptions, which raise only questions of law.

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The suit is in equity for infringement of a copyright, the evidence being referred to a master in the first instance. The plaintiff is the publisher of the periodical of the jewelry trade known as the "Jewelers' Circular," which in 1915 published and copyrighted a third edition of its Trade-Mark Directory, called Trade-Marks of the Jewelry and Kindred Trades. This book contained the names and addresses of jewelers classified under different heads, arranged alphabetically, and opposite the name of each jeweler appeared the trade-names and trade-marks used by him. It was the result of considerable past labor, and was sold in large quantities to the trade at $5 a volume. The information contained in it had been obtained by direct inquiry from the jewelers, and the illustrations of the trade-marks were printed from cuts generally prepared by the plaintiff personally. In some cases the trade-mark owner would himself send an illustration printed upon his stationery in such form that it could be photographically transferred to the surface of a cut which could be directly used in printing. In many cases the plaintiff got either a sketch, or the impression of a die upon metal or paper. In such cases a drawing of the sketch or impression must be made by a draftsman, which should be suitable for photographic transfer, and a cut was made from which the printing could be done.

The defendant, in October, 1920, made up a book called the "Jewelers' Index," in several sections; one, the trade-mark section, of 88 pages, answering the same purposes as the plaintiff's and containing the same information. In preparing this section, after some preliminary and ineffectual inquiries, which are not necessary to mention here, the defendant sent to each jeweler whose name it proposed to insert in the "Index," a letter, asking him to send "a cut of inclosed trade-mark of yours, also cut of any other trade-marks you are now using. * * * We trust you will make a special effort in sending cuts. * * * Send cuts same size (smaller, if possible and convenient) to Jewelers' Index. * * * If unable to furnish cut, send detailed description of trade-mark. * * * If you use different trade-marks for various items, please send cuts and specifications. * * * Assuring you cuts or electros will be returned as soon as possible, we remain," etc. Along with this letter and fastened thereto was a printed illustration of the trade-marks which were supposed to belong to the jeweler in question, and these were clipped direct from the plaintiff's book.

In most cases the jeweler did nothing but return the clipping so inclosed, with a statement that it correctly represented his trade-marks. In some instances, he simply sent back the clipping without comment, and in others it did not appear that the letter was answered at all. The master found in all cases that the defendant in good faith supposed that the clipping which it copied and republished in the "Index" had had the assent of the jeweler against whose name it was entered. While a large part of the trade-mark section of the defendant's book was made up in this way, there were some instances in which the jeweler sent cuts directly, having perhaps himself made the cuts from the illustration sent by the defendant, originally clipped from the plaintiff's book. In many instances Miss Clark, the draftsman for the plaintiff, had made errors in drawing the trademarks, some of which plaintiff had not corrected. These remained in the defendant's book, being mechanically reproduced as part of the trade-mark proper.

The plaintiff, after the return of the master's report, procured a writ of seizure under the Supreme Court rules, and has seized those copies of the "Index" which still remained in the defendant's hands. The latter had distributed the book gratuitously as an advertisement among the trade, but the copies so distributed remained its property, and subject to recall at its request. It is the purpose of the plaintiff to seize all these copies in the hands of the defendant's customers and impound them, subject to forfeiture and destruction, under section 25 (c) and (d), of the Copyright Act (Comp. St. § 9546), and under the Supreme Court rules.

The defendant raises the following points: (1) That the plaintiff's book is not protected by copyright, as it is only a list of prints or labels designed to be used for articles of manufacture, and as such within section 3 of chapter 301 of the Statutes of 1874 (18 Stat. 79); (2) that the "Index" is not an

infringement, because the defendant was entitled to use the plaintiff's book in the way that it did. Having in each case, as the special master found, verified the accuracy of the information contained in the plaintiff's book, it regards itself free to repeat that information, under the supposed rule of Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607. It also contends that the plaintiff should be enjoined from seizing those copies which are now in the hands of its own customers.

W. H. Swenarton, of New York City, for plaintiff.
Robert C. Beatty, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] First, as to validity: I think that the plaintiff's book is clearly a "directory" or an "other compilation," and as such it falls within section 5 (a) of the Copyright Act (Comp. St. § 9521[a]). Under section 6 (Comp. St. 9522) it is not necessary in such cases that the matter compiled should itself be copyrighted; it may be in the public domain. Therefore it is altogether immaterial that the trade-marks themselves could not be copyrighted, or whether section 3 of chapter 301 of the Laws of 1874 still remains in force. If the trade-marks be "prints" at all, under section 5 (k) of the Copyright Act, I may assume that, being designed for use on articles of manufacture, they cannot be copyrighted. Royal Sales Co. v. Gaynor, 164 Fed. (C. C.) 207, was the case of a single print or label; it does not touch this case. J. L. Mott Iron Works v. Clow, 82 Fed. 316, 27 C. C. A. 250 (C. C. A. 7th), was, however, closer. There the copyrighted work was a trade catalogue, consisting of a collection of photographic illustrations of bathtubs and the like. It was denied protection chiefly on the ground that it was an advertisement, but also in part because it was thought to have no æsthetic quality. In both respects the case must be considered overruled by Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460, and it has been so treated subsequently. J. H. White Co. v. Shapiro (D. C.) 227 Fed. 957. See, also, Da Prato Statuary Co. v. Quiliani Statuary Co. (C. C.) 189 Fed. 90.

In any event, the plaintiff's book was not an advertisement, and in so far as Miss Clark, the plaintiff's draftsman, prepared free-hand drawings from the impressions of the trade-marks, it cannot possibly be said that there was no element of æsthetic quality, whether it was bad or good, and however æsthetic quality is defined. In those instances in which the trade-mark owners sent on illustrations which could be directly transferred to cuts by photography, it might indeed be argued that J. L. Mott Iron Works v. Clow, supra, might still apply. Burrow-Giles Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, left open an intimation that some photographs might not be protected, and this possibility was emphasized in J. L. Mott Iron Works v. Clow, supra. I think that, even as to these, Bleistein v. Donaldson Lithographing Co., supra, rules, because no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike. Moreover, this all seems to me quite beside the point, because under section 5 (j) photographs are protected, without regard to the degree of "personality" which enters into them. At least there

has been no case since 1909 in which that has been held to be a condition. The suggestion that the Constitution might not include all photographs seems to me overstrained. Therefore, even if the cuts be deemed only photographs, which in these supposed cases they are, still I think that they and the illustrations made from them may be protected.

[2] Second, as to infringement: Any directory is a compilation, without opportunity for variety in the statement of the facts recorded. All are free to repeat those facts, just because they are facts. Strictly, it might have been logical, therefore, to deny it any protection, till the statute expressly granted one. That was not, however, the law before the act of 1909 (List Publishing Co. v. Keller [C. C.] 30 Fed. 772; Sampson & Murdock Co. v. Seaver-Radford Co., 140 Fed. 539, 72 C. C. A. 55 [C. C. A. 1st]), and it could not be even argued afterwards. Yet in some way subsequent compilers must be allowed to state the same facts, and the question became what independent work they must do to acquire the requisite knowledge. Every one concedes that a second compiler may check back his independent work upon the original compilation, but there has been some dispute whether he may use the original compilation after simply verifying its statements, or whether he must disregard the assistance of the original, except in subsequent verification. I do not find it necessary to determine that question in this case, or to decide whether there is a conflict between Sampson & Murdock Co. v. Seaver-Radford Co., supra, and Edward Thompson Co. v. Amer. Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607 (C. C. A. 2d).

[3] It appears to me quite enough that here the defendant copied the illustrations made by the plaintiff. If those were protected, to copy them would be to infringe. Suppose, for example, that, instead of describing the trade-marks pictorially, the plaintiff had done so verbally. the defendant would have been, of course, entitled to describe them anew, and it would have made no difference that his description and the plaintiff's tallied to the letter. Still no one would contend, I suppose, that he could lift the plaintiff's verbal description and use it bodily merely by getting it verified by the owner. In that case it would be obvious that he had copied the plaintiff's work. Exactly the same thing was done here. The plaintiff's illustration was not the trade-mark itself, but a picture of it, prepared by the plaintiff. The defendant was as much bound to make an independent picture of the object itself as he would have been obliged to make an independent verbal description. This obligation is quite independent of his right, if he have the right, to repeat any facts which he may first learn from a copyrighted work and later verify. Only the case of an ordinary directory can raise the question of such a right, because in a directory there is but one way to state the facts, and a subsequent compiler cannot copy the form of expression of the earlier, because there is no form. When, however, there is any such form, however intangible and difficult to distinguish as such, then the second compiler must depend upon his own resources to express the facts independently. He may not use the form. For the reasons already given, it seems clear to me that the "Index" was an infringement in respect of all the cuts used to print it, which were made

from illustrations of the same trade-mark published in the plaintiff's book. Even as respects those received direct from the trade-mark owners, they as little as any one else could use the plaintiff's illustrations to make cuts. The defendant would be innocent as to these, but the infringement would exist notwithstanding. The fact that one owns a trade-mark gives him no right to copy a picture of that mark, nor can he give another the right to use the picture's copy.

It follows that the defendant must be enjoined from publishing and distributing the trade-mark section of the "Index," and must be directed to recall all those copies over which it has retained the right of recall. This must be done within 20 days after decree filed. The plaintiff may also have an accounting for damages, or I will fix them under section 25 (b), if they cannot be specifically proved. I assume that no accounting for profits will be asked, as I do not see how any could be proved. Allowances will wait for final decree.

[4] There remains a question under section 25 (c) and (d) and the writ of seizure. The defendant has already surrendered all copies of the "Index" in its possession under section 25 (c) and the Supreme Court rules. Section 25 (c), with the rules, is ancillary to section 25 (d), for I take it as patent that the "impounding" is only to assure the eventual destruction of the infringing articles. It appears to me significant that the only provision for the destruction of infringing copies is section 25 (d), which makes it one of the remedies against an infringer that he shall "deliver up on oath," etc. Yet, under section 32 (Comp. St. § 9553), all piratical copies imported may be seized and destroyed in the hands of any one. Thus there is a distinction between a piratical copy not imported, which, if sold, is not subject to seizure in the hands of one not an infringer, and an imported piratical copy, which is.

The writ of seizure authorized by the Supreme Court rules as the proper procedure to enforce section 25 must, of course, be read upon the statute, and if I am right no marshal should seize any copies which had been sold to persons not infringers; it must be remembered that use does not make one an infringer as in the case of a patent. In the case at bar the books were not sold, but were in effect lent to the defendant's customers, subject to recall at its pleasure. Clearly, however, the customers had full possession of the books; they were bailees, entitled to beneficial use of the property, and not agents, acting on behalf of the defendant. The bailment under civil law would have been a commodatum, and not either a depositum or a mandatum.

Now, it is true that at first blush it might seem (the bailment being determinable at will by the bailor) that the writ of seizure might interrupt the bailee's possession, precisely as it can the bailor's. Yet it appears to me that this would be improper. The statute, which is highly penal, cannot be supposed to go further than it says, and it is expressly limited to infringers; all rights, including the right of possession by others, must be immune from violent interruption, unless there is express warrant for it. And so the possession of innocent bailees should be respected, because it is legal, and should be disturbed only under the terms of the agreement which created it. They are free to enjoy the piratical copies, subject to the reserved rights of the defend-

ant. If so, the plaintiff must work out its right to forfeit through the defendant's right to recall the books, and will be enjoined from its proposed course of seizing these books in the hands of the defendant's customers. There is an especial ground in equity for this, because, while such violence would be extremely disastrous to the defendant's business, it could not possibly benefit the plaintiff if the defendant recalls the books within a short time.

Settle decree on notice.

PERMUTIT CO. v. HARVEY LAUNDRY CO. et al.

(District Court, W. D. New York. June 16, 1921.)

1. Patents ⟸69—Foreign publications, to anticipate, must give full description.

Foreign publications, to constitute anticipations of a later patent, must disclose a complete and operative structure, and the description must be sufficiently clear, definite, and understandable to enable persons skilled in the art to construct it.

2. Patents ⟸328—1,195,923, for a water-softening apparatus, held valid and infringed.

The Gans patent, No. 1,195,923, for a water-softening apparatus, consisting of a filter device in which the water is passed through a zeolite bed, with the result of making it absolutely soft, and also of means for restoring the zeolite when exhausted by flowing with a salt solution, *held* not anticipated by prior publications, valid, and infringed.

3. Patents ⟸154—Disclaimer held valid.

A disclaimer filed some three years after issuance of a patent, the only effect of which was to limit it in a single feature, *held* valid.

4. Patents ⟸112(3)—Issuance raises presumption of invention.

The rule that a doubt as to invention is to be resolved in favor of the patent is especially applicable in a case where the commercial utility of the device is beyond dispute.

5. Patents ⟸62—Anticipation must be proved beyond reasonable doubt.

The burden rests on the party alleging it to prove anticipation beyond a reasonable doubt.

In Equity. Suit by the Permutit Company against the Harvey Laundry Company and the Refinite Company. Decree for complainant.

Philipp, Sawyer, Rice & Kennedy, of New York City (James Q. Rice and M. C. Massie, both of New York City, of counsel), for plaintiff.

Livingston Gifford, of New York City, John F. Stout, of Omaha, Neb., and Edward F. Colladay and David P. Wolhaupter, both of Washington, D. C. (Stout, Rose & Wells, of Omaha, Neb., and Shire & Jellinek, of Buffalo, N. Y., of counsel), for defendants.

HAZEL, District Judge. This is a suit in equity by the Permutit Company against the Harvey Laundry Company, a user of the apparatus in question, and the Refinite Company, intervener and manufacturer thereof, to enjoin infringements of letters patent No. 1,195,923, issued on August 22, 1916, on application filed August 5, 1911, to Dr. Robert Gans, of Pankow, Germany, who assigned the patent to the J. D. Riedel

Aktiengesellshaft of Berlin, Germany; the latter afterwards assigning to the plaintiff.

The patent relates to an apparatus for softening water by using a mineral substance of relatively small grains of zeolites or hydrated alumino-silicates and their exchangeable bases. In their natural state zeolite grains are found in the soil. Their composition consists of silicates of alumina sodium, potassium and calcium, and they possess an appetite for lime and magnesia. Upon water passing through them, the lime and magnesia become separated. Their natural existence and inherent chemical properties were discovered in the year 1849, and afterwards the discovery was made that they were capable of absorbing the lime and magnesia from the water—the constituents that make water hard—and of exchanging their silicate bases for new bases and returning to their first bases upon giving up the lime and magnesia and again obtaining sodium salt. The exchange of silicate bases includes the capacity of adapting them in an operative apparatus for frequent and continuous use. There are different kinds of zeolites; those found in the soil and those prepared by melting together the various constituents and hydrating them. Plaintiff's zeolites are of the latter class while defendants' material, known to the trade by the name of "refinite," after mining is baked and crushed for utilization. The patent, though limited to a zeolite softening apparatus is concededly not limited to any particular class of zeolitic material.

In 1906 the patentee (Gans German patent, No. 197,111) invented a form of artificial zeolites by fusing the constituents, viz. clays and soda ash, and hydrating them, to which he gave the arbitrary name of "permutite," and he found out that hard water could be continuously softened by filtration through them, and that the artificial zeolites could be regenerated by washing them with a salt solution after the exhaustion of their softening bases. Such discovery, however, was not immediately commercially useful, because the device then used for softening water was defective and, as hereinafter stated, failed to attain the desired result.

At such time those skilled in the art believed, and the possibility was suggested, that zeolites would even prove useful for obtaining gold from sea water, or manganese from water, or purifying sugar juices, as well as softening hard water for domestic and industrial purposes. But such ideas have not come to pass, except that for the latter use they have, in recent years, become highly useful. The utility of the apparatus in suit for producing absolutely soft water is undisputed.

To carry the invention into effect, a cone bottom cylindrical casing is described in the specification, closed at the top by a cover plate (*b*). Inside there are several perforated plates one at the upper end carrying a layer of gravel or quartz through which the water is first filtered to remove the dirt, while the other, lower down in the casing, supports a bed of grain zeolites through which the water passes; the bed having a free space or distance at the top so that the varying sized grains may adjust themselves when water is admitted. The specification says that the water to be softened passes downward from the supply pipe (*k*) at the top of the casing, through the inlet valve (*m*) and inlet pipe (*l*) to

the filter layer (*e*); thence through the zeolite bed (*f*), where the lime and magnesia are detained; thence through the supporting bed of gravel or quartz (*g*), to the water collecting chamber (*h*), and through the perforated screen (*i*) to pipe (*j*) located at the bottom of the casing. When the zeolites are exhausted the inlet valve (*m*) and outlet (*n*) are closed, and common salt is run through the filter valve (*o*) for restoration to their original condition; the salt solution and lime of magnesia entirely leaving the casing at (*j*) and waste valve (*p*) at the bottom. There are described means for back-washing the zeolites to completely remove particles of brine remaining from the regeneration and slime or other impurities from the filter. Such means consist of passing the water upwardly through the zeolite bed and filter and to the outlet (*l*). A stirring mechanism is also described but it is not involved herein. The proofs show that water of zero hardness by the use of zeolites was first produced in large quantities by the apparatus in suit. At such time, concededly, there were known structures for softening water (not zero hardness), but all operated on a different principle, and in the main comprised apparatus of the so-called precipitation type.

Claims 1 and 5 alone are involved herein. They read as follows:

"1. A water softening apparatus comprising a casing, a filter bed consisting of a layer of sand or quartz and a layer of zeolites or hydrated alumino-silicates disposed on the layer of sand or quartz, means for permitting the passage of water through the casing, means for cutting off the supply of water on the exhaustion of the zeolites, and means for passing through the casing a solution of a salt capable of regenerating the zeolites.

"5. Water softening apparatus comprising a casing, a filter bed consisting of a layer of zeolites or alumino-silicates, supporting means for said layer, means for permitting the passage of water through the casing, means for cutting off the supply of water on the exhaustion of the zeolites, means for supplying and passing into the casing a solution of a salt capable of regenerating zeolites and means connected to the lowest point of the casing for removing the salt solution so introduced."

Nothing is said in the patent as to any novelty in either a downward or upward flow of the water in the apparatus, but on February 26, 1920, during the pendency of this action, the plaintiff filed a disclaimer limiting claim one to means for the downward passage of water to be softened through the layer of zeolites. Thus limited, claim 1 has these elements in combination:

(1) Cylindrical casing.
(2) Filter bed of layer of sand or quartz.
(3) Layer of zeolites disposed on the layer of sand or quartz.
(4) Means for passing the water to be softened downwardly through the casing.
(5) Means for cutting off the supply of water on exhaustion of the zeolites.
(6) Means for passing through the casing a solution of a salt capable of regenerating or reconverting the zeolites.

Claim 5 specifies means for removing the salt solution after the regeneration of the exhausted zeolites at the lowest point of the casing.

The defenses are want of novelty anticipation by prior foreign publications, noninfringement, and invalidity of the disclaimer.

It is contended at the outset by defendants that the disclaimer substantially admits that the patentee was not the first inventor or discover-

er of the apparatus in question, or its substantial counterpart, and that it was filed to avoid anticipation by the prior art and foreign publications, and, in any event, that the flowing of the water in an upward or downward direction in the apparatus and through the zeolites were well-known equivalents.

[1, 2] The first question is whether the patentee was the first to successfully produce absolutely soft water in the use of zeolites by the adaptation of his patented apparatus. In answering it must first be determined what effect shall be given to the prior German patent, No. 197,111, dated April 6, 1908 (application October 28, 1906), and the later American patents, Nos. 943,535–960,887, and reissue, No. 13,686, to the inventor of the patent in suit, and assigned by him to J. D. Riedel Aktiengesellshaft, and the prior foreign publications—the Centralblatt article of September 7, 1907, containing the lecture or writing of Dr. Feldhoff, and the Zeitschrift article of May 28, 1909, by Dr. Siedler, together with his lecture, delivered in London, copies of which were circulated there and in this country more than two years before the application in suit.

Inasmuch as controlling importance is attached by defendants to what is described and illustrated in the prior foreign publications, the rule as to them may be stated here. Foreign publications, to constitute them anticipations of a later invention, must disclose a complete and operative structure, and, indeed, the description given must be sufficiently clear and definite and understandable to enable persons skilled in the art or science to which the invention or device belongs to practice and construct it. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Badische Anilin & Soda Fabrik v. Kalle (C. C.) 94 Fed. 163. Drawings or exhibits, if any, shown in connection with prior publications, must be considered with the published description of the device, which the law requires must be in "full, clear, and exact terms," so that those desiring to manufacture the article or reduce it to practice may do so without either independent experiments or the exercise by them of the inventive faculty. If the prior description and drawings relied on do not conform to that rule, a subsequently issued patent in this country for the same invention is not defeated. Hanifen v. Godshalk Co. (C. C.) 84 Fed. 649. In Robinson on Patents, vol. 1, § 329, it is stated that the invention described in the prior publication must be identical in all respects with that whose novelty it contradicts.

Such being the law, the assertion that the prior patents and foreign publications disclose the Gans patent in suit requires careful scrutiny of the evidence in support thereof. Did the prior publications and lectures teach the skilled in the art how to continuously produce absolutely soft water—that is, water of zero hardness—by flowing water through a zeolite bed contained in a filter device, or in any known container available to the public? The articles and lectures of Drs. Feldhoff and Siedler, who were skilled chemists in the employ of the Riedel Company, fairly establish extensive advertising of the Gans process for softening water by filtration. Not only was the process and its various uses in industrial fields extolled and exploited by the Riedel Company, but the manner of its utilization for purifying sugar juices and softening water,

and the particular filter with which the result was to be obtained were spoken of in such positive terms that softening water by zeolitic action was seemingly a very simple accomplishment.

Dr. Feldhoff, in submitting the result of his laboratory experiments, not only described an apparatus, but he used a sketch in connection therewith. He asserted that, to obtain soft water, the hard water is filtered in a casing through zeolites which, after exhaustion of their bases, are regenerated by washing with sodium chloride. Inlet and outlet valves attached to the casing were sketched and described by him, together with connections extending to a brine tank and a mass of gravel or sand in the filter for supporting the "permutite," that was placed between two perforated plates at the top, surmounted by a layer of excelsior, shavings, or gravel. In the tank or space near the top plate of the casing there was an outlet connection with pipes for passing the waste of the brine solution in back-washing. He specified the means for admitting hard water through pipes in the bottom of the casing, for the purpose of flowing the water upwardly, first through the supporting bed of gravel, then through the zeolites or permutite and excelsior, shavings, or gravel to the outlet. It was explained that, upon passing water through the zeolites, the sodium in the water exchanged for magnesium, with the result that the hard water became soft; that regeneration of the exhausted zeolites occurred upon introducing into the casing a salt solution, by means of a two-way valve positioned at the bottom of the casing, and operating, not only to disconnect the water, but also to connect a pipe for passing the salt solution upwardly to reverse the exchange of bases. In his laboratory experiments Dr. Feldhoff put the zeolites in a vessel and conducted the water downwardly, and upon doing so he said the water would be softened, and the regenerating solution could also enter the vessel at the top.

In the Zeitschrift article of May 28, 1909, Dr. Siedler referred to using a common filter for imbedding the permutite between "wood, wool or gravel," and said that the lime and magnesium salts normally in hard water would be completely removed by the operation; that the material would be regenerated by passing through the filter a salt solution, that this could be repeated as often as desired without impairing the zeolites, and that hard water would soften to zero degrees. In his lecture, delivered in London, he stated that the construction of the filter was to be determined by local conditions, and that it might be arranged either for an upward or downward flow of water. I find from the evidence, however, that the prior publications were not in fact a disclosure of plaintiff's apparatus. The differences in the prior description and the apparatus in suit, true enough, were simple, and even seem to be of a minor character; but they nevertheless were consequential, and by their adaptation an apparatus eventuated by which absolutely soft water is produced by the use of zeolitic material.

The filter device of the prior Centralblatt publication was defective, and because of its defective construction was inoperative and incapable of being put into practical use by the mere exercise of mechanical skill. The plaintiff's apparatus, as the specification of the patent clearly shows, does not assemble the material parts, so as to confine gravel or excel-

sior over the zeolite bed, or confine them between perforated plates as in the drawing or sketch of the Centralblatt article. The witness Kreigsheim swore that a filter apparatus corresponding to the description of the Centralblatt article was constructed in Germany by the Riedel Company, and was later inspected and examined by him, and that it did not fulfill the expectation of the designers in producing water of zero hardness and was abandoned. Upon opening the apparatus it was observed by him that the excelsior layer (marked *g* in drawing) had badly decayed, while the zeolites were discolored and streaked with dirt. It was deduced that the water evidently did not pass through the zeolite bed uniformly; some being exhausted and containing quantities of lime, while others, taken from the sides of the casing, had only small amounts of lime and were not exhausted. He further testified that channels had formed in the zeolites, through which much of the hard water was conducted to the outlet without softening.

Mr. Waterman, who testified as an expert for plaintiff, corroborated Kreigsheim in this particular, and asserted that the devices described in the prior publications did not suggest to the skilled in the art the apparatus of the patent in suit, and moreover that in his opinion the earlier filter was impracticable and could not continuously produce soft water. In this view he is supported, I think, by the inferences fairly deducible from the existing differences of construction and assembling of parts, and their co-operative relation of the earlier device and description and the patented apparatus. By the arrangement of parts in the apparatus in suit the zeolitic material was capable of self-grading, so that the finer material graded on top, and such adaptation I regard a valuable contribution to its success. To confine the permutite between screens in the way pointed out in the articles and lectures with either excelsior, wood, or gravel on top thereof, was a defect, in that it prevented the water from passing uniformly through, with the result that channels were formed through which the water flowed without being softened. Upon this point Mr. Waterman cogently testified:

"The lifting action to which I have referred tends to press the zeolitic bed against the under side of the superimposed layer *b*, indicated in the drawing of the Feldhoff article. If the superimpose screen *g* is coarse, as it might be to support a layer of excelsior, then the zeolitic material would be forced upward in the excelsior bed, clogging the latter. If, on the other hand, the material be sand or gravel fine enough to hold down the zeolitic bed, then the screen on which it rests must be extremely fine, and the apertures would themselves be clogged by the zeolites and the result would be a condition making the successful passage of cleansing water with a velocity sufficient to have a cleansing action impossible."

The arrangement by which the patentee provided means for first filtering the water and then passing it through the zeolites in such a way as to afford them space to adjust themselves after loosening up from the water eliminated the objectionable channeling. The specification does not refer to any free space over the zeolitic material, but the drawing attached thereto shows it. The defects and inefficiencies rendering the earlier device inoperative would not in my opinion have been relieved upon reversing the flow from upward to downward, even if gravel were used over the zeolites in place of excelsior. The bare possibility that,

if such changes or improvements had been made in the earlier Gans structure, it might have operated successfully cannot be considered to anticipate the patent in suit.

[3] It is earnestly insisted, however, that reversing the flow of water in the casing does not save the patent from invalidity, since the disclaimer was obviously filed to escape the effect of the prior publications, and is a substantial admission of anticipation; that, even if the disclaimer is valid, the claims are anticipated, because the ordinary skilled workman constructing a water softening apparatus would have selected a downward flow, in view of Dr. Siedler's suggestion in that relation and the prior filter patents in evidence. In Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, the Supreme Court ruled that a disclaimer may extend to a particular part of a specification or single feature of a claim, but not if the purpose of the disclaimer was to change the description of the invention or convert the claim into somewhat different from that stated therein.

The limitations imposed by the disclaimer have not altered the description as originally filed by the patentee or in any way changed the claim, except to narrow its scope. The Supreme Court in the case cited above also said that the power to disclaim is a beneficial one, and should not be denied to an inventor, except where the power is used for a fraudulent or deceptive purpose. Such I find was not the purpose in filing the disclaimer herein.

