

NATIONAL REPORTER SYSTEM—UNITED STATES SERIES

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 275

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

NOVEMBER, 1921 — JANUARY 1922

ST. PAUL
WEST PUBLISHING CO.
1922


COPYRIGHT, 1921
BY
WEST PUBLISHING COMPANY

COPYRIGHT, 1922
BY
WEST PUBLISHING COMPANY

(275 FED.)



This is a Key-Numbered Volume

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

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

JUDGES

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

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHARLES F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. GEORGE W. ANDERSON, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAMES M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire¹.....Littleton, N. H.
Hon. GEORGE F. MORRIS, District Judge, New Hampshire².....Lancaster, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. LOUIS D. BRANDEIS, Circuit Justice.....Washington, D. C.
Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. CHARLES M. HOUGH, Circuit Judge.....New York, N. Y.
Hon. MARTIN T. MANTON, Circuit Judge.....New York, N. Y.
Hon. JULIUS M. MAYER, Circuit Judge³.....New York, N. Y.
Hon. EDWIN S. THOMAS, District Judge, Connecticut.....Norwalk, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. EDWIN L. CARVIN, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. FRANK COOPER, District Judge, N. D. New York.....Albany, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York³.....New York, N. Y.
Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN CLARK KNOX, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont.....Burlington, Vt.

THIRD CIRCUIT

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

¹ Died September 15, 1921.

² Appointed October 25, 1921.

³ Became Circuit Judge, October 5, 1921.

FOURTH CIRCUIT

Hon. WILLIAM HOWARD TAFT, Circuit Justice	Washington, D. C.
Hon. MARTIN A. KNAPP, Circuit Judge	Washington, D. C.
Hon. CHARLES A. WOODS, Circuit Judge	Marion, S. C.
Hon. EDMUND WADDILL, Jr., Circuit Judge	Richmond, Va.
Hon. JOHN C. ROSE, District Judge, Maryland	Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina	Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina	Greensboro, N. C.
Hon. EDWIN Y. WEBB, District Judge, W. D. North Carolina	Charlotte, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C.	Charleston, S. C.
Hon. HENRY H. WATKINS, District Judge, W. D. S. C.	Anderson, S. C.
Hon. D. LAWRENCE GRONER, District Judge, E. D. Virginia	Norfolk, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia	Lynchburg, Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia	Charleston, W. Va.
Hon. GEORGE W. McCLINTIC, District Judge, S. D. West Virginia	Charleston, W. Va.
Hon. WILLIAM E. BAKER, District Judge, N. D. West Virginia	Elkins, W. Va.

FIFTH CIRCUIT

Hon. JAMES CLARK McREYNOLDS, Circuit Justice	Washington, D. C.
Hon. RICHARD W. WALKER, Circuit Judge	Huntsville, Ala.
Hon. NATHAN P. BRYAN, Circuit Judge	Jacksonville, Fla.
Hon. ALEXANDER C. KING, Circuit Judge	Atlanta, Ga.
Hon. HENRY D. CLAYTON, District Judge, N. and M. D. Alabama	Montgomery, Ala.
Hon. WILLIAM I. GRUBB, District Judge, N. D. Alabama	Birmingham, Ala.
Hon. ROBERT T. ERVIN, District Judge, S. D. Alabama	Mobile, Ala.
Hon. WILLIAM B. SHEPPARD, District Judge, N. D. Florida	Pensacola, Fla.
Hon. RHYDON M. CALL, District Judge, S. D. Florida	Jacksonville, Fla.
Hon. SAMUEL H. SIBLEY, District Judge, N. D. Georgia	Atlanta, Ga.
Hon. BEVERLY D. EVANS, District Judge, S. D. Georgia	Savannah, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana	New Orleans, La.
Hon. GEORGE W. JACK, District Judge, W. D. Louisiana	Shreveport, La.
Hon. EDWIN R. HOLMES, District Judge, N. and S. D. Mississippi	Yazoo, Miss.
Hon. W. LEE ESTES, District Judge, E. D. Texas	Texarkana, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas	Dallas, Tex.
Hon. JAMES CLIFTON WILSON, District Judge, N. D. Texas	Fort Worth, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas	San Antonio, Tex.
Hon. JOSEPH C. HUTCHESON, Jr., District Judge, S. D. Texas	Houston, Tex.
Hon. WILLIAM R. SMITH, District Judge, W. D. Texas	El Paso, Tex.

SIXTH CIRCUIT

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

SEVENTH CIRCUIT

Hon. JOHN H. CLARKE, Circuit Justice	Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge	Goshen, Ind.
Hon. JULIAN W. MACK, Circuit Judge	Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge	Chicago, Ill.
Hon. EVAN A. EVANS, Circuit Judge	Baraboo, Wis.
Hon. GEORGE T. PAGE, Circuit Judge	Peoria, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois	Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois	Chicago, Ill.
Hon. LOUIS FITZHENRY, District Judge, S. D. Illinois	Peoria, Ill.

JUDGES OF THE COURTS

vii

(275 F.)

Hon. GEORGE W. ENGLISH, District Judge, E. D. Illinois.....East St. Louis, Ill.
 Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
 Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
 Hon. CLAUDE Z. LUSE, District Judge, W. D. Wisconsin.....Superior, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
 Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
 Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
 Hon. JOHN E. CARLAND, Circuit Judge.....Washington, D. C.
 Hon. KIMBROUGH STONE, Circuit Judge.....Kansas City, Mo.
 Hon. ROBERT E. LEWIS, Circuit Judge⁴.....Denver, Colo.
 Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
 Hon. FRANK A. YOUNG, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
 Hon. ROBERT E. LEWIS, District Judge, Colorado⁴.....Denver, Colo.
 Hon. HENRY T. REED, District Judge, N. D. Iowa⁵.....Cresco, Iowa.
 Hon. MARTIN J. WADE, District Judge, S. D. Iowa.....Davenport, Iowa.
 Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
 Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
 Hon. WILBUR F. BOOTH, District Judge, Minnesota.....Minneapolis, Minn.
 Hon. CHARLES B. FARIS, District Judge, E. D. Missouri.....St. Louis, Mo.
 Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri.....Kansas City, Mo.
 Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
 Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska.....Omaha, Neb.
 Hon. COLIN NEBLETT, District Judge, New Mexico.....Santa Fé, N. M.
 Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
 Hon. ROBERT L. WILLIAMS, District Judge, E. D. Oklahoma.....Muskogee, Okl.
 Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
 Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
 Hon. TILLMAN D. JOHNSON, District Judge, Utah.....Salt Lake City, Utah.
 Hon. JOHN A. RINER, District Judge, Wyoming⁶.....Cheyenne, Wyo.
 Hon. T. BLAKE KENNEDY, District Judge, Wyoming⁷.....Cheyenne, Wyo.

NINTH CIRCUIT

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

COURT OF APPEALS OF DISTRICT OF COLUMBIA

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

⁴ Appointed Circuit Judge November 15, 1921.
⁵ Retired December 1, 1921.

⁶ Retired.
⁷ Appointed October 25, 1921.

CASES REPORTED

Page	Page		
Abbott, The (D. C. N. Y.).....	360	Ashworth, Huntington Development & Gas Co. v. (C. C. A. W. Va.).....	43
A. Bourjois & Co. v. Katzel (C. C. A. N. Y.)	539	Athan v. National Savings & Trust Co. (App. D. C.)	1020
Acme Mfg. Co., Arminius Chemical Co. v. (C. C. A. Va.).....	1021	Atlantic Corporation v. Harris (C. C. A. N. H.).....	721
Actieselskabet Christiansand, Petition of (C. C. A. N. Y.).....	271	Atteaux, United States v. (D. C. Mass.).....	1013
Adamson v. Alexander Milburn Co. (C. C. A. N. Y.).....	148	Atteaux Co., United States v. (D. C. Mass.).....	1013
Advance Rumley Co. v. John Lauson Mfg. Co. (C. C. A. Wis.).....	249	Atwood v. Rhode Island Hospital Trust Co. (C. C. A. R. I.).....	513
Alexander v. Farmers' Supply Co. (C. C. A. Ga.).....	824	Austin, The Calvin (D. C. N. Y.).....	836
Alexander Milburn Co., Adamson v. (C. C. A. N. Y.).....	148	Automatic Arms Co., Gardiner v. (D. C. N. Y.).....	697
Allen v. Omaha Live Stock Commission Co. (C. C. A. Neb.).....	1	Baker, In re (D. C. N. Y.).....	511
Alps Candies, Mason Au & Magenheimer Confectionery Mfg. Co. v. (D. C. N. Y.).....	357	Baldwin, v. Guss (D. C. Pa.).....	877
American Car & Foundry Co. v. East Jordan Furnace Co. (C. C. A. Ill.).....	786	Bank of Elberton v. Swift (C. C. A. Ga.).....	834
American Engineering Co. v. Metropolitan By-Products Co. (C. C. A. N. Y.).....	34	Bank of Madison v. Bell, two cases (C. C. A. Ga.).....	835
American Engineering Co. v. Metropolitan By-Products Co. (C. C. A. N. Y.).....	40	Barranca, The (D. C. Va.).....	690
American Linseed Co., United States v. (D. C. Ill.).....	939	Bartleson Co., In re (D. C. Fla.).....	390
American Mills Co. v. Hoffman (C. C. A. N. Y.).....	285	Beattie Mfg. Co. v. Smith (C. C. A. N. Y.).....	164
American Smelting & Refining Co., Hilb v. (D. C. Ohio).....	384	Beaver Board Companies v. Imbrie (D. C. N. Y.).....	431
American Steel Foundries v. Indian Refining Co. (C. C. A. Ill.).....	800	Beaver Board Companies v. Imbrie (D. C. N. Y.).....	437
American & British Mfg. Corporation, American & British Securities Co. v. (D. C. N. Y.).....	121	Beaver Cotton Mills, In re (D. C. Ga.).....	498
American & British Securities Co. v. American & British Mfg. Corporation (D. C. N. Y.).....	121	Beiner, United States v. (D. C. Pa.).....	704
Andersen & Co. v. Susquehanna S. S. Co. (D. C. Va.).....	989	Bell, Bank of Madison v., two cases (C. C. A. Ga.).....	835
Anderson, In re (D. C. N. Y.).....	397	Belvidere Screw & Machine Co., Rajah Auto Supply Co. v. (C. C. A. Ill.).....	761
Anderson, United States v. (D. C. N. Y.).....	109	Berger v. United States (C. C. A. Ill.).....	1021
Anderson Brown & Co., Donnelly v. (D. C. N. Y.).....	438	Berry v. United States (C. C. A. Ill.).....	680
Anderson & Co., Susquehanna S. S. Co. v. (D. C. N. Y.).....	355	Bethlehem Steel Bridge Corporation, Richmond Screw Anchor Co. v. (D. C. Pa.).....	585
Anketell, Blossom v. (D. C. Mich.).....	947	B. F. Sturtevant Co. v. Fidelity & Deposit Co. of Maryland (D. C. N. Y.).....	114
A. O. Andersen & Co. v. Susquehanna S. S. Co. (D. C. Va.).....	989	Birkestrand v. Chicago, M. & St. P. R. Co. (C. C. A. Iowa).....	194
A. O. Anderson & Co., Susquehanna S. S. Co. v. (D. C. N. Y.).....	355	Blake Co. v. United States (D. C. Ohio).....	861
Arminius Chemical Co. v. Acme Mfg. Co. (C. C. A. Va.).....	1021	Blossom v. Anketell (D. C. Mich.).....	947
Armour & Co. v. Louisville Provision Co. (D. C. Ky.).....	92	Board of Com'rs of Pottawatomie County, Okl., v. Close Bros. & Co. (C. C. A. Okl.).....	608
Armstrong, United States v. (D. C. Fla.).....	506	Bonner v. United States (C. C. A. Ark.).....	614
Aron & Co. v. United States Lloyds (D. C. N. Y.).....	442	Borden Co., In re (C. C. A. Wis.).....	782
		Borderland Coal Corporation v. International Organization of United Mine Workers of America (D. C. Ind.).....	871
		Boston & M. R. R. v. Sullivan (C. C. A. Mass.).....	890
		Bourjois & Co. v. Katzel (C. C. A. N. Y.).....	539
		Boyd v. United States (C. C. A. S. C.).....	16
		Bradley v. New York Life Ins. Co. (C. C. A. Iowa).....	657
		Brady, Detroit Hotel Co. v. (D. C. Mich.).....	995
		Branche, In re (D. C. N. Y.).....	555

	Page		Page
Brashear, In re (D. C. Pa.).....	481	Cutter Co. v. Metropolitan Electric Mfg. Co. (C. C. A. N. Y.).....	158
Brokaw, In re (D. C. N. Y.).....	437	C. W. Bartleson Co., In re (D. C. Fla.)... 390	390
Brown v. Camp (C. C. A. Ga.).....	612	Dahlen v. Hines (C. C. A. Wis.).....	817
Butler Paper Co., Gould v. (C. C. A. Ill.)..	827	Dalton-Kelly Coal Corporation v. Taplin (C. C. A. W. Va.).....	191
Butterworth-Judson Co., Exporters of Manufacturers' Products v. (C. C. A. N. Y.)..	1022	Davis, Heise v. (C. C. A. S. C.).....	326
Calumet & Hecla Mining Co. v. Equitable Trust Co. (D. C. N. Y.).....	552	Dean v. San Diego (D. C. Cal.).....	228
Calvin Austin, The (D. C. N. Y.).....	336	De Land, Republic Acceptance Corporation v. (D. C. Mich.).....	632
Camp, Brown v. (C. C. A. Ga.).....	612	Delatour, United States v. (C. C. A. Neb.)..	137
Cape Charles, The (D. C. Va.).....	965	Delaware, L. & W. R. Co., Rebmann v. (D. C. N. Y.).....	1009
Caplis, Ex parte, two cases (D. C. Tex.)	980	Dempsey v. Eastern Transp. Co. (C. C. A. Md.).....	350
Card, Payne v. (C. C. A. Wyo.).....	26	De Rees v. Costaguta (C. C. A. N. Y.)... 172	172
Car Float No. 14, The (D. C. Va.).....	965	Detroit Hotel Co. v. Brady (D. C. Mich.)	995
Carpenter, The S. A. (D. C. N. Y.).....	716	Dexter & Carpenter v. United States (D. C. Del.).....	566
Carroll, The John (C. C. A. N. Y.).....	302	Dillon, Lineker v. (D. C. Cal.).....	460
Carter v. Whisler (C. C. A. Iowa).....	743	Disposition of Certain Intoxicating Liquors, In re (D. C. Pa.).....	852
Castner, Curran & Bullitt v. Hamilton (D. C. Va.).....	203	Doebler, Johnson v. (C. C. A. N. D.).....	822
Castner, Curran & Bullitt v. Lederer (D. C. Pa.).....	221	Donlan & Henderson v. Turner, Dennis & Lowrey Lumber Co. (D. C. Mont.)....	71
Central Argentine R. Co., Yone Suzuki v. (D. C. N. Y.).....	54	Donnelly v. Anderson Brown & Co. (D. C. N. Y.).....	438
Central Trust Co. of Illinois, Taaffe v. (C. C. A. Ill.).....	829	Drew v. United States Shipping Board Emergency Fleet Corporation (D. C. Pa.).....	620
C. G. Blake Co. v. United States (D. C. Ohio).....	861	Drumm-Standish Commission Co., Sullinger v. (C. C. A. Mo.).....	1
Chadek v. Turcotte (D. C. Mont.).....	874	Dukes v. United States (C. C. A. S. C.)..	142
Cheney Talking Mach. Co., Victor Talking Mach. Co. v. (D. C. Mich.).....	444	Dunaway, In re (D. C. Ga.).....	591
Chicago, M. & St. P. R. Co., Birkestrand v. (C. C. A. Iowa).....	194	Duvall v. Dyche (D. C. Ga.).....	440
Chicago Record-Herald Co. v. Tribune Ass'n (C. C. A. Ill.).....	797	Dyche, Duvall v. (D. C. Ga.).....	440
Chicago Title & Trust Co. v. Smietanka (D. C. Ill.).....	60	Earle, Yellow Cab Co. v. (C. C. A. Minn.)..	928
Christensen, Union Pac. R. Co. v. (C. C. A. Iowa).....	6	Eastern Transp. Co., Dempsey v. (C. C. A. Md.).....	350
Chumas, Mason Au & Magenheimer Confectionery Mfg. Co. v. (D. C. N. Y.).....	357	East Jordan Furnace Co., American Car & Foundry Co. v. (C. C. A. Ill.).....	786
City of Baltimore, The (D. C. Md.).....	490	East St. Louis & S. R. Co., Fels v. (C. C. A. Mo.).....	881
City of San Diego, Dean v. (D. C. Cal.)..	228	Eddy v. First Nat. Bank of Fargo (C. C. A. N. D.).....	550
Clark, Gaines v. (App. D. C.).....	1017	Edwards, Ex parte (D. C. N. Y.).....	397
Clemmons, Rice v. (C. C. A. Wis.).....	782	Edwards, Porto Rico Coal Co. v., two cases (D. C. N. Y.).....	104
Cleveland Automobile Co., Hartford v. (D. C. Del.).....	590	Eisner, Laemmler v. (D. C. N. Y.).....	504
Cleveland, C., C. & St. L. R. Co., Star Brewing Co. v. (C. C. A. Ill.).....	330	Eli Lilly & Co. v. Wm. R. Warner & Co. (C. C. A. Pa.).....	752
Close Bros. & Co., Board of Com'rs of Potawatomi County, Okl., v. (C. C. A. Okl.)	608	Elmer v. Wallace (D. C. Ala.).....	86
Cohlmeier, Payne v. (C. C. A. Ill.).....	803	Elwell v. United States (C. C. A. Ill.)... 775	775
Commerce Trust Co., Petition of (D. C. Mass.).....	206	Equitable Trust Co., Calumet & Hecla Mining Co. v. (D. C. N. Y.).....	552
Commercial Nat. Bank of Washington, D. C., v. Shriver (C. C. A. Md.).....	12	Exporters of Manufacturers' Products v. Butterworth-Judson Co. (C. C. A. N. Y.).....	1022
Commercial Trust Co. of New Jersey, Garvan v. (D. C. N. J.).....	841	Farmers' Supply Co., In re (C. C. A. Ga.)	824
Commonwealth S. S. Co., Vulcanite Roofing Co. v. (D. C. Va.).....	961	Farmers' Supply Co., Alexander v. (C. C. A. Ga.).....	824
Commonwealth & Dominion Line v. Seaboard Transp. Co. (D. C. Mass.).....	617	Federal Trade Commission, Kinney-Rome Co. v. (C. C. A. Ill.).....	665
Connolly v. United States (D. C. N. Y.)... 509	509	Federal Trade Commission, Western Sugar Refinery Co. v. (C. C. A. Cal.).....	725
Conto v. Franklin County (C. C. A. Ill.)... 806	806	Fels v. East St. Louis & S. R. Co. (C. C. A. Mo.).....	881
Cooksey, United States v. (C. C. A. Cal.).. 670	670	F. G. Borden Co., In re (C. C. A. Wis.)..	732
Cornick v. United States (C. C. A. Ill.)... 354	354		
Costaguta, De Rees v. (C. C. A. N. Y.)... 172	172		
Couch Cotton Mills Co., In re (D. C. Ga.).....	496		
Crosby, In re (D. C. Mass.).....	880		

Page	Page		
Fidelity & Deposit Co. of Maryland, B. F. Sturtevant Co. v. (D. C. N. Y.).....	114	Heise v. Davis, two cases (C. C. A. S. C.)	326
Fidelity & Deposit Co. of Maryland v. Johnson (D. C. Mich.).....	112	Helen B. Moran, The (D. C. N. Y.).....	836
Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co. (C. C. A. N. J.).....	922	Herschberger v. Woodrow-Parker Co. (C. C. A. Ohio)	908
Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation (D. C. N. Y.).....	362	Hess-Bright Mfg. Co., Standard Roller Bearing Co. v. (C. C. A. Del.).....	916
First Nat. Bank of Fargo, Eddy v. (C. C. A. N. D.).....	550	Hicks v. United States (C. C. A. Colo.).....	405
Flaherty, In re (C. C. A. Iowa).....	743	Hilb v. American Smelting & Refining Co. (D. C. Ohio).....	384
Fontenot, Liebman v. (D. C. La.).....	688	Hill v. United States (C. C. A. Ill.).....	187
Fowler, Seaboard Air Line R. Co. v. (D. C. N. C.)	239	Hines, Dahlen v. (C. C. A. Wis.).....	817
Fox Film Corporation v. Knowles (D. C. N. Y.).....	582	Hines v. Smith (C. C. A. Ill.).....	766
France & Canada S. S. Corporation v. French Republic (D. C. N. Y.).....	719	Hiram Walker & Sons v. Lawson (D. C. Mich.).....	373
Francis Drug Co. v. Potter (D. C. Mass.).....	615	Hoffman, American Mills Co. v. (C. C. A. N. Y.).....	285
Franklin County, Conto v. (C. C. A. Ill.).....	806	Holmes v. United States (C. C. A. S. C.)	49
Franklin Sugar Refining Co. v. Holstein Harvey's Sons (D. C. Del.).....	622	Holstein Harvey's Sons, Franklin Sugar Refining Co. v. (D. C. Del.).....	622
Frederick E. Atteaux Co., United States v. (D. C. Mass.).....	1013	Hope Webbing Co., Appeal of (C. C. A. N. J.).....	831
French Republic, France & Canada S. S. Corporation v. (D. C. N. Y.).....	719	Howard v. Maxwell Motor Co. (C. C. A. N. Y.).....	53
Gaines v. Clark (App. D. C.).....	1017	Huntington, United States v. (C. C. A. Cal.)	674
Gannon, In re (D. C. Me.).....	1001	Huntington Development & Gas Co. v. Ashworth (C. C. A. W. Va.).....	43
Gans S. S. Line v. Wilhelmsen (C. C. A. N. Y.)	254	Hurlburt Motors, In re (D. C. N. Y.).....	62
Gardiner v. Automatic Arms Co. (D. C. N. Y.).....	697	Hygrade Lighting Fixture Corporation, Robert Findlay Mfg. Co. v. (D. C. N. Y.).....	362
Garvan v. Commercial Trust Co. of New Jersey (D. C. N. J.).....	841	Imbrie, Beaver Board Companies v. (D. C. N. Y.).....	431
Garvan v. Marconi Wireless Tel. Co. of America (D. C. N. J.).....	486	Imbrie, Beaver Board Companies v. (D. C. N. Y.).....	437
Gavit v. Irwin (D. C. N. Y.).....	643	Indian Refining Co. American Steel Foundries v. (C. C. A. Ill.).....	800
General Electric Co. v. Ohio Brass Co. (D. C. N. J.).....	213	International Organization of United Mine Workers of America, Borderland Coal Corporation v. (D. C. Ind.).....	871
George Cutter Co. v. Metropolitan Electric Mfg. Co. (C. C. A. N. Y.).....	158	Irwin, Gavit v. (D. C. N. Y.).....	643
Gillett, Worden v. (D. C. Fla.).....	654	Ivor Heath, The (D. C. Va.).....	67
Gould, In re (C. C. A. Ill.).....	827	Jaffee, In re (C. C. A. Mass.).....	819
Gould v. J. W. Butler Paper Co. (C. C. A. Ill.).....	827	Jane Palmer, The (D. C. N. Y.).....	719
Grace & Co. v. Nagle (C. C. A. N. Y.).....	343	J. Aron & Co. v. United States Lloyds (D. C. N. Y.).....	442
Grace & Co., Scott v. (C. C. A. N. Y.).....	340	J. C. Turner Lumber Co. v. Toomer (C. C. A. Ga.).....	678
Graham v. Jones (C. C. A. Ga.).....	790	John B. Rose Co., In re (C. C. A. N. Y.).....	409
Gunn v. Standard Oil Co. (C. C. A. N. D.).....	932	John B. Rose Co., In re (C. C. A. N. Y.).....	416
Guss, Baldwin v. (D. C. Pa.).....	877	John Carroll, The (C. C. A. N. Y.).....	302
Haber Bros., Wilson v. (C. C. A. N. Y.).....	346	John Lauson Mfg. Co., Advance Rumley Co. v. (C. C. A. Wis.).....	249
Hallbauer, In re (D. C. Fla.).....	125	John Wanamaker, New York, Victor Talking Mach. Co. v. (D. C. N. Y.).....	448
Hallbauer, In re (D. C. Fla.).....	126	Johnson v. Doebler (C. C. A. N. D.).....	822
Hamilton, Castner, Curran & Bullitt v. (D. C. Va.).....	203	Johnson, Fidelity & Deposit Co. of Maryland v. (D. C. Mich.).....	112
Harden v. Petritz (C. C. A. Ill.).....	811	Johnson, Northwestern Mut. Life Ins. Co. v. (C. C. A. Iowa).....	757
Harris, Atlantic Corporation v. (C. C. A. N. H.).....	721	Jones, Graham v. (C. C. A. Ga.).....	790
Hartford v. Cleveland Automobile Co. (D. C. Del.).....	590	J. W. Butler Paper Co., Gould v. (C. C. A. Ill.)	827
Hartford Rubber Works Co., Metallic Rubber Tire Co. v. (C. C. A. Conn.).....	315	Kanter, Wilson v. (C. C. A. Ill.).....	832
Harvey's Sons, Franklin Sugar Refining Co. v. (D. C. Del.).....	622	Katzel, A. Bourjois & Co. v. (C. C. A. N. Y.).....	539
Haskell Mfg. Co. v. Nelson Blower & Furnace Co. (D. C. Mass.).....	206	Kauffman v. Sodemann Heat & Power Co. (C. C. A. Mo.).....	593
Hawarden, The (D. C. Va.).....	970		
Heath, The Ivor (D. C. Va.).....	67		