There was no unreasonable neglect or delay in filing the disclaimer; it having been filed as soon as counsel for plaintiff was apprised of the Centralblatt article. In Simplex Railway Appliance Co. v. Pressed Steel Car Co., 189 Fed. 70, 110 C. C. A. 634, the Circuit Court of Appeals for this circuit approved of a disclaimer where its purpose had a limiting effect on the claim, even though it was filed 12 years after the patent was issued and upon direction of the trial court as a condition of the decree. Id. (C. C.) 177 Fed. 430; Schwartzwalder v. N. Y. Filter Co., 66 Fed. 152, 13 C. C. A. 380; Thompson v. Bushnell Co., 96 Fed. 238, 37 C. C. A. 456. In this case as in Marconi Wireless Tel. Co. of America v. De Forest Radio Telephone & Telegraph Co., 243 Fed. 560, 156 C. C. A. 258, the patent (if construed broadly) claimed something which the patentee did not need, and hence the disclaimer abandoned what was considered useless to the validity of his invention. I conclude, therefore, that the disclaimer in question was not invalid.

It is next contended that plaintiff is in the same position that the patentee, Gans, or his assignee, the Riedel Company, which presumably had authorized the prior publications, would be in, if this action had been brought by either of them against the defendants, and that plaintiff cannot now deny the adaptability of any known filter apparatus for softening water, "whether it contains zeolites or other filtering matter, because (quoting from defendants' brief) their prior patents, both German and American, were taken out on that basis." This contention is believed untenable. The patentee of the process for manufacturing the artificial zeolites certainly was not precluded from improving an inefficient or defective apparatus, even though it was constructed under his direction by the Riedel Company, nor was he precluded from after-

wards inventing a device based on a new mode of operation, or from assembling old elements in a new way to co-operate to attain a new result—a result that an apparatus conforming to the published description failed to attain and could not attain. It is true the process patents to Gans refer to a filtering device for softening water, but they contain no description of any apparatus, and therefore they are not anticipatory.

It is next contended that there are numerous prior filter patents in which zeolites could be successfully utilized for softening water to zero hardness; that they disclose a downward flow of water in the filter, and, with the knowledge imparted by them, any skilled mechanic could have produced an efficient apparatus. But I am unable to adopt this view of the modifications and changes subsequently made by Gans or by the Permutit Filter Company, a subdivision of the Riedel Company, in November, 1909, and again in the forepart of 1910, more than two years after the Centralblatt publications. Filters of the prior art, in my opinion, were unable to soften water for commercial uses without patentable changes. They operated on a different principle from the device in suit—the former filters to remove mechanical impurities from the water, while the latter softens water by chemical action.

The mere softening of the water by zeolitic action was not the only thing that the patent in suit accomplished. Certainly the regeneration of the exhausted zeolites for constant use or for repeated use is a significant feature—a feature that prior filters, such as shown in the Nearacher, Jewell, and Bommarius patents, could not accomplish. The cone bottom casing, layer of sand for filtering, the free space above the zeolites, the water flowing downward, the regeneration feature, in addition to the salt outlet at the lowest point of the casing, were elements combined in a new way to achieve a different result, viz. practicability, where there existed impracticability and failure. Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 502, 53 C. C. A. 230. In this connection it may be observed that there is evidence tending to show that Dr. Borrowman and Dr. Cross were unable to select from the filter art any water filter capable of accomplishing the desired result.

[4] I repeat that the granting of the patent raises a strong presumption of novelty, and, assuming the existence of a doubt, I am nevertheless required to resolve any doubt in favor of the patent. This rule is especially applicable in a case such as this, where the commercial utility of the apparatus is beyond dispute. Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 227 Fed. 998.

[5] It is next contended that the description of the Aquaril filter is an anticipation. Much importance was attached thereto as disclosing the combination of the claims in issue. A printed circular in evidence tends to show that such apparatus was used in Germany on December 20, 1908, and within two years of filing the application herein. As a prior use in a foreign country it concededly is not an anticipation, and as a prior publication it is insufficient. The Zeitschrift article refers to such filter, but the disclosure there made, and heretofore stated, does not defeat the patent in suit. Dr. Siedler states generally that filtra-

tion might be upwards or downwards, leaving it a matter of selection rather than preference; but he did not suggest a combination of the elements or parts in relation to each other in a way to accomplish the desired result. In asserting that the zeolites were imbedded between wooden shavings or gravel, he fell into error, and his description did not inform the art how an apparatus could be successfully constructed. The burden is upon the defendants to prove anticipation beyond a reasonable doubt. They have not done so. Goodwin Film & Camera Co. v. Eastman Kodak Co., 213 Fed. 231, 129 C. C. A. 575; Coffin v. Ogden, 18 Wall. 121, 21 L. Ed. 821.

The Aquaril apparatus trade circulars in evidence do not remedy the insufficiency of the prior publications. Aside from this, plaintiff's apparatus, as already remarked, was not completed in Germany until the autumn of 1909, about six months after the Zeitschrift article, and, in the circumstances, the presumption is not unwarranted that the Aquaril filter did not embody the combination in suit.

There was also evidence of prior use by Hird & Sons of a zeolite apparatus, which had been converted from a Keystone water filter, but is inconsequential, since the alteration involving a new assembling of the elements was made long after the patent in suit was issued. It is far short of establishing prior use, or that because of the alteration made the patent in suit is lacking in novelty.

The testimony of experiments by defendants' witnesses Terry and Partridge, included in the record, was not taken before the court. It is to the effect that zero hard water was obtained by them in their experiments from a device constructed to correspond with the description of the Centralblatt article. In its operation the water was caused to flow downward in the casing through the zeolites and at times upwardly, with the result, as the witnesses testified, that soft water was produced. The testimony tends to contradict Mr. Waterman as to the inoperativeness of the earlier device and the prior descriptive apparatus; but, in view of the fact that it was a part of defendants' affirmative case, and not surrebuttal, it is doubtful whether the testimony should be considered. The witnesses were not cross-examined, and no notice had been given to plaintiff of the experiments. The cases hold that ex parte experiments are usually disregarded by the court. Bemis v. Stevens & Bros. (C. C.) 117 Fed. 717; Bethlehem Steel Co. v. Niles-Bement-Pond Co. (C. C.) 166 Fed. 880; Plunger Elevator Co. v. Standard Plunger Elevator, 165 Fed. 906, 91 C. C. A. 584.

Counsel for plaintiff, however, has freely discussed the experiments in his brief, and pointed out various changes in the structure used in conducting them, to which consideration has been given. The conclusion reached by me is that the modifications were of enough importance to make the experiments valueless as evidence. Other points discussed at the bar, relating to invalidity, anticipation, and false oath by the patentee, have not been overlooked; but I do not think they are substantial.

As to infringement: The apparatus used by the defendants is not constructed from the descriptive matter in any prior publication, but it is a substantial embodiment of the combination in suit, and accomplishes

the same result. Its casing is provided with a cement bottom, in which the nozzle piping leading to the brine outlet is imbedded. On top of this cement bottom there is a bed of gravel, and over it a bed of zeolitic material, with a free space above it to enable the grains to float and adjust themselves upon the water entering the casing as in plaintiff's apparatus, namely, through a pipe at the top flowing downwardly through the zeolite bed, and from there to the outlet. The filter for the hard water is on the outside of the device, and not within it, as in plaintiff's; but this difference is believed unimportant. There is also a pipe extended to the brine tank, which introduces salt water into the casing to regenerate or reconvert the exhausted zeolitic material. In this manner the zeolites, as in plaintiff's apparatus, give up to the brine solution the lime and magnesia taken up in the process of softening the water, and then, upon taking up the sodium, restore them to their original condition. By using such co-operative means the defendants have appropriated the plaintiff's apparatus as specified in claim 1. After the regeneration of the exhausted zeolites, the brine in defendants' apparatus is washed out in the same way as in plaintiff's, and the water run out at the bottom of the casing. As the exit pipes are attached to the casing on a level with the surface of the cement bottom, the salt solution may be wholly withdrawn at that point, and hence claim 5 in issue is also infringed by the defendants.

As the claims in suit are found to be valid, and to have been infringed by defendants, as contended by the plaintiff, an injunction and accounting is decreed, with costs.

UNITED STATES v. SENECA NATION OF NEW YORK INDIANS et al.

(District Court, W. D. New York. July 8, 1921.)

Indians ⟸27(2)—Courts without jurisdiction of internal controversies over property rights.

In the absence of congressional legislation bestowing on the individual Indians in the Cattaraugus Reservation the right to litigate internal questions relating to their property rights in the federal courts, and conferring jurisdiction on a District Court to determine such controversies, it will not assume jurisdiction.

In Equity. Suit by the United States, in its own behalf and in behalf of Alexander John and Lorinda John, Indians, against the Seneca Nation of New York Indians and others. Bill dismissed.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (John T. Walsh, Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

George P. Decker, of Rochester, N. Y., for the Senecas.

HAZEL, District Judge. This is a suit in equity by the United States and a Cayuga Indian named Alexander John, and Lorinda his wife, a Seneca Indian, who are wards of the United States, against

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

the Seneca Nation of New York Indians and John K. Button, acting surrogate of the Surrogate's Court of Cattaraugus Indian Reservation, and Hattie Snow and Martha Seneca, who are also Seneca tribal Indians, to secure to John and wife their respective rights by partition of certain lands within the bounds of the Cattaraugus Reservation and reserved to the Seneca Nation by treaty.

The bill avers that about 39 acres of land, undivided, are held in severalty by Alexander John and Lorinda, his wife, and defendant Snow as tenants in common—lands that had previously been distributed or awarded to Jesse Turkey, also a Seneca Indian, by the Seneca Nation tribe, and who in his lifetime continuously owned and possessed such lands for more than 40 years before his death—and that division to him was in accordance with law and according to the laws, usages, rules, and customs of the Seneca Nation of Indians. Turkey died on April 15, 1921, leaving no widow, child, or lineal descendant him surviving. When he died he had no relative, except the plaintiff Alexander John, who, as the bill avers, is the only surviving child of a Seneca Indian who was the brother of the mother of Turkey, and hence his only living heir and next of kin; that he died leaving a will devising his lands as follows: One-third thereof to the defendant Martha Seneca, and the remainder to Alexander John and Lorinda, his wife, and to their heirs and assigns forever. The bill then avers that the defendant Hattie Snow conspired with Martha Seneca and one Gordon (a Seneca Indian), who was surrogate of the Cattaraugus reservation, to deprive Alexander John and wife of their interest under the said will and testament by collusive methods, namely, by filing a petition with Gordon as surrogate for probate of the will, and procuring him to deny probate, though he was without power to legally act in the premises, and later to procure the issuance of letters of administration upon the estate of Hattie Snow; that such letters of administration were in fact issued by the defendant Button, who succeeded Gordon to the office of surrogate, or claimed to act in that capacity, and that Hattie Snow thereupon, under an "illegal and inequitable internal law or pretended internal law, rule, or regulation of said Seneca Nation of Indians"—laws or rules in contravention of the Constitution of the United States—claims to be vested with the fee of the real estate and property of Turkey, to which Alexander John and wife are lawfully entitled; that the Seneca population on both reservations is about 2,000, with a few Cayuga Indians domiciled with them.

It is next averred that the defendants threaten to evict and dispossess John and wife from the lands and premises rightfully occupied by them under the aforesaid last will and testament, and having no adequate remedy at law the defendants should be enjoined from dispossessing them until the determination of this action. The writ of subpœna and temporary injunction order were served on the defendants by the marshal of this court on the Cattaraugus Reservation, and all the defendants, without submitting themselves to the jurisdiction of this court, now suggest through their counsel that this court is without jurisdiction over them as tribal Indians and as a nation, or

over their domain, and the writ should be dismissed for lack of jurisdiction.

Defendants earnestly insist that the Indian tribes of the Seneca Nation are entitled to a de jure and de facto system of government on their domain in respect of their affairs under the law of nations of right, independent of the United States, and that the Six Nations are not amenable to judicial process without their consent.

It is true that in the early period in this country the federal courts dealt with tribal Indians as quasi nations by treaty, and it was stated at various times in judicial decisions that the land of the New York Indians was not held subject to any state or federal power; that they (the Mohawk Indians) are not amenable to our courts of justice (Jackson v. Hudson, 3 Johns. [N. Y.] 375, 3 Am. Dec. 500), and that protection and aid was promised them before the Revolutionary War and afterwards by the United States, without any limitation in their property or political rights; that it was agreed that land mentioned in the Seneca Treaty should belong to them absolutely in fee, and that the United States would not disturb them in their occupancy and possession, as appears by the Ft. Stanwix Treaty of 1784, and Ft. Harmer in 1789, and later in 1794 reaffirmed in part by the Canandaigua Treaty and by the treaties of 1838–1842. It is insisted that, regardless of previous acts of Congress and the decision of the Supreme Court in U. S. v. Kagama, 118 U. S. 377, 6 Sup. Ct. 1709, 30 L. Ed. 228, holding that, instead of controlling tribal Indians by treaties Congress has the right to govern them since they are inhabitants within the geographical limits of the United States (Act March 3, 1871 [16 Stat. 566]); that Congress has not yet legislated, nor has the Supreme Court of the United States as yet, in a Six Nations case, decided, that the national obligations assumed under treaty regulations and the protection guaranteed to the Senecas were annulled or rendered ineffectual.

Reliance is had on treaties that in terms and circumstances are materially different from treaties with other western and southern nations or tribes, and, on judicial decisions interpreting them. Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483. Counsel assert that the Six Nation Indians have never agreed to submit to the United States laws, but, on the contrary, have constantly maintained their unlimited sovereignty in internal affairs; that they themselves interpret their treaties, and always have resisted usurpation of tribal rights; in short, that they have governed themselves, organizing a Peacemakers' and a Surrogates' Court, from whose decisions appeals may be taken to the Indian Councilors of the nation duly elected under the governmental organization, as they had a right specifically under section 46 of the Indian Law of the state of New York, and hence that this court is without jurisdiction to grant the relief sought.

The right of the United States, however, to enact criminal statutes for the protection of Indians domiciled on reservations and for the protection of persons with whom they have dealings is no longer open to question and requires no citation of authority (Criminal Code, § 328 [Comp. St. § 10502]); but whether this court, in the absence of

legislation by Congress, has the power to enjoin the disposal of lands to Indians belonging to the tribe, or to partition lands in possession of Indians domiciled on the reservation, or to interfere with the manner of possessing lands held in severalty or in common by them, or how it shall descend, or who shall take by inheritance, bequest, or devise under tribal laws, customs, and usages, is a question not free from difficulty. It must be admitted that from the earliest period their tribal semi-independence has been recognized and acquiesced in by the federal government. Worcester v. Georgia, supra. Indeed, it has been the general policy in this country to guarantee to Indian tribes or bands control of their domestic affairs, including jurisdiction in certain cases to punish crimes committed upon the reservation by an Indian against the person or property of another Indian (section 4149, Comp. St.), and generally to permit them to conform to their Indian customs and usages without interference. Under the constitutional power to regulate commerce with Indian tribes, Congress enacted suitable legislation prohibiting general interference with their affairs by whites. In the Kagama Case the Supreme Court stated that, although as nations the Indian tribes do not possess the full attributes of sovereignty, yet as a separate people they have the power to regulate their internal and social affairs unmolested until Congress passed legislation to limit their rights. "Thus far," the court said, "they have not been brought under the laws of the Union or of the state within whose limits they resided."

The government, however, claims that new customs, new forms and laws, have been passed by the Six Nations Council—a council that is controlled by a faction of the tribal Indians—and if such laws and customs are enforced it will result in unlawfully divesting individual Indians of their personal rights without adequate redress, through ill will or prejudice and fraud by the officials and councilors. It is argued by the United Sattes attorney that, since Indians are the wards of the United States, it is its duty as guardian to protect them as a tribe and in their individual rights, to the end that their lands and property be not illegally invaded or takes from them by illegal means and improper machinery of government.

No claim is made by the government to the lands described in the bill, or that it has a sovereign right of ownership or possession thereto; concededly the property right in fee simple of the Seneca Nation to the lands occupied by them on the Cattaraugus and Allegany Reservations until they voluntarily part with their possessions, which may be only, as herein pointed out, with the consent of the Congress of the United States. The control of Congress over the continued right of possession by the Indians under Act Feb. 19, 1875 (18 Stat. 330), was upheld by the state Supreme Court in Ryan v. Knorr, 19 Hun, 540, and Shongo v. Miller, 45 App. Div. 339, 61 N. Y. Supp. 281. In those cases the court substantially said that, even though Act Feb. 19, 1875, was in conflict with prior treaties, it operated to supersede them, and leases of lands previously made by the Seneca Nation of reserved lands were invalid. In Fellows v. Blacksmith, 19 How. 366, 15 L. Ed. 684, the authority of the United States

under treaty regulations to remove tribal bands of Senecas to western territories after relinquishing lands occupied by them in this state was sustained; but their forcible removal, the Supreme Court held, could only be had under the direction of the United States, and not by dispossess proceedings at law—something that was not contemplated by the treaty—and the court expressly refused to go behind the treaties to determine whether or not the Tonawanda tribe was properly represented at the council by its chiefs and head men in the negotiations and execution thereof. That bears significantly, I think, upon the question here, and would seem to confirm the view that federal courts are reluctant to interfere with the internal affairs of tribal Indians, and with the lands reserved to them for their occupancy, and with the lands subdivided among them under tribal laws.

In Jimeson v. Pierce, 78 App. Div. 9, 79 N. Y. Supp. 3, it was assumed that the Legislature of the state had the right to enact statutory laws providing that an Indian domiciled on the Cattaraugus Reservation possessed the capacity to acquire and hold in severalty and in fee simple lands upon the reservation under the laws of the state, and that the lands so held were subject to partition among the heirs at his death. The facts of that case are analogous to the facts here, and they will be understood by referring to the holding of the court, namely, that an Indian woman who had her dower set off to her by judgment of the Peacemakers' Court, and to whom possession was subsequently denied, had the right to maintain an action in the state Supreme Court to enforce the decree or judgment of the tribal court; and in Mulkins v. Snow, 106 Misc. Rep. 556, 175 N. Y. Supp. 541, it was determined that in the absence of congressional action the state Legislature may confer upon individual Indians of the tribe the right to come into state courts and litigate their controversies, since under Indian Law (Consol. Laws, c. 26) § 46, the Peacemakers' Court had jurisdiction of actions between Indians living on the reservation involving the title to real estate and their limited right to occupancy. These adjudications would seem to establish that John and wife are not without remedy, if action were brought for partition under the Indian Laws of the state. But compare decisions of Judge Woodward in People ex rel. Jimeson v. Shongo, 83 Misc. Rep. 325, 144 N. Y. Supp. 885, and Jimeson v. Lehley, 51 Misc. Rep. 352, 101 N. Y. Supp. 215.

As yet Congress has not authorized individual Indians or the tribe to come into the federal courts and litigate their controversies with other Indians in relation to questions of property rights held by them in severalty or as tenants in common, unless section 24 of the Judicial Code (Comp. St. § 991), conferred such right. The government attaches importance to the cases of Heckman v. U. S., 224 U. S. 415, 32 Sup. Ct. 424, 56 L. Ed. 820, and U. S. v. Boylan (D. C.) 256 Fed. 468, affirmed (C. C. A.) 265 Fed. 165, as showing that the United States may resort to federal courts sitting in equity to protect the Indians in their possessions. In these cases, however, it was held that the United States has the right to sue to enforce restrictions of the alienation of Indian lands to white persons, and (in the Heckman

Case) that no conveyance to citizens by allottee Indians of lands allotted to them within the restricted period was valid without first obtaining the consent of Congress.

The Boylan Case was an action brought on behalf of the Oneida Tribe of Indians by the United States, and there it was likewise held that white persons were prohibited from acquiring the lands of the Six Nations Indians because there was no law empowering the individuals of the tribe to sell or incumber their lands and the conveyance was held to be in violation of the national and state Constitutions. These restrictions on sales of Indian lands to outsiders, the court held, must first be removed by Congress before disposal of the lands of the Indians is permitted. The right of the United States, as guardian and protector of the Indians, to interfere on behalf of the Indians for the purpose of preventing the violation of the restrictions under which the lands are held, cannot be successfully questioned. See La Motte v. U. S., 254 U. S. 570, 41 Sup. Ct. 204, 65 L. Ed. ——, decided by the Supreme Court January 24, 1921, and Privett v. U. S., 255 U. S. ——, 41 Sup. Ct. 455, 65 L. Ed. ——, recently decided. The principle governing those adjudications was quite different from the principle governing the question here in controversy. There the rule did not extend to interference with internal affairs of Indians of their tribe, or with the right of the tribe to administer upon the estate of a deceased tribal Indian, and therefore such adjudications are not strictly applicable.

The jurisdiction of this court, however, is also urged under section 24 of the Judicial Code, which provides that the United States District Court shall have jurisdiction of all actions, suits, or proceedings involving the right of any person of Indian blood or descent of any allotment of land under any law or treaty. But this authorization, in my opinion, based upon a re-examination of the scope of the act, has no application to this case. The land in controversy came to Turkey, not by allotment made to him by the United States, but by division in severalty among the Senecas from the whole tribe. Moreover, by section 4206, Comp. St., the Senecas and other Indian tribes were expressly excluded from the operation of section 24 of the Judicial Code, which in my opinion is limited to allotments of land by the government to the Indians. Hence the case of Lay v. Parker, unreported (Indians), decided by me several years ago, must be considered as having been decided under a misapprehension.

It would serve no useful purpose to further discuss the various matters suggested in the brief, assigning additional reasons for refusing jurisdiction herein. My conclusion is that, in the absence of congressional action bestowing upon the individual Indians the right to litigate internal questions relating to their property rights in the federal courts, and conferring jurisdiction upon this court to determine such controversies, this court should not assume jurisdiction.

An order may be entered dismissing the bill.

NEW YORK TRUST CO. et al. v. EDWARDS, Collector of Internal Revenue.

UNITED STATES v. ROCKEFELLER.

(District Court, S. D. New York. August 3, 1921.)

1. **Corporations ⇐182—Contract requiring purchaser corporation to transfer its shares to vendor's stockholders can be enforced by stockholders.**
A contract between two corporations, whereby one sold to the other certain property in consideration of the purchaser's agreement to transfer its shares of capital stock to the stockholders of the vendor in proportion to their stocks in the vendor corporation, is one for the benefit of the stockholders, which probably could be enforced by them directly.

2. **Corporations ⇐155(2)—Declaration of dividend gives stockholders vested interest therein.**
A declaration of a dividend by a corporation, whether of money or of stock, gives the stockholders a vested interest therein.

3. **Internal revenue ⇐7—Dividend declared from accumulated capital of corporation may be income.**
A dividend declared by a corporation may be income of the stockholders and taxable as such, though it is paid from surplus accumulated before the tax year, and used by the corporation since its accumulation as economic capital.

4. **Internal revenue ⇐7—Shares in other corporations, distributed to stockholders under contract, are taxable, if complete control is acquired over property transferred.**
Where one corporation transferred a portion of its tangible property to another corporation in return for stock in the purchaser corporation, which was either distributed directly to the stockholders in the vendor corporation or was distributed to them by dividend declared by the same resolution which adopted the contract, so that the vendor corporation never had any interest in the shares of stock, those shares are taxable as income of the stockholders if the transfer of the tangible property was absolute, so that the purchasing corporation acquired full control over it.

5. **Internal revenue ⇐7—Fact that both "corporations" had same stockholders does not prevent distribution of shares from being income.**
The fact that both vendor and purchasing corporations had the same body of stockholders does not prevent distribution of the purchasing corporation's shares among the vendor's stockholders for the property sold from being taxable as income of the stockholders, even if the fiction of corporate legal entity be disregarded, since, disregarding such fiction, a corporation is an association of persons to effectuate a given purpose, and two associations, organized for different purposes, are different, though their membership is the same.

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

6. **Internal revenue ⇐7—Contract held to give new corporation complete control over property, so that stock distributed to shareholders of other corporation was income.**
Contracts between oil companies and pipe line companies, whereby the former transferred to the latter their pipe lines, to be operated by the latter, in return for which the pipe line companies distributed their stock directly to the transferor's stockholders, or delivered it to the transferor, which immediately distributed it as a dividend to its stockholders, as effectually severs the pipe line properties from the old corporations as though they had been distributed in kind, so that the stock received by the stockholders is taxable as income.

At Law. Separate actions by the New York Trust Company and others, as executors of William L. Harkness, against William H. Edwards, as collector of internal revenue, and by the United States against John D. Rockefeller. Judgment for defendant in first action, and for the United States in second action.

These cases involve the legality of the income tax levied upon the plaintiff in the Harkness Case and the defendant in the Rockefeller Case. The question turns on the effect of certain corporate actions taken by the Prairie Oil & Gas Company and the Ohio Oil Company during the winter of 1914–15. The Prairie Oil & Gas Company was the owner of pipe line property and oil property, and for reasons not here relevant felt itself forced to separate these two into two separate corporations. In pursuance of that purpose it caused a corporation to be organized known as the Prairie Pipe Line Company. It then made a contract with the pipe line company, by which it was to convey all its pipe line property to it, in consideration of which the pipe line company promised to distribute all its own stock to the stockholders of the oil company in the same proportion as their existing holdings. This was carried out, and the shares of the pipe line company so received by Harkness and Rockefeller were taxed as part of their income for the year in which the shares were issued.

The transaction in the case of the Ohio Oil Company was similar, except that the agreement between it and the Illinois Pipe Line Company, which it organized, required the shares to be transferred direct to the oil company. However, the resolution of the directors of the oil company which accepted the contract, declared as a dividend all the shares to be received from the pipe line company and directed them to be distributed among its stockholders in accordance with their existing holdings. This agreement was carried out as well, and the shares so declared were also taxed as income against Harkness and Rockefeller as in the case of the Prairie Oil & Gas Company. In both cases the pipe line properties represented a surplus above the par value of the oil companies' stock; the conveyances, therefore, left the oil companies' capital unimpaired, and required no reduction in their authorized issues.

Richard S. Holmes, of New York City, and Carl A. Mapes and Newton K. Fox, both of Washington, D. C., for the United States.

George Wellwood Murray and Harrison Tweed, both of New York City, for Harkness and Rockefeller.

LEARNED HAND, District Judge (after stating the facts as above). [1] Neither the Prairie Gas & Oil Company nor the Ohio Oil Company for any moment of time owned the pipe line shares as free assets. This is very clear in the case of the Prairie Company, the transaction in which—observing now the most scrupulous formality—was this. The pipe line company offered to buy the oil company's pipe line assets for $27,000,000, adjusted to actual values, and to give in payment its own shares to be directly distributed by the pipe line company pro rata among the oil company's stockholders. This offer the oil company accepted, and the contract of January 21, 1915, bound the buyer so to distribute the stock, which it did. This was a contract made for the sole benefit of the oil company's stockholders and could probably have been directly enforced by them at law. Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; National Bank v. Grand Lodge, 98 U. S. 123, 124, 25 L. Ed. 75 (semble). Yet it was the only contract by which the oil company ever got any conceivable interest in the pipe line shares, and it gave that company no such interest. It had given away its property for a consideration moving directly to third persons.

[2] In the case of the Ohio Company, formally the contract bound the pipe line company to deliver its shares to the oil company, and they thus would have become free assets, if there had been nothing more. However, in the very resolution of the oil company's board of directors, by which the offer of the pipe line company was accepted, the board declared a pro rata distribution of the pipe line shares among its own stockholders. Thus at the moment of concluding the contract by which alone the oil company got any interest in the shares, the property so acquired was declared as a dividend. That declaration gave the stockholders of the oil company an immediate vested right to the dividend so declared. Staats v. Biograph Co., 236 Fed. 454, 149 C. C. A. 506, L. R. A. 1917B, 728 (C. C. A. 2nd), Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; Raynolds v. Diamond Mills Paper Co., 69 N. J. Eq. 299, 300, 60 Atl. 941.

Therefore I think that Peabody v. Eisner, 247 U. S. 347, 38 Sup. Ct. 546, 62 L. Ed. 1152, does not apply. I agree that, had these shares been once free treasury assets, it would be impossible to distinguish that case; the dividend would have been declared in specific property. But since the shares, even in the case of the Ohio Company were always the property of the stockholders, the transactions must be taken as a whole, and the case determined from their effect upon the rights of the stockholders.

[3, 4] A dividend may be income to the stockholder, though declared out of property which has long since become a part of the economic capital of the corporation. Peabody v. Eisner, supra; Lynch v. Hornby, 247 U. S. 339, 38 Sup. Ct. 543, 62 L. Ed. 1149. True, it must not be a dividend in liquidation. Lynch v. Turrish, 247 U. S. 221, 38 Sup. Ct. 537, 62 L. Ed. 1087. And perhaps it must on that account be from a corporate surplus, since otherwise it is hard to avoid regarding it as in liquidation. But it makes no difference that it distributes to the stockholder property which is not current profit, but the means of producing current profit. He must still pay an income tax upon it, though in his eyes it is a part of his capital. Therefore, in the cases at bar, the only question is of the completeness of severance of the property declared; i. e., the control of it acquired by the stockholder and lost by the corporation.

In Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, the case was of a mere stock dividend, which was held to be no more than new evidence of the stockholder's original ownership. Had the shares been without par value, that would have been literally the case; but they were not. The stock dividend did change the relation of the corporation and the stockholder to the surplus, by permanently impounding it, as it were, in the business, and giving the stockholder a right to insist upon it as an investment, should his fellows later wish to realize it as profit. Yet, though he thus got, and the corporation lost, this element of control over the surplus so declared, it was not regarded as a severance of the property. So far, therefore, Eisner v. Macomber, supra, helps the taxpayers here; it shows that there may be some changes in the relation of the stockholders to the surplus which do not amount to the severance of income.

[5] Nevertheless the cases at bar go further than that case, because in them the surplus was transferred to a new corporation altogether, and the question is whether that distinction changes the result. The taxpayers insist that, if one looks at the very truth of the matter, disregarding corporate forms, this is no difference at all. Although the argument is plausible, it still seems to me that, even when viewed with the utmost disregard of forms, the pipe line properties were completely severed from the oil companies, and that the resulting shares were new property derived from the old shares.

A corporation, stripped of its fictitious personality, is an association of persons mutually agreed upon the execution of more or less definitely expressed purposes, publicly registered as the law requires. In the case of industrial corporations, the personnel of the membership is an immaterial matter; the original members leave as they please and their substitutes enter merely by purchase. Even the number of the members changes from time to time. If so, it is the common purposes and their execution alone that determine the corporation, and whatever substantially changes these changes the corporation itself, and the rights of its stockholders.

The result of the conveyance of the pipe line property was to put it under the contract of an association committed exclusively to its operation as a separate enterprise from that of the oil company. Indeed, this severance in management was the sole result of the transaction, unless there were a surreptitious agreement between the two groups which nullified the dissolution, which is not suggested. Accepting, therefore, the taxpayers' argument that forms should be disregarded, the question is whether a group mutually agreeing to manage the pipe line property independently of the oil property is a different group from one agreeing to manage the pipe line and the oil property jointly. If the association does not depend upon the number or makeup of its membership, but upon its charter, there can be no question that the difference between the two is substantial, because to conduct two businesses as a unity has practical results very different from conducting them in complete independence.

For illustration, let me assume that the pipe line property had been conveyed in specie to the stockholders as co-owners, and that they had incorporated for convenience. The original conveyance to them would have fallen directly within Peabody v. Eisner, supra, and Lynch v. Hornby, supra. It would have made no difference that they had later incorporated. Yet, judged by results, this is exactly what happened; the pipe line was broken from an association committed to its joint management with the oil properties, and consigned to an association which must manage it alone.

Or suppose that the Prairie Pipe Line Company, for example, had been a going concern with property of its own. Upon its acquisition of the pipe line and the issue of its new shares to the oil company stockholders, they would have an interest in an association operating two properties. These new shares would certainly be income in their hands to some extent. Would they be altogether income, or only in the pro-

portion to which, by taking the new shares, they gave up their rights in the old pipe line, and got in exchange an interest in the original property of the Prairie Pipe Line Company? I scarcely think that any one would urge that the new shares were not altogether income. Yet, if so, they would become such only because the pipe line was being conducted in a new joint enterprise by the Prairie Pipe Line Company. Unquestionably the oil company stockholders would to some extent be still holding their old pipe lines and in the same relative proportions.

Or consider, again, the analogy of many of the dissolutions under the Sherman Act. These consisted in no greater separation than was accomplished here, yet it was thought enough to sever the enterprises and create new rights in the new corporations. Nor was it thought to be an answer that the stockholders started out the same. Because the members might join or leave the new group, which conducted only a part of the old business, it was considered that the old group was effectively broken up.

[6] Disregarding, therefore, all formalities, it appears to me, that the pipe line properties were as effectually severed from the old corporations, as though they had been distributed in kind. Indeed, the form adopted was the only practicable way in which they could be so distributed. It is only when one fastens one's attention upon the momentary identity of the two resulting groups that there can be any question of the result. But, as I have perhaps too often said, that identity is nothing unless its continuance is insured for the future by some common agreement between the two. I think that the new shares were income under the law, and that the tax was legal.

Southern Pac. Co. v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, is not to the contrary. There the assets taken over had always been in the actual possession and under the control of the corporation. All the shares of the subsidiary were owned by it, and the two were treated as merged. Nothing of the sort is true in the cases at bar. In Gulf Oil Corp. v. Lewellyn, 248 U. S. 71, 39 Sup. Ct. 35, 63 L. Ed. 133, it is indeed true that the property of the subsidiaries was not in the possession of the parent corporation, but it owned all their shares, and they were all "a single enterprise," controlled by it. In no sense did the pipe line companies and the oil companies here remain "a single enterprise." They might in fact be so conducted for a period; but, if so, it would only be by the spontaneous assent of two independent groups of persons. If they remained in fact "a single enterprise," the whole plan was a mere cover.

Phellis v. U. S. Court of Claims, March, 1921, was a case where all the assets were sold to another corporation, which—omitting irrelevant details—gave its own shares, two for one, to the old stockholders, and conveyed its debenture shares to the old company par for par. The result was that the old stockholders had their old shares now represented by the assets of the old corporation—i. e., the debenture shares in the new corporation—and double their original holdings in common shares of the new corporation. Whatever may be the proper answer to the case, with the greatest deference I cannot follow the reasoning of the learned judge, now urged upon me as authorita-

tive. That reasoning is that because the joint value of the old and new shares after the transfer was the same as that of the old shares before, there can have been no income to the stockholder. It may, of course, happen that, in the case of the distribution of the dividends, the value of the old shares does not fall as much as the value of the dividend, though generally the correspondence is pretty close. It does not make any difference, for taxing purposes, whether it does or not. The surplus declared as dividend may or may not be represented in the value of the shares; but, even though it be fully represented, the dividend becomes income as soon as the stockholder gets it. On his books it may appear as a capital distribution, depending on whether he carries his investment at par. That is not to the point. It was not his property before; it has become such by the declaration of the dividend.

Demurrers sustained. Judgment absolute on the demurrers, dismissing Harkness' complaint, and awarding recovery against Rockefeller as prayed.

LYON et al. v. UNION GAS & OIL CO. et al. and eight other cases.

(District Court, E. D. Kentucky. May 26, 1921.)

Nos. 600–608.

1. **Mines and minerals ⊂=56—Oil and gas lease is not a mere option.**
An oil and gas lease, giving the right to explore for minerals and providing forfeiture for failure to develop unless an annual rental is paid, is not a mere option, but gives a vested right to the lessee to explore for the minerals, though of course its title to the minerals is inchoate until they are reduced to possession.

2. **Mines and minerals ⊂=79(3)—Rentals payable annually under oil lease in lieu of development need not be paid in advance.**
Under an oil lease, providing for forfeiture for failure to do development work unless a specified rental is paid annually, without specifying the time for the payment, the rental need not be paid in advance, but its payment at any time during the 12 months after the expiration of the period for development work prevents a forfeiture.

3. **Mines and minerals ⊂=79(7)—Burden is on oil lessor to show that notice requiring development was reasonable.**
Even if a lessor had the privilege under an oil and gas lease of terminating the lease after reasonable notice of refusal of rentals and demand for development, the burden is on such lessor, suing to enforce a forfeiture, to prove that the notice of 3 months given by him was reasonable.

4. **Courts ⊂=372(1)—Federal courts not bound by state decision granting equitable relief.**
The decision of the state court that equity would enforce the forfeiture of an oil and gas lease for failure to develop after reasonable notice is one affecting the right to relief in equity, which is not binding on the federal court, especially where the decision was a dictum, and a statute had since been enacted establishing the contrary rule.

In Equity. Separate suits by J. I. Lyon and others, by W. M. Lyon and others, by J. M. Skaggs and others, by J. F. Lyon and others, by C. R. Lyon and others, by C. F. Sparks and others, by O. B. Kazee

and others, by L. T. Sparks and others, and by H. F. Williams and others, all against the Union Gas & Oil Company and others, for the cancellation of oil and gas leases. Decrees rendered for defendants.

Cain & Thompson, of Louisa, Ky., and S. S. Willis, of Ashland, Ky., for plaintiffs.

Holt, Duncan & Holt, of Huntington, W. Va., and Clyde L. Miller, of Louisa, Ky., for defendants.

COCHRAN, District Judge. This is the case of J. F. Lyon and others against the Union Gas & Oil Company and others, No. 603, and the opinion which I give in this case applies in eight others.

[1] This is a suit in equity, which seeks to have this court forfeit an oil and gas lease. There is some claim that the lease is invalid on account of want of consideration and mutuality; but I have heretofore considered those questions, and there is no doubt in my mind about the validity of the lease. Any one who thinks of an oil and gas lease as an option is in great danger of being wrong. None of these oil and gas leases are options, and never should be spoken of as options. They are leases, just what they are called. They convey a present right, to wit, a right to search and explore for oil and gas. That right is not inchoate, is not in the future; it exists from the time of the execution and delivery of the lease. Of course, as to the oil and gas itself, the title is inchoate. No title to the oil and gas vests until it is discovered, but, so far as the right to search and explore for oil and gas, there a present right vests on the execution and delivery of the lease. I have had occasion heretofore to pass upon that question, namely, in the case of Lindley et al. v. Raydure et al., so there is no question in my mind as to the validity of the lease.

[2] There is some intimation in the brief for the plaintiffs that the lease was forfeited according to its terms. It is what is called an "unless" lease. It has a provision that, if a well is not drilled within 12 months, the lease shall be null and void unless 10 cents an acre thereafter is paid annually. This lease was made in January, 1916—on the 27th day of January, 1916. The rents were not paid in advance; that is, for the year 1917, or for the year 1918, or for the year 1919. The rent for the year 1917 was paid towards the end of the year, on or about the 1st of January, 1918, and likewise the rent for the year 1918 was not paid in advance, but paid later in the year, along towards the end of the year. Some intimation has been made that these rentals were payable in advance, and, as they were not paid in advance, the lease became forfeited according to its terms. Of course, if the rentals were payable in advance, as they were not paid in advance, the lease would be forfeited according to its terms. The question, then, is whether, according to the true construction of these leases, these rentals for delayed development were payable in advance. The language of the clause is that, in case a well is not drilled within 12 months, it shall be null and void unless thereafter a rental of 10 cents an acre is paid annually. The question here is whether or not under that lease that rental is payable in advance. The clause does not say that. It says "unless thereafter"—that is, after the expiration of the year, the

first year, when drilling is to be done—unless this payment is made. It does not say that it is to be paid in advance; it says "thereafter." Now, that necessarily in my mind excludes the idea that it shall be payable in advance. It says after the expiration of the first 12 months, and if it is after the expiration of the first 12 months, it is to be paid at any time during the year, because there is no other time specified.

Counsel for plaintiff cites an Arkansas decision that sustains their contention that in a lease of that sort the rental is payable in advance, and that decision is based on an Indiana decision to the same effect; but in that decision reference is made to the decisions of three other Supreme Courts that the rental is not payable in advance—the Supreme Court of Kansas, the Supreme Court of Connecticut, and some other court; and it seems to me that is the proper view of the matter, though, if I had a lease of that sort, I would always pay it in advance. I would not take any chance on what courts are going to decide. I would pay in advance. My best judgment is that, under a proper construction of the lease, it is not payable in advance. But, however that may be, the parties have construed it that it was not payable in advance, because the rentals were not paid in advance, but were paid and accepted at the end of the second and of the third years.

And then still further this suit does not seek to have the lease canceled because forfeited according to its terms; that is not the ground upon which relief is sought. Plaintiffs seek to have this court interpose and forfeit this lease, because they claim that equity requires that the lease should be forfeited. On this ground, on October 4, 1919, the plaintiff lessors gave a notice that they would not accept any other rentals and called for development, and they waited about 3 months, and then brought this suit on the 10th day of January, 1920, before the expiration of the year, to have the lease canceled, because the lessee did not comply with that notice and develop the property within the time mentioned, from the 4th day of October to the 10th day of January, 1920, when the suit was brought; and they seek to avail themselves of the decision of the Kentucky Court of Appeals in the case of Monarch Oil, etc., Co. v. Richardson et al., 124 Ky. 602, 99 S. W. 668, in which that court held that in leases of this character development can be hastened by a notice given by lessor to lessee requiring development, and then going, if he has not developed, to a court of equity and having the lease declared forfeited by it. In that case they held that a year's notice ought to be given, and in later decisions they have said that a reasonable time should be allowed to elapse and reasonable notice should be given, intimating that perhaps a year might not be required in every case.

[3, 4] It seems to me that, if that doctrine is to prevail, it is decidedly questionable whether the notice given here was a reasonable one, only 3 months, and the lease contemplated an annual payment. It may be that, if that doctrine applies, there ought to be a year's notice. At any rate, the burden was on the plaintiff to show that that was a reasonable time, and it is extremely doubtful, to say the least of it, whether or not they made out that a reasonable time had elapsed. However that may be, I do not think that I am controlled by the decision of the

Kentucky Court of Appeals in the Monarch Case. The Kentucky Court of Appeals has never actually applied that doctrine to a single solitary case. Never has a lease been forfeited by that court upon a notice requiring development. The statement of the Court of Appeals that a forfeiture can be brought about in this way is pure dictum. As stated, never yet has a case been decided by them where a lease has been declared forfeited upon a notice.

Furthermore, I do not think that dictum is sound. According to the very terms of the lease, delay in development is authorized on the payment of the rental. For a court to forfeit a lease on failure to develop on notice is to change the contract of the parties. If the Legislature were to pass a law saying or providing that in a lease of this character development might be hastened by giving notice, it would be in violation of the constitutional provision that inhibits the Legislature passing a law impairing the obligation of a contract. Then, in March, 1920, the Legislature passed an act overthrowing that doctrine, saying that no lease could be forfeited in that way. So it is no longer a doctrine in Kentucky that a lease can be forfeited in that way. But I do not think that, if that statute had never been passed, I would be bound to follow that dictum of the Court of Appeals. All that is involved is a question of equitable relief. The Supreme Court of Illinois had held that it was not equitable to enforce a lease if it had a surrender clause in it, and yet the Supreme Court of the United States, in the case of Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, decided that the federal court was not bound by that decision—that the federal court would enforce a lease containing a surrender clause —on the ground that it was a matter of relief in equity, and in a matter of that sort federal courts are not bound by the state courts.

Then, in addition to that, this statute has repudiated this doctrine as far as Kentucky is concerned. As there has been no forfeiture of this lease according to its terms, as the lessees, the defendants in this action, have paid their rental according to the terms of this lease as interpreted at least by the parties, I do not think that it presents a case for an equitable forfeiture; i. e., for this court holding that this lease should be forfeited, and therefore the court will dismiss the bill.

This is my conclusion, and a decree will be entered accordingly.

TOWNE v. McELLIGOTT, Acting Collector of Internal Revenue.

(District Court, S. D. New York. August 5, 1921.)

1. **Constitutional law ⇐286—Internal revenue ⇐2—War tax, justified by practice of other nations, not confiscatory.**

   In determining whether a war tax is so excessive as to be confiscatory and void under the Fifth Amendment, it must be considered, in view of the current practices of other civilized nations, in the exercise of similar powers.

2. **Internal revenue ⇐7—Income tax; measure of profit from sale of corporate stock.**

   In computing the profit from the sale of shares of corporate stock, for income tax purposes, where the seller has received a stock dividend on

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

the shares sold, he is not to be considered as having sold all he bought, and is not entitled to credit for the full price paid, but only for the proportion of the price that the shares sold bear to the whole number accruing from the purchase.

3. **Internal revenue ⇐7—Income tax; computing cost of stock dividend shares sold.**

Where a purchaser of stock of a corporation at different times and different prices received a stock dividend on all his shares, and sold a part of his dividend stock, in computing his profits for income tax purposes, the cost of such shares should be determined by allocating the dividend stock between his different purchases, and attributing the shares sold first to his first purchase, and so in order.

At Law. Action by Henry R. Towne against Richard J. McElligott, Acting Collector of Internal Revenue. On demurrer to complaint. Demurrer passed for computation.

See, also, 242 Fed. 702.

This case arises upon demurrer to a complaint by a taxpayer for money paid on income taxes. It raises two questions: First, whether the profits realized upon the sale of the plaintiff's shares of stock were correctly computed; second, whether a surtax of 72 per cent. on such profits was confiscatory. The first question depends upon these facts: The plaintiff owned shares in a corporation before March 1, 1913, and bought other shares thereafter. Later he received a stock dividend of 50 per cent. upon all his shares. In 1918 he sold some of his shares, including those certificates which he had held on March 1, 1913, those which he had bought later, and some of those which he had received as a stock dividend. The tax was collected on the following basis: The plaintiff was charged with the gross sale price and credited on each share sold with the average cost of all the shares. This average for each share was computed by dividing the gross cost of all such shares by the number of the shares, including the shares declared as a stock dividend. The plaintiff argues that he should be credited with the actual cost of each certificate, computing the cost of the shares declared as a stock dividend at nothing. Thus the difference between the parties is whether, in estimating the taxpayer's credit on each share sold, the stock dividend shares should be brought into hotchpot with the shares on which the stock dividend was declared.

Richard S. Holmes, of New York City, and Ferdinand Tannenbaum, for demurrant.

Louis H. Porter, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] I shall take up the second point first, since, if it were sound, it would dispose of the whole case. In brief it comes to this: That a tax of 72 per cent. on the last increment of the plaintiff's income, and a tax of 50 per cent. upon his whole income, is confiscatory, and, if so, void, under the Fifth Amendment. The term "confiscatory," when so used, is clearly one of degree, because literally all taxes are pro tanto confiscatory. Except as it imports some inequality of burden, not here suggested, it can mean nothing but that there is a measure to the amount which the government may seize in taxes for its own purposes. The plaintiff relies on certain language in Brushaber v. Union Pac. Ry., 240 U. S. 1, 24, 25, 36 Sup. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713, which, broken

from its context, he thinks helps his contention. The meaning of that language is only that there may be inequalities in the rates of levy great enough to become a confiscation of the income which suffered the highest rates. The Chief Justice identified possible confiscation with a tax "so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion"; i. e., the conclusion that the property was confiscated. I do not read this language as giving any color for arguing that, when the inequalities are lawful, the rates may be confiscatory as a whole, nor is there any such suggestion in the books that I have seen.

In fact, our war taxes are not out of relation to the sums levied by other civilized nations faced with the same exigencies as the Great War imposed upon us. In critical periods of a nation's life the power to tax may be necessary to preserve it, and perhaps there is no limit beyond which it may not subject the property within its reach to contribution. I need not go so far as that in this case; it is enough that the powers of Congress are to be interpreted, not by dialectical ingenuity, but by current practices of nations in the exercise of similar powers. It is true that these powers are limited, and that those limits must be observed, however little they circumscribe the analogous powers of other Legislatures. Yet when the question is of the interpretation of those broad counsels of moderation contained in the Fifth Amendment, we must interpret the limitations themselves with an eye to the practices which have become tolerated elsewhere among civilized nations. Were it not so, we should be limited forever to the political usages of 1789, and those amendments which were intended to protect the individual against extravagant or invidious discrimination would become a strait-jacket upon the nation's freedom.

[2] The second point is raised by Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, and must be ruled by its implications. Under the doctrine of that case a stock dividend is not regarded as new property at all. The old certificate represented precisely the same property as the old and new do thereafter. The old shares have proliferated, as it were, and although the right they represented has now suffered a cellular division into smaller units of greater number, that is all that has happened. In view of this, it seems to me difficult to avoid regarding the old and new shares together as anything more than the evidence of a right which has persisted unchanged through the declaration of the dividend. It might have been possible to look at the new shares as declared from the surplus, and the surplus as not included in the old shares (at least not in the same sense as the new shares comprise it); but all such notions were expressly repudiated in the prevailing opinion. If so, each of the new shares, whether contained in the old or the new certificate, represents a part of the original property purchased and in selling the first certificate the stockholder has not sold the whole of what he originally bought, and should not be credited with the whole purchase price. Judge Rose, in Safe Deposit, etc., Co. v. Miles (D. C.) 273 Fed. 822, has adopted the same theory of computing an income tax in a stronger case. There the plaintiff sold some "rights" declared

upon his stock, and Judge Rose computed his profit in substantially the same way as I suggest here.

[3] The plaintiff answers this argument by saying that, if so, all shares at any time held by a stockholder must be brought into hotch-pot and averaged. I scarcely think that consistency requires me to go so far. The law may, and in fact does, recognize an identity in every share, which can indeed be traced upon the books of the company, at least until certificates are consolidated, and later subdivided. The purchase of a number of shares can be earmarked by the certificate, and it is an enormous convenience to keep the purchases separate. Yet it is possible and consistent, when new shares are declared, to atttribute them ratably in subdivision of those already issued. They are not so entered on the books, it is true; but the books are not kept in accordance with the underlying doctrine of Eisner v. Macomber, supra, in any event. At least the earlier certificates need not lose their separate identity because new shares are filiated to them in proper proportion.

An illustration will make clear what I mean. Suppose a man has certificate A, for 100 shares, bought at $100, certificate B, for 100, bought at $150, and certificate C, for 100, bought at $200. Suppose, further, that a stock dividend of 50 per cent. is declared, and he gets one certificate D, for 150 shares, without paying anything. If he sells certificate A, he would be deemed to sell, not the whole of his first purchase, but only two-thirds of it, and he could credit himself with only $6,666. If he sold certificate B, he would credit himself with $10,000, and if certificate C with $13,333. If he sold certificate D, he could credit himself with $15,000, made up of $3,333 from his first purchase, $5,000 from his second, and $6,666 from his third. If, on the other hand, he sold only a part of certificate D, some arbitrary rule of apportionment must be adopted, allocating the shares sold among his purchases. The most natural analogy is with payment upon an open account, where the law has always allocated the earlier payments to the earlier debts, in the absence of a contrary intention. Accordingly, if all the new shares were not sold at once, I think the first sales should be attributed to the first purchases still remaining unsold when the stock dividend was declared. I do not see that this method will result in confusion in its application, and it carries into effect the underlying theory of Eisner v. Macomber, supra.

The tax at bar was not computed quite in this way, because all the purchases before the declaration of the stock dividend were brought into hotch-pot. This I think was inconsistent with the theory of the identity of the shares involved in each purchase. It must, therefore, be recalculated, which the parties have kindly consented to do, if they are told the rule. The credits will be computed as follows: Upon each certificate held on March 1, 1913, two-thirds its value on that day; i. e., $230. Upon each certificate bought at $100, $66⅔. Upon each certificate for stock dividend shares, if issued against any specified earlier certificate, the same credit per share as the shares of that certificate. If the certificate of new shares is not so earmarked, or if but one certificate was issued for the new shares, then credit will

be allowed of two-thirds the value of the shares on March 1, 1913, until half the number of shares have been sold, which the plaintiff held on March 1, 1913, and retained till the stock dividend.

The formal disposition of the demurrer will depend upon this calculation. If the tax is less than that collected, the demurrer will be overruled, and the plaintiff will take judgment for the difference; if it is greater, or the same, the demurrer will be sustained, and the complaint dismissed, with costs.

MANHATTAN BOOK CASING MACH. CO. v. E. C. FULLER CO.

(Circuit Court, S. D. New York. January 3, 1912.)

1. **Patents ⇐118—Disclosure in operable form essential to pioneer invention.**
   A patent, which was the first that purported to disclose a machine by which certain work could be done, so as to be fairly within the definition of a pioneer patent, is not entitled to rank as such patent, unless it is accompanied by disclosure, which shows the art how the idea stated in the claim may be realized in an operable structure.
2. **Patents ⇐118—Faults in diagrams, which mechanic could not correct, defeat patent.**
   Though faults in diagrammatic representations do not defeat a patent, if the drawings show at least enough for the ordinary skilled mechanic to build the machine, the drawings must, to make an operable disclosure, be sufficient to enable such mechanic to build a machine, or the disclosure is not operable.
3. **Patents ⇐118—Evidence held to show defects in disclosure rendering machine inoperable.**
   In a suit for infringement of a patent, evidence *held* to show that there were such defects in the machine disclosed by the patent as rendered it inoperable.
4. **Patents ⇐118—Evidence held not to show defects could be overcome by mechanic.**
   In a suit for infringement of a patent, evidence *held* to show that the defects in the construction of the machine as disclosed by the patent were such as could not be overcome by a skilled mechanic.
5. **Patents ⇐129—Patentee cannot claim improvement covered by subsequent patent was mechanical only.**
   A patentee, who had received a subsequent patent covering improvements in the machine covered by the earlier patent, cannot claim that such improvements were merely mechanical and did not involve invention, and therefore cannot claim that a machine constructed under the later patent established that the disclosure in the earlier patent possessed only such defects as a skilled mechanic could overcome.
6. **Patents ⇐118—Evidence held not to show operation of machine constructed under patent.**
   In a suit for infringement of a patent where the defense was that the patent did not disclose an operable machine, evidence *held* not to show that machines which had been actually operated were constructed under the patent in suit.
7. **Patents ⇐91(4)—Evidence held not to show that subsequent patentee had taken prior patentee's idea.**
   In a suit for infringement of a patent, where the defense was that the disclosure in the patent was not operable, evidence *held* not to es-

tablish complainant's contention that defendant had taken the idea from the prior patent, and made it profitable by the use of its greater ingenuity and resources.

In Equity. Suit for infringement of a patent by the Manhattan Book Casing Machine Company against the E. C. Fuller Company. Bill dismissed.

This is the usual bill in equity upon patent No. 603,406, for a machine to apply "cases" or cardboard covers to books. When books have been sewed together, they must have the outer sheets covered with paste, upon which the cover is then pressed. The cover keeps to the book only by the tenacity of the paper and of a small piece of stiff muslin at the back, the loose ends of which are likewise pasted to the cover between it and the outer sheets. Before the invention here patented, this work had universally been done by hand. Only one claim of the patent, No. 6, is in suit: "A machine for binding books, comprising a suitable frame, a glue or paste pot mounted therein, a book-carying frame provided with a horizontal support which projects over the glue or paste pot, and from which the book is suspended, and operative devices for applying the glue or paste to the sides of the book, substantially as shown and described."

The disclosure was of a somewhat complicated machine which lowered the book, hanging upon a horizontal support, inserted between the leaves; when lowered, two paste plates came into contact with the outer leaves, and then the book was raised, the outer leaves having an even coating of paste upon them. As it rose it took up the "case" or cover with it, which had been spread out by hand upon two horizontal plates, below the level of which the top of the book had dropped. The sides of the cover dropped upon the wet leaves as the book rose, and the book with its cover was then taken off by the hand of the operative, the "case" registered upon the book, and the plied for another patent, No. 677,040, for an improved machine, designed upon the surface of the vertical paste plates by a mechanism which rotated them in a paste pot which was hung below the level to which the book descended.

The patent appeared on May 3, 1898, and on June 5, 1900, the patentee applied for another patent, No. 677,040, for an improved machine, designed upon the same theory and operating in general in the same way, but with changes in the devices disclosed. This machine was actually made and put into operation in five instances, but has subsequently been displaced by the defendant's machine.