	Page		Page
Keenan v. Prince Line (D. C. N. Y.).....	712	Marley-Morse Co., In re (C. C. A. Ill.)...	832
Kennedy v. United States (C. C. A. S. C.)	182	Martin, McGinley v. (C. C. A. Mo.).....	267
Kenworthy, Menzer v. (D. C. Conn.).....	649	Mason Au & Magenheimer Confectionery Mfg. Co. v. Alps Candies (D. C. N. Y.)	357
Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co. (C. C. A. Ind.).....	794	Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas (D. C. N. Y.).....	357
Kissam, McElligott v. (C. C. A. N. Y.).....	545	Maxwell Motor Co., Howard v. (C. C. A. N. Y.).....	53
Kinloch Tel. Co. v. Local Union No. 2 of International Brotherhood of Electrical Workers (C. C. A. Mo.).....	241	Menke v. Willcox (D. C. N. Y.).....	57
Kinney-Rome Co. v. Federal Trade Com- mission (C. C. A. Ill.).....	665	Menzer v. Kenworthy (D. C. Conn.).....	649
Knight v. Knight (C. C. A. N. D.).....	196	Mertens, In re (C. C. A. Md.).....	12
Knowles, Fox Film Corporation v. (D. C. N. Y.).....	582	Merriam, United States v. (D. C. N. Y.)..	109
Kokomo Steel & Wire Co., Keystone Steel & Wire Co. v. (C. C. A. Ind.).....	794	Metallic Rubber Tire Co. v. Hartford Rub- ber Works Co. (C. C. A. Conn.).....	315
Laemmle v. Eisner (D. C. N. Y.).....	504	Metropolitan Bank, Appeal of (C. C. A. N. Y.).....	416
Lane v. Whitaker (D. C. Conn.).....	476	Metropolitan By-Products Co., American Engineering Co. v. (C. C. A. N. Y.).....	34
Larson, Jr., Co., In re (C. C. A. Ill.).....	535	Metropolitan By-Products Co., American Engineering Co. v. (C. C. A. N. Y.).....	40
Larson, Jr., Co. v. William Wrigley, Jr., Co. (C. C. A. Ill.).....	535	Metropolitan Electric Mfg. Co., George Cut- ter Co. v. (C. C. A. N. Y.).....	158
Lauson Mfg. Co., Advance Rumley Co. v. (C. C. A. Wis.).....	249	Miami Copper Co., Minerals Separation v. (D. C. Del.).....	572
Lawson, Hiram Walker & Sons v. (D. C. Mich.).....	373	Michigan Lubricator Co. v. Ontario Cart- ridge Co. (C. C. A. Mich.).....	902
Lederer, Castner, Curran & Bullitt v. (D. C. Pa.).....	221	Milburn Co., Adamson v. (C. C. A. N. Y.)..	148
Lehigh Valley R. Co., Fidelity & Deposit Co. of Maryland v. (C. C. A. N. J.).....	922	Miller v. Minerals Separation Limited (D. C. Cal.).....	380
Leong Shee, Ex parte (D. C. Cal.).....	364	Miller, National Life Ins. Co. of Montpel- ier, Vt., v. (C. C. A. Iowa).....	757
Lewis & Kelsey, In re (C. C. A. N. Y.)	40	Mills v. Linen Thread Co. (D. C. Mass.)	937
Lexington, The (C. C. A. N. Y.).....	279	Mims v. Reid (C. C. A. Va.).....	177
Liebman v. Fontenot (D. C. La.).....	688	Minerals Separation v. Miami Copper Co. (D. C. Del.).....	572
Lilly & Co. v. Wm. R. Warner & Co. (C. C. A. Pa.).....	752	Minerals Separation Limited, Miller v. (D. C. Cal.).....	380
Lindy-Friedman Clothing Co., In re (D. C. Ala.).....	453	Missouri Pac. R. Co., Road Imp. Dist. No. 2 of Conway County v. (C. C. A. Ark.)..	600
Lineker v. Dillon (D. C. Cal.).....	460	Mohawk Weaving Mills, In re (D. C. N. Y.).....	589
Linen Thread Co., Mills v. (D. C. Mass.)..	937	Montana Nat. Bank, Van Atta v. (C. C. A. Mont.).....	548
Local Union No. 2 of International Broth- erhood of Electrical Workers, Kinloch Tel. Co. v. (C. C. A. Mo.).....	241	Moore v. Otis (C. C. A. Okl.).....	747
Long, In re (D. C. Fla.).....	119	Moore, United States v. (D. C. N. Y.).....	992
Lott, Mutual Life Ins. Co. of New York v. (D. C. Cal.).....	365	Moran, The Helen B. (D. C. N. Y.).....	836
Louisville Provision Co., Armour & Co. v. (D. C. Ky.).....	92	Morse Dry Dock & Repair Corporation, Olympia Shipping Corporation v. (C. C. A. Va.).....	199
L. P. Larson, Jr., Co., In re (C. C. A. Ill.)	535	Mulligan, Appeal of (C. C. A. N. Y.).....	302
L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co. (C. C. A. Ill.).....	535	Munger v. Perlman Rim Corporation (C. C. A. N. Y.).....	21
Lucas v. United States (C. C. A. Colo.)...	405	Muskegon, The (C. C. A. N. Y.).....	348
Lucey Mfg. Corporation, Wilson v. (D. C. Cal.).....	624	Muskegon, The (D. C. N. Y.).....	117
Luckenbach S. S. Co., Vacuum Oil Co. v. (D. C. Va.).....	998	Mutual Life Ins. Co. of New York v. Lott (D. C. Cal.).....	365
Lumiere v. Pathé Exch. (C. C. A. N. Y.)..	428	Nacoochee, The (D. C. Mass.).....	876
Lydecker, United States v. (D. C. N. Y.)..	976	Nagle, W. R. Grace & Co. v. (C. C. A. N. Y.).....	348
McClelland, In re (D. C. Cal.).....	576	National City Bank of New York v. United States (D. C. N. Y.).....	855
McElligott v. Kissam (C. C. A. N. Y.).....	545	National Laboratory & Supply Co. v. United States (D. C. Pa.).....	218
McGinley v. Martin (C. C. A. Mo.).....	267	National Life Ins. Co. of Montpelier, Vt., v. Miller (C. C. A. Iowa).....	757
McGrath v. United States (C. C. A. N. Y.).....	294	National Savings & Trust Co., Athan v. (App. D. C.).....	1020
McHenry v. United States (C. C. A. Tex.)	1022	Nelson Blower & Furnace Co., William H. Haskell Mfg. Co. v. (D. C. Mass.).....	206
McLain-Hadden-Simpers Co. v. Trent Rub- ber Co. (C. C. A. N. J.).....	831	Nevada, The (D. C. Va.).....	965
Manning v. United States (C. C. A. Mo.)	29		
Marconi Wireless Tel. Co. of America, Gar- van v. (D. C. N. J.).....	486		
Margrave, Ex parte (D. C. Cal.).....	200		

	Page		Page
New v. United States (D. C. Va.).....	970	Richard E. Sause Co., Ex parte (D. C. N. Y.).....	65
Newton Tea & Spice Co., United States v. (D. C. Ohio).....	394	Richmond, The (D. C. Va.).....	970
New York Life Ins. Co., Bradley v. (C. C. A. Iowa).....	657	Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corporation (D. C. Pa.)....	585
New York Times, Public Ledger v. (D. C. N. Y.).....	562	Riordan, Pummill v. (D. C. N. Y.).....	846
Northwestern Consol. Milling Co. v. Rosenberg (D. C. Pa.).....	878	Rizzo v. United States (C. C. A. Pa.)....	51
Northwestern Mut. Life Ins. Co. v. Johnson (C. C. A. Iowa).....	757	Road Imp. Dist. No. 2 of Conway County v. Missouri Pac. R. Co. (C. C. A. Ark.).....	600
Noyes, The Walter D. (D. C. Va.).....	690	Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation (D. C. N. Y.)..	362
No. 17, The (C. C. A. N. Y.).....	930	Rockford Produce & Sales Co., In re (C. C. A. Ill.).....	811
Ohio Brass Co., General Electric Co. v. (D. C. N. J.).....	213	Rogers Palace Laundry Co., In re (C. C. A. Ill.).....	829
O'Leary, United States v. (D. C. N. Y.)..	202	Roman Prince, The (D. C. N. Y.).....	712
Olympia Shipping Corporation v. Morse Dry Dock & Repair Corporation (C. C. A. Va.).....	199	Rose Brick Co., In re (C. C. A. N. Y.)....	409
Omaha Live Stock Commission Co., Allen v. (C. C. A. Neb.).....	1	Rose Co., In re (C. C. A. N. Y.).....	409
One Buick Automobile v. United States (C. C. A. Okl.).....	809	Rose Co., In re (C. C. A. N. Y.).....	416
Ontario Cartridge Co., Michigan Lubricator Co. v. (C. C. A. Mich.).....	902	Rosenberg, Northwestern Consol. Milling Co. v. (D. C. Pa.).....	878
Otis, Moore v. (C. C. A. Okl.).....	747	Russell v. Tilghman (D. C. Va.).....	235
Palmer, The Jane (D. C. N. Y.).....	719	S. A. Carpenter, The (D. C. N. Y.).....	716
Palmer, The Singleton (D. C. N. Y.).....	719	Safran, Petition of (C. C. A. Mass.).....	819
Parham v. Standard Oil Co. of Louisiana (D. C. Miss.).....	1007	Sam & Priscilla, The (D. C. Mass.).....	937
Parker, In re (D. C. Ill.).....	868	Sampson v. Silverman (D. C. R. I.).....	123
Pathé Exch., Lumiere v. (C. C. A. N. Y.)..	428	Saslaw, In re (D. C. Ohio).....	587
Payne v. Card (C. C. A. Wyo.).....	26	Sause Co., Ex parte (D. C. N. Y.).....	65
Payne v. Cohlmeier (C. C. A. Ill.).....	803	Schaff, Sinclair Refining Co. v. (C. C. A. Kan.).....	769
Perlman Rim Corporation, Munger v. (C. C. A. N. Y.).....	21	Schlecht, Yuma County Water Users' Ass'n v. (C. C. A. Ariz.).....	885
Perrow v. Scott (C. C. A. Va.).....	46	Scott, In re (C. C. A. Va.).....	46
Petriz, Harden v. (C. C. A. Ill.).....	811	Scott, Perrow v. (C. C. A. Va.).....	46
Pierre v. United States (C. C. A. Kan.)...	352	Scott v. W. R. Grace & Co. (C. C. A. N. Y.).....	340
Pittman, In re (D. C. N. C.).....	681	Seaboard Air Line R. Co. v. Fowler (D. C. N. C.).....	239
Pittman, In re (D. C. N. C.).....	686	Seaboard Air Line Ry. v. United States (D. C. S. C.).....	77
Pollock, The Walter B. (C. C. A. N. Y.)..	1023	Seaboard Transp. Co., Commonwealth & Dominion Line v. (D. C. Mass.).....	617
Porto Rico Coal Co. v. Edwards, two cases (D. C. N. Y.).....	104	Sedberry, Stokes v. (C. C. A. Tenn.).....	894
Pottash Bros., Tidewater Portland Cement Co. v. (D. C. Pa.).....	237	Sedberry v. Walker (C. C. A. Tenn.)....	894
Potter, Francis Drug Co. v. (D. C. Mass.)..	615	Sexton Co., Wood v. (C. C. A. Pa.).....	660
Prince Line, Keenan v. (D. C. N. Y.).....	712	Shriver, Commercial Nat. Bank of Washington, D. C. (C. C. A. Md.).....	12
Progressive, The (D. C. N. Y.).....	360	Silverman, Sampson v. (D. C. R. I.).....	123
Public Ledger v. New York Times (D. C. N. Y.).....	562	Sinclair Refining Co. v. Schaff (C. C. A. Kan.).....	769
Pummill v. Riordan (D. C. N. Y.).....	846	Singleton Palmer, The (D. C. N. Y.).....	719
Railroad Commission of Georgia, Western & A. R. v. (D. C. Ga.).....	128	Smietanka, Chicago Title & Trust Co. v. (D. C. Ill.).....	60
Rajah Auto Supply Co. v. Belvidere Screw & Machine Co. (C. C. A. Ill.).....	761	Smietanka v. Ullman (C. C. A. Ill.).....	814
Ratageczak, United States v. (D. C. Ohio)...	558	Smith, In re (C. C. A. Ga.).....	835
Ray & Schultz, United States v. (D. C. Mich.).....	1004	Smith, Beattie Mfg. Co. v. (C. C. A. N. Y.)..	164
Rehmann v. Delaware, L. & W. R. Co. (D. C. N. Y.).....	1009	Smith, Hines v. (C. C. A. Ill.).....	766
Reid, Mims v. (C. C. A. Va.).....	177	Smoller, United States v. (D. C. Del.)....	1011
Reisler, In re (D. C. N. Y.).....	65	Sodemann Heat & Power Co. v. Kauffman (C. C. A. Mo.).....	593
Republic Acceptance Corporation v. De Land (D. C. Mich.).....	632	Spearmen v. United States (C. C. A. Tex.).....	1023
Rhode Island Hospital Trust Co., Atwood v. (C. C. A. R. I.).....	513	Standard-Detroit Tractor Co., In re (D. C. Mich.).....	952
Rice v. Clemmons (C. C. A. Wis.).....	782	Standard Oil Co., Gunn v. (C. C. A. N. D.)..	932
		Standard Oil Co. of Louisiana, Parham v. (D. C. Miss.).....	1007
		Standard Roller Bearing Co. v. Hess-Bright Mfg. Co. (C. C. A. Del.).....	916

	Page		Page
Stanfield, Story v. (C. C. A. Or.)	401	United States, Connelly v. (D. C. N. Y.)	509
Star Brewing Co. v. Cleveland, C., C. & St. L. R. Co. (C. C. A. Ill.)	330	United States v. Cooksey (C. C. A. Cal.)	670
State of Santa Catharina, Republic of Brazil, In re (D. C. N. Y.)	431	United States, Cornick v. (C. C. A. Ill.)	354
Stephan v. Union Pac. R. Co. (D. C. Minn.)	709	United States v. Delatour (C. C. A. Neb.)	137
Stifinder, The (C. C. A. N. Y.)	271	United States, Dexter & Carpenter v. (D. C. Del.)	566
Stokes v. Sedberry (C. C. A. Tenn.)	894	United States, Dukes v. (C. C. A. S. C.)	142
Story v. Stanfield (C. C. A. Or.)	401	United States, Elwell v. (C. C. A. Ill.)	775
Sturtevant Co. v. Fidelity & Deposit Co. of Maryland (D. C. N. Y.)	114	United States v. Frederick E. Atteaux Co. (D. C. Mass.)	1013
Sullinger v. Drumm-Standish Commission Co. (C. C. A. Mo.)	1	United States, Hicks v. (C. C. A. Colo.)	405
Sullivan, Boston & M. R. R. (C. C. A. Mass.)	890	United States, Hill v. (C. C. A. Ill.)	187
Superior Motor Truck Co., In re (D. C. Ga.)	623	United States, Holmes v. (C. C. A. S. C.)	49
Susquehanna S. S. Co., A. O. Andersen & Co. v. (D. C. Va.)	989	United States v. Huntington (C. C. A. Cal.)	674
Susquehanna S. S. Co. v. A. O. Anderson & Co. (D. C. N. Y.)	355	United States, Kennedy v. (C. C. A. S. C.)	182
Swift, In re (C. C. A. Ga.)	834	United States, Lucas v. (C. C. A. Colo.)	405
Swift, Bank of Elberton v. (C. C. A. Ga.)	834	United States v. Lydecker (D. C. N. Y.)	976
Symons v. Symons (App. D. C.)	1015	United States, McGrath v. (C. C. A. N. Y.)	294
Taafe v. Central Trust Co. of Illinois (C. C. A. Ill.)	829	United States, McHenry v. (C. C. A. Tex.)	1022
Taplin, Dalton-Kelly Coal Corporation v. (C. C. A. W. Va.)	191	United States, Manning v. (C. C. A. Mo.)	29
The Hub, In re (D. C. Fla.)	400	United States v. Merriam (D. C. N. Y.)	109
Themis, The (C. C. A. N. Y.)	254	United States v. Moore (D. C. N. Y.)	992
Tidewater Portland Cement Co. v. Pottash Bros. (D. C. Pa.)	237	United States, National City Bank of New York v. (D. C. N. Y.)	855
Tilghman, Russell v. (D. C. Va.)	235	United States, National Laboratory & Supply Co. v. (D. C. Pa.)	218
Toomer, J. C. Turner Lumber Co. v. (C. C. A. Ga.)	678	United States, New v. (D. C. Va.)	970
Traveler's Ins. Co., Appeal of (C. C. A. N. Y.)	409	United States v. Newton Tea & Spice Co. (D. C. Ohio)	394
Trent Rubber Co., McLain-Hadden-Simpers Co. v. (C. C. A. N. J.)	831	United States v. O'Leary (D. C. N. Y.)	202
Tribune Ass'n, Chicago Record-Herald Co. v. (C. C. A. Ill.)	797	United States, One Buick Automobile v. (C. C. A. Okl.)	809
Turcotte, Chadek v. (D. C. Mont.)	874	United States, Pierre v. (C. C. A. Kan.)	352
Turner, Dennis & Lowrey Lumber Co., Donlan & Henderson v. (D. C. Mont.)	71	United States v. Ratagczak (D. C. Ohio)	558
Turner Lumber Co. v. Toomer (C. C. A. Ga.)	678	United States v. Ray & Schultz (D. C. Mich.)	1004
Turrett Crown, The (D. C. Va.)	961	United States, Rizzo v. (C. C. A. Pa.)	51
Tuxedo, The (D. C. N. Y.)	716	United States, Seaboard Air Line Ry. v. (D. C. S. C.)	77
Twelve Cases of Four Roses Whisky and Two Gallons of Alcohol, United States v. (D. C. Mass.)	615	United States v. Smoller (D. C. Del.)	1011
Ullman, Smietanka v. (C. C. A. Ill.)	814	United States, Spearman v. (C. C. A. Tex.)	1023
Union Pac. R. Co. v. Christensen (C. C. A. Iowa)	6	United States v. Twelve Cases of Four Roses Whisky and Two Gallons of Alcohol (D. C. Mass.)	615
Union Pac. R. Co., Stephan v. (D. C. Minn.)	709	United States v. Vanderbilt (D. C. N. Y.)	109
Union Tool Co., Wilson v. (D. C. Cal.)	624	United States v. Waddell Inv. Co. (D. C. Mo.)	934
United States v. American Linseed Co. (D. C. Ill.)	939	United States, Williams v. (C. C. A. Cal.)	129
United States v. Anderson (D. C. N. Y.)	109	United States, Wilson v. (C. C. A. N. Y.)	307
United States v. Armstrong (D. C. Fla.)	506	United States v. Yohn (D. C. N. Y.)	232
United States v. Atteaux (D. C. Mass.)	1013	United States Lloyds, J. Aron & Co. v. (D. C. N. Y.)	442
United States v. Beiner (D. C. Pa.)	704	United States Shipping Board Emergency Fleet Corporation, Drew v. (D. C. Pa.)	620
United States, Berger v. (C. C. A. Ill.)	1021	Vacuum Oil Co. v. Luckenbach S. S. Co. (D. C. Va.)	998
United States, Berry v. (C. C. A. Ill.)	680	Van Atta v. Montana Nat. Bank (C. C. A. Mont.)	548
United States, Bonner v. (C. C. A. Ark.)	614	Vanderbilt, United States v. (D. C. N. Y.)	109
United States, Boyd v. (C. C. A. S. C.)	16	Victor Talking Mach. Co. v. Cheney Talking Mach. Co. (D. C. Mich.)	444
United States, C. G. Blake Co. v. (D. C. Ohio)	861	Victor Talking Mach. Co. v. John Wanamaker, New York (D. C. N. Y.)	448
		Vulcanite Roofing Co. v. Commonwealth S. S. Co. (D. C. Va.)	961
		Waddell Inv. Co., United States v. (D. C. Mo.)	934

CASES REPORTED

XV

(275 F.)

	Page		Page
Walker, Sedberry v. (C. C. A. Tenn.).....	894	William Wrigley, Jr., Co., L. P. Larson,	
Walker & Sons v. Lawson (D. C. Mich.)..	373	Jr., Co. v. (C. C. A. Ill.).....	535
Wallace, Elmer v. (D. C. Ala.).....	86	Williams v. United States (C. C. A. Cal.)	129
Walter B. Pollock, The (C. C. A. N. Y.)	1023	Wilson v. Haber Bros. (C. C. A. N. Y.)..	346
Walter D. Noyes, The (D. C. Va.).....	690	Wilson v. Kanter (C. C. A. Ill.).....	832
Wanamaker, New York, Victor Talking		Wilson v. Lucey Mfg. Corporation (D. C.	
Mach. Co. v. (D. C. N. Y.).....	448	Cal.)	624
Wayne Realty Co., In re (D. C. Ohio)..	955	Wilson v. Union Tool Co. (D. C. Cal.)... 624	
Warner & Co., Eli Lilly & Co. v. (C. C. A.		Wilson v. United States (C. C. A. N. Y.).. 307	
Pa.)	752	Wood v. W. E. Sexton Co. (C. C. A. Pa.).. 660	
W. E. Sexton Co., Wood v. (C. C. A. Pa.)	660	Woodrow-Parker Co., Herschberger v. (C.	
Western Sugar Refinery Co. v. Federal		C. A. Ohio)	908
Trade Commission (C. C. A. Cal.).....	725	Worden v. Gillett (D. C. Fla.).....	654
Western & A. R. R. v. Railroad Commis-		W. R. Grace & Co. v. Nagle (C. C. A.	
sion of Georgia (D. C. Ga.).....	128	N. Y.)	343
Whisler, Carter v. (C. C. A. Iowa).....	743	W. R. Grace & Co., Scott v. (C. C. A. N. Y.)	340
Whitaker, Lane v. (D. C. Conn.).....	476	Wrigley, Jr., Co., L. P. Larson, Jr., Co., v.	
Wilhelmsen, Sans S. S. Line v. (C. C. A. N.		(C. C. A. Ill.).....	535
Y.)	254	Yellow Cab Co. v. Earle (C. C. A. Minn.)	928
Willcox, Menke v. (D. C. N. Y.).....	57	Yohn, United States v. (D. C. N. Y.).....	232
William H. Haskell Mfg. Co. v. Nelson		Yone Suzuki v. Central Argentine R. Co.	
Blower & Furnace Co. (D. C. Mass.)..	206	(D. C. N. Y.).....	54
Wm. R. Warner & Co., Eli Lilly & Co. v.		Yuma County Water Users' Ass'n v.	
(C. C. A. Pa.).....	752	Schlecht (C. C. A. Ariz.).....	885

*

CASES REPORTED

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

	Page		Page
Atlantic Corporation v. Harris (C. C. A. N. H.)	721	Beattie Mfg. Co. v. Smith (C. C. A. N. Y.)	164
Atwood v. Rhode Island Hospital Trust Co. (C. C. A. R. I.)	513	Beaver Board Companies v. Imbrie (D. C. N. Y.)	431
Boston & M. R. R. v. Sullivan (C. C. A. Mass.)	890	Beaver Board Companies v. Imbrie (D. C. N. Y.)	437
Commerce Trust Co., Petition of (D. C. Mass.)	206	B. F. Sturtevant Co. v. Fidelity & Deposit Co. of Maryland (D. C. N. Y.)	114
Commonwealth & Dominion Line v. Seaboard Transp. Co. (D. C. Mass.)	617	Bourjois & Co. v. Katzel (C. C. A. N. Y.)	539
Crosby, In re (D. C. Mass.)	880	Branche, In re (D. C. N. Y.)	555
Francis Drug Co. v. Potter (D. C. Mass.)	615	Brokaw, In re (D. C. N. Y.)	437
Gannon, In re (D. C. Me.)	1001	Calumet & Hecla Mining Co. v. Equitable Trust Co. (D. C. N. Y.)	552
Haskell Mfg. Co. v. Nelson Blower & Furnace Co. (D. C. Mass.)	206	Calvin Austin, The (D. C. N. Y.)	836
Jaffee, In re (C. C. A. Mass.)	819	Carpenter, The S. A. (D. C. N. Y.)	716
Mills v. Linen Thread Co. (D. C. Mass.)	937	Carroll, The John (C. C. A. N. Y.)	302
Nacoochee, The (D. C. Mass.)	876	Connelly v. United States (D. C. N. Y.)	509
Safran, Petition of (C. C. A. Mass.)	819	Cutter Co. v. Metropolitan Electric Mfg. Co. (C. C. A. N. Y.)	158
Sampson v. Silverman (D. C. R. I.)	123	De Rees v. Costaguta (C. C. A. N. Y.)	172
Sam & Priscilla, The (D. C. Mass.)	937	Donnelly v. Anderson Brown & Co. (D. C. N. Y.)	438
United States v. Atteaux (D. C. Mass.)	1013	Edwards, Ex parte (D. C. N. Y.)	397
United States v. Frederick E. Atteaux Co. (D. C. Mass.)	1013	Exporters of Manufacturers' Products v. Butterworth-Judson Co. (C. C. A. N. Y.)	1022
United States v. Twelve Cases of Four Roses Whisky and Two Gallons of Alcohol (D. C. Mass.)	615	Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation (D. C. N. Y.)	362
William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co. (D. C. Mass.)	206	Fox Film Corporation v. Knowles (D. C. N. Y.)	582

SECOND CIRCUIT.