The infringing machine is a highly complicated piece of mechanism, which performed many functions, not necessary to indicate in detail. It does, however, carry the book upon a support in the form of an inverted V and lowers it between two paste pots. These pots are then brought together till rollers at their inner sides come in contact with the leaves close under the "shoulder" of the book. The book is then raised, and the rollers at the same time rotate, depositing a coating of paste upon the surface of the leaves. Meanwhile, while the book is at its lowest level, a "case" is automatically fed upon horizontal plates above the book, which "case" is carried up with the book, as in the case of the patent. As the book rises with the "case," clamping devices press the "case" to the book, and it is afterwards carried away upon the support.

The defenses are noninfringement and that the patent is not operable as disclosed.

Boardman Wright, of New York City, for complainant.
James C. Rice, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] There can be no question that the patent was the first that purported to disclose a machine by which books could be coated with paste and take up the "case," or cover, in position to be registered and sent

to the press. As such it might fairly be within the definition of a pioneer patent, and its claims receive the scope in interpretation accorded to such patents, provided it disclosed one way in which this function could in fact be performed. However, even a pioneer patent must be accompanied with a disclosure, which will show the art how the idea stated in the claim may be realized in an operable structure. It is, of course, not enough merely to conceive abstractly of a combination of elements which will together do something new. Invention requires the added element of showing how the idea may be actually incorporated, and without such a disclosure as would enable a skilled artisan to embody the idea it remains sterile, and makes no advance in the art, from which the man conceiving the idea should be entitled to a monopoly. While, therefore, in the case at bar the court ought not to ask for a perfected or finally developed machine, still it is a condition that the patentee must show at least in one practicable form how his idea may be used, else he is at best only an ingenious theorist, and not an inventor at all.

[2] Now, it is here in evidence with no contradiction at all, as I shall show later, that the machine actually disclosed by the patent was inoperable. If the faults were merely in the diagrammatic representations, that would not be a defense, for diagrams or descriptions are not meant for working drawings. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72. But such drawings must at least show enough for the ordinary skilled mechanic to build the machine, correcting the discrepancies and the difficulties appearing in the drawings, by means of that store of expert information which such men will bring to the task in a bona fide effort to make the machine work. Some of the difficulties raised by the defendant are of this correctible character, but several are not.

[3] The defendant raises in his brief nine objections to the disclosure, all of which are unanswered by any technical witness. I will take up separately Nos. 1, 4, 6, and 7, which I think to be radical difficulties, going to the very root of the structure.

No. 1: That the pawl and ratchet mechanism is inoperative. This depends upon the fact that the arms k^5 and k^6 cannot rise high enough, nor drop low enough, to make the pawl take more than two teeth on the ratchet, and pull down more than two, so producing less than a quarter circle of revolution. No one shows how this can be remedied. Moreover, the lever, e^5, is forced into the notch G of the back of the paste plate by a spring, e^8, without which it would never lock the plate, since its heavier end is on the far side of the pivot, e^4. The temporary release of the plate by the contact of the end, e^6, with the cam, e^7, will not answer, because on the return movement the spring, e^8, will at once cause the lever again to lock the plate as soon as the cam, e^7, ceases to contact. That will be before the pawl has begun to pull upon the ratchet, for the cam will lose contact as soon as the L-piece, b^8, has descended the length of the slot, b^9, and the large number B must descend still further than that before the arm, k^6, begins to pull down the lever, f^4, which operates the pawl, if it could do so at all. Moreover, at that period in the operation of the machine, when the

pawl could so operate, the plates are already in contact with the book. The experts say they can see no way to remedy this, and no way is suggested.

No. 4: That the machine can never unlock the plates. This is really another form of the objection No. 7. It also depends in part upon the fact that the bent ends of the treadle *N* cannot operate to raise up the arms, *d*, *d*, high enough, because the bent ends strike on the sides of the frame.

No. 6: The slotted connection between b^8 and *O* is inoperative. This is said to be an unworkable device mechanically; it will jam if one tries to operate it, and it is fundamentally vicious. No one suggests that it could be changed. Obviously there must be a portion of the rise in the book, represented by the slot, b^9, during which the plates so remain in contact with the sheets that a solid piece at that point would not serve. How to remedy this does not appear.

No. 7: The ends, *D*, *D*, of the arms, *d*, *d*, must enter the paste tank to give the slides d^7, their necessary movement. This is obviously true from the diagram. It is answered that the pot might be divided; but, if so, the paste plates could not close on the book. No other suggestion is made as to how this could be remedied.

[4] It must therefore be conceded, and indeed it is not denied, except as I shall show later, that the machine as disclosed was an inoperable mechanism. However, the defendant must go further, and show that it could not be made operable by a skilled mechanic. This it does by the testimony of its two experts, who say that they do not see how it could be made to operate. Now, it was made to operate when the principle was put into the second machine patented by the inventor here, 677,040. This machine was without question an entirely workable machine, and I do not attach any importance to the fact that in the operation of it, as seen by the defendant's witnesses, the leaves were not properly covered with paste. The testimony of the two mechanics who operated it for a period of over a year satisfies me beyond doubt that it was an entirely operable device, and had it been disclosed in the first patent I should not have hesitated to overrule the defence. When, however, one comes to examine the second machine, one sees that, although the principle of the first, as set forth in claim 6, is undoubtedly there, the disclosure is very radically different.

As these two machines are the only ones, besides the defendant's, which have ever appeared in which the claim has been embodied, and as the evidence nowhere suggests that there is another way in which it could be embodied and the unworkable features of the first eliminated, I think the question must resolve itself into this: Whether a skilled mechanic could have devised the second machine from what he saw of the first. A judge is entirely unadapted to decide such a question as an original question, and must rely upon the testimony of skilled artisans or of experts in mechanics.

Here the only evidence is that a skilled artisan could not have done so. I cannot accept Gunz's testimony in rebuttal as raising an issue in this respect. The codefendant's witnesses at great length pointed out the difficulties, and showed that the machine as disclosed was thorough-

ly unworkable. It was not enough for Gunz to say merely that he disagreed with them in their subsequent conclusion that it could not be made workable. I agree that the burden of proof on the issue is on the defendant; but the defendant had made out a case, and the complainant had the burden of going forward with the proof to show how a skilled artisan could change it over. I must conclude that he would not venture to show in detail how the difficulties could be remedied.

[5] Moreover, although it might by another be argued that such changes as were necessary to convert the first machine into the second were obvious to a skilled mechanic, certainly the complainant here cannot claim any such thing. Upon taking out the second patent, the inventor necessarily took the position that the second disclosure showed invention over the first, and it is precisely the negative of that position, which he must now assume to hold that the disclosure of the first was an adequate revelation to anyone wishing to construct the second. He cannot, therefore, rely upon the second machine as an obvious alternative of the first.

[6] Some question is made that the first machine was in fact operable and did the work of "casing." This testimony was, of course, of the greatest consequence to the case; but, in view of the very clear and unanswered testimony of the defendant's experts, I should be disposed to scrutinize it carefully. It seems pretty clear that the machine could not have worked; what, then, is the evidence that it did? I think this testimony is best approached from that of the two workmen in Little's establishment, and I cannot have the least doubt that the machine they used was the second.

Absolutely conclusive appears to me to be their testimony, when they saw the diagrams of the second machine. I know that they were not skilled in the use of diagrams, but that makes their recognition of such details as the intermittent rotating device for the paste plates especially significant. The description, "a sort of a piece of iron sticking out from both sides which went into a socket like," is the sort of description that a layman would give of the second machine, but never of the first. Again Rees and Recame's recognition of the arms C^5 is almost inconvertible evidence that the second machine is what they used, for the arms are quite unlike the plate-tipping arms of the first machine. Although Recame says that the first of the two machines used at Little's was not in use while he was there, yet he recognizes the second patent as describing that machine.

Now, George H. McClellan, who was the foreman at Little's says that five machines were sold, and that only one went to Little's. This one, "as nearly as I can recollect," was built in 1899, was installed in "the early part of 1900"; but later, when recalled, he said it was put in "about the latter end of 1900, or the first part of 1901," but he does not say how it worked, nor under which patent it was made. Certainly, so far as this evidence goes, it shows that, whether or not two machines were sent there, those that were sent were made under the second patent. Jackson McClellan to a certain extent corroborates their testimo-

ny for he says that there were two machines sent to Little's, which differed only in the "running gear, cams," etc.

I am satisfied from all this testimony that both machines were made under the second patent, which was applied for in June, 1900, and that the only evidence of any use of a machine under the first patent is that of Jackson McClellan himself as to the use made of the so-called "model" machine. It becomes necessary, therefore, to consider his testimony. He says that he actually cased in books with the model machine which he made and from which the drawings of the first patent were taken. From that model machine Hindle made the first of the five machines that were ever made at all, and it differed from the model only in running gear. Now, as I have shown, the first of Hindle's five machines was that sent to Little early in 1901 or late in 1900. It is therefore a fair conclusion that the model Jackson McClellan speaks of was similar to the Little machine which Recame identifies as made under the second patent.

Moreover, since Jackson McClellan says that the two Little machines were alike, except in "running gear, cams," etc., Ree's testimony corroborates Recame's that the model machine was under the second patent, in spite of Jackson McClellan's testimony to the contrary. In addition, it is quite clear that Jackson McClellan was confused in his recollection of the two patents, because he says that in each the paste plates get a half turn, which is concededly not the case. His recollection is also at fault in thinking that either of the patents shows any beveling of the paste plates at the edges.

Considering this confused and uncertain testimony of Jackson McClellan, which is certainly inconsistent with itself and with the testimony of the other witnesses, and considering the failure to call Hindle or to explain his absence, I cannot think that the complainant has met the proof of the defendant, and I conclude as a fact that the disclosure was not of an operable device.

[7] There is an insinuation that the Smyth Company had taken the idea, and by its greater ingenuity and resources made it profitable, stealing the inventor's germinative conception. That is, however, not the fact, I believe. The interview, which came out in rebuttal, between Fuller and McKibbin, was probably in the summer of 1900. Now, the Smyth Company began the construction of its first machine "about the latter part of the year 1899," and certainly before it knew of the patent in suit. That machine embodied as much of the idea of the patent as any other. The complainant's invention, even in its second form, never proved to be of any value as he disclosed it. That is perhaps of no consequence, if others took his idea and by improvements got the harvest which he had sown; but there is no evidence that they did do so. Each apparently independently saw that to raise a book up and down while paste was applied might be a good way to supply the place of hand labor, but that idea was of no value till it was accompanied by a practicable disclosure of how to do what was conceived.

It is quite too much to claim for a new invention that it is a pioneer merely because a new theory is adopted. Surely every one is familiar

with many ardent theorists, whose ideas are original and might be useful in the abstract, but whose actual contribution to the arts is nothing whatever. That man wins who first can present the idea in some form that can work.

Bill dismissed, with costs.

In re OLLINGER & PERRY.

(District Court, S. D. Alabama. August 12, 1921.)

Bankruptcy ⊜44—Petition against partnership by one partner must allege insolvency and act of bankruptcy.

Bankr. Act, § 5a (Comp. St. § 9589), providing that a partnership may be adjudged a bankrupt, treats a partnership as an entity, and in view of General Order in Bankruptcy No. 8, providing that a member of a partnership who refuses to join in a petition to have the partnership declared bankrupt "shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership," that he shall be served with notice, and "shall have the right to appear * * * and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act," a petition filed against a partnership by one partner alone must conform to the requirements of an involuntary petition and must allege insolvency and an act of bankruptcy by the partnership.

In Bankruptcy. In the matter of Ollinger & Perry, a partnership, alleged bankrupt. On demurrer to petition. Demurrer sustained.

R. H. & R. M. Smith, of Mobile, Ala., for Perry.

Stevens, McCorvey, McLeod & Goode, of Mobile, Ala., for Ollinger.

ERVIN, District Judge. This was a petition in bankruptcy by Perry against Ollinger & Perry as a partnership and Charles G. Ollinger as an individual, seeking to have himself and the firm of Ollinger & Perry and Charles G. Ollinger declared bankrupt.

The petition filed by Perry is on form No. 2 with the necessary changes so as to show that the said Charles G. Ollinger was not consenting to the adjudication of himself or the partnership as bankrupts.

It did not contain any statement that the partnership was insolvent, nor does it allege any act of bankruptcy as having been committed by it or by Ollinger.

Ollinger demurs on the ground of failure to allege an act of bankruptcy as having been committed by the partnership.

The demurrer raises a question on which the decided cases and text-books all seem to have taken one side. Loveland on Bankruptcy (4th Ed.) 524; Collier (12th Ed.) 177; Brandenburg (4th Ed.) § 193; Remington (2d Ed.) § 73.

The text-books state the names of the cases holding that no act of bankruptcy by the firm need be alleged.

I am, however, so firmly convinced that these decisions have grown out of a misconception by the courts, which misconception was fol-

lowed by the text-books, that I feel it incumbent upon me to explain my views upon the question.

Section 5 of the Bankruptcy Act reads as follows:

"(a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged bankrupt." Comp. St. § 9589.

After much discussion among the authorities as to the separate entity of the partnership, as such, they are now practically unanimous in holding that the adjudication of the firm as an entity is provided for by this act.

The Supreme Court under authority of Congress prepared general orders and forms in bankruptcy. Form of petition No. 1 is a debtor's petition for voluntary bankruptcy.

Form No. 2 is a partnership voluntary petition, and an examination of this form will show that it was contemplated by the court and expressly prepared by it so that it should be signed by all of the partners of the firm. Following the statement contained in the petition for voluntary adjudication of an individual, No. 2 states that said partners owe debts which they are unable to pay in full; that said partners are willing to surrender all their property for the benefit of their creditors except such as are exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

The prayer is that said firm may be declared bankrupt.

It then provides for certain schedules of the partnership creditors and property and for the individual creditors and property.

Form No. 3 is a creditor's petition seeking to have the debtor declared an involuntary bankrupt, and there is written into the statement of facts in this form the following;

"That your petitioner further represent that said ——— is insolvent, and that within four months next preceding the date of this petition, the said ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the ——— day of ———."

These are all the forms prepared by the Supreme Court of petitions to have any one declared bankrupt whether voluntary or involuntary, but it was undoubtedly intended by the court that the necessary allegations written into these forms should be copied into the petitions when prepared, according to the facts necessary to be stated, whether for involuntary or voluntary adjudication, so that form 3—the creditor's petition—should be used against any one who is sought to be declared an involuntary bankrupt, while forms 1 and 2 should be used in voluntary cases.

The Supreme Court prepared at the same time general orders, and No. 8 of these orders reads as follows:

"Any member of a partnership who *refuses to join* in a petition to have the *partnership* declared bankrupt, shall be entitled to resist the prayer of the petition in the *same manner* as if the petition had been *filed by a creditor of the partnership*, and notice of the filing of the petition shall be given to him in the *same manner as provided by law and by these rules* in the case of a *debtor petitioned against*; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he

can, that the partnership *is not insolvent or has not committed an act of bankruptcy*, and to make *all defenses* which any *debtor proceeded against* is entitled to take by the provisions of the act. * * *" (Italics mine.)

The Supreme Court had an order similar to this as applied to the bankrupt act of 1867 (14 Stat. 517), and it was held by the lower courts that it was not necessary to allege an act of bankruptcy by a partnership where the petition was filed by one of the partners; but the Supreme Court speaking of the effect of this order in the case of Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, says that, where one partner was brought in under the petition of the other partner, it was a case of involuntary bankruptcy as to such partners so brought in.

If it is an involuntary proceeding, must not the statements of fact or charges contained in the involuntary form be used?

Now there is this difference between the act of 1867 and the act of 1898 in reference to partnerships, in that the act of 1898 confers the right to declare the partnership bankrupt as a separate entity, which the act of 1867 did not do.

If there was no power to declare the firm bankrupt under the act of 1867, then there was no necessity to allege the commission of an act of bankruptcy by it.

In the case of In re Forbes (D. C.) 128 Fed. 137, it is said that it is not necessary to allege an act of bankruptcy in the petition by one partner against the firm, but is necessary to allege insolvency. The following language is used:

"Neither the act of July 1, 1898, * * * nor the act of March 2, 1867, * * * nor the general practice of courts of bankruptcy under either act, has required an allegation of an act of bankruptcy in a petition filed by one partner to bring into bankruptcy his partnership and partners.

"The act of 1898 does not require an allegation of insolvency, though the allegation that the partners are unable to pay their debts, which is contained in form No. 2, promulgated by the Supreme Court under authority of the act, comes almost to the same thing. On the other hand, general order No. 8 under the act of 1898 and general order 18 of the act of 1867 alike have provided that a partner refusing to join in a partnership petition filed by his copartner is entitled to resist the prayer of the petition as if it had been filed by a creditor, and 'shall have the right * * * to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy.' The general order thus appears to provide that the nonassenting partner may disprove that which the petitioning partner need not allege."

The court seems to overlook the fact that the general orders are as effective as the provisions of the act itself, and further that form No. 2, providing for a voluntary petition by partners, contemplated that it is to be signed by all of the partners. It was not prepared for nor intended to be used where one of the partners objected. The Supreme Court in form No. 1 for a voluntary petition to be used by an individual used the same language as in the voluntary petition to be used by partners, namely, "That he owes debts which he is unable to pay in full." No direct allegation of insolvency is used, and no allegation of an act of bankruptcy.

Form No. 3, the creditor's petition, contains the allegation:

"And your petitioners further represent that said ——— is insolvent, and that within four months next preceding the date of this petition, the said ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the ——— day of ——— "

—leaving the blank space of the statement for the act of bankruptcy alleged to have been committed.

Now it seems to me that when the court wrote general order No. 8 it must have intended that, where a partner of a firm refuses to join in the petition with the other partners or partner, the petition must contain the statement of facts contained in form No. 3 wherein is a charge of insolvency and the commission of an act of bankruptcy, which such nonassenting partner may deny.

If the proceeding becomes an involuntary one as to the partnership by virtue of one of the partners refusing to join, as held in Medsker v. Bonebrake, then it follows that the allegations in the involuntary form should be used, and this is made more manifest by the language of order 8 giving such nonassenting partner the right to resist the prayer in the same manner as if the petition had been filed by a creditor, and to make all defenses which any debtor proceeded against is entitled to make, and specifically giving such nonassenting partner the right to prove, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy.

Bearing in mind that proof by a debtor proceeded against that he is not insolvent or that he has not committed an act of bankruptcy is a complete defense, it necessarily follows that order 8 puts the partnership in the same position when there is a nonassenting partner.

The language used can mean nothing else as I see it.

The petition against a debtor in an involuntary proceeding must allege both insolvency and an act of bankruptcy.

The commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding. In re Meyer, 98 Fed. 979, 39 C. C. A. 368.

If order 8 defines the petitioning partner's petition as an involuntary one as to the firm, it is necessary that it should contain all the essential allegations of an involuntary petition, including the allegations of insolvency and an act of bankruptcy.

If the proceeding against the firm is involuntary, then it must be conceded that the petitioning partner is required to make the same allegations that the petitioning creditor would make against the same partnership.

So construed, general order 8 is in harmony with the forms and no inconsistency is found. There is then no requirement that the nonassenting partner may disprove "that which the petitioning partner need not allege." But there is a requirement that the petitioning partner must allege that which the nonassenting partner may deny.

It is now agreed that the nonassenting partner as an individual cannot be declared bankrupt unless an act of bankruptcy is alleged to have been committed by him. Junck v. Balthazard (D. C.) 169 Fed. 481; In re Ceballos & Co. (D. C.) 161 Fed. 449.

Conceding the partnership is a separate entity which may be de-

clared bankrupt, I ask why the same rule which is applied to the nonassenting partner is not applied to the partnership?

The reading of order 8 will show that it does not limit the right of the nonassenting partner to defend as to personal charges; on the contrary, it permits him "to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy."

Now, in the face of this language, it must be conceded that if such nonassenting partner can prove either that the firm was not insolvent or had not committed an act of bankruptcy, no adjudication can be made against the firm.

Now if order 8 makes no distinction, as a ground for denying adjudication against the partnership, between insolvency and an act of bankruptcy committed by the firm, then I ask where did the courts get authority to make such a distinction?

The rule does not stop here, because after enumerating these two express grounds which the nonassenting partner may show, it then proceeds to say that he may "make all defenses which any debtor proceeded against is entitled to take by the provisions of the act."

It will be conceded that, where the debtor is proceeded against, the allegations used in form No. 3 must be stated in the petition, and further that if proof is made that the debtor was not insolvent, or that he had not committed an act of bankruptcy, no adjudication can be made.

Now rule 8 says that the nonassenting partner shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice shall be given him in the same manner as of a debtor petitioned against, and that it shall be open to him to make all defenses which any debtor proceeded against is entitled to make; now if in the proceedings against the debtor it is necessary to allege insolvency and an act of bankruptcy both, and the debtor can defeat this proceeding by disproving either one of these allegations, how can it be contended that the nonassenting partner is proceeded against in the same way, and is given the same defenses which the debtor has, if you deprive such nonassenting partner of either of these rights which are given to the debtor?

I have seen no case in which it has been undertaken to explain this difference between the right given the nonassenting partner and the right given the debtor according to the rulings of the courts I am criticizing. How can I draw a distinction between the manner in which the debtor may resist a creditor, and the manner in which a nonassenting partner may resist the copartner, when the Supreme Court says the rights and defenses of each are the same?

To draw such a distinction or to refuse to follow the declaration of the rule so plainly laid down by the Supreme Court seems to me necessarily to say that the court either did not know what it was writing when it wrote rule 8, or that it wrote what it did not intend to say.

Construing rule 8 as requiring the petitioning partner to proceed as an involuntary creditor, and so, to use the allegations contained in form 3 enables me to give effect to every provision contained in rule

8 and makes it also consistent with the forms. It is the only way I can see by which the nonassenting partner can be given the same rights as are given to a debtor proceeded against.

It may be said this construction of rule 8 would require a hybrid petition, voluntary as to petitioner and involuntary as to the partnership. It would be not more hybrid than it is now under the decisions as to the nonassenting partner.

The only effect would be to put the partnership in the same involuntary class as a nonassenting partner.

There was much discussion, shortly after the act of 1898 was passed, as to whether one partner could get a discharge from the partnership debts without an adjudication of the partnership as a separate entity. Some courts held it could not be done; others, that it could.

The ruling in Re Laughlin (D. C.) 96 Fed. 589, where it is held that a partner could get a discharge from the partnership debts without an adjudication of the partnership and the method of procedure laid down to accomplish this, seems to me conclusive on that question and eliminates the only hardship I can see in the construction I have placed upon rule 8.

A decree will therefore be entered sustaining the demurrer to the petition.

GORHAM MFG. CO. v. TRAVIS, State Comptroller of New York, et al.

(District Court, S. D. New York. August 11, 1921.)

No. E 16-232.

1. **Taxation ⟸608(9)—Review of a tax assessment conditional on deposit of the tax which is not recoverable held not to afford adequate remedy at law.**
   Where a state tax law requires the taxpayer to deposit the amount of his tax as a condition to a review of his assessment by the courts, and contains no provision for return of the deposit, which under the decision of the state courts cannot be recovered back, he is without adequate remedy at law and may maintain a suit in equity to restrain collection of a tax claimed to be illegal.

2. **Taxation ⟸13—State cannot tax foreign corporation on outside assets.**
   A state in taxing local revenue or local property of a foreign corporation may not include anything outside the state which cannot be said to contribute any part of its value to local assets.

3. **Constitutional law ⟸283—Taxation ⟸37—New York statute taxing income of foreign corporations held valid.**
   New York Tax Law, §§ 208 to 219*l*, providing that a foreign corporation for the privilege of doing business in the state shall pay a tax of 3 per cent. on its local income, to be determined by a consideration of the relative value of its entire property and accounts receivable and of its property and accounts receivable in the state, but which authorizes the corporation to present, and the assessing commission to consider, other relevant facts, *held* to provide a rule of allocation prima facie valid, and not unconstitutional as taking property without due process.

4. **Taxation ⟸608(2)—Collection of tax will not be enjoined for error in assessment which might have been corrected on revision.**
   A foreign corporation *held* not entitled to enjoin collection of a state tax on its income on the ground of an error in the assessment of the

tax, and also that a part of the income taxed was derived from a source entirely outside the state and not taxable therein, where such fact did not appear from complainant's returns to the tax commission, and where it was authorized by the statute, on notice of the assessment to apply for a revision, when the error and the facts as to the sources of income could have been shown, but did not do so.

5. **Taxation ⟸376(1)—State in taxing income of corporation not required to deduct federal tax.**

A state, in taxing the income of a corporation, foreign or domestic, is not required to deduct from such income the tax paid therefrom to the United States.

In Equity. Suit by the Gorham Manufacturing Company against Eugene M. Travis, Comptroller, and Charles D. Newton, Attorney General of the State of New York. Decree for defendants.

The case comes up upon final hearing on a bill in equity by a foreign corporation to enjoin the Comptroller and Attorney General of New York from enforcing a franchise tax levied in 1918. The plaintiff is a silversmith, a corporation organized in Rhode Island, where all its manufacturing is done; but it has two shops and keeps a considerable store of goods, largely samples, in New York.

Title 9a of the New York Tax Law (Consol. Laws, c. 60) provides that such a corporation must pay a tax of 3 per cent. upon its local income for the privilege of doing business in the state. Section 209. This income is to be "presumably" (section 209) taken at the return made by the corporation on its federal income taxes, and is to be allocated in accordance with a formula set forth in section 214, following the facts stated by the foreign corporation in a return required by section 211. This formula divides the income in a proportion determined by the relative values of the sum of the corporation's property everywhere and of the sum in New York. Each sum is made up of the value of its real and personal property, of its accounts receivable for sales and "services," and of the shares in other corporations owned by it. The taxpayer is given the right to a hearing after notice of assessment (section 218), at which the assessors may reassess the tax "according to law and the facts," and to a review by certiorari in the Supreme Court (section 219). As a condition to certiorari, however, he must "deposit" with the comptroller the amount of the tax. A penalty of 10 per cent. and 1 per cent. a month is imposed upon defaults.

The plaintiff filed two returns in 1918, giving all the facts required, and claiming a deduction for the federal taxes it had paid. The Tax Commission of New York, the statutory assessors, assessed and levied the tax ignoring the claim for deduction, and gave the plaintiff notice on July 16, 1919. It asked for no hearing, under section 218, but filed this bill on October 7, 1919. The plaintiff now claims that the federal taxes paid should have been deducted; that the statute is unconstitutional; that its income returned to the United States for the year in question included its profits upon its munitions business, which was wholly local to Rhode Island, and was disconnected from its silverware business; and that the assessment violated the statute.

Robert C. Beatty, of New York City, for plaintiff.
C. T. Dawes, of Albany, N. Y., for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question is of jurisdiction in equity. I should have thought the provisions for revision by the Tax Commission and certiorari to the Supreme Court adequate remedies at law, Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651;

Boise, etc., Co. v. Boise, 213 U. S. 276, 29 Sup. Ct. 426, 63 L. Ed. 796; Dalton Machine Co. v. Virginia, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797, except for one thing. Before applying for the writ, the taxpayer must "deposit" the tax with the State Comptroller (section 219), and there is no provision for getting it back. It is indeed a little strange that there should be doubt about this, but the only reported case, In re Waterman, 33 Misc. Rep. 569, 68 N. Y. Supp. 892, is flatly against any recovery. That was decided 20 years ago, and in spite of the suggestion there contained the Legislature has never seen fit to give power to a court to direct the Comptroller to pay back the money. The defendants say that the Appellate Divisions have frequently so decided, but they cite no cases. When a tax statute expressly directs the Comptroller to refund, it is true that the courts will compel him to do so, People ex rel. Millard v. Chapin, 104 N. Y. 100, 10 N. E. 141; People ex rel. Ostrander v. Chapin, 109 N. Y. 177, 16 N. E. 331, and such an act is constitutional, People ex rel. Evans v. Chapin, 101 N. Y. 682, but here there is no act. The matter at best rests in inference. The situation is therefore closely analogous to Dawson v. Kentucky, etc., Co., 255 U. S. —, 41 Sup. Ct. 272, 65 L. Ed. —, Supreme Court, February 28, 1921, where indeed there was a statute directing a refund, though the state authorities were ambiguous. That case I think rules, and shows that here an adequate remedy at law is not clear enough.

The second question is whether the statute is itself constitutional. It is now settled that a state, under the guise of granting to a foreign corporation the privilege of doing an intrastate business, may not as a condition impose upon it taxes which in fact though not in name are levied upon assets outside the state. That doctrine is generally assumed to take its origin from West. Un. Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, which at one time was apparently thought to have been overruled in Baltic Mining Co. v. Mass., 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, and Kansas City, etc., Co. v. Kansas, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617. These cases were later distinguished in International Paper Co. v. Mass., 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617, and Cheney Bros. Co. v. Mass., 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632, because they imposed only license taxes with reasonable maxima; the calculation being merely a way of grading corporations within that limit. Kansas City, etc., R. R. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176, involved a domestic corporation, and while some of the language may seem to assimilate the two classes, it is clear that that distinction was thought controlling.

[2] The doctrine has been illustrated in various ways. In International Paper Co. v. Mass., supra, as in Western Union Tel. Co. v. Kansas, supra, the tax was levied upon the whole capital stock of the corporation without any limit, and this was bad. In Looney v. Crane Co., 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230, the corporate surplus was to be added to the stock. Again, in Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276, 63 L. Ed. 602, an allocation of tank cars was based only on the mileage of the roads on which they

traveled, and was held bad, as in Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782, where the local value of a railroad in North Dakota having valuable terminals outside the state was allocated on the basis of its track mileage within that state. The allocation was in each case held to include assets outside the state. In general it may be said that a state in taxing local revenue or local property may not include anything outside the state, which cannot be said to contribute any part of its value to local assets. Meyer v. Wells, Fargo & Co., 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445; Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. Galveston, H., etc., Ry. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, is to be understood as depending upon this rule. The only reason for regarding property without the state at all is in order to find the true value of the local assets, not as junk but as parts of an integral industrial unit. That is, I take it, the final test, as applicable since Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, to franchise taxes as to taxes directly on revenue or on principal.

[3] With all deference when applied to corporations having business in several states, any effort at allocation must be more or less arbitrary and fictitious, as is indeed shown by the record at bar. The truth is that in a business which is a unity, it is impossible to break up the parts and satisfactorily to assign to any piece a corresponding part of the income. Take as an instance the record here. Much of the personal property of the plaintiff in New York consists of sample pieces of silverware kept for display, by which goods elsewhere are sold, some of which never come into New York at all. A foreign customer may see such samples and order from them, but the goods may be shipped from Rhode Island to Pennsylvania or Connecticut. Yet it would be an obvious error not to assign any part of the resulting income to the New York samples. No one could possibly say whether the sale would have been made without them. The case in this aspect presents the not wholly unfamiliar difficulty of trying to apportion quantitatively the effect of a number of factors each of which is an absolute condition to the result. In such a case there is no rational solution which will bear scrutiny, and one must proceed by a more or less rough division not too shocking to preconceived assumptions. Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. Ed. ——, Supreme Court, November 15, 1920, presented for example the very converse of the case at bar. There the taxpayer manufactured its goods in Connecticut, the taxing state, but sold few of them there. It argued that its Connecticut income should be measured by its Connecticut sales. But the court said that manufacture was an essential step in making profits and that part of the profits were "made" where the goods were produced. Therefore it sustained a statute which apportioned income by tangible property. The plaintiff here argues that the sales in New York should not be taken as all due to New York assets, because the manufacture took place in Rhode Island. That is quite true, but it is also true, as I have just said, that it is impossible to say

how far sales made elsewhere are created by the shops and stock in New York. Any rule must therefore be largely conventional.

In the case of railroads an allocation of cars and other property according to mileage was supported in State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663, and Pullman's Car Co. v. Pa., 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, and in the case of a telegraph company in Western Union Tel. Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and in Western Union Tel. Co. v. Taggart, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49. I do not understand that Union Tank Line Co. v. Wright, supra, or Wallace v. Hines, supra, overrule those cases so far as the prima facie rule is concerned. They do hold that when the rule is shown in a given instance to result in the taxation of foreign assets, it is invalid. Prima facie it remains a sound rule, as I understand it. In the case of manufacturing companies I know of no similar statute which the Supreme Court has passed on except that in Underwood Typewriter Co. v. Chamberlain, supra. In that case the allocation was made merely upon the proportion of tangibles. While it was not in form an excise, that point was disregarded, and the decision there seems to me to support the defendants here. The income of such a company is created by the use of its economic capital in the hands of those who make and sell its goods. The statute at bar allocates that income upon the basis of capital, real and personal, and of accounts receivable. These last are divided into sales and pay for "services." Sales are some measure of the work of production and marketing. Of course, they are not a certain measure, but nothing is. If all the business of the corporation is done upon the same term of credit, accounts receivable on sales furnish a tolerable measure by which to apportion such work. Capital, the other element, is included directly. If either were omitted, an argument might be made against the propriety of the formula, for each is regarded as a factor in production.

This is indeed a rough rule and may in application work unevenly, but every rule must. Even if each transaction were analyzed, the result would be, as one of the plaintiff's own witnesses put it, "a series of arbitrary decisions which would not be based on the facts at all." The consequence is not, as the plaintiff's argument would have it, to deprive the state of all power to tax, but to require no more, at least as a presumptive rule, than an honest allocation which shall avoid gross inequities. Perhaps the taxpayer must have the right to show that parts of the foreign assets are not functionally connected with the local business; perhaps he must have the further right to show that though functionally a part, as were the terminals in Wallace v. Hines, supra, the formula works with gross inequity. I think he has both these rights. Section 211, subd. 7, gives the Commission the power to call upon the taxpayer to return "such other facts" as it thinks relevant. If the formula were absolute they would be irrelevant. Section 218 gives the Commission on revision, if shown that there have been "included taxes or other charges which could not have been lawfully demanded," power to reassess the tax "according to law and the facts." These provisions in my judgment give the assessors a latitude outside

the formula which would cover its inequitable application. Until it conclusively appears that in its administration they have declined so to interpret their powers, I see no reason for holding otherwise.

It is not clear that the whole statute was under attack in People ex rel. Alpha, etc., Co. v. Knapp, 230 N. Y. 48, 129 N. E. 202, but the effect of the decision was certainly to sustain the act after excising the two objectionable features. Perhaps the propriety of the general methods of allocation was thought to be too obvious for comment. In any event, the case stands for a latitudinarian interpretation of the statute as a whole, and I shall assume that it only lays down a formula which admits of adaptation in those cases in which its literal application would give a clear overvaluation to the local assets, and where the necessary conclusion must be that foreign income is taxed. A statute must be saved by friendly interpretation so long as it can.

[4] The statute being valid on its face, the next question is whether in its application the plaintiff has suffered a constitutional wrong. It filed two returns under the statute, one on July 17, 1918, and one on December 14, 1917; but the proof shows that the Commission followed neither. Their action is based upon a statement contained in the record, but I cannot find any evidence of how they reached it. In any event, the plaintiff made no application for a revision under section 218. Notice of the "audit," or assessment under section 219a, was sent to the plaintiff on July 16, 1919, and the plaintiff began this suit on October 7 of that year. Now it urges that its munitions business, which was conducted entirely outside the state and showed a much larger profit, should not have been treated as part of its silverware business. I should be disposed to think that such a business fell within the rule of Fargo v. Hart, supra, Meyer v. Wells, Fargo & Co., supra, and People ex rel. Alpha, etc., Co. v. Knapp, supra, and surely it was within that of Union Tank Line v. Wright, supra, and Wallace v. Hines, supra. But the plaintiff brought none of this to the attention of the Tax Commission. All they had to go upon was the plaintiff's returns and such other undisclosed figures as resulted in their assessment. Prima facie they were justified in assuming that the income returned was upon a unitary business, and it was the plaintiff's duty either by a rider on its returns, or, by applying for a revision under section 218, to bring the facts to the attention of the Commission and to demand a separation of the two businesses. If this had been denied them, then perhaps the Commission's action might have been unconstitutional and open to collateral attack under the doctrine first announced in Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. Yet even then the Commission's "audit" would have been in effect an assessment, and a bill in equity will not ordinarily lie to enjoin a tax levied under an assessment merely for error of assessors. State Railroad Tax Cases, 92 U. S. 575, 613–615, 23 L. Ed. 663; Chic., etc., R. R. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636. I do not mean that there was in fact an error, because I cannot see how the Commission could have divided out the munitions business of which they knew

nothing, but, if they had known of and disregarded it, the plaintiff was bound to demand a revision. The means given it (section 218) were constitutionally sufficient in the first instance, Hagar v. Reclamation Dist., 111 U. S. 701, 710, 711, 4 Sup. Ct. 663, 28 L. Ed. 569; Gallup v. Schmidt, 183 U. S. 300, 307, 22 Sup. Ct. 162, 46 L. Ed. 207; Wells, Fargo & Co. v. Nevada, 248 U. S. 165, 168, 39 Sup. Ct. 62, 63 L. Ed. 190, and the assessors might well have acceded to their position.

The tax as actually assessed contained a duplication of the accounts receivable. The assessors followed an interpretation of the law condemned in People ex rel. Soc. An. v. Knapp, 191 App. Div. 701, 182 N. Y. Supp. 448, affirmed on opinion below, 230 N. Y. 557, 130 N. E. 892. This section had already been changed by chapter 417 of the Laws of 1918, but for some reason the Tax Commission followed the old statute, perhaps because that chapter, unlike chapter 276 of the Laws of 1918, did not operate retroactively. The difference is less than $300, but of course that should not determine my decision. The blunder was, at most, only an error of the assessors in applying the law, and as in the case of the munitions business, the plaintiff was bound to ask for a revision. Moreover, in this case, whatever may be said about the other, there could be no possible ground I think for a bill in equity. By no construction could it be supposed that such an error in estimating the tax was an unconstitutional taking of property, as might be argued in the case of the munitions business. While, therefore, on the facts as stated, the tax both in respect of this and of the inclusion of the munitions business was erroneous, the plaintiff did not choose to avail itself of that process of law which was accorded to it, and therefore was not the victim of any unconstitutional action by the Commission.

[5] There remains only the question of the exclusion of the federal taxes paid by the plaintiff during the year in question. As the Court of Appeals has decided against the plaintiff on this question, People ex rel. Barcalo v. Knapp, 227 N. Y. 64, 124 N. E. 107, the contention resolves itself into one of constitutionality. It is alleged that this effects a discrimination against foreign corporations and in favor of domestic. It is quite true that the foreign corporation has less income because of the federal tax, but so has a domestic. If the taxes were in like proportion for all incomes, the exclusion of federal taxes would accomplish nothing except that the taxed incomes of each class of corporations would be higher than on the plaintiff's theory they should be. There would be no discrimination in that. Federal taxes do not in fact bear in equal proportion upon all incomes, but they are as apt to bear heavily on domestic as on foreign corporations, and there is no warrant for saying that foreign corporations are subject to discrimination.

The United States and the State of New York in such matters are independent powers, neither of which need yield to the other. Each taxes, and so seizes, a part of the same income; but there is no more reason why the state must recognize the deductions of the United States before calculating its percentages than that the United States must recognize those of the state, which it surely need not, if it choose to ignore

them. All that can be asked is that the state recognize all deductions in assessing foreign corporations that it does in assessing domestic. Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. 460. As it recognizes neither, all are treated equally, though it be with equal severity.

I conclude, therefore, that the statute lays down a valid prima facie rule for ascertaining the local income of a foreign corporation, and that it may tax it; that in so far as the application of that rule in the case at bar may have been unequal, because some of the assets outside the state did not contribute any value to the local assets, and in so far as the assessors misapplied the statute in laying the assessment, the plaintiff had its opportunity to complain and procure a reassessment, and that having failed to do so, no bill in equity lies to reassess the tax; and that the state need not deduct the United States taxes in estimating the taxable income of a foreign corporation.

It follows that the bill must be dismissed, with costs.

SELDEN BRECK CONSTRUCTION CO. v. REGENTS OF UNIVERSITY OF MICHIGAN.

(District Court, E. D. Michigan, S. D. August 15, 1921.)

No. 6280.

1. **Contracts ⟸299(2)—Provision for extension of building contract held not to exempt owner from liability for breach causing delay.**
   A provision of a contract for construction of a building to be completed by a time fixed, that, should the contractor be delayed in the prosecution of the work through the owner or other contractors employed by it, the time of completion should be extended for a period equivalent to the time lost provided a claim therefor was presented by the contractor within 48 hours of the occurrence of such delay, *held* for the benefit of the contractor and not to exempt the owner from liability for damages resulting to the contractor from its breaches of the contract by which the work was seriously delayed.

2. **Contracts ⟸299(2)—Building contractor not required to abandon contract because of breach by owner causing delay.**
   On breach of a building contract by the owner which delays the contractor in his work, the latter is not obliged to abandon such work, but may elect to continue with it, and on performance on his part is entitled to recover his damages sustained as a result of the delay.

3. **Contracts ⟸305(1)—Acceptance of extension by building contractor not waiver of right to damages for breach causing delay.**
   Acceptance by a contractor for a building of an extension of time for its completion, and completion within such time, *held* not a waiver of the right to recover damages for breaches by the owner causing the delay.

At Law. Action by the Selden Breck Construction Company against the Regents of the University of Michigan. On demurrer to declaration. Overruled.

Stellwagen, MacKay & Wade, of Detroit, Mich., for plaintiff.
Beaumont, Smith & Harris, of Detroit, Mich., for defendant.

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

'TUTTLE, District Judge. This cause is now before the court on demurrer to the declaration.

The action is trespass on the case on promises, and was brought to recover damages alleged to have been sustained by the plaintiff, a Missouri corporation, by reason of a breach by the defendant, a Michigan corporation, of a certain contract entered into between the parties hereto, for the furnishing by the plaintiff of labor and material for the construction of a library building for the defendant to be erected upon the campus of the University of Michigan, at Ann Arbor, Mich., which is under the control of the defendant board of regents. The damages claimed by plaintiff, which exceed the necessary jurisdictional amount, are alleged to have been caused by delays to which the plaintiff was subjected in completing its work under the contract as a result of the failure of defendant to perform certain of its duties under such contract.

The declaration alleges that it was provided in said contract that the work thereunder should be done in accordance with certain drawings and specifications and certain "General Conditions" therein declared to be a part of said specifications, all of which were to be prepared and furnished by a certain architect; that it was further provided that plaintiff was to have possession of the building then existing, with the exception of the stacks, by March 1, 1917, so that plaintiff could commence operations on that date and could complete the entire work by January 1, 1918, the date agreed on for such completion; that defendant appointed the said architect as its agent for the purpose of supervising the construction of said building, passing on the workmanship thereof, and furnishing architects' certificates upon completion of various portions of the building; that in accordance with the terms of said contract, and with the usage and custom pertaining thereto, it was the duty of said architect to furnish to the plaintiff, drawings, details, and information covering certain parts of the work, in order that plaintiff might furnish the same to its subcontractors and proceed promptly with the work according to the contract; that it was of the very essence of said contract that all details and information should be furnished by said architect to plaintiff promptly and without delay, for the reason that the cost of labor and building material was constantly increasing during the period of the war, and that only by the erection of said building as quickly as possible and in strict accordance with the terms of said contract could plaintiff avert serious losses, that defendant failed to deliver possession of the aforesaid building by March 1, 1917, as it had agreed, and did not deliver such possession until the middle of July, 1917, so that plaintiff was unable to commence erection of the new building, according to its contract, until the latter time; that the defendant and its agent, the said architect, in violation of said contract, neglected to furnish to plaintiff the necessary details and information covering work on various sections of the said new building, although often requested so to do; that by reason of the breach by the defendant of the said contract in the respects mentioned, plaintiff was compelled to release its subcontractors from their agreements covering the furnishing of labor and material, and to secure such work

from them and from others at a greatly advanced cost, due to the increased cost of building and material at the later period, and that as a further result of such breach of contract, plaintiff was unable to complete said building until several months after the date provided by said contract for such completion, and at a cost greatly in excess of the contract price; and that thereby plaintiff has sustained loss in the sum of $150,000.

The demurrer is based upon the following grounds: (1) That the contract contained an express provision for an extension of time for the completion of the contract by the plaintiff, if it should be delayed by the defendant, and that the effect of such provision was to exclude any right on the part of the plaintiff to recover pecuniary damages by reason of such delay; (2) that it appears from the declaration that, notwithstanding any claimed delay or default on the part of defendant, the plaintiff thereafter proceeded with, and completed, its work under the contract, and that therefore plaintiff waived any right which it may have had to recover damages because of any such delay by the defendant; and (3) that it appears from the declaration that plaintiff accepted an extension of the time within which it was required to finish its work, and that the completion of such work within the time so extended was in lieu of any claims for damages. These defenses will be considered in the order named.

[1] 1. Section 46 of the General Conditions forming part of the contract provides as follows:

"The owner is not to be held responsible for any damage incurred by the contractor through the fault of any other contractor employed by the owner. Should the contractor be delayed in the prosecution of the work by reason of the above cause, or through the owner, the time of completion shall be extended for a period equivalent to the time lost, which period shall be determined by the architect, but no such allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of such delay."

The contention of defendant that this provision limits and measures the extent of the rights and remedy of the plaintiff in the event of delay occasioned through the fault of the defendant and deprives the plaintiff of the right to recover damages caused through such delay cannot, in my opinion, be sustained. In the absence of an express stipulation relieving the defendant from liability for damages caused by its breach of this contract, it would, of course, be liable therefor. The language of the provision thus invoked and relied upon by defendant as a basis for exemption from such liability certainly does not in terms provide for such exemption, and to have that effect a meaning must be read into it which is not expressed in the words used. There seems to be no ambiguity in this language. It merely provides that if the plaintiff be delayed through the fault of any other contractor employed by the defendant, or through the defendant, "the time of completion shall be extended for a period equivalent to the time lost." The "time of completion" is obviously the period of time referred to in the clause of the contract, copy of which is attached to the declaration, providing that the plaintiff "is to complete the entire

work upon or before January 1, 1918." The purpose, then, of the condition invoked by defendant, is, manifestly, to relieve the plaintiff from the consequences of a failure on its part to complete its work by the date mentioned, if such failure be caused by the fault of the defendant, by allowing to the plaintiff an extension of the time of completion for a period "equivalent to the time lost by reason of such fault of defendant." That this was intended to be an allowance to, and not a limitation upon, the plaintiff, is further indicated by the concluding clause in this section providing that such an "allowance" will not "be made" unless a claim therefor is presented within the time therein specified.

Although some authority is cited apparently to the contrary, I am unable to accept the reasoning or agree with the conclusion involved in the theory of the defendant in support of this contention. I am satisfied that the provision in question, properly construed, was intended to, and does, create an exemption in favor of the plaintiff, and not of the defendant, and that to interpret it otherwise would be to import into it a meaning which the parties thereto have not themselves expressed. Nelson v. Pickwick Associated Co., 30 Ill. App. 333; W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210; Del Genovese v. Third Avenue R. R. Co., 13 App. Div. 412, 43 N. Y. Supp. 8; Id., 162 N. Y. 614, 57 N. E. 1108.

[2] 2. It is further urged by defendant that the act of plaintiff in proceeding with, and completing, its work under the contract after the alleged breach thereof by defendant, operated as a waiver of any right to recover damages caused by such breach. I cannot agree with this contention. Consideration of the subject satisfies me that the correct rule is that upon breach of a building contract by the failure of the owner to perform his obligations under such contract, which delays the contractor in completing his work thereunder, the latter is not obliged to abandon such work, but may elect to continue therewith after such breach and, upon performance of the contract on his part, is entitled to recover the damages sustained by him as a result of the delay caused by such owner. W. H. Stubbings Co. v. World's Columbian Exposition Co., supra; Allamon v. Albany, 43 Barb. (N. Y.) 33; Florence Oil & Refining Co. v. Reeves, 13 Colo. App. 95, 56 Pac. 674; 9 Corpus Juris, 793.

[3] 3. The claim by defendant that the acceptance by the plaintiff of an extension of the time within which it was bound by the contract to finish its work, and the completion by plaintiff of the building within the time so extended, operated to deprive the plaintiff of any right to recover damages resulting from the alleged breach by defendant, if such claim be intended to be separate from, and in addition to, the contentions already considered, is disposed of by the conclusions reached with respect to such contentions, as hereinbefore indicated. The considerations pointed out in that connection are equally applicable and controlling, in principle, here; from which it results that the demurrer must be overruled.

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON, Atty. Gen. of State of New York, et al.

(District Court, S. D. New York. February 28, 1921.)

No. 791.

1. Gas ⇐14(1)—**Decree impounding part of rate collected until fixed by state authority held not to require that power be given to Public Service Commission to fix rate retroactively.**
   A decree limiting the rate to be charged by a gas company, and impounding a certain part of the money collected, to be later distributed according to a rate eventually determined by authority of the state, does not require that the power given to the Public Service Commission extend to fixing a rate to be effective retroactively.

2. Gas ⇐14(1)—**Motion to extend time fixed by decree limiting rate to be charged for gas denied.**
   Where the elements of cost production of gas are disputed, and no evidence is present, except affidavits concerning the cost, a definite rate will not be set, and the limitation of the rate by a former decree, which impounded a portion of the money to be distributed according to the findings of the Public Service Commission, to be effective until March 1, 1921, will not be extended.

3. Gas ⇐14(1)—**Time fixed by decree for impounding part of charges collected, to be distributed according to rate to be fixed by Public Service Commission, extended.**
   Where a new rate for gas will not be fixed by the Public Service Commission until after decision on appeal from a decree impounding a part of the charges collected, to be distributed according to the rate to be fixed by such commission, the time fixed by the decree for impounding will be extended for three months after the determination of the appeal, in order to give the Public Service Commission time to set a new rate.

In Equity. Suit by the Consolidated Gas Company of New York against Charles D. Newton, Attorney General of the State of New York, and others. Application by defendants for an extension of time fixed by decree for turning over to plaintiff the sums impounded. Granted in part; denied in part.

For former decree, see 267 Fed. 231. See, also, 256 Fed. 238; 260 Fed. 244.

Shearman & Sterling, of New York City, for complainant.
Godfrey Goldmark, of New York City, for defendants.

LEARNED HAND, District Judge. In the decrees entered herein (267 Fed. 231) on August 4 and August 11, 1920, I provided that until March 1, 1921, the complainant should be limited to $1.20 in the price it might charge for gas, and that, if before that time a rate should be fixed by competent public authority, the master should distribute the sum deposited in court above 80 cents as though that rate had been in force from the date of the decree, but if no rate had been promulgated that he should turn over the sums impounded to the plaintiff. That period has now expired, and the Legislature of New York has not yet given power to any public authority to fix a rate in excess

of 80 cents, and of course no such rate has been fixed. The defendants, therefore, apply for an extension of the period, either indefinitely or to some stated time, the limit to remain as before, and the provision for distribution in accordance with the new rate to be retained. The plaintiff answers by insisting that the costs of manufacture and distribution have greatly increased in seven months' time, and that if any limit is to be fixed it must be much in excess of $1.20.

Although the state has not yet taken any final action, its authorities have not been idle, for there is pending in the Legislature, acting on the recommendation of the Governor, a bill which, as presented, gives the Public Service Commission power to fix a rate, regardless of existing statutes, and, as printed, summarily to establish a temporary rate, which shall supersede existing rates for a period in the aggregate of not over nine months. It is clear that, unless changed, the commission would under this bill have power at once to deal with the situation here arising. The plaintiff suggests that the provisions for temporary rates in advance of full hearing might be unconstitutional, but, if so, conceivably this possible defect may be remedied by amending the bill; at least I may not assume that this will not be done. For example, when enacted, it may provide that the temporary rate, if a reduction, should merely authorize the commission to impound the difference and make an eventual award in accordance with more deliberate findings. Indeed, such may be the correct interpretation of the commission's powers as the bill stands. As section 72 reads at present, the commission will certainly have power to impound some of the moneys collected for certain purposes which it may order the companies to realize.

[1] As regards this proposed legislation, the assertion was made in argument that the Public Service Commission must be granted power to fix a rate retroactively, if the decree is to stand, and that this has not been proposed. This is a misconception of the meaning of the decree, which required no such powers in the commission. The power assumed in the decree was to impound over a limited period the difference between the statutory rate and what the plaintiff charged, and to distribute it later, accepting the rate eventually fixed as the proper measure of distribution for that period. The commission does not fix the rate, if by that is meant enforcing it in invitum. The court merely accepts it as proper evidence over the period, in distributing the sums collected through the voluntary acceptance by the plaintiff of the benefit of the injunction. That acceptance has always operated in futuro. As showing how mistaken the assumption is, it may be observed that, if the plaintiff had chosen to await the action of the defendants, it would have been free to charge and keep whatever it wished; the statutory rate having in fact become invalid. It was, however, not content with that course, but demanded the extraordinary relief of an injunction to prevent the defendants from moving against it at all. In so doing it subjected itself to all equitable conditions upon that relief, from which it could and can still at any moment be free by vacating the decree. The sole question is whether it is an equitable condition to insist that the court shall distribute the sums collected as nearly as it can in accordance with the long-expressed policy of the state and with

the eventual action of its officials. In pursuance of that purpose, it is not in the least essential that the commission should have power to fix a rate retroactively.

[2] The first question is of an extension of the limit of $1.20. When this was set, all the data were taken from the evidence at the hearing, and the limit was based upon the utmost sum which it could be supposed that the plaintiff could be allowed to charge by the Public Service Commission when it acted. At that time the plaintiff was apparently content with the limit, because on the reargument it challenged only what it mistakenly calls the "retroactive" feature of the decree. Since that time it has had over six months' experience with that limit, and it presents figures which, if true, show that it cannot make a profit of 3 per cent., since its cost of manufacture and distribution have risen to over $1.10. With a possible profit of $.32, and income taxes of $.03, the rate comes to more than $1.45. Indeed, its estimates, based upon the prices obtaining at the end of the period, are somewhat higher. Some of the items, as, for example, the difference between gas produced and gas sold at 10 per cent., are clearly too high; but the difference is not very substantial in result. The defendants, on the other hand, challenge the figures so produced, especially the cost of oil and coal, which account for most of the increase.

The issue, as I have already said, is misconceived. Of course, I cannot at present undertake, especially on affidavits, to decide whether the plaintiff's claims are too high, nor would it be of service if I could. Nothing can be decided as to how much the plaintiff shall eventually retain, but only how much it shall presently collect. In that I should have to be guided substantially by what the plaintiff claims, so long as it makes a prima facie case for its figures. The evidence is not sufficient to make any finding, and this is in any event not the time to do so. Moreover, it has proved impossible to avoid the consequence that the limit, if fixed, shall be supposed to be a rate, and it would be unfortunate to give any color to the supposition that a rate of $1.45 had the approval of a court. Besides, the rights of the public are in any case protected, if the plaintiff must eventually account for all sums collected. Finally, it must be conceded that since my decision there have been several rulings to the contrary, and between us the Supreme Court alone can decide. If I set a limit, and that court eventually decides that I had no such power, the damage will be finally consummated; but, if it holds that I have power to distribute the fund according to the rate, the money will be at hand, and nothing will be lost to consumers, except the temporary use of their money, on which they are being secured their interest. For all these reasons, it appears to me, therefore, best not to extend the limitation beyond the original period.

[3] I think, however, that the period should be extended over which the new rate, when promulgated, should relate back. I may assume that by May 1, 1921, the Legislature will have finally determined what course to take, and whether it deems best to give power to the commission summarily to allow a temporary rate with or without an impounding feature. Hence, if there were no appeal pending I should think that in three months—that is, by August 1, 1921—the plaintiff

ought not to be required any longer to deposit its collections in court. But it is scarcely possible to suppose that any commission would fix a new rate until the appeal from this decree is determined, and therefore it appears to me that the impounding should continue for an adequate season after that, say three months. The sums impounded should, however, be held for a further time, and until the commission has had a chance to come to more than a mere summary conclusion. They should therefore be held until the rate is finally settled by the commission and be then distributed in accordance with that rate, subject to qualifications I shall mention in a moment.