Abbott, The (D. C. N. Y.)	360	Gardiner v. Automatic Arms Co. (D. C. N. Y.)	697
A. Bourjois & Co. v. Katzel (C. C. A. N. Y.)	539	Gavit v. Irwin (D. C. N. Y.)	643
Actieselskabet Christiansand, Petition of (C. C. A. N. Y.)	271	George Cutter Co. v. Metropolitan Electric Mfg. Co. (C. C. A. N. Y.)	158
Adamson v. Alexander M'burn Co. (C. C. A. N. Y.)	148	Grace & Co. v. Nagle (C. C. A. N. Y.)	343
American Engineering Co. v. Metropolitan By-Products Co. (C. C. A. N. Y.)	34	Helen B. Moran, The (D. C. N. Y.)	836
American Engineering Co. v. Metropolitan By-Products Co. (C. C. A. N. Y.)	40	Howard v. Maxwell Motor Co. (C. C. A. N. Y.)	53
American Mills Co. v. Hoffman (C. C. A. N. Y.)	285	Hurlburt Motors, In re (D. C. N. Y.)	62
American & British Securities Co. v. American & British Mfg. Corporation (D. C. N. Y.)	121	Jane Palmer, The (D. C. N. Y.)	719
Anderson, In re (D. C. N. Y.)	397	J. Aron & Co. v. United States Lloyds (D. C. N. Y.)	442
Aron & Co. v. United States Lloyds (D. C. N. Y.)	442	John B. Rose Co., In re (C. C. A. N. Y.)	409
Austin, The Calvin (D. C. N. Y.)	836	John B. Rose Co., In re (C. C. A. N. Y.)	416
Baker, In re (D. C. N. Y.)	511	John Carroll, The (C. C. A. N. Y.)	302
		Keenan v. Prince Line (D. C. N. Y.)	712
		Laemmle v. Eisner (D. C. N. Y.)	504
		Lane v. Whitaker (D. C. Conn.)	476
		Lewis & Kelsey, In re (C. C. A. N. Y.)	40

Page	Page		
Lexington, The (C. C. A. N. Y.).....	279	Victor Talking Mach. Co. v. John Wan-	448
Lumiere v. Pathé Exch. (C. C. A. N. Y.)..	428	maker, New York (D. C. N. Y.).....	1023
McElligott v. Kissam (C. C. A. N. Y.)....	545	Walter B. Pollock, The (C. C. A. N. Y.)..	346
McGrath v. United States (C. C. A. N.	294	Wilson v. Haber Bros. (C. C. A. N. Y.)... 346	307
Y.)	294	Wilson v. United States (C. C. A. N. Y.)..	307
Mason Au & Magenheimer Confectionery	357	W. R. Grace & Co. v. Nagle (C. C. A.	343
Mfg. Co. v. Alps Candies (D. C. N. Y.)	357	N. Y.)	343
Mason Au & Magenheimer Confectionery	357	Yone Suzuki v. Central Argentine R. Co.	54
Mfg. Co. v. Chumas (D. C. N. Y.).....	357	(D. C. N. Y.).....	54
Menke v. Willcox (D. C. N. Y.).....	649		
Menzer v. Kenworthy (D. C. Conn.).....	649		
Metallic Rubber Tire Co. v. Hartford Rub-	315		
ber Works Co. (C. C. A. Conn.).....	315		
Metropolitan Bank, Appeal of (C. C. A.	416		
N. Y.).....	416		
Mohawk Weaving Mills, In re (D. C. N.	589		
Y.)	589		
Moran, The Helen B. (D. C. N. Y.).....	836		
Mulligan, Appeal of (C. C. A. N. Y.).....	302		
Munger v. Perlman Rim Corporation (C.	21		
C. A. N. Y.).....	21		
Muskegon, The (C. C. A. N. Y.).....	348		
Muskegon, The (D. C. N. Y.).....	117		
National City Bank of New York v. United	855		
States (D. C. N. Y.).....	855		
No. 17, The (C. C. A. N. Y.).....	930		
Palmer, The Jane (D. C. N. Y.).....	719		
Palmer, The Singleton (D. C. N. Y.).....	719		
Pollock, The Walter B. (C. C. A. N. Y.)..	1023		
Porto Rico Coal Co. v. Edwards, two cas-	104		
es (D. C. N. Y.).....	104		
Progressive, The (D. C. N. Y.).....	360		
Public Ledger v. New York Times (D. C.	562		
N. Y.).....	562		
Pummilli v. Riordan (D. C. N. Y.).....	846		
Rebmann v. Delaware, L. & W. R. Co.	1009		
(D. C. N. Y.).....	1009		
Reisler, In re (D. C. N. Y.).....	65		
Richard E. Sause Co., Ex parte (D. C. N.	65		
Y.)	65		
Robert Findlay Mfg. Co. v. Hygrade Light-	362		
ing Fixture Corporation (D. C. N. Y.)..	362		
Roman Price, The (D. C. N. Y.).....	712		
Rose Brick Co., In re (C. C. A. N. Y.)....	409		
Rose Co., In re (C. C. A. N. Y.).....	409		
Rose Co., In re (C. C. A. N. Y.).....	416		
S. A. Carpenter, The (D. C. N. Y.).....	716		
Sause Co., Ex parte (D. C. N. Y.).....	65		
Scott v. W. R. Grace & Co. (C. C. A. N.	340		
Y.)	340		
Singleton Palmer, The (D. C. N. Y.).....	719		
State of Santa Catharina, Republic of	431		
Brazil, In re (D. C. N. Y.).....	431		
Stifinder, The (C. C. A. N. Y.).....	271		
Sturtevant Co. v. Fidelity & Deposit Co. of	114		
Maryland (D. C. N. Y.).....	114		
Susquehanna S. S. Co. v. A. O. Ander-	355		
son & Co. (D. C. N. Y.).....	355		
Themis, The (C. C. A. N. Y.).....	254		
Traveler's Ins. Co., Appeal of (C. C. A.	409		
N. Y.).....	409		
Tuxedo, The (D. C. N. Y.).....	716		
United States v. Anderson (D. C. N. Y.)	109		
United States v. Lydecker (D. C. N. Y.)	976		
United States v. Merriam (D. C. N. Y.)	109		
United States v. Moore (D. C. N. Y.)....	992		
United States v. O'Leary (D. C. N. Y.)..	202		
United States v. Vanderbilt (D. C. N. Y.)	109		
United States v. Yohn (D. C. N. Y.).....	232		
		THIRD CIRCUIT.	
		Baldwin, v. Guss (D. C. Pa.).....	877
		Brashear, In re (D. C. Pa.).....	481
		Castner, Curran & Bullitt v. Lederer (D.	221
		C. Pa.).....	221
		Dexter & Carpenter v. United States (D. C.	566
		Del.)	566
		Disposition of Certain Intoxicating Liq-	852
		uors, In re (D. C. Pa.).....	852
		Drew v. United States Shipping Board	620
		Emergency Fleet Corporation (D. C.	620
		Pa.)	620
		Eli Lilly & Co. v. Wm. R. Warner & Co.	752
		(C. C. A. Pa.).....	752
		Fidelity & Deposit Co. of Maryland v. Le-	922
		high Valley R. Co. (C. C. A. N. J.).....	922
		Franklin Sugar Refining Co. v. Holstein	622
		Harvey's Sons (D. C. Del.).....	622
		Garvan v. Commercial Trust Co. of New	841
		Jersey (D. C. N. J.).....	841
		Garvan v. Marconi Wireless Tel. Co. of	486
		America (D. C. N. J.).....	486
		General Electric Co. v. Ohio Brass Co.	213
		(D. C. N. J.).....	213
		Hartford v. Cleveland Automobile Co. (D.	590
		C. Del.).....	590
		Hope Webbing Co., Appeal of (C. C. A. N.	831
		J.)	831
		Lilly & Co. v. Wm. R. Warner & Co.	752
		(C. C. A. Pa.).....	752
		McLain-Hadden-Simpers Co. v. Trent Rub-	831
		ber Co. (C. C. A. N. J.).....	831
		Minerals Separation v. Miami Copper Co.	572
		(D. C. Del.).....	572
		National Laboratory & Supply Co. v.	218
		United States (D. C. Pa.).....	218
		Northwestern Consol. Milling Co. v. Rosen-	878
		berg (D. C. Pa.).....	878
		Richmond Screw Anchor Co. v. Bethlehem	585
		Steel Bridge Corporation (D. C. Pa.)....	585
		Rizzo v. United States (C. C. A. Pa.)... 51	51
		Standard Roller Bearing Co. v. Hess-	916
		Bright Mfg. Co. (C. C. A. Del.).....	916
		United States v. Beimer (D. C. Pa.).....	704
		United States v. Smoller (D. C. Del.)...1011	1011
		Tidewater Portland Cement Co. v. Pottash	237
		Bros. (D. C. Pa.).....	237
		Wood v. W. E. Sexton Co. (C. C. A. Pa.)..	660
		FOURTH CIRCUIT.	
		Andersen & Co. v. Susquehanna S. S. Co.	989
		(D. C. Va.).....	989
		A. O. Andersen & Co. v. Susquehanna S.	989
		S. Co. (D. C. Va.).....	989
		Arminius Chemical Co. v. Acme Mfg. Co.	1021
		(C. C. A. Va.)	1021
		Barranca, The (D. C. Va.).....	690
		Boyd v. United States (C. C. A. S. C.)... 16	16

CASES REPORTED

(275 F.)

xix

	Page		Page
Cape Charles, The (D. C. Va.).....	965	Lindy-Friedman Clothing Co., In re (D. C. Ala.).....	453
Car Float No. 14, The (D. C. Va.).....	965	Long, In re (D. C. Fla.).....	119
Castner, Curran & Bullitt v. Hamilton (D. C. Va.).....	203	McHenry v. United States (C. C. A. Tex.)	1022
City of Baltimore, The (D. C. Md.).....	490	Parham v. Standard Oil Co. of Louisiana (D. C. Miss.)	1007
Commercial Nat. Bank of Washington, D. C., v. Shriver (C. C. A. Md.).....	12	Smith, In re (C. C. A. Ga.).....	835
Dalton-Kelly Coal Corporation v. Taplin (C. C. A. W. Va.).....	191	Spearman v. United States (C. C. A. Tex.)	1023
Dempsey v. Eastern Transp. Co. (C. C. A. Md.).....	350	Superior Motor Truck Co., In re (D. C. Ga.)	623
Dukes v. United States (C. C. A. S. C.)..	142	Swift, In re (C. C. A. Ga.).....	834
Hawarden, The (D. C. Va.).....	970	The Hub, In re (D. C. Fla.).....	400
Heath, The Ivor (D. C. Va.).....	67	Turner Lumber Co. v. Toomer (C. C. A. Ga.)	678
Heise v. Davis, two cases (C. C. A. S. C.)	326	United States v. Armstrong (D. C. Fla.)..	506
Holmes v. United States (C. C. A. S. C.)	49	Western & A. R. R. v. Railroad Commission of Georgia (D. C. Ga.).....	128
Huntington Development & Gas Co. v. Ashworth (C. C. A. W. Va.).....	43	Worden v. Gillett (D. C. Fla.).....	654
Ivor Heath, The (D. C. Va.).....	67		
Kennedy v. United States (C. C. A. S. C.)	182	SIXTH CIRCUIT.	
Mertens, In re (C. C. A. Md.).....	12	Armour & Co. v. Louisville Provision Co. (D. C. Ky.).....	92
Mims v. Reid (C. C. A. Va.).....	177	Blake Co. v. United States (D. C. Ohio)..	861
Nevada, The (D. C. Va.).....	965	Blossom v. Anketell (D. C. Mich.).....	947
New v. United States (D. C. Va.).....	970	C. G. Blake Co. v. United States (D. C. Ohio)	861
Noyes, The Walter D. (D. C. Va.).....	690	Detroit Hotel Co. v. Brady (D. C. Mich.)	995
Olympia Shipping Corporation v. Morse Dry Dock & Repair Corporation (C. C. A. Va.).....	199	Fidelity & Deposit Co. of Maryland v. Johnson (D. C. Mich.).....	112
Perrow v. Scott (C. C. A. Va.).....	46	Herschberger v. Woodrow-Parker Co. (C. C. A. Ohio).....	908
Pittman, In re (D. C. N. C.).....	681	Hilb v. American Smelting & Refining Co. (D. C. Ohio).....	384
Pittman, In re (D. C. N. C.).....	686	Hiram Walker & Sons v. Lawson (D. C. Mich.).....	373
Richmond, The (D. C. Va.).....	970	Michigan Lubricator Co. v. Ontario Cart-ridge Co. (C. C. A. Mich.).....	902
Russell v. Tilghman (D. C. Va.).....	235	Republic Acceptance Corporation v. De Land (D. C. Mich.).....	632
Scott, In re (C. C. A. Va.).....	46	Saslaw, In re (D. C. Ohio).....	587
Seaboard Air Line R. Co. v. Fowler (D. C. N. C.).....	239	Sedberry v. Walker (C. C. A. Tenn.)....	894
Seaboard Air Line Ry. v. United States (D. C. S. C.).....	77	Standard-Detroit Tractor Co., In re (D. C. Mich.)	952
Turrent Crown, The (D. C. Va.).....	961	Stokes v. Sedberry (C. C. A. Tenn.)....	894
Vacuum Oil Co. v. Luckenbach S. S. Co. (D. C. Va.)	998	United States v. Newton Tea & Spice Co. (D. C. Ohio).....	394
Vulcanite Roofing Co. v. Commonwealth S. S. Co. (D. C. Va.).....	961	United States v. Ratagezak (D. C. Ohio)..	558
Walter D. Noyes, The (D. C. Va.).....	690	United States v. Ray & Schultz (D. C. Mich.).....	1004
		Victor Talking Mach. Co. v. Cheney Talking Mach. Co. (D. C. Mich.).....	444
FIFTH CIRCUIT.		Walker & Sons v. Lawson (D. C. Mich.)..	373
Alexander v. Farmers' Supply Co. (C. C. A. Ga.).....	824	Wayne Realty Co., In re (D. C. Ohio)..	955
Bank of Elberton v. Swift (C. C. A. Ga.)	834		
Bank of Madison v. Bell, two cases (C. C. A. Ga.).....	835	SEVENTH CIRCUIT.	
Bartleson Co., In re (D. C. Fla.).....	390	Advance Rumley Co. v. John Lauson Mfg. Co. (C. C. A. Wis.).....	249
Beaver Cotton Mills, In re (D. C. Ga.)...	498	American Car & Foundry Co. v. East Jordan Furnace Co. (C. C. A. Ill.).....	786
Brown v. Camp (C. C. A. Ga.).....	612	American Steel Foundries v. Indian Refining Co. (C. C. A. Ill.).....	800
Caplis, Ex parte, two cases (D. C. Tex.)	980	Berger v. United States (C. C. A. Ill.)..	1021
Couch Cotton Mills Co., In re (D. C. Ga.)	496	Berry v. United States (C. C. A. Ill.).....	680
C. W. Bartleson Co., In re (D. C. Fla.)...	390	Borden Co., In re (C. C. A. Wis.).....	782
Dunaway, In re (D. C. Ga.).....	591	Borderland Coal Corporation v. International Organization of United Mine Workers of America (D. C. Ind.).....	871
Duvall v. Dyche (D. C. Ga.).....	440		
Elmer v. Wallace (D. C. Ala.).....	86		
Farmers' Supply Co., In re (C. C. A. Ga.)	824		
Graham v. Jones (C. C. A. Ga.).....	790		
Hallbauer, In re (D. C. Fla.).....	125		
Hallbauer, In re (D. C. Fla.).....	126		
J. C. Turner Lumber Co. v. Toomer (C. C. A. Ga.).....	678		
Liebman v. Fontenot (D. C. La.).....	688		

	Page		Page
Chicago Record-Herald Co. v. Tribune Ass'n (C. C. A. Ill.).....	797	Kinloch Tel. Co. v. Local Union No. 2 of International Brotherhood of Electrical Workers (C. C. A. Mo.).....	241
Chicago Title & Trust Co. v. Smietanka (D. C. Ill.).....	60	Knight v. Knight (C. C. A. N. D.).....	196
Conto v. Franklin County (C. C. A. Ill.)...	806	Lucas v. United States (C. C. A. Colo.)...	405
Cornick v. United States (C. C. A. Ill.)...	354	McGinley v. Martin (C. C. A. Mo.).....	267
Dahlen v. Hines (C. C. A. Wis.).....	817	Manning v. United States (C. C. A. Mo.)	29
Elwell v. United States (C. C. A. Ill.)...	775	Moore v. Otis (C. C. A. Okl.).....	747
F. G. Borden Co., In re (C. C. A. Wis.)...	782	National Life Ins. Co. of Montpelier, Vt., v. Miller (C. C. A. Iowa).....	757
Gould, In re (C. C. A. Ill.).....	827	Northwestern Mut. Life Ins. Co. v. Johnson (C. C. A. Iowa).....	757
Gould v. J. W. Butler Paper Co. (C. C. A. Ill.).....	827	One Buick Automobile v. United States (C. C. A. Okl.).....	809
Harden v. Petritz (C. C. A. Ill.).....	811	Payne v. Card (C. C. A. Wyo.).....	26
Hill v. United States (C. C. A. Ill.).....	187	Pierre v. United States (C. C. A. Kan.)...	352
Hines v. Smith (C. C. A. Ill.).....	766	Road Imp. Dist. No. 2 of Conway County v. Missouri Pac. R. Co. (C. C. A. Ark.).....	600
Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co. (C. C. A. Ind.).....	794	Sinclair Refining Co. v. Schaff (C. C. A. Kan.).....	769
Kinney-Rome Co. v. Federal Trade Commission (C. C. A. Ill.).....	665	Sodemann Heat & Power Co. v. Kauffman (C. C. A. Mo.).....	593
Larson, Jr., Co., In re (C. C. A. Ill.)...	535	Stephan v. Union Pac. R. Co. (D. C. Minn.).....	709
Larson, Jr., Co. v. William Wrigley, Jr., Co. (C. C. A. Ill.).....	535	Sullinger v. Drumm-Standish Commission Co. (C. C. A. Mo.).....	1
L. P. Larson, Jr., Co., In re (C. C. A. Ill.)	535	Union Pac. R. Co. v. Christensen (C. C. A. Iowa).....	6
L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co. (C. C. A. Ill.).....	535	United States v. Delatour (C. C. A. Neb.)	137
Marley-Morse Co., In re (C. C. A. Ill.)...	832	United States v. Waddell Inv. Co. (D. C. Mo.).....	934
Parker, In re (D. C. Ill.).....	868	Yellow Cab Co. v. Earle (C. C. A. Minn.)	928
Payne v. Cohlmeier (C. C. A. Ill.).....	803		
Rajah Auto Supply Co. v. Belvidere Screw & Machine Co. (C. C. A. Ill.).....	761	NINTH CIRCUIT.	
Rice v. Clemmons (C. C. A. Wis.).....	782	Chadek v. Turcotte (D. C. Mont.).....	874
Rockford Produce & Sales Co., In re (C. C. A. Ill.).....	811	Dean v. San Diego (D. C. Cal.).....	228
Rogers Palace Laundry Co., In re (C. C. A. Ill.).....	829	Donlan & Henderson v. Turner, Dennis & Lowrey Lumber Co. (D. C. Mont.)...	71
Smietanka v. Ullman (C. C. A. Ill.).....	814	Leong Shee, Ex parte (D. C. Cal.).....	364
Star Brewing Co. v. Cleveland, C., C. & St. L. R. Co. (C. C. A. Ill.).....	330	Lineker v. Dillon (D. C. Cal.).....	460
Taaffe v. Central Trust Co. of Illinois (C. C. A. Ill.).....	829	McClelland, In re (D. C. Cal.).....	576
United States v. American Linseed Co. (D. C. Ill.).....	939	Margrave, Ex parte (D. C. Cal.).....	200
Wilson v. Kanter (C. C. A. Ill.).....	832	Miller v. Minerals Separation Limited (D. C. Cal.).....	380
EIGHTH CIRCUIT.		Mutual Life Ins. Co. of New York v. Lott (D. C. Cal.).....	365
Allen v. Omaha Live Stock Commission Co. (C. C. A. Neb.).....	1	Story v. Stanfield (C. C. A. Or.).....	401
Birkestrand v. Chicago, M. & St. P. R. Co. (C. C. A. Iowa).....	194	United States v. Cooksey (C. C. A. Cal.)...	670
Board of Com'rs of Pottawatomie County, Okl., v. Close Bros. & Co. (C. C. A. Okl.)	608	United States v. Huntington (C. C. A. Cal.)	674
Bonner v. United States (C. C. A. Ark.)	614	Van Atta v. Montana Nat. Bank (C. C. A. Mont.).....	548
Bradley v. New York Life Ins. Co. (C. C. A. Iowa).....	657	Western Sugar Refinery Co. v. Federal Trade Commission (C. C. A. Cal.).....	725
Carter v. Whisler (C. C. A. Iowa).....	743	Williams v. United States (C. C. A. Cal.)	129
Eddy v. First Nat. Bank of Fargo (C. C. A. N. D.).....	550	Wilson v. Lucey Mfg. Corporation (D. C. Cal.).....	624
Fels v. East St. Louis & S. R. Co. (C. C. A. Mo.).....	881	Wilson v. Union Tool Co. (D. C. Cal.).....	624
Flaherty, In re (C. C. A. Iowa).....	743	Yuma County Water Users' Ass'n v. Schlecht (C. C. A. Ariz.).....	885
Gunn v. Standard Oil Co. (C. C. A. N. D.)	932	DISTRICT OF COLUMBIA.	
Hicks v. United States (C. C. A. Colo.)...	405	Athan v. National Savings & Trust Co. (App. D. C.).....	1020
Johnson v. Doebler (C. C. A. N. D.).....	822	Gaines v. Clark (App. D. C.).....	1017
Kauffman v. Sodemann Heat & Power Co. (C. C. A. Mo.).....	593	Symons v. Symons (App. D. C.).....	1015

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

ALLEN, U. S. Atty., v. OMAHA LIVE STOCK COMMISSION CO. et al.
SULLINGER, U. S. Atty., v. DRUMM-STANDISH COMMISSION CO. et al.
(Circuit Court of Appeals, Eighth Circuit. July 16, 1921.)

Nos. 5799, 5802.

1. **Appeal and error** Ⓒ863—Appellate court will not consider merits on appeal from order granting preliminary injunction.

Ordinarily the appellate court, on an appeal from an order granting a preliminary injunction will not go into the merits of the case further than necessary to determine whether the trial court exceeded a reasonable discretion in making the order, especially where the rights of the parties can only be determined on full proof of the facts.

2. **Appeal and error** Ⓒ843 (2)—Constitutional law Ⓒ46 (1)—Court will determine constitutional questions only when absolutely necessary.

Only when it is absolutely necessary will courts pass on a constitutional question, and this applies with greater force on an appeal from an interlocutory injunction, granted on the bill after a motion to dismiss has been denied and no answer tendered.

3. **Injunction** Ⓒ85 (2)—May be granted to restrain prosecutions by federal officers under unconstitutional statute.

A court of equity may control by injunction the action of federal officers threatening to institute criminal proceedings under an unconstitutional act which will seriously affect property rights.

4. **Injunction** Ⓒ74—Equity has jurisdiction to review action of executive officer, in absence of statutory provision for review.

An order of a board, commission, or executive officer, prescribing maximum rates for services performed, if no provision for review by the courts is made, entitles one who claims the rates to be confiscatory to a review by a court of equity, especially if the penalties for violation of the order are so severe that every one would be deterred from testing it in a criminal prosecution.

5. **Injunction** Ⓒ144—Bills held to entitle complainants to preliminary injunction.

Bills, alleging that complainants are live stock commission brokers, with an established business, that their rates of charge for their services are just and reasonable, and that rates prescribed by order of the Secretary of Agriculture, without notice under Lever Act, § 5 (Comp. St. 1918, Comp.

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

St. Ann. Supp. 1919, § 3115 $\frac{1}{8}$ g), are unjust, unreasonable, and confiscatory and will deprive complainants of their property without due process of law, *held* to entitle complainants to a preliminary injunction to restrain enforcement of such order, in view of the fact that the statute makes no provision for its review and of the severity of the penalties prescribed for its violation.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suits in equity by the Omaha Live Stock Commission Company and others against Thomas S. Allen, United States Attorney for the District of Nebraska, and by the Drumm-Standish Commission Company and others against James W. Sullinger, United States Attorney for the Western District of Missouri. From orders granting preliminary injunctions, defendants appeal. Affirmed.

James B. Horigan, Asst. to the Solicitor, U. S. Department of Agriculture, of Washington, D. C. (R. W. Williams, Solicitor, U. S. Department of Agriculture, of Washington, D. C., James W. Sullinger, U. S. Atty., of King City, Mo., T. S. Allen, U. S. Atty., of Lincoln, Neb., and George H. English, Asst. U. S. Atty., of Kansas City, Mo., on the brief), for appellants in both cases.

Francis A. Brogan, of Omaha, Neb. (Alfred G. Ellick and Anan Raymond, both of Omaha, Neb., on the brief), for appellees in No. 5799.

I. N. Watson, of Kansas City, Mo. (John B. Gage, Henry N. Ess, and R. E. Watson, all of Kansas City, Mo., on the brief), for appellees in No. 5802.

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

TRIEBER, District Judge. The issues in both of these cases being identical, they were, by agreement of counsel, presented and argued as one case, and this opinion will apply to both.

The appeals are under section 129, Judicial Code (Comp. St. § 1121) from temporary injunctions, enjoining appellants, United States attorneys, from instituting prosecutions against appellees for failure and refusal to comply with certain orders of the Secretary of Agriculture, made under the provisions of section 5 of the act of Congress of August 10, 1917 (chapter 53, 40 St. 276), generally referred to as the "Lever Act" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115 $\frac{1}{8}$ g).

[1] The complaints, which are identical in both cases, are very lengthy, and, in addition to the allegations hereinafter set out, attack the constitutionality of this section, as well as the power of the President and Secretary of Agriculture to make the order and regulations sought to be enjoined. But, as this is an appeal from a temporary injunction only, which was granted on the bills of complaint and affidavits accompanying them, after a motion of defendants to dismiss the complaints had been overruled, we do not deem it necessary to pass on these constitutional questions on these appeals, although an

appellate court may on such an appeal consider the entire case, and, if the complaint fails to state a cause of action, reverse the order granting the temporary injunction and direct a decree of dismissal. *Shubert v. Woodward*, 167 Fed. 47, 61, 92 C. C. A. 509, and authorities there cited. But ordinarily the appellate court on such an appeal will not go into the merits of the case, further than necessary to determine whether the trial court exceeded a reasonable discretion in making the order, especially where the rights of the parties can only be determined upon full proof of the facts. *City of Owensboro v. Cumberland Tel. & T. Co.*, 174 Fed. 739, 747, 99 C. C. A. 1.

[2] If the complaint challenges the constitutionality of a legislative act, and also raises other questions of equitable cognizance, on which the action can be determined without passing on the constitutionality of the act, courts will not pass on it. Only when it is absolutely necessary will they pass upon a constitutional question. *Weyman-Bruton Co. v. Ladd*, 231 Fed. 898, 901, 146 C. C. A. 94. And this applies with greater force on appeals from an interlocutory injunction granted on the complaint, after a motion to dismiss has been denied and no answer tendered. Therefore, leaving out of consideration the constitutional questions raised, the question is, Are the other allegations in the complaint sufficient to warrant the granting of the interlocutory injunction?

Plaintiffs charge: That they are live stock commission brokers, operating, the one in case No. 5802 in Kansas City, Mo., and the other in case No. 5799, in Omaha, Neb., under federal licenses issued to them pursuant to the provisions of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{8}$ e-3115 $\frac{1}{8}$ kk, 3115 $\frac{1}{8}$ l-3115 $\frac{1}{8}$ gr). That their business is handling live stock in their respective markets, and that the services rendered by them are personal services, into which the elements of judgment, ability, experience, and responsibility enter. That they had been engaged in that business for a number of years, and built up, prior to the order of the Secretary, a large and exclusive trade, and to prevent them from carrying it on would cause great and irreparable loss. That in the course of their business they have heretofore charged various commissions for their services, which were based upon the cost to them of conducting the business and a fair and reasonable return for their skill, experience, and services, and the expenses necessarily incurred therein. That during the years 1919 and 1920 the cost of conducting their business was greatly increased by reason of being required to pay higher salaries to their employees, and the increased cost of material needed in the conduct of their business, and in order to meet this increased cost and leave them a just return for their service it was necessary to increase their commissions and charges slightly. This increase was made July 19, 1920. The complaint sets out the schedule of charges put in force by the plaintiffs on that day. That on August 12, 1920, the Secretary of Agriculture, acting, as stated by him, under authority of the President, notified plaintiffs that after an investigation of the charges made by those engaged in the live stock commission business, he had found the charges to be unjust, unreasonable, discriminatory, and unfair, and ordered them to discontinue

said charges, and only charge the lower rates established by him, which are set out in the notice, said lower charges to take effect August 23, 1920.