The plaintiff argues that that rate, which may not be fixed for many months after the commission begins its inquiry, will, when fixed, be no index of the proper rate during the period of accumulation. That, of course, may be true. The period may include a "peak" of prices, which would make inadequate a rate proper enough after the "peak" had passed. The answer for the present is that we cannot now tell what the future will show, and that, even though there be such a "peak," it does not follow that the rate, when fixed, ought not to apply over the period. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, is a direct authority that for limited periods the rate need not insure a sufficient profit, and it would by no means follow that the rate as fixed should not be held applicable throughout the period, despite a "peak." Prima facie I think it ought, unless the plaintiff can show the contrary.

Moreover, while the commission will presumably have no power to make a retroactive rate, it has large powers of investigation, and it may in fact be empowered to make findings as to the proper rate over the period in question, even though it cannot prescribe for it. And even though the findings and rate were not rigidly applicable, it is nearly certain that some of the findings and principles on which the commission will proceed will be of extended application, which could in very substantial part be used by the court in distributing the moneys. Such, for example, might well be the rate of return, the valuation of the "rate base," the propriety of the oil contract, the loss of gas, and many others. Nor, indeed, is it inconceivable that the commission or some properly delegated officer might consent to act as master of the court, if the distribution required an independent inquiry. As I conceive it, the court is free, by any means it can within the limits of equity procedure, to distribute the fund in the closest practicable conformity with the action of the state authorities when made. The court has such latitude as may be necessary to accomplish that result. Some way should be found, I think, to prevent the plaintiff from enjoying a long period during which it may charge any rate it chooses. Certainly that is contrary to the long-standing policy of the state.

The defendants' motion I have therefore disposed of as follows: The motion to fix a limit to the plaintiff's charges after March 1, 1921, is denied; the motion to extend the period for impounding is granted, by extending that period till three months after the appeal is decided, unless the commission before that period expires has put in force a new rate, temporary or final; the moneys so collected the master will dis-

tribute when the commission has finally fixed a rate, and in accordance with that rate, unless the plaintiff successfully shows cause to the contrary. In that case it will be distributed as nearly as possible in conformity with the findings of the commission and the principles on which the new rate has been fixed.

An order in accordance with the foregoing is filed herewith.

MAZZA v. J. G. WHITE ENGINEERING CO.

STATHATOS & CO., Limited, v. INTERNATIONAL FREIGHTING CORPORATION.

(District Court, S. D. New York. June 16, 1921.)

1. **Shipping ⇐52—Agent making charter for undisclosed principal liable as charterer.**
   In a suit by an owner for breach of charter, it is no defense that in making the charter respondent acted as agent, where such fact and the name of the principal were not disclosed.

2. **Shipping ⇐39—Construction of special provision of charter party.**
   Where, in a charter party prepared by the English agents of the owner, though made and to be performed in the United States, the parties have inserted a special provision which is for the benefit of the charterer, so that the contract in fact falls within an English decision, in interpreting the change that decision becomes a particularly persuasive authority.

3. **Shipping ⇐45—Charterer held excused from delays in loading from any cause in fact beyond its control.**
   A provision of a charter party excepting from lay days for loading time lost through "any cause beyond the control of the charterers, whatsoever," *held* to excuse any delay caused in fact by circumstances which the charterer could not control, but to a similar charter party in which the word "whatsoever" is omitted the rule ejusdem generis applies.

4. **Shipping ⇐39—Exceptions in charter party construed as mutual.**
   Exceptions in a clause of a charter party containing mutual agreements by owner and charterer construed as being themselves mutual, though not so designated.

5. **Shipping ⇐39—Exception in charter party of restraints of rulers held to cover transportation of coal cargo from mines to port of loading.**
   Exception in a charter party of restraints of rulers *held* to cover transportation of coal, which was to constitute the cargo, from mines to port, where it was known to both parties that the practice at the port of loading was not to store coal in quantity, but to load direct from cars from the mines, and to excuse the charterer for failure to load within the time prescribed, where it was caused by an order of the Interstate Commerce Commission establishing priorities and preferences.

In Admiralty. Suits by Edward Mazza against the J. G. White Engineering Company, and by Stathatos & Co., Limited, against the International Freighting Corporation, and four other cases. On exceptions by libelants to two articles of answers. Sustained in part.

The case arises on the libelant's exceptions to two articles (tenth and eleventh) of the answer for insufficiency.

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

The libel was filed by the owner for damages arising for a breach of the charter party under which the respondent chartered a steamer for a voyage from Baltimore to Genoa with a cargo of coal. The material part of the charter party for the purposes of the case are clauses 3 and 7, which read as follows:

"3. The cargo to be loaded with customary despatch but at not less than 1,500 tons per running day, Sundays and legal holidays excepted, lay days commencing, * * * steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours, 9 a. m. to 5 p. m., or 1 p. m. on Saturdays. * * * Any time lost through riots, strikes, lockouts, or any disputes 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, frost, fogs, storms or any cause beyond the control of the charterers, whatsoever, 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 runing 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 aforementioned causes, the lay hours to be extended proportionately to the diminution of output arising from such partial holiday or stoppage. * * *"

"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 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." Comp. St. §§ 8029–8035.

The libelant alleges readiness and tender of the vessel and the respondent's failure to furnish a cargo.

The tenth article of the answer alleges that the respondent was acting as agent for Société Co-operative Suisse de Charbons, of Basle, Switzerland, on whose behalf the charter party was made, as appeared from the approval signed by one Rohner, Chief of the Official Purchasing Office of the Legation of Switzerland.

The eleventh article is too long to set out in extenso; in substance it is as follows: That at the time in question no coal was stored at any of the loading ports named in the charter party, but it was all transported in freight cars always direct to the vessels into which it was dumped, as was well known to the libelants. That strikes and labor troubles arose before July 9, when the vessel was tendered, which greatly impeded the transportation and delivery of coal. That by reason of the situation so arising the Interstate Commerce Commission declared an emergency to exist, and established by valid orders priorities, preferences, and conditions in the shipment of coal. That all carriers obeyed these orders, and that the respondent by reason of their provisions was unable to obtain a cargo, although it made diligent efforts to do so. That the condition so arising continued for six running days, at the end whereof the respondent denounced the charter party as entitled to do.

Charles R. Hickox, of New York City, for exceptant.
Roscoe H. Hupper, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] The mere fact that the charter party was approved by the purchasing officer of the Swiss legation did not make the contract one with the Swiss Coal Company. The only charterer named was the respondent, and even though the Swiss Company was in fact an undisclosed principal, it is nothing to the purpose. To escape liability the agent must disclose the identity of the undisclosed principal. Horan v. Hughes (D. C.) 129 Fed. 248, affirmed 129 Fed. 1005, 64 C. C. A. 581 (C. C. A. 2d). Here there was no declaration, in the document or outside, of the identity of the principal. All that appeared was that the Swiss Republic approved, and the most that that might signify was that they had some interest in the contract. It now transpires that a Swiss corporation, prima facie at least quite independent of the Swiss Republic, was the principal. There was no intimation, even, of that, and I can see no ground for the defense. The exception to the tenth article is sustained.

I shall assume that the scope of the eleventh article is that the orders of the Interstate Commerce Commission absolutely prevented the respondent from obtaining a cargo for the ship. It is clear that the pleader does not mean to aver that it was so prevented by the strikes and labor troubles alone. The pleading at least on exception must be taken to mean that the labor troubles caused so much delay and dislocation of transportation that the Interstate Commerce Commission found it necessary to intervene, and that its intervention proved a fatal obstacle to the respondent's performance. The excuse is therefore necessarily based either upon the frustration of the venture by an event so unexpected as to amount to excuse, or upon a situation which was within the exceptions of the charter party (clauses nos. 3 and 7).

[2] In Larson v. Sylvester, [1908] A. C. 295, the House of Lords held that a clause which read "hindrances of what kind soever" should not be construed under the usual rule, ejusdem generis, but enabled the charterer to take advantage of any cause which in fact prevented his performance. It must be owned that the distinction is verbal and narrow, but the law has been so in England since 1908. It is extremely probable that the word "whatsoever," which was written into the printed form, was added to fall within the doctrine of that case; at least it is a strange coincidence if it be not so. Moreover, the charter party was prepared on a form of the owner's agents, and it is fair to assume against them that in so preparing it, and inserting in writing the word in question, they meant to give the charterer the benefit of that rule. The agents are the well-known English house of Furness, Withy & Co., Limited, and they presumably dealt with the English law in mind. Of course, I do not mean that the interpretation of a writing made in this country and to be performed here, as respects loading, is as matter of law to be interpreted in accordance with the law of England unless the parties so agree, which they have not done. All I

mean is that where they have especially conformed their contracts so as in fact to fall within an English decision, in the interpretation of the change (made as this was for the charterer's benefit), that decision becomes a particularly persuasive authority.

England being the greatest maritime nation, we have always accorded much weight to the decisions of its highest courts in all matters maritime. I should be disposed, I think, to yield to the authority of that court, even though I might be in considerable doubt. However, it does not seem to me that there is really any room for doubt in the case at bar, even without the authority in question. What must be the inevitable conclusion from the conduct of an owner who had before him a printed form which limited the charterer's excuses to matters ejusdem generis with riots, strikes, accidents, and railway obstructions, and who expressly inserted the word "whatsoever," which was not necessary to the clause as it stood, and which could therefore have no meaning except make the excuses general? I can imagine that if the word had occurred in the printed form it might be treated merely as scrivener's tautology, but the deliberate insertion of it in writing necessarily presupposes a purpose to extend the charterer's rights.

[3] Therefore I conclude that the clause, "any cause beyond the control of the charterers whatsoever," excused any delay caused in fact by circumstances which the charterer could not control, and I overrule the exception to the eleventh article in those cases in which the word "whatsoever" appears.

In one of the cases, however, it does not appear, and the case stands with the rule ejusdem generis applicable to clause 3 of the charter party. I have just considered this question at perhaps too great length in The Poznan, 275 Fed. ——, filed July 9, 1921, and it will be unnecessary to discuss it again. The only distinction between that case and this is that if I am to find a "genus" or single "category" within which under Lord Justice Farwell's doctrine all the enumerated excuses must be comprised, it would be more difficult to do so than in the bill of lading of the Poznan, and perhaps it would be impossible. That doctrine, as I there said, does not appear to me to be based upon the authorities. I recognize its logical perfection, but that seems to me its very imperfection when applied to everyday affairs. I do not believe that men mean anything so definite and conclusive when they draw up documents of this character. The doctrine has been disapproved several times in England since it was announced, and with the greatest deference, I cannot believe that it is the law there, or should be the law here. Therefore I hold that clause 3 does not excuse the charterer in the libel of the owners of the steamship Morte.

[4] The exceptions in the seventh clause are divided into two sentences and not run together as is usual. Neither of the sentences contains the words "mutually excepted," and the question is whether they are to be so interpreted, or are to be taken to protect only the shipowner. On authority this question seems to be in considerable doubt. I have been referred to no American cases which throw any light upon it. In Hughes v. Hoskins (D. C.) 136 Fed. 436, and M. O. H. of

West Indies v. Hannevig (C. C. A.) 264 Fed. 311, the exception was mutual in terms. In McLeod v. 1,600 Tons of Soda (D. C.) 55 Fed. 528, although it was not in form mutual, the context showed that that was unquestionably so intended.

In England the case seems first to have come up before Lord Kenyon, in 1801, in Blight v. Page, 3 B. & P. 295, note, in a case where the exceptions were directly adjacent to the owner's covenants, and was ruled against the charterer. Lord Alvanley, in Touteng v. Hubbard, 3 B. & P. 292, made the same ruling obiter, and there were actual decisions to the the same effect in Sjoerds v. Luscombe, 16 East, 201, and Storer v. Gordon, 3 M. & S. 309. In Ford v. Cotesworth, L. R. 5 Q. B. 544, the charterer was excused on the ground that the discharge was prevented by vis major, but Mr. Baron Martin, at page 548, declared that he regarded the exceptions as mutual in any event. In Barrie v. Peruvian Corporation, 2 Com. Cas. 50, Mr. Justice Mathew examined the whole clause in which the exceptions were contained, and because it began and ended with mutual provisions, held that the exceptions were also to be considered as mutual. Mr. Justice Bigham, who had been counsel for the owners in Barrie v. Peruvian Corporation, supra, followed that case, though against his judgment, in Newman, etc., Co. v. British, etc., Co. (1903) 1 K. B. 262, and Mr. Justice Scrutton did the same thing in Embiricos v. Sydney Reid Co., 19 Com. Cas. 263. On the other hand, Mr. Justice Greer, in Aktieselskabet Frank v. Namaqua, etc., Co., 25 Com. Cas. 212, reached a different result in a case where the only exceptions were in the second of three clauses.

The first clause concerned the charterer's loading, and the third his discharge; but the second contained nothing which could be deemed mutual, unless it were the exceptions. In this respect it differed from Barrie v. Peruvian Corporation, supra. In Cazalet v. Morris (1916) Session Cases, 952, the Scotch Court of Session, after a full discussion, declined to follow Barrie v. Peruvian Corporation, supra; but in that case it did not appear that any part of the clause in which the exceptions occurred was mutual. Mr. Carver, section 150, seems to understand that if the exceptions are only annexed to the shipowner's covenants, he alone is to have the benefit of them, but if they follow several clauses which relate to the obligations of both parties, they are to be construed mutually.

In the case at bar the probable intention of separating the exceptions in clause 7 into two sentences was to distinguish between such events as might be due to the crew's negligence and such as could not, though it must be admitted that this division is not altogether accurate. I think it hardly probable that there was a deliberate purpose to make the first exceptions mutual, since it would have been quite easy to include the word "mutual," had that been so intended. However, the clause as a whole contains a sentence expressly in the charterer's favor, and the provision for the Harter Act at the end begins with the words, "it is also mutually agreed." In such documents I think that any attempt by refined analysis to piece together a consistent meaning is apt to prove delusive; the interpretation must be cruder, because the intent is

somewhat vague. While I recognize that the occurrence of the word "mutually," in the last sentence, and its omission from the first sentence, is an argument in favor of the owner, on the other hand, it must be observed that a mere emphasis on the word "also" would be an answer to that argument. On the whole, I think it safer to adopt the canon of interpretation of the English courts; that is, to limit the rule that the exceptions favor only the owner to those cases where they are either annexed specifically to the owner's obligations (in which case there is no doubt), or—as in Aktieselskabet Frank v. Namaqua, etc., Co., supra, —where they occur in a clause which contains no provisions touching the charterer, and where all his rights and duties are therefore to be found in entirely different clauses. As the exceptions in this case occur in a clause which contains mutual agreements, I construe them as being themselves mutual.

It is therefore unnecessary to consider whether independently of the exception the charterer would be excused under the doctrine of vis major. Ford v. Cotesworth, supra; M. O. H. of West Indies v. Hannevig, supra.

In Stathatos et al. v. International Freighting Corporation, the exception was mutual and the point does not arise.

[5] The only remaining question in all the suits is whether the matter alleged protects the respondents, that is, whether the exception covers the restraint of rulers over transportation from the mine to the port. It is alleged that it was known to both parties that the practice at the ports in question was not to store coal in quantity, but to carry each shipment direct from the mines and to dump it on board from the cars. In analogous cases it has been held that any interruption of transportation between such a place of storage and the ship is within the exception. Hudson v. Ede, L. R. 3 Q. B. 412; Smith et al. v. Rosario, etc., Ltd., (1893) 2 Q. B. D. 323; Allerton v. Falk, 6 Asp. 287. Indeed, under clause 3 the matter is not even open to argument. Under clause 7, it is perhaps debatable, but I shall follow the English cases.

I do not find anything in Judge Rose's opinion in Hellenic, etc., Co. v. Archibald McNeil & Co., Inc. (D. C.) 273 Fed. 290, which conflicts with what I have said. He did not determine any of the questions raised by the pleadings here, but was passing on the facts. It does not, of course, follow that the respondents can make good their defenses any more than they did before Judge Rose, but if they show an absolute prevention from loading any cargo, owing to the orders of the Interstate Commerce Commission, I think they are excused from performance.

The exceptions are therefore overruled to the eleventh article of the answers in the first five suits and sustained as to the tenth article. The exception to the fourteenth article of the answer in the Stathatos libel is overruled.

AKTIESELSKABET BRUUSGAARD v. STANDARD OIL CO. OF NEW JERSEY.

(District Court, S. D. New York. July 14, 1921.)

No. 811.

1. **Shipping ⇐149—Charter party held not to expressly authorize charterer to collect freight.**
   Provision of charter party that freights shall be all prepaid without discount on signing bills of lading *held* not to mean that the charterer must collect the freight in advance, and so to authorize him to collect it, and therefore to sign bills of lading, but to be intended to protect the ship's hire against the charterer.
2. **Shipping ⇐153—Shipper, defending against owner's claim for freight, held to have burden of showing the master authorized the charterer to sign bill of lading.**
   The charter party containing a provision intended to protect the ship's hire against the charterer, a shipper, defending against claim of the ship owner for freight, notwithstanding it had been paid to the charterer, has the burden of showing that the master authorized the charterer to sign bill of lading and collect the freight as he did.
3. **Shipping ⇐149—Master, by receiving goods on board, does not ratify charterer's unknown bill of lading.**
   The master, by receiving goods over the rail, does not ratify any unknown bill of lading signed by him per the charterer and given to the shipper, and on which the freight was paid to the charterer.
4. **Customs and usages ⇐3—Custom, whereby charterer has authority to sign bills of lading, must be shown independently of express authority.**
   The only proof of custom, whereby the charterer has authority to sign bills of lading and collect freight, that would count, is that without express authority charterers commonly undertook to so sign and collect.
5. **Shipping ⇐103, 149—The charterer, as such, not agent to sign bills of lading or collect freight.**
   The charterer, as such, is not an agent to sign bills of lading or collect freight.

In Admiralty. Libel by the Aktieselskabet Bruusgaard against the Standard Oil Company of New Jersey. Decree for libelant.

Libel in personam for freight upon a cargo of oil carried from New York to South America under the following circumstances:

The libelant, through its New York agents, on April 24, 1919, chartered the Norwegian ship Maella to the C. H. Pattengill Corporation, a New York corporation, on a rate charter from any United States Atlantic port to Montevideo or Buenos Ayres, at $19.50 per ton if to Montevideo, and $18.50 if to Buenos Ayres, "all prepaid without discount on signing bills of lading and considered earned and irrevocable, vessel lost or not lost." The Pattengill Corporation was acting as agent for the Caravel Steamship Company, and the libelant, although they did not know this fact, did know that the Caravel Steamship Company was to act as loading agent. Before signing the charter, the Caravel Steamship Company had attempted to get the Maella and two other ships, but had been refused; the libelant's agents being not satisfied with their responsibility.

The respondent had a shipment of some 3,000 barrels of oil which it wished to send to South America, and, after negotiations with the Caravel Steamship Company's broker, made an agreement with it to load the same on the Maella. Schoultz, the president of the steamship company, signed two bills of lading, which he delivered to the respondent, and which concluded as follows: "In

witness whereof the master or agent of said vessel hath signed two bills of lading," etc., "by Arthur W. Schoultz." Schoultz collected the whole freight, some $16,489, and eventually paid the same to the Pattengill Company, who applied it on the account of another vessel. Thereafter the owner's agent learned that the Caravel Steamship Company was signing bills of lading and sent word to all the shippers that they would not be bound thereby.

Before the ship sailed, the master refused to carry the oil, unless upon payment of the freight in accordance with the charter party, and thereupon the parties entered into a stipulation by which it was agreed that the cargo should remain in the ship and should be carried to destination, and that, if the position of the ship were right, the reasonable freight was $16,489, which the libelant should recover, but that, if the payment of freight had bound the ship, there should be no recovery.

John W. Griffin, of New York City, for libelant.
Charles R. Hickox, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). It appears to me that this case does not turn upon the question which was most debated at bar. It has been treated as though the question were whether the ship were bound to carry the oil, once it had been received over the side. That is by no means an essential consideration. I may assume, without deciding, that "the ship is bound to the cargo" as soon as she lifts it. Still the critical question would remain whether the freight had been prepaid. Unless payment to the Caravel Steamship Company was payment to the ship, the freight was not paid, and "the cargo was bound to the ship" as much as "the ship to the cargo." Now, the last question—i. e., whether payment to the Caravel Steamship Company was payment to the owners—is not a question of maritime law at all, in the sense that it depends upon any "privilege" of the cargo against the ship. It turns wholly upon a question of fact, which is whether the owners had constituted the charterers, and the charterers might in turn constitute their loading agents, agents to collect freight.

[1] First. It is necessary to decide whether there was an express authority given the charterer, and there was no express agreement, except the charter party itself. This mentions bills of lading only three times: First (line 15), that the port of discharge shall be "as ordered on signing bills of lading"; second (lines 31, 32), that freights (hire) shall be "all prepaid without discount on signing bills of lading"; third (line 97), that "cargo" is "to be consigned on bills of lading to named receivers." The shipper argues that the second of these means that the charterer must collect the freight (hire) in advance and might therefore sign bills of lading. This construction seems to me extremely unreasonable. If it means any such thing, then the ship never has any lien for freight, and must depend for her hire upon the continued solvency of the charterer. If, on the other hand, the clause means that the master only shall sign, then the ship has the security of the lien for freights until the bills of lading are signed, and has the freights themselves thereafter. (I am assuming for the moment with the shipper that the mutual "privileges" arise as soon as the ship lifts the cargo.) But it is perfectly apparent, I think, that the clause was in-

tended to protect the ship's hire against the charterer, and, if so, the shipper's construction would defeat its purpose.

[2] There being no express consent in the charter party, the shipper must show express or implied assent by conduct in pais which should amount to a waiver of this provision of the charter party. It is not uncommon in this port for owners to give express authority to the charterer to sign bills of lading and collect freight, but nothing in this case gives the least color to the assertion that the owners here gave any such authority. Indeed, Schoultz admits that the owners refused to charter the Maella to him, and, while he denies that it was because he had signed bills of lading in another case, Berg says that this was the reason, and Pattengill says that it was expressly stated when he got the charter party that the master only should sign. In the case of the other two vessels, the Vicomte and the Mona, chartered to Pattengill, like the Maella, Schoultz himself conceded that the master signed all bills of lading, and if forced to a decision I should not hesitate to find that there was no express or implied assent. The mere knowedge that the Caravel Steamship Company was the loading agent and advertised the ship would not tend in the slightest degree to put Berg on notice. But it is not necessary to make any such finding; the shipper has the burden of showing that the master under such a charter party authorized the charterer—here it was the charterer's loading agent—to sign, and it has not by any means carried that burden.

[3] Again, it is argued that the receipt of the goods estops the ship. The argument is that the master, at the time of receiving the goods over the rail, knows that, as he has not signed a bill of lading, some one else must have done so, and must have received the freight. Then is his time to refuse, and, if he does not, he ratifies all that the charterer has done. I know of no such practice, and the record is quite without any suggestion of its existence. But, if it be so, and if the result be as the shipper here contends, then a master can never with safety to his lien allow any cargo to come over the side without calling up the shipper to learn whether some intermeddler without authority may not have issued a bill of lading and collected freight on the parcel. But he has no right whatever to make the reception of the cargo conditional on anything of the sort. The charter party gives the charterer the right to consign what he wills to the ship, and the ship must take it, regardless of any agreements between the charterer and his shippers. Those are no affairs of the master; he looks only to his own contract, and the charterer could properly enough complain if he undertook any such inquisition into his dealings with shippers.

It may be, as I am assuming, that the master establishes a "privilege" against his ship by receiving any cargo; but, if so, it is measured by the charter party, not by some anonymous bill of lading which the charterer may have assumed to give in his name, and which may modify his fundamental rights as stipulated. It would be intolerable to charge him with all changes he did not run down and protest against. The bills of lading with which he is concerned come only when the cargo is laden and the freight is to be collected. In The Esrom (C. C. A.) 272

Fed. 266, 271, it was said obiter that the master ratifies any bill of lading signed by another as soon as he breaks ground, and that well may be because he must know by that time that no bills of lading have been signed, unless by the charterers, and that there is every probability that some have been given. The suggestion implicitly denies that there is any ratification at an earlier time, and for the reasons given there is at least in this record no warrant for any such holding.

[4] Finally, it is urged that there is a binding custom under which the charterer has authority to sign bills of lading and collect freight. No such custom is pleaded, as it should be; but I will not stand upon that. The question is whether the custom should be taken as an implied term of the charter party. No number of instances, and no practice, of the master's giving express authority to the charterer, would be relevant upon that issue. On the contrary, it would rather tend to show that express authority was thought necessary. The only proof which would count is that without express authority charterers commonly undertook to collect freights and sign bills of lading. There is no such proof; the most that can be said is that shippers frequently do not inquire whether any express authority has been given, especially when they are satisfied with the charterer's responsibility anyway. There might, perhaps, also be the basis for an estoppel, if, without proving that charterers had exercised the power without authority, the evidence did prove that it was universally granted in each case. Being charged with that knowledge, it might be plausible to argue that in signing a charter party an owner must be held to anticipate that shippers would assume he had given an express authority as was customarily done. But there is no proof of any such universal practice as should charge owners with that knowledge. It is not a light thing to convert a relation analogous to that of lessor and lessee, in which the parties act at arm's length into a relation of principal and agent. In so doing the lessor loses the protection of all the terms which he may rightfully exact and becomes chargeable generally. To do so through an estoppel, the proof ought to show pretty clearly that the supposed authority was a universal accompaniment of the agreement. There is no such proof here.

[5] In re Interocean Transportation Co., 234 Fed. 863, 148 C. C. A. 461, is a square decision that the charterer as such is not an agent to sign bills of lading or collect freight. There the shipper recovered from the charterer in bankruptcy freight money paid it upon a bill of lading issued for the master. The theory was that in representing itself as an agent of the master the charterer was guilty of a false statement, and that the money could be recovered on that ground. Obviously this could not have been held, if the charterer became an agent to collect and sign by virtue of the charter party. I cannot see that The Stornaway, 4 Asp. 529, has any bearing on the case.

The libelant may take a decree.

PETTERSON et al. v. UNITED STATES.

(District Court, S. D. New York. March 14, 1921.)

No. 785.

1. Seamen ⇐33—**Held not discharged, within statute providing penalty for failure to pay wages within certain period after seaman has been "discharged."**

Seamen, who on expiration of term prior to end of voyage went ashore, after demanding their pay and informing the master that they would no longer be responsible for the safety of the ship, but who thereafter agreed to an extension of the articles and went back on board, and on end of voyage received full pay and a bonus of a month's pay, and signed a release of the ship under Rev. St. § 4552 (Comp. St. § 8341), which was not set aside for good cause under section 4530 (section 8322), *held* not discharged, under section 4529 (section 8320), requiring master or owner to pay seaman his wages within a specified time after he has been discharged or pay penalty.

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

2. Seamen ⇐19—**Seaman discharged with own consent not entitled to bonus.**

A seaman discharged with his own consent in a foreign port is not entitled to a month's bonus, under Rev. St. § 4581 (Comp. St. § 8372); such discharge being voluntary.

3. Seamen ⇐10—**Held not entitled to difference between subsistence agreed in articles and shore allowances during time when ashore, when they could have lived on board.**

Seamen, who on expiration of term prior to end of voyage demanded the right to go ashore, but thereafter went back on board and agreed to an extension of the articles, could not, on end of voyage, recover the difference between the subsistence agreed in the articles and the shore allowances, where the "wage scales and working conditions aboard ship" provided for subsistence allowances only "when subsistence is not provided on board," or "when in port and board is not furnished," or "when crew is not boarded aboard the vessel," since such seamen could have lived on board during such time, if they had chosen to so do.

4. Seamen ⇐33—**Court will not aid them to catch at penalties, where they have suffered no wrongs.**

Though seamen are wards of the courts, and are protected against their own carelessness, and though the statutes, especially the revision of 1915, show an increased solicitude for their welfare, they remain in some measure persons sui juris, and the court will not aid them to catch at penalties, where they suffered no wrongs.

In Admiralty. Libel by Robert Petterson and others against the United States. Libel dismissed.

Libel by eight seamen against the United States, as owner of the steamship Bushong, for double pay from May 10 to July 3, 1920. The libelants "signed on" on November 11, 1919, for a voyage from New York to Alexandria, Egypt, and return, north of Hatteras, "for a term of time not exceeding six calendar months." The ship discharged her cargo at Alexandria, and on her return reached Gibralter on March 31, 1920. The master was out of funds and could no longer disburse the ship, and apparently for that reason lay in the roads until May 10, 1920, when six of the libelants asserted that the voyage was up and demanded their pay of the consul at that port. He counseled that they have patience and wait, and they went back on board. On June 4, 1920, they repeated their demand and asked to be allowed to go ashore. The

consul again urged them to be patient, but said that they might leave as they wished. This they did, writing a letter to the master to say that they "resigned" from the ship. On June 15th they were joined by Leavitt and Haaverson, the other two libelants, whose term of six months had expired on June 14, 1920.

On June 26, 1920, one of them, Hanson, was discharged by the consul and went to England. It does not appear whether he was discharged on his own application or not, but he was paid in full to the day of discharge and gave a release. On July 3, 1920, the others made an agreement with the master before the consul to work the ship back, upon the master's promise to pay all arrears and a bonus of one month's pay in addition. This they did, and were paid off in accordance with this agreement and discharged at New York before the deputy shipping commissioner, at which time they signed a release of the ship in usual form according to Revised Statutes, § 4552 (Comp. St. § 8341).

They now sue on the theory that from May 10, 1920 (or June 14, 1920, in the case of Leavitt and Haaverson), double pay became due under Revised Statutes, § 4529 (section 8320) and Hanson sues in addition, under Revised Statutes, § 4581 (Section 8372), for a month's bonus because of his discharge in a foreign port The eight also make claim for the difference between their subsistence expenses ashore at Gibralter from June 4 to July 3, and the union rates agreed in the articles.

Their ratings were as follows: Robert Petterson, chief mate; Sebastian K. Wolkowski, second mate; Henry K. Hannah, Jr., third mate; Gustav Kleinert, first assistant engineer; Nil C. Hanson, third assistant engineer; Emory J. Barnes, wireless operator; Paul Leavitt, seaman, later carpenter; James Haaverson, seaman.

Harold K. Hines, of New York City, for libelants.

Louis Bennett, of New York City, for the United States.

LEARNED HAND, District Judge (after stating the facts as above). Section 4529 of the Revised Statutes, on which the libelants rely, so far as relevant, provides as follows:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens. * * * Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

It will be observed that a distinction is made between "coasting" and "foreign" voyages. In the first payment must be made "within two days after the termination of the agreement * * * or at the time the seaman is discharged," while in the second it is "within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged." The section is penal, and the right stricti juris. In the case of foreign voyages, therefore, the seaman must be discharged to get the right to double pay for any period of delay. In the case at bar the libelants, except Hanson, were not discharged till they reached New York. In the case of each they were paid in full at the time of discharge. Hence prima facie the section does not ap-

ply, this being a "foreign voyage." It is not necessary, therefore, to decide whether or not their agreement had terminated.

[1, 2] The libelants argue that the transactions with the master and the consul are the equivalent of a discharge and gave them equal rights, but the evidence scarcely supports that construction. At the first interview, on May 10th, the master says that they demanded their money and a discharge, though the libelants only say that they demanded their money. Both agree that the consul persuaded them to go back and wait. By no possible theory can this be considered as the equivalent of a discharge. On June 4th they repeated their demand for pay, and though the consul again urged them to wait, they insisted on leaving the ship. It does not certainly appear that they requested their discharge a second time and were refused by the consul, and there is good reason to suppose that they did not so regard their "resignation." The letter, so far as we have it, merely refused to be longer responsible for the safety of the ship and demanded the right to go ashore. On June 12th, the master was in funds and offered to pay every one who wanted his money. Although he paid off ten of the crew at the time, none of the libelants was included. Besides, on June 26th, Hanson was discharged, apparently with his own consent. On July 3d, the other 7 agreed to an "extension" of the articles and went back on board.

Considering the penal character of the cause of action, the libelants have failed to show that the consul refused to discharge them on June 4th. If he did, perhaps it would have been a wrong; and if the master persuaded him to do so, possibly the discharge should date from that day. Even so, their recovery would only be of four days' pay; i. e., from June 8th, four days after the discharge, until June 12th, when they were offered pay by the master. So far as I can see, the libelants preferred a rest from the tedium of their labors beneath sunny Mediterranean skies to a discharge. Even were it not so, seven have received a month's bonus, and have given a release which under Revised Statutes, § 4552, is a bar, unless it should be set aside under Revised Statutes, § 4530 (section 8322), for "good cause," of which there is none. Hanson also signed some kind of release on his discharge on June 26th. The circumstances do not appear, except that the consul would not otherwise have paid him. As to him, the right to four days' pay is perhaps free from a release; but he fails because he has not shown that he demanded a discharge on June 4th, for the reasons already given. As his discharge was, so far as appears, quite voluntary, he is not entitled to a month's bonus under Revised Statutes, § 4581, which expressly excludes such a case.

[3] The remainder of the claim is for the difference between the subsistence agreed in the articles and the shore allowances. The "wage scales and working conditions aboard ship" provide for subsistence allowances only "when subsistence is not provided on board," or "when in port and board is not furnished," or "when crew is not boarded aboard the vessel." These men were not sent ashore, but demanded the right to go. The "wage scale" did not apply. There is

not the least evidence that they could not have lived on board, if they chose, under the regular union conditions.

[4] In conclusion, I may add that it is quite apparent that the libelants were well satisfied with what they got, and that they were not in any way overreached or oppressed. They have been paid in full, have got a bonus, have given acquittances, and made no protest. Seamen are wards of the courts, no doubt, and are protected against their own carelessness. The statutes, especially the revision of 1915, show an increased solicitude for their welfare, which courts have no right to view with jealousy. Still they remain in some measure persons sui juris, and there is neither justice nor policy in aiding them to catch at penalties, where they have suffered no wrongs. The libelants were not helpless or ignorant victims, but alive to their rights. They were satisfied twice with the bargain they had driven, which left them with no ground for complaint.

Libel dismissed, with costs.

PENNSYLVANIA CEMENT CO. v. BRADLEY CONTRACTING CO.

(District Court, S. D. New York. July 7, 1920.)

1. **Internal revenue ⇐28—United States has no present provable claim for income taxes against receivers until expiration of year for which taxes are due.**
   The United States has not a present provable claim for income taxes against receivers of a corporation on the corporation's receipt of an amount of money as income prior to the expiration of the calendar year for which such taxes are due.

2. **Internal revenue ⇐7—"Income tax" defined.**
   An "income tax" is not a tax upon any specific sum of money, but is a personal tax, measured by sums of money received, or possibly accrued, to the person taxed during a certain period.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income Tax.]

3. **Receivers ⇐113—Court cannot adjudicate validity of imposing tax prior to due date of tax.**
   Where, on petition by receiver for instructions as to taxes due the government, the United States refuses to state whether it will claim an income tax on a sum of money received by the receivers prior to the due date of such tax, and does not consent to the adjudication of the question of whether the government can impose such a tax on such fund, the court cannot adjudicate such question.

4. **Receivers ⇐153—Personally liable for income tax on distribution of fund prior to due date.**
   Under Comp. St. §§ 6372, 6373, relating to priority of "debts due to the United States," a receiver who distributes to creditors a sum of money received prior to the due date of income tax would be personally responsible, where a valid claim is made by the government, on due date.

5. **Action ⇐6—One cannot be compelled to come into court and have future rights adjudicated.**
   One having no present demand presently enforceable, but who can be shown to be about to present a demand, cannot be compelled to come into court and have his future rights adjudicated.

In Equity. Suit by the Pennsylvania Cement Company against the Bradley Contracting Company, in which receivers were appointed for defendants. On petition of receivers therein for instructions. Instructions given.

On May 21, 1920, an order to show cause was issued, based upon the receivers' petition, which among other things prayed this court to instruct the receivers as to "the duty of the receivers in connection with any taxes payable to the United States government * * * or any other taxes for which the receivers or this estate may be liable."

The persons served with this order were also required to show cause substantially why a dividend should not presently be paid to the creditors herein.

Upon the return of this order on June 3d, it appeared that service thereof had been made upon the United States Attorney for the Southern District of New York, the Collector of Internal Revenue for the Second District of New York, and the Commissioner of Internal Revenue in Washington, D. C., as well as creditors and other parties in interest in the ordinary sense of the phrase.

It further appeared that approximately 120 claims had been filed against this defendant, in the aggregate amount of upwards of $4,000,000; that the process of liquidating these demands, though by no means completed, had progressed so far that under ordinary circumstances a dividend would be appropriate.

It further appeared that the receivers had on hand a balance of cash amounting to upwards of $500,000, but that such cash was practically all derived from the payment of a certain judgment recovered by the receivers in an action against the city of New York, and paid and satisfied by said city on March 18, 1920.

This judgment was entered in an action brought by the defendant herein against the city prior to the appointment of the receivers under this bill in equity, which is an ordinary creditors' bill asking for a "protective" receivership. The action so pending when receivers were appointed and by them prosecuted in the name of the defendant herein was an action at law to recover damages for breach of contract, and most of the recovery had was not for expenses or disbursements made by the Bradley Construction Company on the faith and strength of the contract so broken by the city, but was for loss of profits or gains which the construction company would have made (in the opinion of the jury) had it been permitted to fulfill its contractual obligations.

In the seventeenth section of the receivers' petition for instructions it is set forth at length that even before the actual receipt of the money so paid as aforesaid under the judgment the receivers sought to obtain a ruling or promise from the Treasury Department of the United States in respect of the attitude of the Treasury regarding taxes under the Income Tax Law in force at the time of their receipt of the money, to wit, the law of 1918, as amended in 1919, down to the date of the receivers' petition (May 21, 1920), the Treasury Department through the Commissioner of Internal Revenue had in effect declined to make any ruling at all.

On the return of the show cause order (June 3, 1920) the United States Attorney for this district appeared specially on behalf of the governmental officials served with the order, and moved to dismiss the motion as to them on the ground that the court had no jurisdiction. This motion was denied, and exception noted. The other matters raised by the receivers' petition were then disposed of, and the motion continued to July 6th in respect of

(a) The duty of the receivers in respect to taxes claimed by or to be claimed by the United States, and

(b) The declaration of a dividend at the present time.

On the adjourned day of hearing the United States Attorney for this district again appeared, and, without withdrawing or seeking to withdraw his motion to dismiss as to the governmental officials, changed his special appearance to a general appearance, but offered no evidence.

From the statements of counsel at bar and the reading of sundry letters which have not been filed, the court concludes as matter of fact that down to the present time the United States through the Treasury Department and the Department of Justice has refused or neglected to make any ruling, state any opinion, or make any promise, much less any agreement of a contractual nature in respect of the governmental attitude regarding taxes, and particularly income taxes in respect of the moneys so as aforesaid collected by the receivers in March, 1920, from the city of New York.

Hughes, Rounds, Schurman & Dwight, of New York City, for Penn Cement Co.

Thomas Henry Keogh, of New York City, for Frank, James, and William Bradley.

Thomas Henry Keogh, Frederick L. C. Keating, and Thomas F. Conway, all of New York City, for Bradley Contracting Co.

Frederick L. C. Keating, of New York City, pro se.

Leo Oppenheimer, S. H. Kaufman, and Richard E. Dwight, all of New York City, for receivers.

Charles D. Newton, Atty. Gen., for the State of New York.

John F. Collins, Asst. Corp. Counsel, of New York City, John P. O'Brien, Corp. Counsel, of Brooklyn, William P. Burr, Corp. Counsel, of New York City, and Joseph A. Storer, Asst. Corp. Counsel, for city of New York.

Francis G. Caffey, U. S. Atty., of New York City, for Commissioner and Collector of Internal Revenue.

C. J. Vert, of Plattsburg, N. Y., for First Nat. Bank of Plattsburg.

Olcott, Bonynge, McManus & Ernst, Irvine L. Ernst, Guthrie B. Plante, Selden Bacon, and Saul Myers, all of New York City, for Irving Nat. Bank.

Olcott, Bonynge, McManus & Ernst, Irving L. Ernst, and George C. De Lacy, all of New York City, for Irving Trust Co.

Olcott, Bonynge, McManus & Ernst and Irving L. Ernst, all of New York City, for American Surety Co.

Shearman & Sterling, of New York City, for Standard Gaslight Co. of City of New York and New Amsterdam Gas Co.

William W. Corlett, of New York City, for American Bridge Co.

House, Grossman & Vorhaus, of New York City, for Louis J. Levy and High Grade Holding Corporation.

Seligsberg, Lewis & Strouse and Irving L. Ernst, all of New York City, for Djorup & McArdle.

Katz & Sommerich, of New York City, for Lena Keller.

Thomas E. O'Brien, of New York City, for Thomas W. Conway.

Wm. P. Maloney, of New York City, pro se.

Arthur M. Lee, for Fannie Schlesinger.

Oscar Englander, of New York City, for Francis Hunter.

Timothy A. Leary and Henry T. Beekman, both of New York City, for Henry T. Beekman.

Pressinger & Newcombe, of New York City, for Robert W. Haff Realty Corporation.

Leonard Klaber, of New York City, for Thomas Hassett.

Albert L. Phillips, of New York City, for Clarke Bros.

Saul S. Myers, of New York City, for National Surety Co. and Farson Bros., Inc.

Frank Brevillier, for Milton Schnaier.

Samuel Riker, Jr., of New York City, for estate of Lavinia A. Burden.

Ernst, Fox & Cane, of New York City, for Matilda Hoykendorf.

Blandy, Mooney & Shipman, of New York City, for Grand Delancey Co.

Max Sheinart, of New York City, for James S. and Daniel L. Reardon.

HOUGH, Circuit Judge (after stating the facts as above). Perhaps the shortest way of stating the problem before the court is this: What reason is presented forbidding the present declaration of a dividend? I think no reason exists except the attitude of the United States, which has presented no claim and refuses to declare its intentions (if any it has) in the premises.

The relations of receivers, executors and other similar fiduciaries toward income taxes levied under the Constitution as affected by recent amendments is not a subject as yet much mooted in the courts.

One must regard first the taxing statute itself, and, second, any general legislation directed against or personally affecting the fiduciaries.

[1, 2] As to the statute itself, it must be admitted that in one sense the United States has no present claim—i. e., no presently provable claim—against these receivers, if the proceeds of the judgment against the city of New York are to be regarded as income of 1920. This necessarily follows from the fact that an income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received (or possibly accrued) to the person taxed during a certain period—i. e., the calendar year—and the year 1920 is not expired.

[3] Analogies are often misleading, yet I cannot but think the analogy of bankruptcy instructive. In bankruptcy it is clear law that a claim not due is not provable, and that a discharge is valid only against provable debts. Therefore, without having recourse to any of the statutes giving preference or priority to the United States, there is no claim presently existing on the part of the taxing power. It is therefore difficult for me to see how this court can at present consider the validity of a claim that does not legally exist.

The statute directed against fiduciaries to insure their preservation of the rights of the United States date back to the eighteenth century, and have been interpreted in numerous cases, none of which presents facts similar to the present. See Gould and Tucker's Notes to sections 3466, 3467, U. S. Rev. Stat., and notes in Comp. Stat. §§ 6372, 6373.

[4] My inference from these statutes and the decisions under them is that, while receivers are not mentioned by name or title, they are within the purview of the act. It is of course possible to read these statutes so narrowly as to say that they speak always of "debts due to the United States," and that, therefore, if a fund be distributed

when there is no debt actually due to the United States, the custodian of the fund cannot be held to a personal liability when the debt subsequently arises. But I cannot so read the statutes. There has been a great deal of judicial juggling with such words as "due" and "payable," and in a certain inchoate sense an income tax is due as soon as there is an income; but the tax is "solvendum in futuro," and it becomes payable only when the solution or assessment is accomplished. A fiduciary who hastened distribution before the due date of a tax, and then said, I have nothing to pay with, would, in my judgment, be personally responsible, and any court which facilitates such a distribution would be chargeable with judicial wrongdoing.

There is another inquiry germane to this case which seems to me to be answered for this circuit by In re Heller, 258 Fed. 208, 169 C. C. A. 276, viz.: If there is any income taxable or otherwise, whose is it? Is it the income of the corporation or the income of the receivers? In the case cited it was held that under the act of 1916 (section 13c [Comp. St. § 6336m]) only net income earned by a "trustee while operating the business of a bankrupt corporation" was taxable. In other words, if this money is income at all, it is the receivers' income, and not that of the corporation.

But the receivers are advised that the United States may settle, assess or levy a tax against them in the year 1921; wherefore if it is their income they are assuredly not justified in depriving themselves of the means of satisfying the demand of which they have notice.

While the contention of the creditors (who naturally want a dividend and want it now) is not put in exactly the following manner, I think it is substantially this, viz: That any demand for income tax payable out of the moneys presently in the hands of the receivers is so wholly without warrant of law and so contrary to every natural principle of justice that the court is authorized, if not required, to order a present distribution without regard to such a shadow of a legal shade as a demand for income taxes to be made next year.

This is an attractive proposition, because every piece of information or evidential element necessary for decision is in a sense presented on this motion. That is, it is known what the receivers have been doing, where they got the money from, what the money represents, and who are presently entitled to share in it.

[5] Consideration has been given to the cases cited by the creditors. In every one of them there is one thing present which is here absent, viz. a party legally to be required instantly to present his rights for adjudication; but in this instance what is really asked for is what in England (and I believe in New Jersey and other states) is called a "declaratory judgment." This means, as I take it, that one having no present demand presently enforceable, but who can be shown to be about to present a demand, as upon the extinction of a life interest or the like, can be compelled to come into court and have his future rights adjudicated. Experience has shown that this is a good thing, but it is not law in the courts of the United States nor those of New York, and very regretfully I am compelled to the opinion that this court is without present power to pass on the rights of the United

States as to any sum or sums of money received by these receivers in the year 1920 and asserted to be income by the taxing authorities of the United States. I can see no method of compelling the officers of the United States to declare a policy, give an opinion, make a promise, or obey an order in the premises until after the 15th day of March, 1921, at the earliest.

This is a serious matter for the creditors; it was the hope of the court that some assistance would be given in the distribution of this estate by the government. None has been given, nor do I perceive any immediate prospect thereof; and it is therefore ordered:

(1) That the receivers be instructed to declare no dividend herein until the further order of the court; and

(2) That they advise as far as possible the representatives of the creditors of this estate that the reason for this order is that the taxing authorities of the United States assert a demand substantially against this fund which is not legally capable of present adjudication except by consent, which consent has been withheld.

(3) The receivers are instructed to continue reasonable efforts to arrive at an adjustment or submission of this controversy, and to report from time to time to the court regarding their success or failure.

The foregoing is directed to be filed as an order. No other or more formal order is deemed necessary, and it is made without prejudice to any future, further, or similar proceeding.

In re TIDEWATER COAL EXCHANGE.

(District Court, S. D. New York. July 7, 1921.)

No. 809.

1. **Bankruptcy ⟸70—Coal exchange an "unincorporated association" within Bankruptcy Act.**

The Tidewater Coal Exchange, an association organized by shippers of bituminous coal during the war with Germany, at the instance of the Council of National Defense, for the purpose of speeding the transshipment of coal from cars to ships at tidewater, etc., involving a general pooling arrangement for coal, with debit and credit charges against and for each member, *held* an "unincorporated company" within Bankruptcy Act, § 4b (Comp. St. § 9588), so as to give the District Court jurisdiction of an involuntary petition against it.

2. **Bankruptcy ⟸88(2)—Debtors of alleged bankrupt cannot be heard in opposition to petition.**

Debtors of an alleged bankrupt cannot be heard as objectors to an involuntary petition against such bankrupt.

In Bankruptcy. In the matter of the Tidewater Coal Exchange, bankrupt. On objection to the jurisdiction of the court. Overruled, and further hearing directed.

See, also, 274 Fed. 1011.

A petition in bankruptcy was filed by three persons alleging themselves to be creditors of the Tidewater Coal Exchange asking an involuntary adjudication against this association. Certain parties, claiming an interest in the

result, intervened and objected to the adjudication on the ground that the alleged bankrupt was not an "unincorporated company" within the meaning of section 4b of the Bankruptcy Act (Comp. St. § 9588). The facts were stipulated and are as follows:

On June 20, 1917, at the instance of the Council of National Defense, certain shippers of bituminous coal to eastern tidewater ports formed an association known as the "Tidewater Coal Exchange." Its general purpose was to speed the transshipment of coal from cars to ships at tidewater ports and so to release the average number of cars held up. These shippers agreed that all their shipments should be pooled in common at the ports, and deliveries made to ships out of the pool; they being credited with all coal received by the Exchange and debited with all coal shipped on their consignments. The affairs of the Exchange were managed in accordance with rules duly promulgated and by an executive committee of eleven persons elected by the members for one year, and the chief executive was a commissioner. The expenses of the Exchange were paid by the carriers, but the members agreed to pay the carriers the amount assessed against them for freight charges, under the authority of the commissioner. The Exchange hired many employees, and the total cost of operating was over $800,000. It established a system of coal classification, reducing the previous 900 classes to about 50, under which the coal was all consigned and shipped.

At the outset no member was allowed to ship more than the amount of coal he had in the pool, but this system was subsequently changed, and from time to time the commissioner allowed members to withdraw a larger quantity of coal than had arrived, and they thus became debit members of the Exchange. Similarly, those who had shipped more coal than had been delivered, on their consignment, were credit members. It so came about that the pool did not contain enough coal to answer all the claims of all members.

Besides the members, any shipper of coal might deal with the Exchange on the same terms as members, and after the control of the carriers by the Director General, all shippers of coal to tidewater were in fact compelled to ship in this way, since they could not get cars unless they agreed to the pool. The total quantity of coal thus passing through the Exchange amounted to over 72,000,000 tons, or about 1,500,000 carloads.

On the 10th day of April, 1920, the Exchange was incorporated under the laws of Delaware, and the corporation took over and conducted the same business from that date, until it was closed on April 30, 1920.

The status of the objectors here does not definitely appear. In the opinion they are assumed to be creditors, although the record seems rather to put them in the position of debtors.

James F. Curtis, of New York City, for petitioning creditors.
Peale & McLaughlin, of New York City, for objectors.

LEARNED HAND, District Judge (after stating the facts as above). [1] Both parties approach this question from a mistaken point of view, in my judgment. They seem to suppose that an association must be an entity, recognized by the law as a legal person, in order to fall within the phrase "unincorporated company." This is not in the least necessary, and if it were, I should find my jurisdiction extremely doubtful at best. "Associations" in our law have always had a tenuous and ambiguous status. Even partnerships, which are uniformly treated as persons in the civil law, remain with us composed of the separate partners, who are only co-owners of the firm property, and joint obligors of the firm debts. Nor has the Bankruptcy Act under the somewhat blind provisions of section 5g succeeded in this respect in shaking the extreme conservation of our law. Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A.

1915E, 706. To the creation of a person vested with rights and bound by obligations, there is always necessary, so far as I know, some fiat of the state, and such procedural changes as those provided by sections 1919–1922 of the New York Code of Civil Procedure have not done more than change the method by which the joint property of the members may be reached. Even for that purpose there is no integration of the liabilities into a single corporate obligation, but the plaintiff must prove that all the members are liable. McCabe v. Goodfellow, 133 N. Y. 89, 30 N. E. 728, 17 L. R. A. 204.

But the relations between the members are one thing, and means of winding up the joint venture another. It needs no change in the legal relations between the members—internally among themselves, or collectively against outsiders—to give a court power to take over the joint assets, both chattels and choses in action, and finally to dissolve the association. Nor would that be outside the scope of the bankruptcy section of the Constitution if Congress chose to do it. Dissolution proceedings of such associations have been undertaken before this by courts of equity, either as trusts or partnerships, or without any explicit ground. Burke v. Roper, 79 Ala. 138; Henry v. Jackson, 37 Vt. 431; Hodgson v. Baldwin, 65 Ill. 532; Re Printers, etc., Soc. (1899) 2 Ch. Div. 184. If section 4b of the Bankruptcy Act means that such associations shall be adjudicated, there is no objection to taking over the whole tangled congeries of rights into this court, transferring them into the hands of a trustee, through him collecting such claims as the members may have as joint obligees, and distributing the whole amount in accordance with the terms of the fundamental agreement of organization. And there is a great procedural advantage in doing so.

It cannot be reasonably doubted that by the words "unincorporated company" Congress did mean to include some sorts of such associations, and the only cases have so held which have dealt with the question at all. Re Order of Sparta (D. C.) 238 Fed. 437; Id., 242 Fed. 235, 155 C. C. A. 75 (C. C. A. 3d); Re Associated Trust (D. C.) 222 Fed. 1012; Re Seaboard Fire Underwriters (D. C.) 137 Fed. 987. No case has been or is likely to be close to another, but the only matter which has been debated, and, as I understand it, the only one here in debate, is whether the phrase "unincorporated company" is to be applied generally to all such associations, or whether the choice of the word "company" indicates a more restricted purpose, and if so, what that is. While I am struck with the force of the contrast between the unlimited use of that phrase and the specific limitations added to the word "corporation" (Cleage v. Laidley, 149 Fed. 346, 348, 79 C. C. A. 284), it seems to me unnecessary in the case at bar to commit myself to any general theory in respect of its scope. In this regard it is wiser to follow the admonition of Re Order of Sparta, supra, and decide as little as possible.

In the case at bar the Tidewater Coal Exchange, if it was not a commercial, was certainly a business, association. The objectors assume that there cannot be such an association unless it is organized for the direct profit of the members themselves, but surely this is a

harsh and unwarranted limitation to impose upon the word. The purposes of this association were to speed the carriage of coal, to avoid impounding so many cars, and to prevent delays at the wharves. It is true that no dividends would be declared, but these results were none the less commercial advantages which benefited the members individually, as well as the community at large. If anything turns on the choice of the word "company," and even if the limitations imposed upon the succeeding word "corporation" apply to "unincorporated company," this association in any view falls within that phrase.

Nor can I see any distinction due to the fact that the association was formed under pressure of war. That mere fact did not change the legal results of men's conduct, and motives are in any case irrelevant. These persons, whether individuals, firms, or corporations, formed a common purpose, made it articulate in words, and appointed agents to secure its execution. They were in every sense a corporation except for the benediction of a state, which they eventually got, but which did not change their purpose or the relations they meant to establish. It was that common purpose so defined, and so delegated for fulfillment, which created an association, and continued it until the purpose was itself completed. So far as I can see, it is immaterial what determined their decision.

The objection to the jurisdiction of this court seems to me, therefore, ill taken, and is overruled. I understand that this was the only point submitted at the hearing, and therefore I will not direct an adjudication until the parties have been heard again.

[2] The status of the objectors is indefinite, and if the point were pressed I should suppose that they could not be heard. Certainly that is the case if they are debtors of the Exchange. However, I shall assume, as no such point was raised, that they have the status of creditors, and I dispose of the case on that theory.

In re TIDEWATER COAL EXCHANGE.

(District Court, S. D. New York. July 26, 1921.)

1. **Bankruptcy ⇐89(1)—Answers not putting in issue material allegation no hindrance to adjudication.**

Answers to an involuntary petition in bankruptcy not putting in issue any material allegation of the petition, but merely alleging that the alleged bankrupt cannot be adjudicated, which is matter of law, and that it is not insolvent, which is irrelevant, and lacking a material traverse, are no hindrance to the adjudication.

2. **Associations ⇐18—Executive committee of coal shippers' association had general authority.**

Between annual meetings of members of a coal exchange formed by shippers of bituminous coal at the instance of the Council of National Defense during the war with Germany, *held*, that the executive committee,

the only body in existence capable of acting at all for the exchange, an unincorporated association, had complete authority to do everything which a normal board of directors of a corporation could do.