The bill charges that no notice had been given them by the Secretary of Agriculture of any investigation and no opportunity afforded them of producing evidence that their charges were just and reasonable, and had they been given an opportunity to produce evidence, they could have shown their charges to be just and reasonable; that no finding that their charges were unjust and unreasonable was made by the President, except that made by the Secretary of Agriculture; that plaintiffs have not abided by the directions of the Secretary, but continued to collect the charges, which they had collected prior to the orders made by the Secretary. It is further charged that, if compelled to adhere to the charges fixed by the Secretary, which were those in force prior to July 19, 1920, they will be compelled to discharge a number of employees, curtail the facilities for conducting their business, which would materially reduce the efficiency of their services as such live stock commission brokers; that if their licenses are suspended by reason of failing to comply with the Secretary's schedule of charges their business will be destroyed.

They deny that their charges were unjust, unreasonable, or unfair, and that, by reason of having uniformly dealt fairly and honestly with their patrons, and not having charged unjust, unreasonable, or unfair commissions or charges, a relation of trust and confidence has been built up between them and their patrons, and as a result they now enjoy a valuable good will in their business.

It is further alleged that the schedule of commissions and charges established by the purported order of the Secretary of Agriculture is unjust, unreasonable, and confiscatory, and if enforced they would be deprived of their property without due process of law; that the penalties prescribed by the act for failing to comply with any orders of the President, made by authority of said section 5 of the Lever Act, are, not only a revocation of their license to continue their business, but severe punishments are to be imposed on them, a fine not exceeding \$5,000, or imprisonment for not more than two years or both for such failure to comply with the order, or doing business after revocation of their license, and every independent transaction shall constitute a separate offense; that they have refused to comply with said order, believing it to be unconstitutional and void, and, unless the defendants are enjoined from instituting such prosecutions or revoking their licenses, plaintiffs and their employees having been threatened by the defendants with a revocation of their license and criminal prosecutions under the act and the penalties being so enormous and imprisonment so severe, they are deterred from questioning the validity of the order, and unless defendants are restrained from instituting prosecutions against them they cannot continue their business.

It is also alleged that such prosecutions would involve them in contractual difficulties and litigation with their clients for whom they render services, and result in the total destruction of their business.

The temporary injunction requires each plaintiff to execute a bond

in the penal sum of \$25,000, conditioned that they will deposit in court every two weeks such portions of the commissions and charges in excess of those specified and named as reasonable in the orders of the Secretary of Agriculture, and file an account showing by whom or on whose behalf such moneys were collected by the complainants as commissions and charges, for the sale of live stock, giving the address of all such patrons.

[3] That a court of equity may control by injunction the action of federal officials, threatening to institute criminal proceedings under an unconstitutional act, which will seriously affect property rights, is no longer an open question. Such actions have been frequently brought and sustained. *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Hammer v. Dagenhart*, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, are among late cases.

[4] Nor can there be any doubt at this day that an order of a board, commission, or executive officer, prescribing maximum rates for services performed, if no provisions for a review by the courts is made, entitles one who claims the rates to be confiscatory to a review by a court of equity, and especially if the penalties for violations of the order or regulation are so severe that every one would be deterred from testing them in a criminal prosecution. *Ex parte Young*, 209 U. S. 123, 147, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 349, 33 Sup. Ct. 961, 57 L. Ed. 1507; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 662, 35 Sup. Ct. 214, 59 L. Ed. 405; *Oklahoma Operating Co. v. Love*, 252 U. S. 333, 337, 40 Sup. Ct. 338, 340 (64 L. Ed. 596). In the last-cited case, the court even went so far as to hold that—

“If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should nevertheless issue to restrain enforcement of penalties accrued *pendente lite*, provided that it also be found that plaintiff had reasonable ground to contest them as being confiscatory.”

In *Wadley Southern Ry. v. Georgia*, *supra*, the railroad company, instead of applying to a court of equity for relief, against an order of the Railroad Commission of the state, claimed to be invalid, permitted itself to be sued for the penalty. Having been found guilty, the cause was finally removed by writ of error to the Supreme Court of the United States. That court, affirming the judgment of the state court, said:

“If the *Wadley Southern Railroad Company* had availed itself of that right and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order, though not so in respect of violations prior to such adjudication.”

It is hardly necessary to say that the penalties under this act which makes “every independent transaction a separate offense” are such that

persons would be deterred from testing the order in criminal prosecutions.

[5] Are the allegations in the complaint, which are not denied, sufficient to entitle the plaintiffs to a temporary injunction, leaving out of consideration the question of unconstitutionality of the act? Without reciting all these allegations which are set out hereinbefore, they clearly charge that the rates or commissions charged by them are just and reasonable, and that the rates prescribed by the Secretary of Agriculture are unjust, unreasonable, noncompensatory and confiscatory, and if enforced plaintiffs would be deprived of their property without due process of law. This, if true—and on this record they must be taken as true—not being denied, the court committed no error in granting the temporary injunction. If there were room for doubt, it would be resolved in favor of the order of the court below, as an appellate court will not reverse an interlocutory injunction, if the record shows any reasonable grounds to sustain it, especially when such ample provision has been made for the protection of all parties, who may be affected by the interlocutory injunction, as has been done by the court below in these cases.

The rates made by the Secretary were without notice or an opportunity to plaintiffs to be heard, nor does the act provide for a review of the acts of the President or the official authorized by him to act for him in making such an order. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. The plaintiffs allege that they are noncompensatory and confiscatory, and would be taking their property without due process of law. The only opportunity to determine these charges is by a proceeding in equity, such as has been instituted, unless they were willing to take the risk of the severe punishment provided by the act, if their contentions in a criminal prosecution should not be sustained, as was done in *Wadley Southern Ry. v. Georgia*, supra. This they were unwilling to do, and instead have applied to a court of equity for an interlocutory injunction, pending the determination of the validity of the act and order complained of.

Upon the facts set out in the complaints, without passing on the constitutional question raised and ably argued, we hold that the order of the trial court should be affirmed.

UNION PAC. R. CO. v. CHRISTENSEN et al.

(Circuit Court of Appeals, Eighth Circuit. July 13, 1921.)

No. 5801.

1. Taxation ⇐500—To authorize setting aside an assessment as discriminatory, the discrimination must be intentional and systematic.

To authorize the setting aside as discriminatory assessments for taxes, it must appear that the discrimination in favor of one or more classes of property as against others was intentional and systematic, and errors of judgment by officials will not support a claim of discrimination.

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

2. Taxation ⇨40(5)—Assessment of property of a railroad company in a state as an entity held constitutional and valid.

Code Supp. Iowa 1913, §§ 1334-1339, providing for the assessment of the property of railroad companies by the executive council of the state, based on a valuation of the entire property of a company in the state, and distributed between the counties and other subdivisions of the state for the purpose of local taxation in accordance with its mileage therein, are constitutional, and are not discriminatory because under such system a company having but a few miles of track in the state, all in one city, and having valuable terminal property there, is assessed at a higher valuation on its property in such city than other companies having a much greater mileage in the state, though their local property may be equally valuable.

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Suit in equity by the Union Pacific Railroad Company against James P. Christensen, and his successor, as County Treasurer of Pottawattamie County, Iowa, and others. Decree for defendants, and complainant appeals. Affirmed.

Addison G. Kistle, of Council Bluffs, Iowa (George S. Wright, of Council Bluffs, Iowa, and Edson Rich, of Omaha, Neb., on the brief), for appellants.

Henry Peterson, of Council Bluffs, Iowa (V. A. Morgan, of Council Bluffs, Iowa, on the brief), for appellees.

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

TRIEBER, District Judge. The Railroad Company instituted this action in equity against the defendants, the county treasurer of Pottawattamie county, Iowa, and the city council of Council Bluffs, Iowa, to cancel certain taxes assessed against its property, in the nature of railroad property, assessed by the executive council of the state pursuant to the laws of the state of Iowa. The taxes in question are for water and light levies for the years 1911, 1912, 1913, 1914, and 1915, and by amendment include the years 1916 and 1917.

The grounds for the relief claimed are that the property is beyond the benefit district of the expenditure of water and light funds, and that it receives no benefit therefrom.

The statutes under which the taxes are assessed are also attacked as being contrary to the state and national Constitutions in the following particulars:

"(a) That section 894 of the Code of Iowa, 1897, and the acts amendatory thereto, under which said attempted levy and tax is claimed, are unconstitutional and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the state of Iowa.

"(b) That sections 1334 to 1339, inclusive, of the Code supplement of Iowa, 1913, and all sections of the Code of Iowa and supplements relative to the taxation of the property of the appellant, are unconstitutional and void, including those sought to be enforced herein, for the reason that they do not operate uniformly upon railroads owning property in the state of Iowa, and that under said statutes the property of the appellant is valued about four or

five times higher than like property of equal value owned by other railroads in Iowa used for the same purpose and in the same taxing district in the state of Iowa as that of appellant.

"(c) And that said sections are contrary to section 6 of article 1 of the Constitution of the state of Iowa, and also contrary to section 30 of article 3 of the Constitution of the state of Iowa.

"(d) That the aforesaid sections under which the property of the appellant is assessed for taxation purposes are null and void for the reasons that the assessment based thereon amounts to and results in a systematic and intentional discrimination against the property of the appellant herein, and subjects the property of the complainant to a higher rate of tax than like property in like situation used for the same purpose in the same taxing district, and that it amounts to the taking of private property without due process of law, contrary to section 1 of article 14 of the Amendments to the Constitution of the United States, and denies to appellant the equal protection of the law.

"(e) That said sections are contrary to section 2 of article 8 of the Constitution of the state of Iowa, in that it taxes property of corporations differently than property of individuals and for other and different purposes.

"(f) That the so-called assessments are null and void for the further reason that they are not based on a uniform valuation of the property, which results in a systematic and intentional discrimination contrary to section 1 of article 14 of the amendments to the Constitution of the United States."

The answer denies that the property is without the limits of benefit and protection of the waterworks and of the lighting plant, but alleges that they are within the benefit limits of the water and light systems, as created by resolution of the city council of the city for the years in controversy.

Upon the hearing the assessments were held valid, the statutes, under which they were made, constitutional, and the bill of complaint dismissed.

The facts established are that appellant's eastern terminus is located in Council Bluffs, and that is all the property it owns in the state of Iowa. Its mileage in the city and state is 3.78 miles of main track, 2.6 miles of second track, and 43.39 miles of side track, a total of 52.95 miles of all tracks, all in the city of Council Bluffs. It also has a 20-stall brick roundhouse, with a wooden coaling station, cinder pit, water station, and a number of old wooden buildings. It owns a brick passenger transfer depot and hotel constructed in 1877, which is used as a local as well as a transfer passenger station, also a brick local freight station, constructed in 1916, adjoining paved streets and right of way and house tracks, having a capacity of 40 cars. There are tracks on both sides of the platform with a capacity of 75 cars and tracks for car repairs and cleaning coaches with a capacity of about 75 cars.

Other railroads, which traverse the state, with a mileage of several hundred miles in the state, have similar tracks and improvements in the city, but are assessed at a much lower rate than appellant's property, and therefore it is claimed by appellant that there is gross discrimination between its property and that of all other railroads and that of private individuals also.

The learned trial judge correctly held that, even considering all that is claimed, it would not invalidate the statutes attacked, which do not authorize such discriminations, if in fact any existed.

As to the allegation in the complaint that the railroad company receives no benefit whatever from the light and water funds, the finding of the trial judge was:

"The evidence here shows that the plaintiff has substantial benefits both of light and water. True it pays for millions of gallons of water which it uses; so does every householder pay for what he uses. Plaintiff pays for electric current; so does every householder. The particular mode by which plaintiff acquires water and current is not controlling; it does have the benefit of the right to receive these commodities, and whether it receives them through one pipe or one set of wires, or one hundred, cannot be conclusive as to being within the district benefited."

There is no evidence in the record which would have warranted any other finding. As counsel for appellant, neither in their brief, nor in their oral argument have attacked this finding, the allegation must be considered as having been abandoned.

The real and only issue is that of discrimination against it, as compared with the assessments of the property of other railroads operated in the city of Council Bluffs, and the property of individuals therein. There is no substantial evidence to warrant a finding that the property of individuals in the city of Council Bluffs is not assessed at the same proportionate value as is that of the railroads. The testimony of the assessor failed to establish it; besides its admissibility is at best doubtful. In *Chicago, Burlington & Quincy R. R. v. Babcock*, 204 U. S. 585, 593, 27 Sup. Ct. 326, 327 (51 L. Ed. 636), the court said:

"When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the Governor of the state, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. * * * All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

[1] But aside from this, to set aside as discriminatory assessments for taxes, it must appear that the discrimination in favor of one class of property or other classes, as against others, was intentional and systematic. *Greene v. Louisville & I. R. R.*, 244 U. S. 499, 517, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 353, 38 Sup. Ct. 495, 62 L. Ed. 1154; *Taylor v. Louisville & Nashville R. R.*, 88 Fed. 350, 364, 365, 31 C. C. A. 537. In the *Lake Iron Co. Case* it was said:

"It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

Counsel claim that the court should take judicial notice of the fact that real estate in Council Bluffs and other parts of the state is not assessed at its real value, but fails to suggest how this court is to know without evidence how assessments are made in every county, city, and hamlet in the Eighth Circuit.

[2] The contention most earnestly urged by counsel is that the assessments of other railroads having mileage and terminals in Council Bluffs are assessed at a much lower valuation than appellant's property in that city, and therefore there is an unlawful discrimination against it, although in the same class.

While property, real and personal, of individuals is, under the laws of the state, assessed by county assessors, the assessment of the property of railroads is made by the executive council of the state. Section 1334 of Code Supplement of 1913 requires the railroads to report as to the following matters:

"1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

"2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

"3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

"4. The total number of ties per mile used on all its tracks within the state;

"5. The weight of rails per yard in main line, double tracks and side tracks;

"6. The number of miles of telegraph lines owned and used within the state;

"7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

"8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

"9. The gross earnings of the entire road, and the gross earnings in this state;

"10. The operating expenses of the entire road, and the operating expenses within this state;

"11. The net earnings of the entire road, and the net earnings within this state."

Section 1335 requires a statement of the operating expenses of the railroad. These reports were made by appellant and all other railroads operating in Council Bluffs. Other sections relating to these assessments are sections 1336, 1337, 1337a, 1338, 1339.

Section 1336 provides as follows:

"The said property shall be valued at its actual value and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. * * *"

Section 1337 provides:

"On or before the first Monday in August of each year, the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property."

Section 1337a provides for a plat showing the length of the main track in each county.

Section 1338 provides as follows :

"At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order stating the length of the main track and the assessed value of each railway lying in each city, town, township or lesser taxing district in its county, through or into which said railway extends, as fixed by the council, which shall constitute the taxable value of said property for taxing purposes; and the taxes on said property, when collected by the county treasurer shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council or trustees of the city, town or township."

Section 1339 provides :

"All such railway property shall be taxable upon said assessment at the same rates, by the same officers and for the same purposes as the property of individuals within such counties, cities, towns, townships and lesser taxing districts."

It will thus be seen that railroads are required to be assessed as an entity, including the entire mileage and improvements in the state.

The Chicago, Burlington & Quincy Railroad has 1,366.065 miles in the state and hundreds of stations. Without setting out the mileage and improvements of the other railroads in the state of Iowa, it is sufficient to state that each of them has a mileage of several hundred miles traversing agricultural lands, some uncultivated and not subject to cultivation, many in counties distant from markets; part in small towns and larger cities. If assessed separately on value in every county and town, it would not only cause confusion, but would prevent a valuation on the system as a whole, which is, of course, of great value, and must be considered in determining its value, and thereby cause discrimination. That such statutes as these are not violative of any provision of the national Constitution is beyond question. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; Cleveland, etc., Railroad Co. v. Backus, 154 U. S. 439, 444, 14 Sup. Ct. 1122, 38 L. Ed. 1041; Branson v. Bush, 251 U. S. 182, 187, 40 Sup. Ct. 113, 64 L. Ed. 215; St. Louis, Southwestern R. R. v. State of Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265. That it is not objectionable to any provision of the Constitution of Iowa, has been, so far as the national courts are concerned, conclusively determined by the Supreme Court of Iowa. Central Iowa R. R. Co. v. Board of Supervisors, 67 Iowa, 199, 25 N. W. 128; Dubuque v. Chicago, etc., R. R. Co., 47 Iowa, 196.

That a railroad whose property is wholly situated in a large city is more valuable per mile than one traversing hundreds of miles through agricultural sections, and some of but little value, requires no extended argument, and as the assessment of the latter is made as a whole, and then divided equally according to mileage, and when thus divided, certified to the counties, its valuation would naturally be lower per mile than of the former. A late case in point is St. Louis & East St. Louis Electric Ry. Co. v. State of Missouri, 256 U. S. —, 41 Sup. Ct. 488, 65 L. Ed. —, opinion filed May 2, 1921, in which the statutes involved are similar to those of the state of Iowa. The Board of Equal-

ization of Missouri had valued the entire property of the company, which owned .865 of a mile of electric railway constructed on a bridge over the Mississippi river at St. Louis, at \$537,630 a mile. Only .346 of a mile were in the state of Missouri, and the proportion in Missouri was assessed as of the value of \$186,019. The assessment was sustained, the court saying:

"It is apparent that the large value, which it is conceded this street railroad had, was derived, not from its mere franchise, but from the exclusive right which we have seen the company acquired by private contract to operate over the Eads Bridge, a public highway, and from the other rights also derived from private contract, which made its line of track a part of two Illinois systems of railway and gave it a profitable operating agreement with them."

In the instant case the few miles in the state of Iowa, owned by appellant, were in Council Bluffs, and a part of its great system in other states, which gives it a value much greater than if the part in Council Bluffs had no connection with the rest of appellant's system of railways.

No one will contend that a street railway operated exclusively in a city like Chicago cannot be assessed at a higher rate per mile in that city than an interurban system of 100 miles, of which perhaps less than a mile is in the city.

The decree is right and is affirmed.

COMMERCIAL NAT. BANK OF WASHINGTON, D. C., v. SHRIVER et al.

In re MERTENS et al.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1888.

1. Corporations ⇨149—Pledge of stock without present consideration not a bona fide holder.

The holder of a certificate of stock of a corporation, who has taken it as security for an existing debt without promise of extension or other present consideration, is not protected as a purchaser for value, unless the true owner is estopped by some negligence which has enabled the person with whom he had intrusted the stock to perpetrate a fraud on the purchaser.

2. Bankruptcy ⇨182—Pledge of stock by donee of bankrupt held ineffective against trustee.

A bank which took a certificate of stock as collateral on extension of a note with knowledge that the pledgor acquired the stock by gift from his father against whom a petition in bankruptcy had been filed and of other facts which charged it with notice that the father was insolvent when the gift was made, and that it was a fraud on his creditors, held not to have acquired title as against the trustee in bankruptcy of the father.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

In the matter of the bankruptcy of Frederick Mertens and others, individually and as partners, as F. Mertens' Sons; Henry Shriver, trus-

tee. From an order of the District Court, the Commercial National Bank of Washington, D. C., appeals. Affirmed.

R. Lee Slingluff, of Baltimore, Md., and Charles L. Frailey, of Washington, D. C. (Stuart S. Janney, of Baltimore, Md., Charles Cowles Tucker, of Washington, D. C., and Janney, Stuart & Ober, of Baltimore, Md., on the brief), for appellant.

Walter C. Capper, of Cumberland, Md. (Benjamin A. Richmond, of Cumberland, Md., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. The firm of F. Mertens' Sons, of which Frederick Mertens was a member, was adjudged bankrupt March 27, 1917, under a petition filed February 7, 1917. The issue here is whether the District Court was right in adjudging the trustee, Shriver, to be entitled to 20 shares of stock of the Third National Bank of Cumberland, the certificate for which is in the possession of the Commercial National Bank of Washington.

Frederick Mertens was owner of the certificate of stock and a director of the Third National Bank. According to his testimony and that of Frederick Mertens, Jr., in March, 1916, he indorsed the stock certificate in blank, and turned it over to Frederick Mertens, Jr., as a gift. His statement that he did this because he wished to disconnect himself with the bank is contradicted by his action in remaining on the board of directors and attending its meetings long after the alleged gift of his stock to his son. He admitted that for a year before the alleged gift his firm owed very large debts. One of the firm's pressing creditors was the Commercial Bank, holding claims which turned out to be \$25,000 over the value of its collateral. The liquidation in bankruptcy shows that a year after the alleged gift the firm's assets were about \$400,000 and its liabilities \$4,000,000. There was no evidence of depreciation of assets or increase in liabilities within the year. It thus seems clear that the firm and its members were hopelessly insolvent when the gift is alleged to have been made; and, as against Frederick Mertens, Jr., the donee, there can be no doubt the gift was in fraud of creditors. *Kehr v. Smith*, 20 Wall. 31, 22 L. Ed. 313; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363; *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908.

The Commercial Bank claims the stock as bona fide holder for value without notice. Taking as true the testimony adduced in its behalf, the Commercial Bank acquired the certificate of stock in this way: Frederick Mertens, Jr., owned a majority of the stock of the Mt. Vernon & Marshall Hall Steamboat Co., Limited, and was president of the corporation. In 1916 this corporation owed the Commercial Bank \$20,000. In September, 1916, in compliance with the bank's demand for collateral, Frederick Mertens, Jr., turned over to the Commercial Bank the certificate of stock of the Third National Bank of Cumberland. He informed the president of the Commercial Bank at the time that it had been given to him by his father in 1916. There is

no evidence that when the certificate was acquired by the Commercial Bank as collateral in 1916 there was renewal of any portion of the \$20,000 debt or any promise of extension. Afterwards, on March 13, 1917, a renewal note of \$2,700 was given by the Mt. Vernon & Marshall Hall Steamboat Co., Limited, indorsed by F. Mertens' Sons and John P. Agnew & Co. Frederick Mertens, Jr., gave his note of same date and maturity for the same debt, in which the certificate of stock was mentioned as collateral.

It thus appears that the Commercial Bank acquired the certificate of stock in 1916, not to secure a debt then made or as consideration for a renewal of extension but merely as security for an existing debt. The general rule is that one who acquires a mortgage or other chose in action or chattel as security for an existing debt, with no promise of extension by renewal or otherwise, is not a bona fide holder for value. *Peoples Savings Bank v. Bates*, 120 U. S. 569, 7 Sup. Ct. 679, 30 L. Ed. 754. But an indorsee, taking a negotiable bill or note as security for an antecedent debt, even when there is no extension or renewal, is deemed a holder for value. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61. This rule has been incorporated into the negotiable instruments statute, now in force in nearly all the states.

The extent to which the Supreme Court has gone with respect to stock certificates is to hold that an agent intrusted for a particular purpose with stock certificates indorsed with a power of attorney signed in blank confers a good title on a bona fide purchaser to whom he sells for a present consideration in breach of his trust. *National Safe Deposit S. & T. Co. v. Hibbs*, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241. This was on the ground that one who intrusted to an agent instruments so constantly and freely dealt in should bear the consequences of the fraud he had enabled the agent to perpetrate. To the same effect is *Russell v. American Bell Tel. Co.*, 180 Mass. 467, 62 N. E. 751. The Circuit Court of Appeals of the Seventh Circuit in *National City Bank v. Wagner*, 216 Fed. 473, 481, 132 C. C. A. 533, extended this rule to stock certificates indorsed in blank as security for an existing debt. But in that case also the owner intrusted the certificates to the person, who fraudulently turned them over to the bank as security for his existing debt. The report of the case does not show whether there was a promise of extension or renewal.

The Supreme Court decided in *Shaw v. North Pennsylvania R. Co.*, 101 U. S. 557, 25 L. Ed. 892, that the bona fide purchaser of stolen bills of lading could not be protected as a purchaser for value, although they had been made negotiable instruments by the state law. The court points out the essential and important difference in the character and office of negotiable bills and notes and negotiable bills of lading. Bills and notes call for a certain sum of money, but do not represent the title to any particular money. The indorsee of a bill or note payable to order, or the holder of one payable to bearer, takes a good title, although it may have been stolen from the true owner. The court says:

"He may hold it although he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or

constructive notice that the instrument is not the property of the person who offers to sell it; that is, nothing short of mala fides, will defeat his right. * * * Bills of lading are regarded as so much cotton, grain, iron, or other article of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions." 101 U. S., pages 564, 565, 25 L. Ed. 892.

A stock certificate is in like manner distinguished from a note or bill, as was decided in *Knox v. Eden Musee A. Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, holding that one who purchased stock certificates reissued by a bank officer, after they had been surrendered for cancellation and new certificates had been issued, could not claim the protection of a purchaser for value.

The great weight of state decisions is to the effect that one who takes a stock certificate as security for an existing debt, without promise of extension or other present consideration, is not protected as a purchaser for value. Many of the numerous decisions are cited in 14 C. J. p. 736, and in 7 R. C. L., pp. 214, 215, 278, 279; *Millard v. Green*, 94 Conn. 597, 110 Atl. 177, 9 A. L. R. 1610.

[1] Our conclusion is that the holder of a certificate of stock who has taken it as security for an existing debt without promise of extension or other present consideration is not protected as a purchaser for value, unless the true owner is estopped by some negligence which has enabled the person with whom he had intrusted the stock to perpetrate a fraud on the purchaser. There is no such feature of estoppel in this case, and therefore, on both reason and authority, we hold that the Commercial National Bank did not take the certificate of stock as a purchaser for value when it obtained it as collateral in 1916.

[2] What was the effect of the action of the Commercial Bank on March 13, 1917, in extending \$2,700 of the debt of \$20,000 of the Mt. Vernon & Marshall Hall Steamboat Company, Limited, by taking the note of the corporation and the note of F. Mertens, Jr., payable in 60 days, and the certificate of stock mentioned in the note of F. Mertens, Jr., as collateral? Previous to this, as we have shown, the bank was mere custodian of the certificate, ownership being in F. Mertens, Sr., the insolvent donee, for the benefit of his creditors. The extension of the debt on March 13, 1917, on the faith of the certificate, changed the relation and made the bank a purchaser for value of the certificate. The principle was applied in *Crawford v. Dollar S. F. & T. Co.*, 236 Pa. 206, 84 Atl. 694.

Nevertheless, the claim of the Commercial Bank must fail, because it was a purchaser with notice of the vice in the title of F. Mertens, Jr., from whom it purchased. The bank had notice when it first received the stock, in 1916, that Frederick Mertens, Sr., had made a gift of the certificate to his son when he was unable to pay his obligations. The copartnership of which he was a member had borrowed money from the Commercial Bank for several years, and at the time of the bankruptcy the indebtedness to it was \$111,110, for which it was short of collateral by \$25,780. When the bank became a purchaser for value on March 13, 1917, the petition in bankruptcy had been filed.

Surely this was enough to put the bank on inquiry, which would have led to the information that F. Mertens, Sr., was insolvent when he undertook to give away the stock. The gift of the insolvent father was a fraud upon his creditors, and we think the Commercial Bank's knowledge of the father's inability to meet the large obligations to itself and the pendency of the bankruptcy proceedings put the bank on notice of his insolvency and of the invalidity of the gift to his son, and so charged it with constructive, if not actual, notice of the fraud.

Affirmed.

BOYD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 7, 1921.)

No. 1897.

1. Commerce ⚡33—Interstate shipment remains such until delivered by carrier to consignee.

When a shipper delivers property to a carrier on a contract for carriage and delivery to a consignee in another state, the property remains under the protection of the federal statutes regulating interstate commerce until it is lawfully surrendered to the consignee or his assignee.

2. Commerce ⚡33—Interstate shipment to order held not delivered by carrier.

The placing by a terminal company of a car containing an interstate shipment, under an order bill of lading, on its side track to the warehouse of the consignee, but without surrendering possession to the consignee, *held* not a delivery which took the shipment out of interstate commerce.

3. Carriers ⚡38—That a fraud was committed by defendant in the name of a corporation in obtaining delivery of car not a defense.

That defendant in obtaining delivery of a car of grain from a railroad company by fraud and deception acted in the name and for the benefit of a corporation of which he was the principal owner *held* not a defense, but to render both defendant and the corporation chargeable.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Criminal prosecution by the United States against Charles F. Boyd and the Charles F. Boyd Company, Inc. Judgment of conviction and defendants bring error. Affirmed.

H. L. Erckman, of Charleston, S. C., for plaintiffs in error.

J. Waties Waring, Asst. U. S. Atty, of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. Each of the counts 1 to 5 of the indictment charged a separate offense of obtaining by fraud and deception a carload of corn or hay, moving as an interstate shipment, in the custody of the Southern Railway at Charleston, S. C. Of these charges

the defendants were acquitted. They were convicted on count 6, which charged that the defendants obtained at Charleston, S. C., on June 29, 1920, by fraud and deception, a carload of corn moving as an interstate shipment of freight, in the custody of the Charleston Terminal Company. The details are thus set out:

" * * * Which said corn was then moving as an interstate shipment of freight, from Williamsburg Station, in the state of Maryland, to Charleston, in the state of South Carolina, which said shipment had not been paid for and was a shipment commonly known as an order notify shipment; and they, the said Charles Frederick Boyd and Charles F. Boyd Company, Incorporated, did then and there represent to the Charleston Terminal Company that they were unable to obtain the bill of lading covering the said shipment of corn so as to surrender the same to the said Charleston Terminal Company in order to obtain the said shipment of corn, and in lieu thereof did then and there file with the said Charleston Terminal Company a certified statement of the invoice price of the said shipment of corn, which said certified statement showed the said invoice price to be \$2,346.62, and thereupon did deposit with the said Charleston Terminal Company a check to cover the said amount, and in pursuance thereof did obtain the said shipment of corn, as aforesaid, which aforesaid certified statement was false, in that the invoice price of the said shipment of corn was not \$2,346.62, as so falsely certified by the said Charles Frederick Boyd and Charles F. Boyd Company, Incorporated, but in truth and in fact the invoice price of the said shipment was \$3,627.36, all of which was then and there well known to them, the said Charles Frederick Boyd and Charles F. Boyd, Incorporated. * * *"

The first assignment of error is directed to the refusal to direct a verdict of acquittal on the ground that the evidence does not show that the carload of corn was moving as an interstate shipment of freight at the time the defendants obtained it from the Charleston Terminal Company.

Three interstate railroads, the Atlantic Coast Line, the Southern, and the Seaboard, run into Charleston. The Charleston Terminal Company is a separate corporation, with a track along the docks. The Terminal Company has a number of spur tracks to the warehouses of wholesale dealers. It receives cars from the three railroads, and delivers them to the dealers at their warehouses. The rules of all the carriers require that a car containing an order notify shipment shall not be delivered to the merchant for whom it is intended until the bill of lading indorsed by the shipper has been surrendered either to the railroad or to the Terminal Company. The bills of lading with the drafts attached were sometimes delayed in transmission to the Charleston banks. When this happened, for the accommodation of the merchants, the railroads and the Terminal Company allowed the merchants to obtain the goods by depositing the amount of the invoice, plus 10 per cent. as security against the irregular delivery.

[1, 2] In this instance the carload of corn was shipped by William Gower & Son from Williamsport, Md., to their own order, Charleston, S. C., notify Charles F. Boyd Company. It arrived at the freight station of the Atlantic Coast Line Railroad Company on June 18, 1920. The Railroad Company delivered it to the Terminal Company, to be delivered to Boyd Company on surrender of the bill of lading.

The Terminal Company placed it on the Boyd Company's side track at its warehouse June 23, 1920, without surrender of the bill of lading or payment of the draft to which it was attached. Placing the car on the side track of the Boyd Company was merely for convenience in handling, and it was clearly understood by the Terminal Company and the defendants that they thereby acquired no possession or right of possession until the bill of lading had been presented, or the consent of the carrier had been obtained.

The defendants, nevertheless, contended that the car ceased to be moving in interstate commerce on arrival at the Charleston freight station of the Atlantic Coast Line Railroad, or at least when it was put on defendant's side track, and that therefore the federal statute does not apply. It is true that when goods moving in interstate commerce reach their ultimate destination, and are reconsigned from that destination on a new contract of shipment to some other point in the same state, the last movement is not interstate. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Pittsburg, etc., Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 39 L. Ed. 538; *Gulf, etc., R. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; *Chicago, etc., R. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988. This, however, in no way affects the obvious rule that when a shipper delivers his goods to a carrier on a contract for carriage and delivery to a designated consignee in another state the goods remain under the protection of federal statutes regulating interstate commerce until they are lawfully surrendered to the consignee or his assignee. *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Heymann v. Southern Ry.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178; *Ohio Com. v. Worthington*, 225 U. S. 101, 109, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Texas, etc., R. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442.

Pere Marquette R. Co. v. French & Co., 254 U. S. 538, 41 Sup. Ct. 195, 65 L. Ed. — (January 17, 1921), relied on by defendants, does not affect the question. There the delivery was held to be made when the carrier, at the direction of the holder of the bill of lading, released its possession at the point of destination by turning over the goods to another railroad, or to a terminal company, for an entirely separate transportation "in assumed termination and discharge of its obligations." Here the carrier had no such request from the holder of the bill of lading, nor did it intend to surrender possession by placing the car on the Boyd Company's side track for their convenience in handling. In such circumstances the Terminal Company and the side tracks are mere instruments of interstate commerce. *Southern Pac. Ter. Co. v. I. C. C.*, 219 U. S. 498, 522, 31 Sup. Ct. 279, 55 L. Ed. 310. The District Judge so charged the jury, and the assignments of error on this point are without merit.

The next question is whether the evidence made an issue for the jury on the charge that the defendants obtained car No. 66804 from the Terminal Company by fraud and deception. The car was placed on the side track of Boyd Company. Not having the bill of lading,

Boyd, on behalf of the Charles F. Boyd Company, presented to the Terminal Company a paper represented by him to be a copy of the invoice and certified by him to be correct. The paper was in these words:

"Car PRR 66804. 89089# Bulk W. Corn @ \$2.05, \$2,627.36. Less freight, \$280.74,—\$2,346.62. We hereby certify that the above is a true and correct copy of the original invoice in our possession. Charles F. Boyd Co., Inc., per Chas. F. Boyd."

The real invoice was:

"1769 less 25 bushels shelled corn at \$2.05, \$3,627.36. P. R. R. 66804. Draft account Maryland Brokerage Co., Hagerstown, Md."

Boyd gave to Snelling, the agent of the Terminal Company, a certified check of Boyd Company for \$3,627.36. Snelling testified that this check was given for the \$2,627.36 represented on the certified copy of invoice as the price of the corn in car 66804 and \$1,000 due by Boyd Company on another shipment. Boyd testified that the check was for the real amount due on car 66804, and that his certified statement of the invoice as \$2,637.36 instead of \$3,637.36 was merely an error of his stenographer, unobserved by him. Against this explanation and in support of Snelling's testimony the government relied on the significant fact that not only was the amount represented by Boyd \$1,000 less than the invoice price, but the language of the true invoice differs entirely from the paper presented by Boyd; particularly in that the former described the corn in bushels and the latter in pounds, and that the true number of pounds was 99,112 and the number represented to be in the car was 89,089. Added to this is the extreme improbability of Boyd's statement that he gave the check for \$1,000 more than he supposed to be the true amount, when he was very hard pressed for money. No further remark is necessary to show that a serious question of fact was made by the evidence as to the good faith of Boyd in the transaction.

Reliance is placed on the dates as showing conclusively the delivery of the carload of corn to the Boyd Company before the alleged false copy of the invoice and the check were given the Terminal Company. According to the testimony of Snelling, agent of the Terminal Company, the car was placed on side track of Boyd Company June 24, 1920, and released to it June 28th. The certified check for \$3,346.62 was dated July 1, 1920. The paper certified by Boyd as copy of the invoice was not dated. If these dates are taken as exact, they do not remove the issue whether the defendant obtained the goods by means of the fraud and deception charged. Snelling, it is true, admitted sometimes allowing Boyd to unload cars before presenting the bill of lading with certified check, on his own uncertified check or on payment in money, and sometimes to commence unloading on his mere promise to pay during the day. He also admitted the possibility of having first taken an uncertified check for this carload of corn. But there is no evidence except Boyd's that Snelling gave this unwarranted favor before the amount was ascertained from a certified copy of the invoice. Even if Boyd gave his own uncertified check and obtained

the corn on the faith of his false statement as to the amount of the invoice, the charge of the indictment would be sustained. There was ample evidence to sustain a finding that he did. Indeed, the jury might well have discredited the whole of the evidence of Boyd because of the conflict with the evidence of Kennedy and Thomas on material issues, and for other reasons.

Indeed, the evidence of the face of the true invoice and that of the paper presented by Boyd as a copy might have been taken by the jury as convincing of a deliberate purpose to present to the Terminal Company a false statement of the amount due on the car. That inference by the jury might well lead to the further conclusion that the false paper was presented before the corn was delivered and as a means of getting it, since there was no reason to fabricate it afterwards. Other evidence might be set out tending to prove the guilt of the defendants, but enough has been recited to show that the trial judge was right in refusing to direct a verdict of acquittal.

Exception to the exclusion of evidence that order notify shipments were frequently released by agents of the carriers in violation of law and the rules of the carriers loses all force, in view of the fact that the evidence was in fact adduced.

[3] There is nothing in the point that Boyd could not be convicted because he obtained the carload of corn for the benefit of the Boyd Company. He practically owned the Boyd Company, and converting the corn to the use of the Boyd Company was in effect converting it to his own use. If he obtained it by fraud and deception he violated the statute, and it makes no difference that he was acting in the name of the Boyd Company. In such case the individual and the corporation are both guilty. The facts in *Van Weel v. Winston*, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. Ed. 384, relied on by defendants, are so different that the case has no application.

On the issue whether Boyd obtained the corn by consent of the Terminal Company on his promise to pay in the future, or on a willfully false copy of the invoice and a check covering less than the true amount, the District Judge charged that if he obtained the corn by the consent of the carrier or its agent, unless he procured that consent and delivery by fraud and deception, he would not be guilty. There was nothing in the case requiring an instruction that the false statement must be likely to deceive one exercising prudence and caution. The carrier had nothing to put it on notice that the paper presented by Boyd was not a copy of the invoice. Hence there was no error in refusing the requests on these subjects.

We find no error in the record.

Affirmed.

MUNGER v. PERLMAN RIM CORPORATION.*

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 242.

1. Patents \Leftrightarrow 328—638,588, for demountable rim for automobile tires, held valid and infringed.

The Munger patent, No. 638,588, for means of attaching automobile tires to the rims, claim 4, held valid and given the broad construction to which it is entitled, as covering the principle of wedge action for fastening a demountable rim, infringed.

2. Patents \Leftrightarrow 319 (1)—Reasonable royalty to be paid by infringer determined.

Where it was determined that a patentee of an automobile part was entitled to damages for infringement, measured by a reasonable royalty, such royalty held properly based on a percentage of the sale price of the infringing part in conformity with the custom of so fixing royalties for similar patented parts.

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

Suit in Equity by Louis De F. Munger against the Perlman Rim Corporation. Decree for complainant, and defendant appeals. Modified and affirmed.

See, also (D. C.) 244 Fed. 799.

Suit is upon patent 638,588, for which application was filed April 25, 1899, patent issued December 5, 1899, to National Wheel & Traction Company as assignee of the inventor, who is the plaintiff herein.

The disclosure of the specification is for an improvement in "cushion-tires" for vehicle wheels, the object being "to provide an improved means of attachment of the tire to the wheel rim or felly, and specially designed for the driving wheels of automobiles." It is admitted that the specification reveals two entirely distinct thoughts—one for securing the pneumatic tire to its base by vulcanization, the other for the means of attaching said tire base to the wheel proper.

The only claim in suit is No. 4, which deals with the last alleged inventive thought, and reads as follows: "In combination with a tapered felly, a tire, an annular rigid base to which said tire is secured, said base having a tapered under-surface and fitted on said felly, substantially as described."

The description referred to is of a "felly slightly inclined or at an angle with the axle, the outer diameter of the wheel being the smaller to form a tapering fit for the tire base." As shown, the tapered felly fits within a similarly tapered tire base, to the end that "the larger circumference of the base can be easily slipped over the small outer circumference of the felly." It is then stated that "when in place these wedge-shaped surfaces form a close fit and also resist any tendency of further inward movement of the band on the felly due to strain on the tire in turning corners."

The tapered or frustro-conical tire base when placed over the similarly shaped felly, is not only locked in position but pressed into further wedge-like relation to the felly by bolts passing through said felly substantially at right angles to a spoke and with an extension or lug (integral or detachable) bearing upon the outer surface of the tire base; the entire bolt and lug being tightened with a nut so as to press (if necessary) the tapered tire base further on the similarly tapered felly.

Of this construction it is said that when the securing bolts are loosened it is only necessary in removing the tire base "to back off the base slightly from the felly, when it can be easily slipped down off the inclined surface."

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 54, 66 L. Ed. —.

Under the assignment above referred to, National Wheel & Traction Corporation remained the owner of record of this and other patents of Munger's until September 5, 1916, when it assigned said patents to the plaintiff herein by a transfer duly recorded. It is upon this title that plaintiff brought suit.

In July, 1902, however, an assignment of the patent in suit (and others) was drawn and executed by the National, etc., Company to a New Jersey corporation known as "Munger Automobile Tire Company." This assignment was delivered to the attorney for the men who had agreed to finance the then newly created Munger, etc., Company, and who caused the incorporation of that company.

This corporation commercially manufactured under Munger's tire patent; but the business lasted only a few months. It is evident that there were disagreements, if not quarrels, between this plaintiff and the men who were to furnish capital for the new corporation bearing plaintiff's name. Such disagreements quickly produced insolvency proceedings in the chancery of New Jersey (in October, 1902).

The receiver sold out the effects of the Munger, etc., Company, but never specifically sold the patent or patents covered by the assignment of July, 1902, until September, 1917, about a year after the beginning of this suit. Between 1902 and 1917 the assignment from National, etc., Company to Munger, etc., Company remained in the possession of the attorney for the financial backers of Munger, etc., Company, who (as found below) never fulfilled the promises of financial aid or working capital made by them to National, etc., Company and Munger when the project was formed that took shape in the incorporation of Munger Automobile Tire Company, the concern which they themselves promptly put into insolvency.

In 1917 defendant herein in effect acquired by formal conveyances from the receiver and purchasers at the receiver's final sale of 1903 (who apparently had never seen or heard of the patent) whatever paper rights to the patent in suit were or had been of the Munger Automobile Tire Company of New Jersey, whereupon by leave of the District Court the defense was presented that plaintiff had no title to the patent in suit.

The alleged infringing article is a now familiar form of demountable motor rim, and may be described in language taken from the decision of Hunt, C. J., in *Perlman v. Standard Welding Co.* (D. C.) 231 Fed. 453, affirmed 231 Fed. 734, 146 C. C. A. 18.

Defendant's demountable rim is of the clincher type, and is in effect provided with a block, or stop, so that it will not creep. Each of the locking devices consists of a bolt and a metal wedge. The wedges go between the demountable rim and the fixed rim (or felly), and exert an inclined pressure upon the demountable rim radially away from the wheel body, spacing it from the fixed rim, and also press it laterally against the flange at the other end of the fixed rim; the wedges used by defendant are propelled by means of threaded bolts. (D. C.) 231 Fed. at page 455.

The court below found that defendant's alleged infringing article was manufactured under a patent owned by it, No. 1,052,270, being the same patent which was considered and interpreted in this circuit in the cases above referred to. It was further held that the patent in suit should not be "restricted to the precise relation of the wedge elements shown" therein, but should be so construed as to "include within its scope the obvious equivalents." It then declared that defendant's structure "performs its function in practically the same way as the patented" one, and therefore decreed infringement.

Pending trial, however, plaintiff's patent had expired, whereupon (no injunction issuing) it was decreed that plaintiff "recover from * * * defendant, a reasonable royalty on all demountable rims manufactured, sold, or otherwise disposed of by said * * * defendant in this cause in infringement of (said claim 4 of the patent in suit), as damages for such infringement."

The ascertainment of these damages was sent to a master, who under the form of decree quoted from had no power to do more than ascertain damages

by ascertaining the proper royalty upon Munger's invention. No exception has been taken to this limitation upon the master's power. That official reported: (1) That defendant corporation was liable only for such infringements as it had committed from the date of its incorporation April 6, 1916, to the date of the expiration of the patent in suit—i. e., December 5, 1916—(2) that during that time defendant had either manufactured or sold, or both, 348,568 infringing rims or tire bases; (3) that a reasonable rate of royalty for the use of the invention of the claim in suit is \$.2096 per rim; (4) wherefore, after making certain deductions, plaintiff should recover as the reasonable royalty aforesaid \$73,070.08—for which amount, with interest from the date of the master's report and costs, final decree was entered, and defendant took this appeal.

Melville Church, of Washington, D. C., and John Thomas Smith, of New York City, for appellant.

William B. Greeley and Ambrose L. O'Shea, both of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges

HOUGH, Circuit Judge (after stating the facts as above). This appeal presents three questions: (1) Has the plaintiff title to the patent in suit? (2) Is claim 4 valid and infringed? (3) Have the damages been properly adjusted?

The question of title depends solely on whether the delivery of the written assignment of the patent in suit to the attorney for the promoters of Munger Automobile Tire Company was absolute or in escrow. Plaintiff contended that it was merely deposited with the attorney in question until such time as his clients produced the money they had promised to provide for the new corporation. It is plain that they never provided the money.

It is not doubted that an escrow is a written instrument, which by its terms imports a legal obligation, and which is deposited by the grantor with a third party to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee. 10 R. C. L. 621.

Undoubtedly there was much to be said in favor of interpreting a deposit with the promoters' attorney as a delivery to the promoters, yet it was and remained wholly a question of fact whether there ever was a delivery or merely a deposit in escrow. The trial judge considered this question of fact on a record containing the testimony (so far as we can see) of every living person who could have had knowledge in the premises, and after such hearing decided that there was a deposit in escrow, and that the condition upon which delivery depended had never been fulfilled. We are not disposed to disturb these findings of fact, and it is not denied that from them flowed the conclusion of law that title to the patent never passed out of the National, etc., Company, as whose assignee the plaintiff brings this suit.

[1] The trial court found as a fact that defendant's rims were made under the Perlman patent so fully considered in this circuit in *Perlman v. Standard, etc., Co.*, supra. This statement is true in a strictly legal sense, but it is also true that what this defendant has made and is making is in substance or essence the device which was

found to infringe in *Perlman v. Standard Co.*, supra. This means that the scope accorded Perlman patent 1,052,270 was so broad that it covered a style of demountable rim very much better for commercial purposes than anything disclosed by Perlman's specification.

Perlman's disclosed means consist essentially in a plurality of threaded bolts passing through the felly at appropriate intervals, having frustro-conical heads, which can be "set up" by nuts, into apertures in the rim or tire base, which base fitted loosely over the felly. By the wedge-action of these frustro-conical bolt-heads the tire-base is to be held firmly in position. The wedge-action held to be a mechanical equivalent is set forth in (D. C.) 231 Fed. at page 455, and is mechanically identical with what is now said to infringe Munger's patent. Throughout the Perlman litigation, supra, the patent now in suit was not cited or referred to. It is a necessary inference from our previous decision, and is abundantly proven here, that wedge-action for the purpose of tightly fastening a demountable rim was broadly new when Munger filed his application.

The references now introduced were disposed of by our previous decisions; they are assuredly no better as against Munger than they were against Perlman. The difference between Perlman's disclosed device and that which was held to infringe in the case cited was in the method of applying wedge-action, but the devices of both parties applied wedges at certain predetermined points on the periphery of the felly, whereas Munger makes of the whole of his tapered rim one wedge when it is slipped over and pressed upon the similarly tapered felly. If, as we have held, wedge-action in this art was broadly new, it makes no difference that instead of a half a dozen wedges Munger has one large wedge.

It is objected that Munger's device was not operative, but the evidence proves that it was used and that it did operate in accordance with the law of its being as described and claimed. That it was not a commercial success is true, as the story of sales shows. But neither was Perlman's disclosed means successful, yet his concept of wedge-action seemed so new and meritorious, as to entitle him to dominate, and (in the person of the defendant corporation bearing his name) ultimately appropriate, the superior application of wedge-action practiced by the defendants in the original Perlman litigation, supra.

The Munger patent is entitled to the same broad scope, because it is a still earlier concept of wedge-action, operative and useful even though not commercially successful. As we have held that wedges driven in between felly and rim must pay tribute to one who described only wedge bolts protruding through the felly (the claim being sufficiently broad), so must the same successful device pay tribute to Munger's earlier wedge-action device.

[2] The interlocutory decree (as interpreted by the opinion below) substantially held that this plaintiff was not entitled to profits; and that since there was not and never had been any established license rate under Munger's patent, and there was no adequate basis for an assessment of damages on lost sales, the master was told to assess damages by ascertaining "what would have been a reasonable royalty, consid-

ering the nature of the invention, its utility and advantages, and the extent of the use involved." *Dowagiac, etc., Co. v. Minnesota, etc., Co.*, 235 U. S. 648, 35 Sup. Ct. 221, 224 (59 L. Ed. 398). No assignment of error challenges this limitation on plaintiff's recovery, and we express no opinion on this point. The only question before us is whether, assuming plaintiff to be entitled to any damages, the ascertainment and computation thereof was correct.

Plaintiff proved that defendant under the Perlman patent had an established or usual royalty charge; that there were many patents covering parts of or devices used in motor vehicles, and that for them rates of royalty had been and were being charged, based upon a percentage of the sale prices of the part or devices containing said patented invention. Then a witness, apparently disinterested, a pioneer in motor exploitation and himself an inventor and manufacturer, gave it as his opinion that from 10 per cent. to 15 per cent. of the sale price of infringing rims would be a reasonable royalty for the use of Munger's invention. There was substantially no evidence in contradiction of the foregoing. Under the *Dowagiac Case* we think this evidence competent, and if believed sufficient whereon to ground an award of damages, if supplemented (as it was) by proof of sales and manufacture.

This expert's royalty rate the master "accepted, for the purpose of apportioning defendant's profits," choosing, however "15 per cent. rather than the minimum 10 per cent. or any figure between the two."

The sentence regarding "apportioning defendant's profits" is the master's method of stating the thought (naturally arising on this record) that a reasonable royalty under the Munger patent, a commercially unsuccessful invention, should be less than the price justly chargeable for using the detachable wedge of defendant's actual system. It is but another way of stating the thought of plaintiff's expert, when he suggested a percentage royalty, for his highest figure amounts to much less than the royalty defendant has been charging other manufacturers.

The case comes down to this: Having regard to the history of this invention, and the obviously more desirable application of the wedge principle used by defendant, was the master justified in using the higher rate suggested by plaintiff's expert rather than the lower? The matter is one not made plainer by discussion. After consideration of the record we are of opinion that the master should have taken the 10 per cent. estimate rather than the 15 per cent. one. It is therefore ordered that the decree appealed from be modified by reducing the amount of plaintiff's recovery to \$48,713.39, and that, as so modified, the decree appealed from be affirmed, without costs in this court.

PAYNE, Agent U. S. R. R. Administration, v. CARD.

(Circuit Court of Appeals, Eighth Circuit. June 9, 1921.)

No. 5591.

1. Trial ⇌181—Charge of court held sufficiently excepted to.

Where the trial court directed a verdict, exception to the charge *held* sufficient to entitle the excepting party to include it in the bill of exceptions.

2. Trial ⇌141—Each party held, under the pleadings, entitled to directed verdict on claim and counterclaim respectively.

Under pleadings which with the facts admitted showed that plaintiff as carrier through mistake delivered to defendant 88 head of cattle which were not his, but which he sold, and that plaintiff received for carriage to defendant 106 head of cattle owned by him, but which through mistake plaintiff delivered to another, but afterward sold, plaintiff *held* entitled to a directed verdict for conversion of the 88 head, and defendant on his counterclaim to a directed verdict for conversion of the 106 head, the damages in each case to be assessed by the jury.

3. Carriers ⇌212—Misdelivery by carrier constitutes conversion.

The delivery by a carrier of a shipment of cattle to another than the owner and consignee *held* to constitute a conversion for which the carrier was not relieved from liability by a tender of part of the shipment to the owner several months later.

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action at law by John Barton Payne, Agent United States Railroad Administration, against Harry B. Card. Judgment for defendant, and plaintiff brings error. Reversed.

Nye F. Morehouse, of Chicago, Ill. (A. A. McLaughlin, of Evans-ton, Ill., and Avery Haggard, of Cheyenne, Wyo., on the brief), for plaintiff in error.

J. M. Hodgson, of Cheyenne, Wyo. (W. B. Ross, of Cheyenne, Wyo., on the brief), for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. This is a suit by the Director General of Railroads against Harry B. Card for conversion of 88 head of cattle, alleged to be worth \$7,268.25. Card denied the essential allegations of the petition, and counterclaimed in two counts. From a judgment on a directed verdict denying recovery to plaintiff and allowing Card recovery on both counts of his counterclaim in the total of \$1,552.92, this writ of error is brought.