3. **Associations ⇐18—Vote of part of members of executive committee held not legal.**
Where the executive committee of a bituminous coal shippers' association normally consisted of 11 members, but only nine were ever elected, and one of the nine had resigned, though his resignation was not accepted, three members of the committee, and two other persons holding proxies to act for two other members of the committee, which five united in a certain vote, did not produce a legal vote of the executive committee of the association, though the business of the committee had customarily been conducted in such manner.

4. **Associations ⇐18—Discretionary powers of committee not delegable.**
Discretionary powers of the executive committee of an unincorporated association could not be lawfully delegated.

5. **Associations ⇐18—Other members of committee of association could ratify void resolution.**
An act done by three of the nine members of the executive committee of an unincorporated association on behalf of the association or company, and in its name, though unauthorized, might be ratified by acquiescence after knowledge brought home to the other members of the committee; if the other members had knowledge of the particular resolution, which was ineffectual as concurred in by only three of the nine members of the executive committee, etc., and after a reasonable time for repudiation remained acquiescent, or expressed their concurrence, they must be deemed to have ratified it, and it became valid ab initio.

6. **Associations ⇐18—Resolution of committee of unincorporated association held ratified by nonvoting members.**
A resolution of three of the executive committee of nine of an unincorporated association, which resolution constituted an act of bankruptcy, *held*, under the evidence, by filing of an answer to the involuntary petition in bankruptcy by the attorney for the exchange, ratified by the other members of the committee as of the time of adoption, so that an adjudication was valid.

7. **Bankruptcy ⇐88(2)—Motion to intervene denied in discretion of court for delay of two months.**
Motion to intervene in bankruptcy proceedings by applicants who allowed a default of nearly two months to run against them without any excuse whatever may be denied, in the discretion of the court.

In Bankruptcy. In the matter of the Tidewater Coal Exchange, bankrupt. On motion for adjudication by petitioning creditors, on motion to strike out certain answers, and on motion of the Delaware Steamship & Commerce Corporation to be allowed to intervene and file an answer. Adjudication directed; motions denied.

See, also, 274 Fed. 1008.

James F. Curtis and Root, Clark, Buckner & Howland, all of New York City, for petitioning creditors.

William Mann, of New York City, for alleged bankrupt.

Peale & McLaughlin and John C. Myers, all of New York City, for objectors.

Thomas K. Schmuck and Hulon Capshaw, both of New York City, for Delaware Steamship & Commerce Corporation.

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

LEARNED HAND, District Judge. This case now comes up upon motion for an adjudication on further stipulated facts, on motion by the petitioning creditors to strike out the answers of McNeil & Co. and of the "Protective Committee" of shippers, and on motion of the Delaware Steamship & Commerce Corporation to be allowed to intervene and to file an answer.

[1] As to the adjudication, I may say at the outset that the answers already in do not put in issue any material allegation of the petition. They allege that the Exchange cannot be adjudicated, which is matter of law, and that it is not insolvent, which is irrelevant. There is no material traverse at all, and the adjudication might go forthwith. The petitioners have, however, for reasons which I do not quite understand, disregarded these omissions, and both sides have prepared a new stipulation touching the act of bankruptcy, i. e., the resolution of May 11, 1921. Even this is incomplete because it is only from the affidavits of Mr. McLaughlin of July 20, 1921, and Mr. Snider, of July 15, 1921, that I can glean the whole situation which the parties mean to discuss.

I might, and perhaps I ought to, decline to consider any issues not embodied in a pleading but picked up from a mass of desultory papers in such way as best I may. Nevertheless, I prefer to try to dispose of what the parties apparently think they have presented, rather than to throw them back upon the letter of what they have done. However, I have not considered the question whether the petitioners are creditors of the Exchange. That allegation of the petition is not only not at issue, but it is not mentioned in the briefs, nor was it argued at the bar. Therefore I consider only the question whether there was an act of bankruptcy. In that consideration I disregard in toto the answer of the Exchange as a pleading, though not, as will transpire, as an act in pais. It is nothing that I can discover but a well-intentioned statement of evidence concluding with an expression of doubt. In contentious matters a court is entitled to be left less in the position of advisor and more in that of judge.

[2] In the stipulation now submitted I find no statement of the composition of the executive committee of the Exchange on May 11, 1921, when the resolution was passed at a special meeting. On its face the resolution was an authoritative action of that body, to which the closest analogy is a board of directors of a corporation, and such a board has the power to make such a declaration, in states where it may make an assignment for the benefit of creditors. Re Moench & Sons Co., 130 Fed. 685, 687, 66 C. C. A. 37 (C. C. A. 2d). The powers of the executive committee of the alleged bankrupt are defined by rules 4 and 7 of the "Revised Rules." They give that committee "supervision" over the Exchange and the right to amend the rules. There is to be but one meeting of the members every year, and no provision is made for calling special meetings, as is done in the case of the executive committee (Rule 6). It appears to me that between the annual meetings of members, the executive committee, which was the only body in existence capable of acting at all, had complete authority to do everything which a normal board of directors could do. I must pro-

ceed by analogy, doubtless, but the analogies all make for the powers exercised in this instance.

[3, 4] Next arises the question whether the power was in fact exercised. The affidavits show that of the eleven members of the executive committee provided for in the rules, only nine were ever elected, and, of these nine, one had resigned before the day in question, though his resignation was not accepted. It makes no difference as I view it whether there were eight or nine members. On May 11, 1921, the date of the resolution, there were present at the meeting three members of the committee and two other persons holding proxies to act for two other members. All these five united in the vote and no more. The first question is whether this was a legal vote of the executive committee. I am satisfied that it was not, in spite of the fact that the business of the committee had customarily been conducted in that manner. Again, having recourse to the analogy of a board of directors, such discretionary powers could not be lawfully delegated. Craig Med. Co. v. Merchants' Bank, 59 Hun, 561, 14 N. Y. Supp. 16; Perry v. Tuskaloosa, etc., Co., 93 Ala. 364, 9 South. 217; Atty. Gen. v. Scott, 1 Ves. 413, 417.

[5] Nevertheless, the act was in fact done on behalf of the company and in its name, and, though unauthorized, it might be ratified by acquiescence after knowledge brought home to the other members of the committee. Here again I revert to the analogy of a corporation. Rolling Mill v. St. Louis, etc., R. R., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639; Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 381, 9 Sup. Ct. 770, 33 L. Ed. 157. If, then, the other members had knowledge of this resolution and after a reasonable time for action remained acquiescent, or expressed their concurrence, they must be deemed in effect to have ratified it, and it would be valid ab initio according to the common maxim of the civil law.

[6] The resolution was passed on May 11, 1921, and the Exchange appeared before May 24th, through its attorney, whose authority to appear and act must be taken as authorized without further proof than the appearance itself. Osborn v. U. S. Bank, 9 Wheat. 738, 829, 830, 6 L. Ed. 204; Ritchie v. McMullen, 159 U. S. 235, 241, 16 Sup. Ct. 171, 40 L. Ed. 133. On June 7, 1921, after several extensions, he filed an answer which not only did not repudiate the resolution, but spoke of it as passed by the executive committee. The question is whether this answer after an interval of four weeks, together with the reasonable inferences to be drawn from the situation as a whole, make prima facie proof of acquiescence, or indeed of positive assent.

I think that the evidence is enough. That the two members who sent proxies at once learned of what had been done in their name appears to me nearly a certainty, at least so probable as to justify a finding to that effect, in the absence of contradiction. Had they protested, I think that the attorney duly authorized to file an answer would not have unconditionally alleged in the answer that the executive committee had passed the resolution. To suppose the contrary is

to suppose that though he knew that only three of the committee had acted, and that others whose names were used were in protest against it, he nevertheless disregarded their dissent, and alleged what he knew to be untrue or at least doubtful. But if they did not protest at what was done, it seems to me that a period of four weeks was a reasonable time within which to make their protest, and the basis of a fair inference that they in fact assented to the use of their names by their proxies.

The three members who were not present are not so surely fixed with notice as the two who sent proxies. Still, a thing so notorious as the filing of a petition in bankruptcy would not be likely to be kept from the executive members of the society. It is only a shade less probable that they knew of what took place, both the petition and the resolution, than the two members who sent proxies. Finally, I cannot suppose that the answer prepared at the end of the period was not brought to the attention of the only persons who could authorize it. Perhaps indeed the presumed authority of the attorney is alone enough to go so far.

As matter of evidence in this record I therefore conclude that the members not present, and certainly the two who sent proxies, learned of the resolution, and of the answer to be filed, and assented to both. I further conclude that this assent was a ratification by them—and particularly by the two who must have got an immediate report from their proxies—of both resolution and answer. In this view it is strictly speaking unnecessary to consider any subsequent action or inaction of the members of the committee. However, I note in corroboration of my conclusion that although the case has been in court for about six weeks after the answer was filed, and although the attorney, Mr. Mann, has been in attendance at all hearings, his client has not suggested any repudiation of the resolution nor has any individual member of the committee made any protest.

In Re Bates Machine Co. (C. C.) 91 Fed. 625, Judge Lowell had before him a closely analogous case involving indeed express ratification. He held that the ratification would not relate back because of the rights of intervening creditors who had filed objection, as have the respondents here. It is not clear whether in Re Bates Machine Co., supra, the intervening creditors had filed their objection before the stockholders' vote of ratification. Apparently they did, and I interpret the decision as holding that their intervention and objection before the vote of ratification gave them rights which could not be changed. In the case at bar no creditors intervened until June 7, 1921, the day when the Exchange's answer was filed. At least there is no evidence of any action before that time. As I have held that there is enough evidence to justify the conclusion that the resolution was ratified on or before June 7, In re Bates Machine Co., supra, does not apply. Yet with the greatest deference it appears to me that the mere filing of an answer might not have vested the interveners with any new rights which a

subsequent ratification could not affect. I see no change in the interveners' position through such action. Their rights remained what they had been; they had merely come forward to assert them. The retroactive effect of a ratification always changes existing rights in some respects, else it would be irrelevant. Farmers' Loan, etc., Co. v. Memphis, etc., Co. (C. C.) 83 Fed. 870; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933. The exception to the general rule is not very clear, as is shown in Mr. Justice Lurton's discussion in Farmers' Loan & Trust Co. v. Memphis, etc., R. R., supra, and so far as I know it has in application been confined to cases where there has been some intervening attachment, execution, or similar lien, or to cases like Strain v. Gourdin, 23 Fed. Cas. No. 13,521, where the principal seeks to be relieved from notice which he had when he ratified but did not have when the unauthorized act was done.

Therefore I should wish to consider carefully whether the mere interposition of an answer was the vesting of an intervening right, if I thought that there was no adequate evidence of ratification on or before June 7, 1921. Judge Hazel, in Re Lisk Mfg. Co. (D. C.) 167 Fed. 411, gave as one reason for accepting a resolution similar to that at bar the later acquiescence of the directors. His language is indeed obiter, but for all that not to be disregarded.

[7] I conclude, therefore, that the ratification speaks as of May 11, 1921, and that an adjudication may pass. The motion to strike out the answer of McNeil and the "Protective Committee" I shall deny, but without passing upon the merits. It is enough that I have concluded to adjudge the Exchange a bankrupt regardless of those answers. Any decision on the motion would of necessity be obiter. The motion for leave to intervene made by the Delaware Company I deny, but as matter of discretion. I should deny it merely as irrelevant except that on an appeal if the Circuit Court of Appeals took a different view of the law, it would be necessary for the District Court to exercise its discretion in the first place before any consideration of those answers could be had. I use my discretion against the applicants because they allowed a default of nearly two months to run against them without any excuse whatever. I must conclude from their affidavit that they knew of the proceedings all the time and chose to take no action. It is certainly not necessary to do more than allude to the excuse of other pressing business, unless all judicial proceedings are to be delayed at the convenience of the parties or their attorneys. Moreover, there seems good reason not to open a default in this case. If the tangled affairs of this society can be unraveled in bankruptcy and any preferences set aside, it is surely in the interests of justice that it should be done. Of course, I make no suggestion now as to the legal relations arising from what was done before the bankruptcy proceedings. All that I decide is that being within the jurisdiction of this court the Exchange committed an act of bankruptcy and can bring its affairs here to be settled. Whether the petitioners are creditors of the Exchange or creditors only of certain of its members, I do not say. Whether the assignment of credits

from one to another in contemplation of insolvency is within section 68 I do not say. All these things will necessarily arise at some future stage of the proceedings, certainly if suits are brought to set aside the assignments; they do not arise now.

Adjudication directed; both motions denied.

LOW LING SING et al. v. STANDARD TRANSP. CO., Limited.

(District Court, S. D. New York. May 2, 1921.)

1. **Statutes ⇐190—Construed according to actual words used, where unambiguous.**
   In the construction of statutes, the actual words used must prevail, so far as they may bear only one meaning.

2. **Seamen ⇐24—Entitled on demand to one-half of wages earned and still due under statute entitling them to one-half of wages "earned."**
   Under Rev. St. § 4530, as amended in 1915 (Comp. St. § 8322), entitling seaman, on arrival at port in United States, to "one-half of the wages which he shall have earned," on demand from master, seamen are entitled on such demand to one-half of the wages earned and still due them, and not merely to one-half of the total wages earned since the voyage began, in view of the legislative history of such statute.

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

In Admiralty. Libel in personam by Low Ling Sing and others against the Standard Transportation Company, Limited, for seamen's wages. Decree for libelants.

The libelants were members of a crew shipping at Calcutta or Bombay for a voyage to New York and return upon the steamship Wabasha, flying the British flag. At New York they demanded half the wages earned and still due them, under Revised Statutes, § 4530 (Comp. St. § 8322), which were refused. Theretofore they had received one-half the total wages earned since the voyage began. If they were entitled to half the wages earned and still unpaid, their demand was justified, and they should, because of the refusal, recover full wages. If they were entitled to demand only half the sum of the total wages earned, including what had been paid and what remained unpaid, their demand was not justified.

Silas B. Axtell, of New York City, for libelants.
Courtland Palmer, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). This question has been many times before the courts, and there is only one decision in favor of the libelants. The Ixion (D. C.) 237 Fed. 142. In re Ivertson (D. C.) 237 Fed. 498, contains an express dictum in accord, but it was clearly obiter and cannot rank as a decision. Contrary are a decision of the Circuit Court of Appeals for the Fifth Circuit, The Rathlin Head, 262 Fed. 751, and another of the Third Circuit. The London, 241 Fed. 863, 154 C. C. A. 565. In addition there are four decisions of District Judges. The Thor, 248

Fed. 942 (Judge Dooling); The Meteor, 241 Fed. 735 (Judge Ervin); The Jacob N. Haskell, 235 Fed. 914 (Judge Sheppard); and The Delagoa, 244 Fed. 835 (Judge Chatfield). Judge Sheppard and Judge Chatfield made the same rulings, also, in The Strathearn, 239 Fed. 583, and The Clematis, 244 Fed. 484. Furthermore, in The Talus, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, the mode of calculating wages was that adopted by the ship here. It was in fact held valid, and that is urged as authoritative. Nevertheless, the only point before the Supreme Court, and the only one upon which the decision can be said to be an authority, is that advances in foreign ports were lawful. The Supreme Court cannot be said to have even remotely indicated any actual opinion upon the issue now at bar. It will thus be seen that, although there is no decision positively binding upon me, the great weight of authority favors the respondent.

Before the amendment to Revised Statutes, § 4530, of 1915, the law was clearly the other way. Between 1898 and 1915 the sentence read:

"Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel * * * shall load or deliver cargo."

From 1790 to 1898, it was verbatim the same, except that he was entitled only to one-third, instead of one-half. In 1915 the words "which shall be due him" were changed to "which he shall have then earned," and there was added to the sentence the clause, "and all stipulations in the contract to the contrary shall be void." If the section had been enacted for the first time in 1915, I should have little question that the interpretation laid down in The Rathlin Head, supra, and The London, supra, was the only possible one. However, it had been possible to make the law a dead letter before 1915 by inserting stipulations in the articles that no wages should be "due" till the voyage was completed, and this was conceivably the reason for the concluding phrase in the sentence. The question is whether, having strengthened the statute by that phrase, I should assume that Congress meant to weaken the substance and purpose of it in changing the word "due" to the word "earned."

Under the earlier forms, no wages were "due" if the articles said they should not be. If the word "due" had been left, and the concluding clause added, while I should personally have held that the wages would be "due," notwithstanding contrary provisions in the articles (then rendered void by the concluding phrase), still it is easy to see that the sentence as a whole might have been thought to be inconsistent with itself, and in the interests of clarity it might have been supposed "earned" would remove any ambiguity. This is sufficient to account for the change in phraseology, and the whole legislation of which this amendment is a part very effectually precludes the idea that seamen were to have less rights than before.

The bill was under discussion before Congress and the country three

years and both the majority and minority (certainly the minority) of the committee on merchant marine in their reports of May 2, 1912 (Report 645, 62d Congress, 2d Session), appeared to assume that the section in this respect was unchanged. Such reports have been recently treated as of much importance in determining the meaning of a statute. Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. —— (Supreme Court, January 3, 1921). The same interpretation was assumed in the Senate debates and in committee hearings.

[1, 2] Moreover, in June, 1920 (41 Stat. 1006), the section was again amended, after all the decisions above cited had been passed, and Congress then made it clear even to redundancy that the purpose was the same as it certainly had been before 1915. I have been unable to find any case which touches the precise situation, but it appears to me legitimate evidence of the original legislative intention, if, after certain courts have decided that a law has one of two possible interpretations, Congress at once changes its language to preclude the one adopted. Of course, like all canons of interpretation, the actual words used must prevail, so far as they may bear only one meaning, and, if that be the case here, there is no room for interpretation. The word "earned," however, does not to my mind necessarily shut out the meaning "earned and unpaid." It appears to me at least a debatable point whether the language was not as appropriate to that intention as to the one assumed by the cases cited. If so, the fact that Congress at once so declared when the matter was otherwise decided, ought not to be ignored.

Therefore, after a good deal of hesitation, and in view of the fact that there is no authoritative decision to the contrary, I have concluded that the intent of the amendment of 1915 was not to change the law in this respect. It follows that the libelants are entitled to a decree, but, in view of the uncertainty, without costs.

MATTES et al. v. STANDARD TRANSP. CO.

(District Court, S. D. New York. April 26, 1921.)

1. **Seamen ⇐26—Owner, being sued for wages of discharged seamen, must prove just grounds for discharge.**
   In libel in personam for wages of discharged seamen, the owner must prove just grounds for the discharge.

2. **Seamen ⇐26—Discharge of seamen for incompetency held a cover merely to avoid continued payment of American wages.**
   In libel in personam for seamen's wages against owner, which had discharged the seamen, claiming them to be incompetent, without procuring a certificate of consul approving such discharge, under Rev. St. §§ 4580, 4581 (Comp. St. §§ 8371, 8372), evidence *held* to prove that the discharge for incompetency was colorable, and merely a cover to avoid the continued payment of American wages.

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

In Admiralty. Libel in personam by Victor Mattes and others against the Standard Transportation Company for seamen's wages. Interlocutory decree for plaintiffs for reference before a commissioner.

The respondent is a British corporation and at the time in question was the owner of the Wabasha, flying the British flag. She sailed from Bombay in the early part of 1920, and reached New York with a Chinese crew in April of that year. This crew deserted while in New York, and the master was forced to engage another crew, consisting of 45 or 47 men, of whom the libelants, 29 in number, were a part. They were made up of various nationalities, largely Portuguese, who were supplied by a boarding house keeper. The Wabasha was a coal-burning steamer, and the men shipped as seamen, firemen, quartermasters, oilers, and coal passers. Some of them had prior discharges, and all swore at this trial that they had had former experience as seamen.

The master, the chief officer, the second officer, the second engineer, and steward were called for the respondent, and swore that the crew was incompetent. The quartermasters could not steer a straight course; the cook so cooked the food that the crew were in constant complaint; the seamen were unable to do anything but the simplest duties. The second engineer testified that the coal passers refused to heave up the ashes, so that the firemen were unable to work the boilers, and the speed of the ship was reduced from 10½ to 8 or 9 knots an hour. The master swore that the men could not get the ashes out, and that one of them hurt his hand in doing so; that the officers constantly complained that there was no sailor among the crew; that they were themselves always complaining of their food; that off Gibraltar he threatened to call a British man-of-war, apparently because of their complaints about food. On his cross-examination, however, he testified that their conduct was not bad conduct, that they tried to obey orders, but were incompetent.

The steamer made the port of Algiers on May 10th, when the master called the crew on dock, and, according to his statement, asked them whether they would be willing to be sent back to New York. He says that they agreed, and the other officers say so. The crew, of whom many were called, unanimously swore that they performed their duties and were ordered off the ship, on which they were willing to serve out their articles. In any event, they went ashore in small boats, and the master on the 11th shipped an Algerian crew at £25 a head to Calcutta, with maintenance ashore and return to Algiers added. (The master said that they would not serve beyond Calcutta.) At that port this Algerian crew was sent back by passenger steamer and a Lascar crew shipped, at about 24 or 26 rupees a month, equal to $8 or less. This third crew worked the ship back to New York.

The libelants, together with the rest of the New York crew, were sent home via Havre, and their wages paid until June 8th, when they arrived. As the Wabasha reached New York on September 15th, they claim for loss of wages between those dates, less what each had been able to earn meanwhile.

Silas B. Axtell, of New York City, for libelants.
Courtland Palmer, of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). It was apparently the early rule that mere incompetence would not justify a master in discharging a seaman at a foreign port. Capillo v. Bristol Packing Co. (D. C.) 112 Fed. 439; Sherwood v. McIntosh, Fed. Cas. 12,778 (semble). The master's powers were only to degrade the seaman to such services as he was capable of performing and upon eventual payment to deduct from his services whatever was the loss occasioned by his incompetence. In this respect the incompetence was put upon a different basis from insubordination or deliberate shirk-

ing of duty, The T. F. Oakes (C. C.) 36 Fed. 442, or drunkenness, The Bertha, 111 Fed. 550. I am not prepared to say, however, that incompetence may not be a sufficient ground for discharge even in a foreign port (Rev. St. § 4581 [Comp. St. § 8372]), at least where the master provides for the repatriation of the seaman, and especially, as here, where he pays wages until his arrival home. Although the master has some opportunity, upon shipping a crew, to ascertain their former experience by their discharge papers, they engage, nevertheless, as competent to perform the duties which they undertake, and it seems to me a harsh rule that would require a master to continue an incompetent crew, however subordinate and ready, providing he is willing himself to assure their return home. In any event, that case can await its arising, for it is not before me here.

[1, 2] The respondent must, however, prove just grounds for the discharge, and the whole circumstances of this case do not satisfy me that the excuse given by the master, though corroborated by his officers, was the true reason. It seems to me inherently unlikely that 45 men, many of whom certainly had had prior service, and all of whom say that they had, should turn out to be wholly incompetent, every man of them, for the comparatively simple duties which devolved upon them. The specifications of their incompetency are vague and contradictory. The engineer says that they refused to heave up the ashes; the master merely says that, though willing, they could not, something which it is very hard to believe. It is, of course, possible that the quartermaster could not steer a straight course, and that the oilers were not expert; but that did not involve the whole crew. No doubt there were complaints of food; there generally are, but such complaints could scarcely justify the threat to call a war vessel. The master expressly disclaims any insurbordination, and their complaints must be put down to sailors' growls.

On their face, the charges bear an appearance of being trumped up, nor are they mended by the two letters written to the owners on May 8th, which may well have been to lay a foundation to his case. Again, I think it unlikely that the men were willing to go home, and thought they would have a "jolly holiday." Work proved scarce when they got here, and it is fair to assume that they knew it would be so. They swear that they had a good berth and there is no reason to doubt them, if the abundance of food, which the officers insist they gave, was in fact supplied. Moreover, why did he retain the two cooks, around whom much of the trouble centers? He says that they did not want to leave, but a more likely reason, I suspect, was that Arab cooking would be worse. Was there an adequate motive for wishing to be rid of them? I think there was.

The Wabasha had shipped a Chinese crew at Calcutta or Bombay, and these deserted in New York. Their desertion may be attributed to the recent laws, which enable them to ship here at higher wages, and the result was that intended; i. e., to compel the captain either to raise his wages to the American standard, $85 or $95, or to take on a new crew at those rates. Finding his hand so forced, it was obviously to his advantage, if he could, to get rid of this crew as soon as

possible. The alternatives open to him were three; he could discharge them, and ship them back at Algiers, as he did; he could take them to Calcutta and there discharge them; or he could carry them back to New York. If he discharged them at Algiers, he must get an Algerian crew to work the ship on to Calcutta, and these in turn could be discharged and sent back, and a Lascar crew substituted, with merely nominal wages.

There were, indeed, serious losses involved in discharging the American crew at Algiers and shipping an Algerian crew to Calcutta. The cost of shipping the American crew back was about $12,600, and the cost of the Algerian crew $13,000, making a total of over $25,000. The cost of the American crew between June 8th and September 15th was about $12,000, making a difference there of $13,600, which the ship lost. This, the respondent answers, is conclusive evidence against the master's putative motive. I think that this analysis of the situation is not complete. The master was under engagement to take the American crew back to New York; he would there have had to engage a second American crew, presumably at the same high wages. Had he carried them to Calcutta and discharged them, the expense would have been greater, and by discharging them at Algiers and employing an Algerian crew only to Calcutta, he had his ship free at that place, and could then begin with a Lascar crew for a round trip, which would end again in India.

Once he got his ship manned with cheap labor, he could continue to work her at Indian wages, and he would make up his loss in five months. If he did not, he was condemned indefinitely to pay American wages. True, in so doing he ran the risk that the Lascar crew in turn would desert at New York, just as the Chinese crew had done; but that depended upon his being able to keep his Lascars out of the hands of those who might advise them of their rights in New York. That risk, it appears to me, he might well have accepted. Moreover, it seems to me very strange that he could not get his Algerians to work the ship back from Calcutta to Algiers, but must hire them only for the voyage out. That is an unexplained and indeed surprising circumstance, which fits much better with the plan which I think he had in mind from the outset, to get his wage scale back upon the Indian level.

Thus, merely as between the officers' assertions, which are to me significantly vague, and the crew's denials, I should find it impossible to accept the excuse. There is, however, another circumstance which appears to me to put the case beyond any doubt. The master was in a port where there was a British consul, whose sanction he professes orally to have obtained to what he insists was a voluntary discharge. Now, section 188 of the British Merchant Shipping Act of 1894 provides that no master shall discharge a seaman without the "sanction" of the local consul indorsed on the articles, and the consul must examine into the causes of the discharge before he sanctions it. In cases of "leaving behind," he must issue a certificate stating the causes thereof, and, if the master violates this section, he commits a misdemeanor.

So it makes no difference whether this was a case of strict discharge or leaving behind; the master did not do what the law required of him, and was in any event guilty of a misdemeanor. It is hornbook law for masters that discharges must be approved by consuls, and the law of the United States is in substance the same. Rev. St. §§ 4580, 4581 (Comp. St. §§ 8371, 8372). That the master thus violated the law, and did not get the "sanction" indorsed upon the articles, or a "certificate" stating the causes, is to my mind of the utmost significance. Ship's articles are intended to be the authoritative evidence of the agreement, and the visé of the consul is expressly to protect seamen (and, indeed, masters as well) from just the uncertainties which arise from disputes like this. I do not believe that any master, with a good case against his crew for "incompetence" (Rev. St. § 4581), or "unfitness" (British Merchant Shipping Act, § 188), would have discharged the whole body of them without this protection to himself. Least of all would he have omitted this precaution, if, as he says, they were all willing to be discharged, and there could have been no dispute to settle and no doubt of the result.

Therefore it seems to me as clearly proved as such facts can be that the discharge was colorable, a cover to avoid the continued payment of American wages. Whether under British law the discharge, which had never the written sanction of the consul, could under any circumstances be valid, I need not inquire. It follows that there must be a reference to compute the wages of the libelants between June 8 and September 15, 1920, less such earnings as they made, or could have made, during that time. In addition to wages the libelants are entitled to their keep, which the parties have agreed upon at the rate of $10 a week.

There will be an interlocutory decree for the usual reference before a commissioner.

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