[1] Defendant has filed here a motion to strike from the transcript that portion of the bill of exceptions containing the charge of the court to the jury, upon the ground that none but a general exception to the whole charge was made, and that such character of exception, under rule 10 of this court (188 Fed. ix, 109 C. C. A. ix), excludes the charge from the bill of exceptions. The prime purpose of rule 10 was to limit the review of the charge in this court to matters which had

been specifically brought to the attention of the trial court at a time and in a way to afford that court a fair opportunity to consider the exceptions and correct any errors in the charge as excepted to. Here the essence and only effect of the charge was to direct the verdict of the jury. The jury was left no consideration of the evidence, and no choice of decision on the facts. Its verdict merely records the determination of the court upon the facts. The statement by the court of its reasons for reaching the conclusion, which it directed the jury to register in the verdict, could have no legal effect upon the action of the jury, and can hardly be classed as a portion of the charge to it. The real office of such a statement is similar to an opinion. For this reason, the application of rule 10 is doubtful, except to the extent of exceptions to separate specific items covered by the directed verdict, which items in this case would be the amount sued for by plaintiff, and the two amounts allowed on the counterclaim. But plaintiff not only excepted to each of those items separately, but did so with full reasons and in elaborate detail. The motion should be denied.

[2] On the merits, plaintiff contends that the evidence and law are so conclusive in its favor that the court should have directed a verdict for it on its claim, and against defendant upon his counterclaim.

It is important first to determine just what the issues were as made by the pleadings. The petition alleged that plaintiff, as a common carrier, had mistakenly delivered to defendant 88 head of cattle belonging to another shipper, Harris, at Newell, S. D., and upon discovery of the mistake had, about November 12, 1918, demanded return of the cattle, which was refused; that he was, by purchase from Harris, entitled to the cattle; that he was entitled to the possession of the cattle at the time of conversion; that the reasonable value of the cattle at the time of conversion was \$7,268.58.

The answer denied generally these allegations. It also contained what was denominated as a "set-off and cross-petition," which consisted of two so-called causes of action. The first cause was that plaintiff, as a common carrier, had undertaken to transport to defendant, at Manville, Wyo., 106 head of cattle, which he had purchased but never seen; that the cattle were purchased for resale, under a previous arrangement; that he believed the 88 head received to be a portion of the cattle shipped to him, and that there was a shortage of 18 head; that he endeavored to take up with plaintiff this shortage, but received no response or information, except that the local agents of defendant informed him that the 88 head were his cattle; that, not desiring to accept the cattle until he ascertained about the shortage, nor to receive for the entire 106 head as received, he held the cattle in corrals for several weeks, at great expense, while seeking such information; that there was great danger of escape and loss of the cattle, as they were unbranded and were breaking out of the corrals; that it was necessary to go to great expense in guarding against escape of the cattle from the corrals; that, relying upon the acts and statements of plaintiff's agents, and being misled thereby, and the persons to whom he had contracted the cattle being willing to accept the 88 head and wait for the missing 18 head, he sold and delivered the 88 head to them,

upon the terms previously agreed upon, and such cattle were branded and removed by the purchasers; that some time after such sale and delivery, he was notified by plaintiff that the 88 head were not his cattle, but that through mistake these cattle had been delivered to him, and his cattle had been delivered at Newell, S. D.; that demand was then made upon him for delivery; that it was then entirely impossible for him to comply with such demand; that the mistaken deliveries were due entirely to plaintiff's negligence, and not to his fault; that he was damaged thereby to the extent of \$5,267.55, consisting of four items, as follows: Difference in price between the 88 head he had purchased and the 88 head delivered, \$2,467.55; expense of holding cattle in corrals for about a month while waiting for information, \$300; interruption of his business and time spent in looking after the cattle delivered, and looking for the cattle not delivered, \$500; expenses incident to this suit, including time of defendant in preparing for trial and attending court, \$1,500; inability to deliver the cattle he had contracted to sell, \$500.

His second cause was that plaintiff, as a common carrier, had contracted to transport and deliver to him 106 head of cattle; that it did not do so, but transported and delivered them at Newell, S. D., and has converted them; that he was sole owner entitled at the time of conversion and thereafter to delivery of the cattle; that the conversion was of about November 12, 1918; that he has been damaged thereby \$5,768.52.

The plaintiff, by amended answer to the above first cause of action, admitted receipt of 106 head of cattle to be shipped to defendant, and the wrongful delivery to him of 88 head not his cattle. To the above second cause, it admitted receipt of the cattle to be shipped to defendant, but denies conversion, alleging that defendant refused to receive the same, wherefore plaintiff was compelled to and did sell the cattle for the highest price obtainable, and has held and holds the proceeds for the benefit of any one entitled thereto.

Taking these pleadings together with their contained admissions, it seems clear that the cattle delivered defendant were not his cattle, and that his cattle were delivered to some one else at Newell, S. D. The issues as to plaintiff's claim, therefore, were whether the circumstances of the receipt and dealing with the cattle and the refusal to return upon demand constituted conversion, and, if so, the amount of recovery. The issues as to defendant's first claim were his right to recover and the amounts of his several items alleged as damages because of negligent failure of plaintiff to deliver defendant's cattle. The issues as to defendant's second claim were whether plaintiff had converted the cattle, and, if so, the damages due therefor.

As to plaintiff's claim, there can be no question but that, on the admissions in the answer, he was entitled to a directed verdict for the value of the 88 head mistakenly delivered. On the first cause of action of defendant there should be no recovery. The first item, of difference in value of the cattle, is covered by the second cause of action. The next three are not properly chargeable against plaintiff as legal damages. The last item for damages in the sum of \$500 is not charge-

able, unless knowledge by plaintiff of the contract can be shown, and no such showing is in the evidence.

[3] Defendant's second cause is for conversion of the 106 head. This conversion is denied by plaintiff. It is admitted that the cattle were not properly delivered, but were erroneously sent to Newell, S. D., and there delivered to another shipper. This constituted a conversion as of the date of wrongful delivery. This could not be avoided by a tender of part of the cattle 2½ months later. While mere delay in delivery by a carrier will not constitute conversion, yet any dealing with the cattle by the carrier at any time which is inconsistent with or a denial of the shipper's title and right to possession (after payment of charges due the carrier) is a conversion, and fixes the rights of the parties, although subsequent action of the carrier may go in mitigation of damages.

The court should have directed a verdict for plaintiff upon his claim and upon the first cause of action of the defendant; it should have directed a verdict for defendant upon his second cause of action; it should have left to the jury to determine the damages under the above directed verdicts.

The judgment is reversed, and a new trial ordered.

MANNING v. UNITED STATES.

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

No. 5659.

1. Criminal law ⇔196—Test of former jeopardy.

The test by which is determined a plea of former jeopardy is whether if what is set out in the second indictment had been proved under the first it would have supported a conviction, and, if it would, the second cannot be maintained.

2. Criminal law ⇔196—Acquittal on one charge of conspiracy held bar to prosecution on second charge.

Acquittal of defendant under an indictment charging conspiracy with another to sell opium derivatives "not in pursuance of written orders on forms issued in blank for that purpose by the Commissioner of Internal Revenue," in violation of Harrison Anti-Narcotic Act Dec. 17, 1914, c. 1, § 2 (Comp. St. § 6287h), held a bar to prosecution on a second indictment, charging a conspiracy, with the same person, at the same time and place, to violate said section, in that they conspired that defendant, who was a physician registered under the act, should issue prescriptions for the proscribed drugs not in the course of his professional practice, to persons other than his patients, and that his coconspirator, who was a druggist and dealer registered under the act, should fill such prescriptions and sell the drugs to the persons to whom they were issued, proof of such charge being sufficient, under Crim. Code, § 332 (Comp. St. § 10506), to sustain a conviction under the former indictment.

3. Conspiracy ⇔27, 43 (5)—Defective indictment not aided by averment of overt act; overt act need not be criminal.

While an overt act is essential to render a conspiracy punishable under Crim. Code, § 37 (Comp. St. § 10201), such act need not be a criminal act, and a substantially defective indictment for conspiracy cannot be

aided by the averment of acts done by one or more of the conspirators in furtherance of its object.

4. Indictment and information \Leftrightarrow 111(1)—Indictment for conspiracy to violate narcotic act need not negative exceptions.

In an indictment for sale of drugs in violation of Harrison Anti-Narcotic Act Dec. 17, 1914, c. 1, § 2 (Comp. St. § 6287h), it is not necessary to negative any of the exceptions to the prohibition of said section.

In Error to the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Criminal prosecution by the United States against Thomas S. Manning. Judgment of conviction, and defendant brings error. Reversed.

Edward A. Raithel, of St. Louis, Mo., for plaintiff in error.

Vance J. Higgs, Sp. Asst. Atty. Gen., of St. Louis, Mo. (James E. Carroll, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

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

SANBORN, Circuit Judge. Thomas S. Manning, the plaintiff in error, and one of the defendants below, was indicted under section 37 of the Criminal Code, 35 Stat. 1096 (Comp. St. § 10201), for committing the offense of conspiring with his codefendant George F. Cucchi and others to the grand jurors unknown, at St. Louis, Mo., between June 30, 1916, and July 12, 1916, to commit the offense of disposing of opium, its compounds and derivatives, in violation of section 2 of the Harrison Anti-Narcotic Act. 38 Stat. 786 (Comp. St. § 6287h). He pleaded not guilty, was tried, acquitted, and on May 18, 1917, was discharged. On June 19, 1917, he was again indicted under section 37 of the Criminal Code for conspiring with George F. Cucchi on or about July 1, 1916, to commit the offense of disposing of opium, its compounds and derivatives, in violation of section 2 of the Harrison Anti-Narcotic Act. 38 Stat. 786 (Comp. St. § 6287h). He pleaded his former indictment, trial, and acquittal in bar. The plaintiff demurred to his plea, and the demurrer was overruled. The plaintiff then answered the plea, and admitted in the answer the former indictment, trial, and acquittal of Manning, but denied that the conspiracy charged in the first indictment was for the same offense as that charged in the second indictment. The issue thus formed was submitted to the court on the plea and answer. The court overruled the plea, the defendant excepted, pleaded not guilty, was tried, convicted, and sentenced. It is this judgment and sentence that the writ of error in this case was sued out to reverse. In support of his writ, the defendant Manning makes numerous specifications of error in his trial, one of which is that the court, on the answer of the plaintiff, overruled his plea of former jeopardy and acquittal of the same offense charged in the second indictment. This specification will first be considered.

[1] The fifth amendment to the Constitution of the United States declares: "Nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb." The question here is whether or not the defendant has been put twice in jeopardy in violation of this declaration, and "the test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be." Bishop's Criminal Law (8th Ed.) § 1052, subd. 2; *Morgan v. Devine*, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153; *Carter v. McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; *Burton v. United States*, 202 U. S. 345, 381, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

[2] Section 2 of the Harrison Anti-Narcotic Act forbids any one to dispose of any opium or coca leaves, or any of their derivatives, to any person or party, but, subject only to a compliance with certain methods of procedure prescribed in the act, makes these six express exceptions to its prohibition: First, one may lawfully dispose of these drugs in pursuance of a written order of the person to whom he disposes of them, on the form prescribed and issued by the Commissioner of Internal Revenue. Second, one who is a physician, dentist, or veterinary surgeon, registered under the act, may lawfully dispose of such drugs in the course of his professional practice only to his patient. Third, one who is a dealer, registered under the act, may dispose of such drugs to a consumer, in pursuance of a written prescription, issued by a physician, dentist, or veterinary surgeon registered under the act. Fourth, any one in the United States may dispose of such drugs to any person in any foreign country, in accordance with such regulations for the importation thereof, as are prescribed by that country. Fifth, any one may dispose of such drugs to any officers of the United States, or of any state, lawfully engaged in making purchases thereof for the army, the navy, the Public Health Service, the hospitals, or prisoners of the nation, state, or of any city or county therein. Sixth, one may dispose of such drugs in quantities not exceeding one-fourth of a grain at a time, "Provided, that such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this act." Compiled Statutes, § 6287l.

The first indictment charged that Manning, Cucchi, and others to the grand jurors unknown, conspired, between June 30, 1916, and July 12, 1916, "to sell, barter, exchange and give away," that is to say, to dispose of the proscribed drugs, "not in pursuance of written orders on forms issued in blank for that purpose by the Commissioner of Internal Revenue," that is, without bringing themselves under the first exception to the inhibition of the act, but it does not allege that the defendants did not bring themselves under one or all of the other five exceptions. The indictment then alleges as overt acts the disposition by defendants, to persons named, of 581 grains and to persons unknown of 2,100 grains of the proscribed drugs. The second indictment charged that, on or about July 1, 1916, which was at the same time charged in the first indictment, and at the same place the defendant and Cucchi conspired "to commit an offense against the act of

Congress of the United States of America, dated December 17, A. D. 1914," the Anti-Narcotic Act (Comp. St. §§ 6287g-6287q), in that the defendant Manning, who was a physician, registered under the act, conspired with Cucchi, who was a druggist and dealer registered under the act, that Manning should issue prescriptions for the proscribed drugs not in the course of his professional practice only, to persons other than his patients, and that Cucchi should fill such prescriptions and dispose of the proscribed drugs to the persons who received the prescription. In other words, the second indictment charged that the defendants conspired to violate the prohibition of the second section of the law, and did not bring themselves under either the second or third exceptions thereto, but the indictment fails to charge that they were not within either the first, fourth, fifth, or sixth exceptions. There was no statement in that part of either of the indictments which charged the conspiracy of the persons or parties to whom the conspirators agreed to dispose of any of the drugs, or of any definite time, place, or circumstance not hereinbefore stated to more fully identify the conspiracy charged in either of them. The second indictment alleged as overt acts the disposition by Cucchi, on prescriptions issued by Manning, of 242½ grains of the proscribed drugs.

[3] The offense charged in each of these indictments is not a violation of the Anti-Narcotic Act, but it is a conspiracy to violate that act, and a conspiracy to violate a law of the United States is a separate and distinct offense from the offense of violating that law. *Kelly v. United States*, 258 Fed. 392, 393, 169 C. C. A. 408; *United States v. Rabinowich*, 238 U. S. 78, 85, 35 Sup. Ct. 682, 59 L. Ed. 1211. While an overt act, done to effect the object of a conspiracy, is essential to render a conspiracy punishable, such an act need not be a criminal act, much less an act constituting the crime that is the object of the conspiracy. *United States v. Holte*, 236 U. S. 140, 144, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281. Overt acts are in reality something apart from the conspiracy, being acts to effect the object thereof, *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 535, 35 Sup. Ct. 291, 59 L. Ed. 705; and a substantially defective indictment for a conspiracy cannot be aided by the averment of acts done by one or more of the conspirators in furtherance of its object, *United States v. Britton*, 108 U. S. 204, 205, 2 Sup. Ct. 531, 27 L. Ed. 298; *United States v. Black*, 160 Fed. 431, 435, 87 C. C. A. 383.

[4] It would have been unnecessary, even in an indictment for a direct violation of the prohibition of section 2 of the Anti-Narcotic Act against the disposition of the proscribed drugs, to negative any of the six exceptions to that prohibition, for they were matters of defense. Much less was it necessary to negative any of them in an indictment for a conspiracy to commit that offense. *Stetson v. United States*, 257 Fed. 689, 691, 168 C. C. A. 639; *United States v. Nelson* (D. C.) 29 Fed. 202, 209; *Nelson v. United States* (C. C.) 30 Fed. 112, 117; *United States v. Cook* (D. C.) 36 Fed. 896, 897; *Shelp v. United States*, 81 Fed. 694, 696, 26 C. C. A. 570; *United States v. Oregon Short Line Ry. Co.* (C. C.) 160 Fed. 526, 529; *United States v. Penn. Ry.*

Co. (D. C.) 153 Fed. 625, 628; *Smith v. United States*, 157 Fed. 721, 726, 727, 85 C. C. A. 353; *Jin Fuey Moy v. United States* (opinion filed December 6, 1920) 254 U. S. 189, 41 Sup. Ct. 99, 100, 65 L. Ed.

In the case last cited the defendant was indicted for a direct violation of section 2 of the Anti-Narcotic Act. He was convicted on eight counts of that indictment. Each of these counts alleged the violation of the prohibition of section 2, first in the way the first indictment in this case alleges that the defendant conspired with Cucchi and others to violate it, to wit, by selling, bartering, exchanging and giving away the proscribed drugs to a person named in the count not in pursuance of a written order from such person on the form issued in blank by the Commissioner of Internal Revenue, and also, second, in the way the second indictment in this case alleges that Manning, being a registered physician, conspired with Cucchi to violate it, to wit, by issuing, not in the course of the defendant Manning's professional practice only, to a certain person named in the indictment, who was not a patient of the defendant, a prescription for one of the proscribed drugs. The defendant in the *Jin Fuey Moy* Case was convicted, and counsel insisted that the two offenses charged in each count of the indictment, the disposition of the drugs by selling to a person not on a prescribed form, and the disposition of them by a registered physician by means of a prescription issued by him to one not a patient, were so essentially different that they were repugnant, and that they made each count of the indictment fatally defective. The Supreme Court, referring to the charge in that case of selling not on a written order upon the prescribed form, held that—

“Unless defendant could ‘sell’ in a criminal sense, by issuing a prescription, the indictment is bad. If ‘selling’ must be confined to a parting with one's own property there might be difficulty. But by section 332 of the Criminal Code (Compiled Stats. § 10506) ‘whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.’ Taking this together with the clauses quoted from section 2 of the Anti-Narcotic Act, it is easy to see, and the evidence in this case demonstrates, that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser. Hence there is no necessary repugnance between prescribing and selling, and the indictment must be sustained.”

In other words, the Supreme Court held in that case that a charge of selling the proscribed drugs in violation of the prohibition of section 2 of the Anti-Narcotic Act to a person not pursuant to a written order on the prescribed form issued by the Commissioner might be established by proof that the defendant, being a physician registered under the act, disposed of the drugs by prescribing them, not in his professional practice, to a person not his patient.

Now, bearing in mind that the parts of the two indictments under consideration which charged the conspiracy charge it at the same time and place, but do not specify any persons or parties to whom the defendants, or either of them, conspired to sell or prescribe the drugs,

that they simply charge in the first indictment that the defendants conspired to violate the prohibition of section 2 without bringing themselves under the first exception, and in the second indictment that they conspired to violate the prohibition without bringing themselves under the second exception, and that under the decision of the Supreme Court in the Jin Fuey Moy Case last cited the conspiracy to violate the prohibition of the second section of the act by selling the proscribed drugs to a person, not pursuant to an order on the prescribed form, might have been established by the proof of the conspiracy to violate that section by the disposition of the proscribed drugs by the defendant, who was a registered physician, by prescribing them, not in his professional practice to one not his patient, the facts of this case completely meet the test of former jeopardy, and the judgment and sentence below must be reversed, and the case must be remanded to the court below, with directions to discharge the defendant.

**AMERICAN ENGINEERING CO. v. METROPOLITAN BY-PRODUCTS CO.,
Inc. (four appeals).***

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 261.

1. **Receivers** ⇨128—**Prior lien creditors held not to lose right to foreclose by reason of acquiescence in issuance of receivers' certificates.**
Prior lien creditors of a private corporation engaged in the disposal of garbage under a contract with a city could not be deprived of their liens because they did not appear and object, and appeal if their objections were overruled, to a continuation of the business after appointment of a receiver without their express consent, the business being continued by the receiver, and the certificates being issued by him under the mistaken belief of creditors that the business would become profitable, though it was ordered by the court that the receivers' certificates should be a prior lien.
2. **Receivers** ⇨128—**Equities held in favor of prior lien creditors as against receivers' creditors.**
In a receivership proceeding, prior equities held in favor of prior lien creditors who advanced their money to build a garbage disposal plant upon an express agreement for liens, as against receiver's creditors who advanced money for the continuation of the business after appointment of the receiver under the belief that the business would become profitable.
3. **Corporations** ⇨477 (1)—**Void provision in agreement held severable so as not to affect right of mortgagee to enforce lien.**
A provision in an agreement as to prior lien on property of private corporation engaged in disposal of city garbage, whereby the contract with the city was mortgaged, which was void as against public policy, held entirely severable so as not to affect right of mortgagee to enforce its lien on the property and funds; the moneys secured by the mortgage being honestly loaned and applied in building the mortgagor's plant.

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

Suit by the American Engineering Company against the Metropolitan By-Products Company, Inc. From a decree distributing the fund

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 94, 66 L. Ed. —.

after appointment of receiver, the Title Guarantee & Trust Company, as trustee, the Columbia Trust Company, as trustee, Frank Bailey and others, as a committee of bond holders and preferred note holders, and Robert H. Davis and another, as a committee of general creditors, appeal. Reversed, with directions.

See, also, 267 Fed. 90; 275 Fed. 40.

Davison & Underhill and Oscar A. Lewis, of Brooklyn, N. Y. (Alfred T. Davison and Harold C. McCollom, both of New York City, of counsel), for appellants Title Guarantee & Trust Co., Columbia Trust Co., and Bailey and others.

Deiches & Goldwater, of New York City (Robert H. McCarter, of Newark, N. J., and Maurice Deiches, of New York City, of counsel), for appellant Davis.

Charles A. Brodek, of New York City, for committee of general creditors.

Lewis & Kelsey, of New York City (Frederick T. Kelsey and Wallace T. Stock, both of New York City, of counsel), for appellees receiver of Metropolitan By-Products Co. and others.

John P. O'Brien, of New York City (Josiah A. Stover, of New York City, of counsel), for appellee city of New York.

Shearman & Sterling, of New York City, for appellee International Bank.

Ferdinand I. Haber, of New York City, for appellee Cobwell Corporation.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. December 22, 1915, the city of New York advertised for bids for a contract to dispose of its garbage for five years.

April 1st the firm of Gaffney, Gahagan & Van Etten arranged with the banking firm of J. H. McClement & Co. that if they were awarded the contract by the city they would organize a company to carry it out, and the bankers agreed to buy \$1,000,000 of the first mortgage bonds of the company for \$950,000 and to sell second mortgage bonds to the amount of \$800,000 for cash. For the protection of the bondholders it was further agreed that the bankers or a trust company named by them should constitute a voting trust of a majority of the company's stock, so putting them or it in control of the directorate. The bankers named the Title Guarantee & Trust Company as voting trustee.

April 10, 1916, the city did enter into a contract with the Gaffney firm, who organized the Metropolitan By-Products Company, Inc., to carry it out, the Street Cleaning Commissioner assenting to the assignment of the contract to the Metropolitan Company. The bankers did take the \$1,000,000 of bonds secured by a first mortgage to the Title Guarantee & Trust Company, trustee, dated July 2, 1916, and did sell \$832,000 of bonds secured by a second mortgage of the same date to the Central Trust Company, trustee.

November 28th, because of delays in completing its plant, the Metropolitan Company leased the garbage plant of the New York Sanitary

Utilization Company on Barren Island for two years, and deposited securities of the value of \$202,000 with the Central Union Trust Company as collateral to a bond given by the Metropolitan Company to the Sanitary Company for the faithful performance of its covenants under the lease. There is a surplus of about \$128,000 in this fund.

September 1, 1917, the Metropolitan Company, being in dire need of funds, executed a mortgage to the Central Trust Company, for which the Columbia Trust Company was substituted, to secure \$500,000 of bonds, of which \$359,200 were issued, to which mortgage the second mortgage to the Central Trust Company, dated July 2, 1916, was by agreement subordinated.

May 22 to November 15, 1917, various parties advanced moneys to the amount of \$290,000 and the holders of the bonds under the second and third mortgages subordinated those mortgages to the claims of these noteholders.

November 19, 1917, the American Engineering Company filed its bill against the Metropolitan Company, which had been operating its Staten Island plant since May, 1917, asking for the appointment of a receiver, not to wind up the corporation and distribute its assets among its creditors, but—

“that this court will forthwith appoint a receiver of all and singular the property and assets of defendant, of every nature, wheresoever held, owned, or controlled by defendant, with full power to manage and operate the same and to continue and conduct the business of defendant under direction of this court, with power to employ, discharge, and fix the compensation of managers, agents, and employees, with power to incur such expenses and make such payments as may be necessary or advisable in connection therewith, with power to purchase for cash or on credit such supplies, materials, or other property as may be advisable, and to borrow the necessary funds to meet pay rolls, purchases of property and expenses in continuing and conducting said business; to collect and receive all moneys and property; to institute, prosecute, intervene in, continue or defend any suits, actions or proceedings at law or in equity concerning any of defendant's property or assets, to make allowance upon or otherwise adjust any claims of or against defendant, and with the usual powers of receivers.”

On the same day the company appeared, admitted the allegations of the bill, and consented to the appointment of receivers. On the same day the court appointed receivers, the order including the following:

“Ordered, adjudged and decreed that the said receivers are, until further order of this court, hereby fully authorized to take immediate possession of the said properties and assets, and to manage and operate the same, and to continue and conduct the business of defendant in their own discretion, until the further order of this court, and to do all and any such things as may be necessary to preserve and protect such properties, assets and business, with full power to employ, discharge and fix the compensation of managers, agents and employees, to incur such expenses and make such demands as may be needful in connection with the administration of their trust and the continuance and conduct of the business of the defendant; to continue the performance of the present contract of defendant with the city of New York for the disposal of the garbage of the boroughs of Manhattan, The Bronx, and Brooklyn; to purchase for cash or on credit such supplies, material, or other property as may be advisable, with leave to apply to court for authority to negotiate receivers' certificates and borrow funds to meet pay rolls, purchases of materials and disbursements and expenses necessary or desirable in continuing and conducting said business; to sell the product of defendant for

cash or on credit; to collect and receive the rents, income, accounts, and notes receivable and other properties and money to which the defendant may be entitled; to bring suit for collection, and receive and take into their possession all the property of defendant of every nature and description, to institute, prosecute, intervene, or continue in behalf of defendant any suits, actions, or proceedings at law or in equity concerning any of defendant's property or assets; to defend, make allowances upon, or otherwise adjust any claims of or against defendant; and to employ counsel and attorneys, their compensation to be subject to approval by this court; and to exercise in all things the usual powers of receivers; but all subject to the duty of said receivers to account for their acts and to be held responsible for failure to act properly as such."

November 20th the court authorized the receivers to borrow \$50,000. the loan to constitute a lien against the defendant's property prior to all other liens, and if an issuance of receivers' certificates was subsequently authorized, to be paid by such certificates or out of their proceeds.

December 4th the court, after notice to all parties, authorized the issuance of receivers' certificates to the amount of \$300,000—

"the said certificates to be payable one year after date of issue, unless sooner paid, to bear interest at the rate of six per cent. (6%) per annum, payable semiannually, both principal and interest to be payable at the office of the Title Guarantee & Trust Company, in the city of New York, or such other place as the receivers may, in their discretion, determine, the said certificates to constitute a first and paramount lien upon all the property and assets of the company, real and personal, of every kind and description, now owned or hereafter acquired, and wheresoever situated, prior to the lien of any mortgage or lien now upon said property and assets or any thereof, saving and excepting, however, to the receivers the right to sell, use, and consume, in the ordinary course of the company's business as conducted by the receivers, any and all personal property and said certificates and coupons attached thereto to be substantially in the following form:"

The Title Guarantee & Trust Company, trustee under the first mortgage, did appear specially and object, but its objection was overruled, and it did not appeal.

September 27, 1918, the receiver petitioned for leave to discontinue the business, stating that:

"Through inability to obtain funds and from various other causes beyond my control, I am unable longer to continue said business. As a result of these causes I have been unable to conduct the business of the company at a profit, and do not believe that further operation under existing conditions would result in financial profit."

The next day the District Judge filed a memorandum containing the following:

"The receivers were authorized to continue the business in their discretion. The purpose of continuing the business was to produce a sufficient amount to recompense the creditors, if that were possible, but it was understood that the contract with the city of New York, by which this company was taking care of the garbage of the Greater City, must be carried out in order to save the city and the taxpayers from the effects of the wasteful and disagreeable methods which could otherwise be made use of. All the creditors and the entire body of taxpayers and citizens are concerned in this matter."

The receivers did discontinue the operation of the plant.

November 26 orders were entered permitting the Title Guarantee &

Trust Company and the Columbia Trust Company as trustees to foreclose their respective mortgages, which resulted in a fund of \$202,000.

The first and vital decision of the special master, which was affirmed by the District Court, is that though the Metropolitan Company was a private and not a quasi public corporation, debts contracted by the receiver, whether upon general credit or upon an express agreement for lien prior to all other liens, were in either case entitled to such priority. This was upon the theory that the indebtedness incurred was for the preservation of the property, and that for such purpose priority could be given even in the case of a private corporation.

It may be that a charge for actual preservation from destruction, as for watchmen, would be so secured, because such services could not in the nature of things be had on credit; so also a charge for premiums of insurance, without the consent of prior lienholders, if insurance could not be obtained except upon such terms. But the indebtedness in this case was not incurred for the preservation of the property, but for the continued operation of the business because the receivers believed it was about to become profitable. Their petition of November 20, 1917, stated:

"Upon information and belief: That the funds with which to construct the Staten Island plant were obtained by the company through the issuance of secured indebtedness. This financing has proved inadequate, because of increased cost of construction of the plant and machinery, and the necessity of making a deposit of the sum of \$200,000 to secure the performance by the company of the provisions of its lease of the Barren Island plant. The cost of maintaining and operating two plants, instead of one, has caused the company to operate at a loss. Conditions have been improving, and it is believed that the turn in the company's affairs should come about January 1, 1918, or shortly thereafter, after which it should operate at a profit. The heavy expense of operating the Barren Island plant will then cease; the initial period of operating the Staten Island plant necessitates readjustments, and experiments in co-ordination of machinery will have ended; and, in addition, the company will be able to sell its by-products, viz. grease and tankage (a base from which fertilizer is made), and after January 1, 1918, grease at a largely increased price. It is essential that the company continue to perform the contract with the city of New York. Said performance is a quasi public duty, as failure by the company would seriously imperil public health. The plant and assets of the company would be of little value for other purposes."

And the memorandum of the District Judge of September 28, 1918, supra, stated that they were authorized to continue the business in order to pay the creditors, that is, to make money, but primarily out of consideration for the public welfare, that is, treating the corporation as a quasi public corporation. See our opinion in *Westinghouse Electric Co. v. Brooklyn Rapid Transit Co.*, 260 Fed. 550, 171 C. C. A. 334.

But the special master and the District Court went still further, holding that, even if the court had no power to give priority on the ground of preservation of property, the prior lien creditors were estopped from saying so, because, having notice, they had acquiesced in the orders, and did not appear and object and appeal. Only the Title Guarantee & Trust Company, trustee, actually objected, and it did not appeal.

[1] We are of opinion that the court was without power to give the receivers' general creditors priority over the Metropolitan Company's

prior lien creditors without their express consent. In re J. B. & J. M. Cornell (D. C.) 201 Fed. 387. Decisions in the case of public and quasi public corporations stand on entirely different grounds.

The orders being beyond the power of the court, the lien creditors cannot be deprived of their liens because they did not appear and object and appeal if their objection were overruled. They had a right then to rely upon the liens they had contracted for, and they have a right now to attack collaterally the orders made displacing them.

[2] It has been suggested that the equities are in favor of the receivers' creditors, but we do not think so. The prior lien creditors advanced their money to build the plant upon an express agreement for liens; if the business was to be continued, it should not have been at their risk, but at the risk of those who thought it wise to advance funds to continue it.

Two of the receivers' creditors are in a little different position, because one, the International Bank, did stipulate to receive certificates, which were never given, and the other, the city of New York, exchanged city stock deposited with it by the Metropolitan Company as collateral for receivers' certificates.

The International Bank loaned upon the promise of priority, and the city of New York was actually given, under an order of August 6th, amended August 15, 1918, receivers' certificates to the amount of \$33,000 in exchange for city stock in the same amount that had been deposited with it by the Metropolitan Company under article E of its contract with the Metropolitan Company.

"(E) The contractor shall deposit with the comptroller of the city of New York, on or before the signing, sealing and delivery of this contract, the sum of fifty thousand dollars (\$50,000) in lawful money of the United States of America, as additional security for the faithful performance of the terms and conditions of this contract, and as a fund to be drawn upon by the commissioner of street cleaning, to pay for any expense which may be incurred hereunder by said commissioner or by the city of New York, due to the failure of the contractor to comply with the said terms and conditions of this contract; the contractor shall have the option of depositing in lieu of the \$50,000 in cash, corporate stock or certificates of indebtedness of any nature issued by the city of New York, which the comptroller shall approve as of equal value. If securities are deposited, instead of cash, the same shall be subject to all the conditions applying to the cash deposit herein set forth. The city shall, from time to time, collect all interest, dividends, or other profits or revenue on any securities deposited by the contractor, and shall, when collected, pay the same to the contractor; if the securities are in the form of coupon bonds, the coupons as they respectively become due, shall be delivered to the contractor.

If at any time it becomes necessary for the commissioner to make use of any of the moneys or securities so deposited, the contractor shall, upon notice from the commissioner, immediately restore the amount which has been withdrawn or expended by the commissioner."

"(P) If the contractor shall fail to perform any part of the work called for in this contract in accordance with the terms thereof and the commissioner decides not to cancel and terminate this contract as provided in clause O thereof, the commissioner shall have the power and is hereby authorized to perform or cause or procure to be performed such part of the work as the contractor shall fail to perform, at the expense of the contractor, and to deduct such expense from the special deposit provided for in clause E hereof. If such expense shall exceed the amount on deposit, the contractor shall pay the balance to the city."

In each case the orders were made without any notice to the lien creditors. The loan of the International Bank was made, not only without any express, but also without any implied, assent, because it was made, without notice, the day after the receivers were appointed.

And the city of New York did not cancel the contract under article O, and has proved no claim of the commissioner of street cleaning for any expense incurred by him due to the failure of the Metropolitan Company to comply with the contract for which the city stock was pledged as collateral.

The special and general creditors of the receivers and the general creditors of the Metropolitan Company may accordingly be laid out of the case because the funds to be distributed, viz. the surplus of the sanitary fund \$128,000, and the foreclosure fund, \$202,000 will be exhausted by prior lien creditors.

[3] It is said that the first mortgage is void because of the provisions in the contract between the Gaffney firm and the bankers. The control of the directorate of the Metropolitan Company was given to a voting trustee of the capital stock. It is true that this contract was mortgaged to the Title Guarantee & Trust Company, and that this provision was void as against public policy. But the provision was entirely severable, it had nothing whatever to do with the foreclosure of the mortgage, and should not affect its lien. The moneys secured by the mortgage were honestly loaned and honestly applied in building the plant, and to deprive bondholders of their lien for this reason would be inequitable in the highest degree.

The lien of the Title Guarantee & Trust Company, trustee under the first mortgage, upon the foreclosure fund of \$202,000 is paramount, and the fund, less expenses, will go to it. The first mortgage was not a lien upon the surplus of the Sanitary fund and the noteholders were by agreement with the bondholders of the second and third mortgages given priority over them, so that the fund, less expenses, will go to them.

The court below is directed to enter a decree in accordance with this opinion, and to that end the decree is reversed.

**AMERICAN ENGINEERING CO. v. METROPOLITAN BY-PRODUCTS CO.,
Inc. (three appeals).**

In re LEWIS & KELSEY.

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 253.

1. Appeal and error ⇐80(1), 82(2)—Leave to apply for further relief does not prevent finality of decree.

Leave to apply at the foot of a decree in receivership proceeding for further relief is very usual, and does not prevent the decree from being final, or an order modifying the decree from being appealable.

2. Receivers ⇔189—When allowance of attorney's fees permitted.

The only proper cases that can arise where courts of equity in receivership proceedings can award compensation to an attorney out of funds due others than his client is where such an attorney for one of a class has created or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class; an allowance in such cases not being on the theory of an attorney's lien, but on the theory that all interested in the fund should contribute ratably to the cost of creating or securing it.

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

Suit in equity by the American Engineering Company against the Metropolitan By-Products Company, Inc. In the matter of the application of Lewis & Kelsey for an accounting after appointment of a receiver. From a decree in favor of the applicant, the Title Guarantee & Trust Company, as trustee, the Columbia Trust Company, as trustee, and Frank Bailey, and others, as a committee of bondholders and preferred note holders, appeal. Modified and affirmed.

See, also, 267 Fed. 90; 275 Fed. 34.

Davison & Underhill, of Brooklyn, N. Y. (Alfred T. Davison and Harold C. McCollom, both of New York City, of counsel), for appellants Columbia Trust Co. and Bailey and others.

Oscar A. Lewis and A. Bertron Reed, both of Brooklyn, N. Y., for appellant Title Guarantee & Trust Co.

Deiches & Goldwater, of New York City (Robert H. McCarter, of Newark, N. J., and Maurice Deiches, of New York City, of counsel), for appellant Davis.

Lewis & Kelsey, George Gordon Battle, and Frederick T. Kelsey, all of New York City, for appellees Lewis & Kelsey.

Lewis & Kelsey, of New York City (Frederick T. Kelsey and Wallace T. Stock, both of New York City, of counsel), for appellee Moffetty.

John P. O'Brien, Corp. Counsel, of Brooklyn, N. Y. (John F. O'Brien and Josiah A. Stover, both of New York City, of counsel), for appellee city of New York.

Shearman & Sterling, of New York City (William W. Lancaster and James A. Stevenson, Jr., both of New York City, of counsel), for appellee International Bank.

Ferdinand I. Haber, of New York City, for appellee Cobwell Corporation.

Charles A. Brodek, of New York City, for committee of general creditors.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The question to be disposed of arises in an ordinary receivership in equity of the Metropolitan By-Products Company, Inc., in the United States District Court for the Eastern District of New York. A fund of \$202,000 was deposited with the Central

Union Trust Company, trustee, as collateral to secure the New York Sanitary Utilization Company for the performance by the Metropolitan Company as lessee, of its covenants in a lease of the Sanitary Company's garbage plant at Barren Island, N. Y. Any surplus remaining after the claims of the Sanitary Company will go to prior lien claimants.

Prior lien claimants were as follows: (1) Title Guarantee & Trust Company as trustee under the first mortgage of the Metropolitan Company dated July 2, 1916, to secure an issue of \$1,000,000 of bonds, by Oscar A. Lewis, Esq. (2) Holders of certain preferred notes of the Metropolitan Company to the amount of \$290,000, by Davison & Underhill, Esqs. (3) Columbia Trust Company as substituted trustee under a mortgage of the Metropolitan Company dated September 1, 1917, for \$359,200 of bonds outstanding, by Davison & Underhill, Esqs., and Cullen & Dykman, Esqs. (4) The International Bank, relying on an agreement to be given receivers' certificates to secure the unpaid balance of \$30,000 of a loan to the receivers, by Shearman & Sterling, Esqs. The city of New York, holder of receivers' certificates in the amount of \$33,000, by the corporation counsel. (5) The receivers' creditors by Lewis & Kelsey, Esqs., attorneys for the receivers.

As a result of our opinion in 267 Fed. 90, there is a surplus of about \$128,000.

Applications were made to the District Court by Mr. Oscar A. Lewis, Messrs. Davison & Underhill and Cullen & Dykman for allowances out of the fund for their services and expenses. August 27, 1920, the District Court awarded to Mr. Lewis \$4,000, to Messrs. Davison & Underhill \$15,141.14, to Messrs. Cullen & Dykman \$3,117.90. November 17, 1920, upon an application by Messrs. Lewis & Kelsey as attorneys for the receiver, the court modified its decree of August 27 by adding an award to them of \$15,000. These are appeals from that order.

[1] It is said that because the District Court reserved at the end of its decree of August 27th jurisdiction as to matters not therein disposed of, this award to Lewis & Kelsey is not final or appealable. But leave to apply at the foot of a decree for further relief is very usual, and does not prevent the decree from being final (*French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270), or the order from being appealable (*Farmers' Loan & Trust Co.*, petitioner, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; *Odell v. Batterman Co.*, 223 Fed. 292, 138 C. C. A. 534.

[2] The attorneys for these various claimants were seeking to reduce the claim of the Sanitary Company upon the fund and so increase the surplus, each for the benefit of his own particular client and for no one else. There was not in any case a representative proceeding in which one party creates or preserves a fund not only for his own benefit but also for the benefit of others similarly situated, who, having received the benefit of the proceeding, ought in equity to contribute to the payment for those services. It is a misnomer to speak of these attorneys as either creating or preserving a fund, at least for the benefit of anybody else than their own clients. The fund existed to the knowledge of every one, and the only question was which of the competing

claimants was entitled to it. And this could not be known until a final distribution. Otherwise every one who had spent time and study in preparing a brief or in cross-examination of witnesses or in objecting to the special master's report and the decree of the District Court as to this fund would be entitled to compensation out of it whether his client were ultimately found to have any interest in it or not. In point of fact neither the Title Guarantee & Trust Company as trustee nor the Columbia Trust Company as trustee have been awarded anything out of this fund, as may be seen from our opinion upon appeal from the final decree handed down herewith. No such allowances are proper in the federal courts. The circumstances under which courts in equity and bankruptcy may allow compensation to an attorney out of a fund in the hands of the court for distribution are well expressed by Judge Dayton in *Re Gillaspie* (D. C.) 190 Fed. 88, as follows:

"The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has 'created' or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class. In such cases the courts award compensation to the attorney out of the fund due to all, not on the theory of his having an attorney's lien, but on the broader theory that all interested in the fund should contribute ratably to the cost of 'creating' or securing it. These principles are very clearly set forth in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central R. R. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; *Harrison v. Perea*, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; *Jefferson Hotel Co. v. Brumbaugh* (4th Circuit) 94 C. C. A. 279, 168 Fed. 867."

It is fair to say that this reduction of the Sanitary Company's claims was due to the efforts of Messrs. Davison & Underhill and Cullen & Dykman. Messrs. Lewis & Kelsey must look for their compensation to property actually coming into the hands of the receiver. The decree, modified by striking out this allowance, is affirmed without costs to either party.

HUNTINGTON DEVELOPMENT & GAS CO. v. ASHWORTH et al.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1870.

1. Lost instruments § 8(1)—Recording raises presumption of proper execution, consideration, delivery, and acceptance.

A lost deed, proven to have been recorded before destruction of records by fire, will be presumed to have been properly executed and acknowledged, and to have been given for a valid consideration, and to have been delivered and accepted.

2. Lost instruments § 8(3)—Evidence held to prove that lost deed contained reservation of minerals.

Evidence held to prove that lost deed, proven to have been recorded before the destruction of the records by fire, contained a reservation of the mineral rights.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Suit by the Huntington Development & Gas Company against W. J. Ashworth and others to quiet title. From an adverse decree as to certain part of the tract claimed, plaintiff appeals. Reversed.

W. C. W. Renshaw and Cary N. Davis, both of Huntington, W. Va. (J. S. Clark and H. A. McCarthy, both of Philadelphia, Pa., and Vinson, Thompson, Meek & Renshaw and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for appellant.

Henry Simms and E. E. Young, both of Huntington, W. Va., for appellees.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. The appellant, Huntington Development & Gas Company, herein called plaintiff, brought this suit to remove, as clouds upon its title to the minerals underlying two tracts of land, one of 60 and the other of 95 acres, in Lincoln county, W. Va., certain deeds and leases to the several defendants. From an adverse decree as to the 95-acre tract it prosecutes this appeal.

Shortly stated, the case is this: Some time in 1888 or 1889, one Samuel Eddy, plaintiff's predecessor in title, executed a deed to W. B. Ashworth, under whom defendants claim, which deed, as will for the present be assumed, covered the 95 acres in question. If that deed conveyed the surface only, and reserved to the grantor the underlying minerals, as plaintiff contends, it is entitled to the relief prayed for in its bill; if the deed contained no such reservation, the bill was properly dismissed. It is agreed that the courthouse of Lincoln county was burned in November, 1909, and that all the records in the clerk's office, where the disputed deed is alleged to have been recorded, were completely destroyed. The original deed is lost, and cannot be found. Did it contain a reservation of the minerals and mineral rights?

The plaintiff's proofs are these: One Talbot, a civil engineer and surveyor, testified that in the course of his employment by the Guyan Oil Company, in surveying mineral lands in that section, he made an examination of the records in the courthouse of Lincoln county, shortly before it burned, for the purpose of obtaining the descriptions in "compromise deeds"; that is, deeds of lands in which there had been a severance of the surface and mineral titles. He produced the notebook or ledger used by him at the time, entitled, "Compromise Deeds, Carroll District, Lincoln County, copied during the month of November, 1909," and testified that all the entries were in his own handwriting. Examined further, he said:

"A. I find that I have a description of a deed from Eddy to W. B. Ashworth for 95 acres on Big creek of Trace fork.

"Q. Please state the book and page of recordation if your notes show it. A. Book 'K,' page 133.

"Q. Please state from your notes what was the description of the tract as contained in that deed? A. My notes state that Eddy conveys 95-acre survey made for M. J. Ashworth on 16th of September, 1849."

The other witness for plaintiff was James A. Holley, who lived in Lincoln county up to 1898, and was there clerk of the circuit court. He has since been adjutant general of the state, mayor of Charleston, and clerk of the Supreme Court of Appeals. He was also the commissioner to whom was referred for certain investigations the case of the state of West Virginia against Samuel Eddy and others, and as such made and filed a report in June, 1896. He testified to making an investigation of the records, to see what lands had been compromised with Samuel Eddy and others, who owned or claimed a tract of land in Lincoln county of 89,500 acres, known as the "Smith surveys," which was later acquired by the trustees of the Lincoln County Land Association. As a trustee of that association and its general land agent for some years, he was presumably familiar with the titles to the properties owned by it, commonly called "the company land." Refreshing his recollection from the report mentioned, and answering a question put to him, he said:

"Yes; on page 68 of my report, 95 acres reported in the name of W. J. (B) Ashworth, in which I state the surface conveyed, recorded April 3, 1889, Book 'K,' page 133, Hatter's run. This was a release or conveyance of the company to Ashworth for the surface of this 95 acres."

And, replying to a further question, he said:

"The reservations were the mineral interests. The company has always in conveyances and compromises retained the mineral interests, and released or conveyed to the parties the surface only."

It is admitted in answer that—

"From the year 1906 to and including the year 1916, said land has been assessed and charged as surface to respondents."

True, they say that prior to 1906 it was entered on the land books "in the name of W. B. Ashworth as fee," and that the change was made without their knowledge or consent, but it seems to us highly significant that the charge to them as surface only should begin directly after the passage of an act which provided for a reassessment of lands in West Virginia, and required them to be thereafter assessed at their true and actual value, especially so, when it is borne in mind that under the laws of West Virginia, which defendants must be presumed to know, the failure of an owner to have his lands properly entered upon the land books results, after five years, in the forfeiture of the estate not charged and the transfer of title thereto to the state.

[1, 2] Against this nothing appears. The defendants called no witness, and offered no evidence. The plaintiff's proofs, therefore, with all legitimate inferences therefrom, stand wholly unopposed. And we think they are sufficient to establish its claim to the mineral rights in the 95 acres. That Samuel Eddy gave a deed to W. B. Ashworth, about the time alleged, is not seriously disputed. The fact that such a deed was recorded in April, 1889, is proven beyond reasonable doubt; and the resulting presumptions are that the deed was properly executed and acknowledged, that it was given for a valid consideration, and that it was delivered and accepted. 25 Cyc. 1625. The question then is not of the existence of the deed, but merely whether it contained a reserva-

tion of the minerals; and that question, in our opinion, is answered in the affirmative by competent and convincing evidence. *Miller et al. v. Estabrook*, 273 Fed. 143, decided by this court April 2, 1921. It is certainly difficult to believe that Talbot, who was searching for compromise deeds, entered this deed in his notebook as a deed of that kind, unless the record he read was the record of a deed which reserved the minerals in the lands described. It is equally difficult to believe that General Holley, appointed to make investigation of surface conveyances, filed an official report, which, as respects the matter in hand, was not in accordance with the truth. Nor, in view of the West Virginia statute, is it easy to understand why the defendants, for 10 years preceding this suit, paid taxes only on the surface of the tract, if they claimed to be owners in fee. In short, we are constrained to hold that the plaintiff has established its case.

Some question is made as to the number of acres and identity of the lands embraced in the Eddy conveyance, but the argument is quite unconvincing. Talbot's notes show that the deed he found of record "conveys 95-acre survey made for M. J. Ashworth on 16th of September, 1849," on Big creek of Trace fork. Holley's report shows a surface deed of 95 acres on Hatter's run, reported in the name of W. J. Ashworth, and he testifies to the impression or understanding that "Hatter's run empties into Big creek of the Trace fork." Moreover, it is admitted that—

The map in evidence "correctly shows the location of said 60 acres and of the Michael J. Ashworth 95 acre survey, and correctly shows the locations of the land claimed by the defendants with reference to said two tracts."

In the absence of anything of contrary import, we deem it not doubtful that the land in controversy is the identical land described in the M. J. Ashworth 95-acre survey of 1849.

Reversed.

PERROW v. SCOTT.

In re SCOTT.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1880.

Bankruptcy ⇐172—**Validity of bankrupt's deed of trust cannot be attacked by parties who were not creditors at time of its execution.**

The validity of a deed of trust executed by the bankrupt prior to bankruptcy proceedings cannot be attacked on the ground that the security was fraudulent, by creditors or by the trustee in bankruptcy on behalf of creditors who were not such at the time of its execution.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Petition by R. L. Perrow, trustee in bankruptcy of the estate of J. R. Scott, bankrupt, to expunge and reject the claim of C. C. Scott, which had been allowed. Order of referee, annulling the deed of

trust, setting aside sales to C. C. Scott, and expunging his claim, was reversed by the court on petition for review, and the trustee appeals. Affirmed.

James H. Guthrie, of South Boston, Va., for appellant.

John G. Haythe, of Lynchburg, Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. On April 26, 1916, J. R. Scott, of Brookneal, Va., was adjudicated bankrupt on his own petition. Nearly two years before, in May, 1914, the bankrupt and his wife had conveyed his entire real estate to Duncan Drysdale, trustee, to secure 11 notes, of \$1,000 each, made and indorsed by him, and payable on demand at the First National Bank of Lynchburg. This deed of trust was duly recorded in the proper clerk's office soon after its execution, and the notes delivered to the bankrupt's brother, C. C. Scott, who held the same when the bankruptcy occurred. On the appointment of appellant as trustee in bankruptcy, and at various dates in May and September, J. R. Scott, C. C. Scott, and other witnesses, were examined at length in regard to the bankrupt's affairs, and particularly in regard to the consideration for these notes, no part of which had then been paid. Not long afterwards the proof of claim of C. C. Scott for the amount of the notes and interest, as a debt secured by the deed of trust, was filed without objection and allowed by the referee.

In October, 1916, the trustee petitioned for leave to sell the real and personal property of the bankrupt, "free and discharged of all liens and incumbrances thereon," describing in his petition the several parcels of real estate, and reciting that the same were encumbered by the deed of trust in question. C. C. Scott objected to such a sale on the ground that it would not extinguish the inchoate right of dower of the bankrupt's wife, and asked instead that a sale be made under the deed of trust in which the wife had joined. By order of November 20 the referee overruled the objection and directed a sale as prayed for by the trustee; the order providing, among other things, that—

"If the said C. C. Scott should become the purchaser of any of said property, the said trustee shall not collect the purchase money of him, to the extent of \$12,607.83, with interest thereon from the 31st day of October, 1916, that being the amount of the debt secured to him by the deed of trust aforesaid on said property, but said trustee shall report such sale to the referee."

Upon Scott's petition for a review of this ruling it was affirmed by the court below on the 6th of December; the order of affirmance containing the same provision in substance as the one just quoted from the order of the referee.

On the following day the greater portion of the real estate was sold to C. C. Scott, the highest bidder, for the aggregate sum of \$12,075, as appears by the trustee's report filed on the 12th of December. There was a further sale of some small parcels on the 24th of February, 1917, to C. C. Scott for \$261, which was reported by the trustee on the 3d of March. By petition filed with the referee on the 10th of

April, the trustee asked the confirmation of these sales and for authority to convey to the purchaser. At a date not shown by the record, but presumably about this time, certain general creditors objected to a confirmation of the sale of the "new brick warehouse" for \$9,250, and asked that a resale of the same be ordered, on the ground that the price was "grossly inadequate"; the claim being made that this property was "worth from \$12,000 to \$13,000."

Thus the matter stood for upwards of a year, until March 30, 1918, when there was a further examination of C. C. Scott and other witnesses by counsel for the general creditors. This examination was continued on the 16th of July. Then, on August 19, 1918, the trustee, "at the instance of counsel," filed a petition to reject and expunge the claim of C. C. Scott, which had been allowed in November, 1916, on the ground (1) that he and the bankrupt "were partners in the warehouse business at Brookneal, Va., under the style and firm of J. R. Scott"; and (2) that "said alleged debt is fraudulent and void as to the general creditors of said bankrupt, whose debts have been proved in this matter." This petition appears to have been based on the previous examination, as the record does not show that any testimony was afterwards taken. The demurrer, motion to dismiss, and answer of C. C. Scott was filed on the 23d of August.

Two years later, on August 27, 1920, the referee entered an order annulling the deed of trust, setting aside the sales to C. C. Scott, and expunging his claim for the \$11,000 and interest, holding the same to be "fraudulent and void as to the debts of the bona fide creditors of said bankrupt." On petition for review, and by decree of October 30, the court below held the deed of trust valid, reversed the order of the referee, and confirmed the sales to Scott. The trustee appeals.

A brief statement will suffice for our conclusions. As above recited, the consideration of the notes in question was the subject of extended inquiry shortly after the bankruptcy, with the result that all parties in interest, the trustee, the other creditors, and the referee, were apparently satisfied that C. C. Scott had in fact advanced to and paid for his brother the full amount of \$11,000 at or about the time the deed of trust was executed. Following this inquiry his proof of debt was filed and allowed without objection.

It is enough to say, without reviewing the testimony, that the subsequent examination in 1918 disclosed no substantial ground for rejecting a claim which had been accepted as valid more than a year and a half before, or for setting aside the sales of real estate which the trustee had deliberately asked to have confirmed not long after they were made. The original proofs showed convincingly, as we think, and as the trustee seems to have thought at the time, that C. C. Scott had actually paid to or for the bankrupt the aggregate sum of at least \$11,000 on the security of the deed of trust, and those proofs, in our opinion, were not weakened or discredited by anything brought out in the later testimony, most of which had no relevancy to the issue of consideration for the notes. Moreover, and this of itself would appear sufficient, the trustee's petition does not allege, and no attempt was made to show, that any of the parties in whose behalf

this belated attack is made were creditors of the bankrupt at the time the deed of trust was executed and recorded. It is not for them to say that the security is fraudulent.

The decree appealed from will be affirmed.

HOLMES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1876.

Criminal law ⚡394, 753(2)—Evidence illegally obtained is inadmissible, and, absent other evidence, directed verdict for defendant is proper.

Where the only evidence to sustain a charge of illicit distilling was the testimony of prohibition agents that they went to defendant's residence in his absence without a search warrant, and there found certain articles which they believed parts of a still and destroyed, consisting of empty kerosene cans, a keg, a piece of galvanized iron pipe, and a tub, held that such evidence was illegally obtained, and should have been stricken out on motion, and that in the absence of such motion a motion by defendant for a directed verdict should have been granted.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

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

G. T. Graham, of Lexington, S. C. (George Bell Timmerman, of Lexington, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. Plaintiff in error, herein called defendant, was convicted of illicit distilling. The government's witnesses were three prohibition agents. 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 10 or 12 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 ginnery in the neighborhood, they went there and arrested him, without a warrant. On the way to the jail he admitted, as they swore, that he had used the articles found by them for distilling whisky and had made a "run" only two or three days before.

No objection was made in the course of the trial to any of this testimony. The government of course produced none of the articles mentioned, for they had all been destroyed, but they were repeatedly referred to on cross-examination and by defendant's witnesses. The latter testified to the effect, among other things, that the articles in question, or at least some of them, had not been and could not have been used as parts of a still, and defendant stoutly denied that he had ever made any whisky or ever admitted having done so. There was no motion for a directed verdict at the close of the testimony, but after the general charge to the jury defendant submitted a number of requests for specific instructions, the last of which was that the jury be directed to acquit, "for the reason that the undisputed evidence in the case shows that all that is brought against the defendant was information obtained by the government's witnesses going upon and making search of the premises of the defendant, and making seizures thereon of the effects of the defendant, without due process of law and in violation of the Fourth Amendment of the federal Constitution." The refusal of this request raises the only question which needs be considered.

The recent cases of *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. —, and *Amos v. United States*, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. —, decided by the Supreme Court February 28, 1921, and in which the subject of illegal seizure is discussed at length, leave no room for doubt that the evidence upon which defendant was convicted was obtained in plain violation of his constitutional rights, and therefore should have been excluded. In each of those cases the conviction was sought to be sustained in part on the ground that application for return of the property seized was not made in time, but the contention was overruled. On that point the court says in the *Gouled Case*:

"It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

In the instant case the articles seized had been destroyed, as defendant knew, and to ask for their return, either before or at the trial, would have been an obvious futility. Nor was there any basis for objecting

to testimony in regard to them, on the ground of illegal seizure, until the fact was developed, on cross-examination of the government's principal witness, that the agents had raided the premises without a search warrant or other process. When that fact appeared and was admitted, the proper course undoubtedly would have been to move to strike out the evidence, because illegally obtained, and to object to further evidence for the same reason, instead of allowing the testimony to come in, and putting up a defense on the merits, and then raising the question by motion for a directed verdict. But this delay in making objection, or failure to object at the most fitting time, is the only feature, so far as we perceive, which distinguished the case at bar from the cases cited, and in the circumstances here disclosed it seems to us a distinction without substantial difference.

The judgment will be reversed and a new trial awarded.
Reversed.

RIZZO v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 30, 1921.)

No. 2644.

1. Prostitution ⇨1—Offense under White Slave Traffic Act is complete when transportation is accomplished.

Under White Slave Traffic Act, § 2 (Comp. St. § 8813), the offense of transporting a woman in interstate commerce for the purpose of prostitution is complete when the transportation has been accomplished without regard to whether later the purpose is accomplished.

2. Criminal law ⇨59(5)—Aider and abettor must have knowledge of offense.

One cannot be convicted under Penal Code, § 332 (Comp. St. § 10506), of aiding and abetting an offense of which he had no knowledge until after it was complete.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Criminal prosecution by the United States against Charles Rizzo. Judgment of conviction, and defendant brings error. Reversed.

John Memolo, of Scranton, Pa., for plaintiff in error.

Rogers L. Burnett, U. S. Atty., and John M. McCourt, Asst. U. S. Atty., both of Scranton, Pa.

Before WOOLLEY and DAVIS, Circuit Judges, and MORRIS, District Judge.

WOOLLEY, Circuit Judge. By the first count of the indictment, Nigro, Carroll and Polino were charged with a violation of the White Slave Traffic Act (36 Stat. 825, Comp. Stat. §§ 8812-8819) in transporting three women from New York to Pennsylvania for the purpose of prostitution. By the second count, Rizzo was charged (under section 332 of the Penal Code, 35 Stat. 1152 [Comp. St. § 10506]), with the offense of knowingly aiding and abetting the principals in the trans-

action. Upon evidence establishing both the fact and purpose of transporting the women, the three first named defendants were convicted. They submitted to sentence. Rizzo was convicted upon evidence that after the arrival of the women in Pennsylvania he received them in his house where later they engaged in prostitution, and upon an instruction by the Court that, if he thereby enabled the other defendants to accomplish the unlawful purpose for which they had transported the women, he became a participant in the crime by aiding and abetting its perpetration and was equally guilty, although, as it was conceded by the Government, there was no evidence that he had participated in or had any knowledge of the transportation of the women from New York to Pennsylvania. Thereupon Rizzo sued out this writ, raising the question whether one can unlawfully aid and abet the commission of an offense defined by the White Slave Traffic Act when he had no knowledge of the offense.

The answer to this question turns on several considerations, the only ones we need consider being the elements of the offense and when the offense is complete.

Obviously, the elements are two: (a) The interstate transportation of women (b) for the purpose of prostitution. It would be a narrow construction of the Act to hold, in order to bring the plaintiff in error within its terms, that the offense is not complete when these elements are present but is complete only when the purpose for which women were transported has been accomplished.

[1] As the Act denounces trafficking in women for immoral purposes and forbids the employment of interstate transportation as a facility of the wrong, we are of opinion that the offense is complete when the interstate transportation takes place for the defined purpose, without regard to whether later the purpose is accomplished. Subsequent prostitution is but evidence of the purpose. *Wilson v. United States*, 232 U. S. 570, 571, 34 Sup. Ct. 347, 58 L. Ed. 728; *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; *Hoss v. United States*, 232 Fed. 328, 146 C. C. A. 376; *United States v. Holts*, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281.

[2] Section 332 of the Penal Code (Comp. St. § 10506) deals with accessories at or before the fact; section 333 (Comp. St. § 10507) with accessories after the fact. Rizzo was indicted under section 332. As the offense was complete before Rizzo knew of it and before he did the act charged to have been in aid of it, it follows that he could not be legally convicted of knowingly aiding and abetting its perpetration. As we are dealing with a question of law, not with a matter of morals, we are constrained to reverse the judgment below.

HOWARD et al. v. MAXWELL MOTOR CO., Inc., et al.
(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 187.

Corporations 579 (2)—**Lessor creditor held entitled to follow assets after reorganization sale to recover subsequently accruing rentals.**

Where the assets of a corporation were sold by the receivers to a reorganized company, subject to payment of claims filed within a time fixed by the court, and such assets exceeded in value the price paid in a sum sufficient to pay all claims, the purchaser, by paying the rent under a lease to the old company until the time for filing claims expired, could not deprive the lessor of the right to follow such assets to recover for subsequently accruing rentals.

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

Suit in Equity by Harold A. Howard and John C. Howard, trustees under the will of Sarah J. Howard, deceased, against the Maxwell Motor Company, Inc., and the Maxwell Briscoe Motor Company. Decree for complainants, and defendant Maxwell Motor Company appeals. Affirmed.

For opinion below, see 269 Fed. 292.

Larkin, Rathbone & Perry, of New York City (Henry V. Poor, of New York City, of counsel), for appellant.

Norman K. Anderson, of Chicago, Ill., and F. Leon Shelp, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. The Maxwell Motor Company, Inc., purchased the property of several corporations then in the hands of equity receivers, among others the Maxwell Briscoe Motor Company, at public sale under a plan of reorganization approved by the court. The court fixed a time before which all creditors were required to file their claims or be barred from participation in the proceeds of sale, which is a usual and proper limitation for the protection of the purchaser. The value of the Maxwell Briscoe Motor Company's property has been found by the court below to have exceeded the amount paid for it by the reorganizing company, the Maxwell Motor Company, Inc.; the excess being more than enough to pay the creditors of the Maxwell Briscoe Motor Company in full.

The plaintiffs, trustees under the will of Sarah J. Howard, deceased, had leased certain premises in Chicago to the Maxwell Briscoe Chicago Company, whose name was afterwards changed to United Motor Chicago Company, and the Maxwell Briscoe Motor Company had guaranteed the payment of the rent under this lease. The receivers before, and the Maxwell Motor Company, Inc., after, the sale, continued to pay the rent quarterly in advance until the time fixed for proving claims had elapsed, so that the plaintiffs were never in a position to prove their

claim in time. Subsequently the plaintiffs recovered a judgment for \$142,560 against the Maxwell Briscoe Motor Company on its guaranty. After the sale the United Motor Chicago Company was adjudicated a bankrupt upon its own petition.

We agree with the court below that the defendant company, which was the purchaser, could not by this payment of rent deprive the plaintiffs of their right to follow the assets of the Maxwell Briscoe Motor Company.

Decree affirmed.

YONE SUZUKI et al. v. CENTRAL ARGENTINE RY. CO., Limited, et al.

(District Court, S. D. New York. June 27, 1921.)

1. Shipping Ⓒ—174—Implied promise by consignee, accepting cargo, to pay demurrage.

On delivery and acceptance of cargo, an implied promise by the consignee, to whom the bill of lading is assigned, arises to pay demurrage, for which the ship had a lien under the bill of lading.

2. Shipping Ⓒ—185—Ship entitled to lien under bill of lading for demurrage at either port.

A provision of a charter party, expressly incorporated by reference into the bill of lading, "steamer to have a lien for all freight, dead freight, and demurrage," held to give a lien for demurrage at either port of loading or discharge.

3. Shipping Ⓒ—185—Recital of prepayment of freight in bill of lading estops ship from asserting lien for freight against assignee of bill.

Where a bill of lading contained a recital that the freight was prepaid, an assignee of such bill, receiving the cargo, cannot be held liable for an unauthorized deduction from the freight money made by the shipper.

In Admiralty. Suit by Yone Suzuki and others against the Central Argentine Railway Company, Limited, and others. On exceptions to answer of defendant Railway Company. Sustained in part.

This cause comes up on exceptions by the libelants to four articles of the answer of the Central Argentine Railway Company, one of the respondents in personam. The libel was filed primarily against the charterer of two Japanese schooners, owned by the libelants and chartered each for a voyage from Hampton Roads, Va., to Buenos Ayres, Argentine, with a cargo of coal. The Central Argentine Railway Company, Limited, is sued as consignee of the coal and holder of a bill of lading of the whole cargo in each ship, and the circumstances on which the liability arises are as follows:

The charters provided, among other things, for lay days for loading and discharge, and demurrage at 48 cents per gross registered ton for each day that the ship was held beyond the lay days. It also contained the following provisions material hereto:

"8. Bills of lading to be signed without prejudice to this agreement at not less than rates as stated herein."

"9. The liability of the party of the second part (the charterer) shall cease and terminate as soon as cargo is loaded and the freight is paid, steamer to have a lien upon the cargo for all freight, dead freight, and demurrage, and all and every other sum or sums of money which may become due the steamer under this contract of affreightment."

The libel alleges that there were delays beyond the lay days both at the port of loading and the port of discharge, from which arose demurrage; also that

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

at the port of discharge the ships had to pay various charges for stevedoring and the like, properly payable by the respondents, which they refused to meet. It further alleges that at the port of loading the charterers deducted certain of the freight money due under a false claim of dispatch money, as provided in the charter party. This deduction the libellant claims in addition to the loading demurrage and the demurrage and charges at the port of discharge. It further alleges that the master of each steamer signed a single bill of lading for the whole cargo to be transported to Buenos Ayres to "order or assigns he or they paying freight for the same as per charter party, dated February 16, 1920, all the terms and exceptions contained in which charter are herewith incorporated." It finally alleges that the respondent Central Argentine Railway Company, Limited, "became the owner of said bill of lading and entitled to said cargo, * * * subject to the conditions and exceptions of said bill of lading and of the aforesaid charter party of February 16, 1920, including the claim for demurrage at loading port and unpaid balance of freight as aforesaid," and that after much delay it took delivery of the coal under this document.

The articles of the answer excepted to allege that the Central Argentine Railway Company, Limited, took discharge of the cargo from the ship's tackle, and that by reason thereof the ship's lien was lost and the respondent was not liable. As to the charge for freight deducted, the answer alleges that the bill of lading under which the cargo was shipped provided, among other things, that "freight on the cargo had been prepaid," that by reason of that provision the lien, if any, was not incorporated into the bill of lading, and the respondent, in taking delivery, received it free from any lien for unpaid balance of freight.

George C. Sprague, of New York City, for exceptant.

Edwin Serre Murphy and L. De Grove Potter, both of New York City, for respondent.

LEARNED HAND, District Judge (after stating the facts as above). [1] The liability for demurrage comes first, and this may be divided into two parts, demurrage at the port of loading and demurrage, and charges at the port of discharge. As to the latter, the authorities are so numerous and uncontradicted that nothing more need be done than cite them, *Neilsen v. Jesup* (D. C.) 30 Fed. 138; *Gates v. Ryan* (D. C.) 37 Fed. 154; *Sutton v. Housatonic* (D. C.) 45 Fed. 507; *Taylor v. Fall River Iron Works* (D. C.) 124 Fed. 826; *Crowley v. Hurd* (D. C.) 172 Fed. 498; *Vane v. A. M. Wood & Co.* (D. C.) 231 Fed. 353; *Union Pac. R. R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720, 121 C. C. A. 182. As I said in *Vane v. A. M. Wood & Co.*, supra, the liability of the consignee appears to be regarded as arising from an implied contract; the lien being surrendered upon a promise to pay the charges. The promise should be commensurate with the lien, as was expressly held in *White & Co. v. Furness Withey & Co.* [1895] A. C. 40. It is generally said that the surrender of the lien and acceptance of the goods are only prima facie evidence of a contract, which may be rebutted by other circumstances (*Frontier S. S. Co. v. Central Coal Co.*, 234 Fed. 30, 148 C. C. A. 46 [C. C. A. 7th]), and that may be so. In any case the facts are here un rebutted and the liability clear.

[2] It has been sometimes supposed that the demurrage at the port of loading is on a different basis, and Mr. Carver, in his book (section 637), seems to recognize such a distinction. I do not, however, think that the authorities require it, and in a case like that at bar I cannot see

any ground for it in principle. In *Smith v. Sieveking*, 4 E. & B. 945, 5 E. & B. 589, the language of the bill of lading was interpreted as binding the ship only for the payment of freight, and the case went off on that point in both counts. Baron Parke said that the language of a bill of lading must be very clear to indicate the intent to hold the goods for delays at the port of loading not in any way due to defaults of the consignee. Yet the case stands for no more than a rule of interpretation. Moreover, in *Gray v. Carr*, L. R. 6 Q. B. 522, the lien was extended to demurrage under the charter party at port of loading, though damages and dead freight were not thought to be clearly enough included by the words "he or they paying freight and all other conditions * * * as per aforesaid charter party." The question is therefore of the extent of the ship's lien, and the lien depends altogether upon the language of the bill of lading and the charter party.

In the case at bar the language of the bill of lading was:

"He or they paying freight for the same as per charter party, dated February 16, 1920, all the terms and exceptions contained in which charter are herewith incorporated."

There is no doubt, I think, that the word "terms" is broad enough to include any lien created by section 9 of the bill of lading. If so, the case turns upon the meaning of that section, which reads:

"Steamer to have a lien for all freight, dead freight and demurrage."

In *Gray v. Carr*, supra, the contest was over the scope of the word "demurrage," the charter party having fixed a period of 10 days after the lay days, as demurrage at a fixed rate. It was held not to include damages for "detention" after that period. But in the case at bar the charter party reads not so, but makes the demurrage rate apply indefinitely after the lay days expire, which are themselves to be calculated on a minimum speed of loading. It is true that in *Gray v. Carr*, supra, the language was such as made the word "demurrage" necessarily include only delays at the port of loading; but I think it equally clear here that the charter party here meant to include demurrage at either port. If so, the ship had a lien on the cargo for demurrage proper under this charter party. If the premise is commensurate with the lien (*White & Co. v. Furness Withey & Co.*, supra; *Vane v. Wood*, supra), then it follows that the respondent is liable for all demurrage and the exceptions are well taken.

[3] As to the liability for freight, the case is different. I do not agree with the libelants that the deduction of freight under a false charge for dispatch money changed those charges into charges for demurrage. The charterer had wrongfully refused to pay the actual freight due, but it still remained freight money. The same considerations would apply to this unpaid freight as to the demurrage, were it not that the bill of lading recited that the freight was prepaid. That appears to me a clear estoppel, for a master who uttered such a bill of lading would be guilty of a fraud upon the consignee and innocent holder of a bill of lading, if he held the goods for freight. Besides, the charter party provides, in section 8, that the bill of lading shall be signed

"at not less than the charter rate." Signing the bill of lading was a clear assertion by the master that the entire charter hire had been paid, since there was but one bill of lading for each cargo. Obviously the ship cannot permit the consignee to receive the cargo on the faith of such a declaration, and afterwards deny it and attempt to set up an obligation for a part of the hire. Therefore the exceptions to the twenty-second and twenty-third articles of the libel are overruled.

MENKE et al. v. WILLCOX et al.

(District Court, S. D. New York. March 9, 1921.)

1. Receivers ⇐90—Mere inaction not adoption of contract.

Mere inaction of receivers, where they do not enjoy any benefits from assets cum onere, is never of itself an adoption of a contract, though it may endanger their right to adopt, and in order to be bound they must positively indicate their intention to take the contract over.

2. Receivers ⇐90—Intention to adopt contract indicated by retaining assets.

The intention of receivers to adopt a contract may be indicated by remaining in enjoyment of assets without dissent.

3. Receivers ⇐90—Of exporter held not to have adopted his contract of purchase.

Receivers of an exporter, who wrote the seller of goods to such exporter, asking the seller to cancel the exporter's order, *held* not to have adopted the contract for purchase of the goods made by the exporter, either by such letter or by an earlier adoption, suggested and evidenced by the letter.

At Law. Action by William Menke and others against William R. Willcox and others, as receivers. Verdict for defendants.

This is an action at law upon the assumed adoption of a contract by the defendants as receivers. By consent the parties agreed to a trial before a jury of one and at the conclusion of the evidence each side moved for a direction of the verdict. The court took the case under advisement.

William J. Farrell was an exporter doing business in the city of New York, and on the 5th day of April, 1920, his creditors filed the usual creditors' bill in sequestration with his consent, alleging that his affairs were in confusion and his assets likely to be dissipated by repeated executions and attachments, by which the rights of the creditors would be injured. Upon the bill and consent the defendants were appointed receivers on that day, with power to continue the business in their discretion for a time extending beyond the events hereinafter set forth.

A few days before January 20, 1920, one O'Sullivan, an employee of Farrell, made an oral contract with Webber, an employee of the plaintiffs, and on that day Farrell signed and delivered a written "confirmation," agreeing to purchase "120 pieces each, about 30 yards style 4281 taffeta, at \$2.75 per yard." The "confirmation" also contained the terms of payment, a full description of the goods, how they should be packed, and the time of shipment. Of the 120 pieces so ordered, the plaintiffs delivered 28 pieces to Farrell before the receivers were appointed. After their appointment, Webber, representing the plaintiffs, had talks on the telephone with O'Sullivan, and some time in April came to see Mr. Eggers, one of the receivers. Webber kept asking for

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

shipping instructions for the goods, which were then packed and ready for delivery f. a. s. New York, as required by the contract; but in these interviews the receivers gave no instructions, and did not declare their decision in any other way to adopt or renounce the contract. On June 4, 1920, at the request of O'Sullivan, the plaintiffs sent a bill or "invoice" to the receivers, describing 90 pieces of silk of the kind required by the contract and billed to the receivers personally. The contract called for 92 pieces, not 90; but the difference had been waived by O'Sullivan upon Webber's statement that 2 of the pieces reserved had proved defective. Eggers saw this bill shortly after its delivery, but took no action upon it, except by cabling to his South American correspondents to see whether the goods could be profitably resold in Brazil.

No other transactions of any moment took place between the parties until August 7, 1920. On that day the defendants wrote a letter to the plaintiffs, of which the following is a copy:

"Gentlemen: The receivers do not acknowledge any responsibility or adopt any contract or other transaction of William J. Farrell except as expressly and specifically stated by them. [In print.]

"In reference to your invoices of June 4th, covering the balance of merchandise due us against order No. 21551, as your Mr. Webber knows when he was down to our office on various occasions regarding the disposition of this matter, the customer has refused to accept the first shipment of the merchandise.

"We have done all we possibly could to get them to accept, and have cabled them direct, as well as to our agents, and also to the bank, who has taken a special interest in this matter.

"Their taking the matter up as above has been of no avail, and we are now in receipt of advice from our agent, requesting us to cancel the order.

"We would appreciate your co-operation in this matter and cancel this order, letting us have a credit memo. covering your bill by return mail.

"We dislike very much to ask you to cancel this invoice; but, in view of the unfortunate situation that we are in, we trust you will comply with the request as above.

"Thanking you for the many past favors which you have done for Mr. William J. Farrell and ourselves, we are

"Yours very truly, William R. Willcox and Herman H. Eggers,
"As Receivers of William H. Farrell,
By W. R. Willcox, Receiver."

"JWB O'S.EA.

To this letter the plaintiffs replied on August 10th, declining to "co-operate" in sending a credit memo. for their bill of June 4th and asking for remittance. On August 13th the defendants answered the plaintiffs' letter of August 10th, declaring that they had "elected not to execute this contract," and with this the transaction ended.

The plaintiffs pleaded three causes of action: First, for goods sold and delivered; second, upon an account stated; and, third, under section 144 of the Personal Property Law (Consol. Laws, c. 41), which provides that the seller may sue for the purchase price in certain contingencies. The defenses were that the defendants had never adopted or ratified the contract, and that, if they had, no action lay for the purchase price, but only for damages, which had not been proved.

Leonard Klaber, of New York City, for plaintiffs.
Walbridge S. Taft, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] The defendants knew of the contract some time during April, the exact day being unknown, and took no action upon it for over three months. It is possible that this was more than a reasonable time, and, if so, had they eventually adopted it, the plaintiffs conceivably might have been released; but the mere inaction of receivers, where they do not enjoy any benefits from assets cum onere, is never of itself

an adoption, though it may endanger their right to adopt. In order to be bound, they must positively indicate their intention to take it over. *Peabody Coal Co. v. Nixon*, 226 Fed. 20, 140 C. C. A. 446 (C. C. A. 8). That intention may be indicated by remaining in enjoyment of the asset without dissent. *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, 51 N. E. 179. But in such cases it is only because an assent may in fact be so implied. Indeed, the receiver may perform some part of the contract himself, experimentally, without becoming bound. *Butterworth v. Degnon Contracting Co.*, 214 Fed. 772, 131 C. C. A. 184 (C. C. A. 2).

[3] On the 7th of August, therefore, the receivers were free to adopt or renounce the contract as their interests dictated. Their letter of that date did neither one nor the other. It merely requested that the order be canceled, which would have relieved them of any decision at all, and Farrell's estate of any claim for damages. In so far as it indicated anything at all as to their own position, it was a renunciation. Besides, the printed matter at the beginning of the letter, which expressly warned the recipient that the receivers would not adopt any contract of Farrell unless they "expressly and specifically" so stated, forbade the letter from being taken as an adoption.

The plaintiffs argue that, even so, the language of the letter presupposes an earlier adoption of the contract. To read it so is to ignore the receivers' patent purpose. They wanted the estate to be free from the contract altogether, and did not by implication concede that they had themselves theretofore adopted it, which would in fact have been untrue. All that they had done, meanwhile, was to ascertain whether they could resell the goods, a course they had a right to adopt, though at the risk of a termination by the plaintiffs before they might decide. This suggestion of the defendants the plaintiffs rejected by their letter of August 10th, erroneously assuming that the defendants' letter of August 7th was either an adoption or the evidence of prior adoption. To this interpretation of their letter, however, the defendants did not accede, for on the 13th they answered that they had not elected to execute the contract.

It is urged that the result is unjust to the plaintiffs, but this is incorrect. They had it always in their power to require the receivers to elect, and, this being a commercial contract, the time given would have been very short. Instead, they probably supposed that the receivers' Brazilian agents could place the goods so advantageously that they would adopt the contract, which was a good bargain for the seller. Having failed in this anticipation, they now attempt to hold the receivers who never suggested in any way that they would adopt. I can see no injustice in the failure of this attempt.

Verdict for defendants.

CHICAGO TITLE & TRUST CO. v. SMJETANKA, Collector of Internal Revenue.

(District Court, N. D. Illinois, E. D. March 14, 1921.)

Internal revenue ↵7—Trust agreement held to create association subject to income tax.

An agreement between the stockholders of five street railway companies, by which the legal title to the stock was vested in trustees, who were to do certain things, but in all other matters to be under the control of a committee of so-called participating stockholders, *held* to create an "association," within the meaning of Income Tax Act Oct. 3, 1913, § II G(a), providing that the normal tax shall be levied on the net income of "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 clause "no matter how created or organized" applying to corporations, joint-stock companies, and associations, as well as to insurance companies.

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

At Law. Action by the Chicago Title & Trust Company, as trustee of the Chicago City & Connecting Railways Collateral Trust, against one Smietanka, Collector of Internal Revenue. On demurrer to declaration. Demurrer sustained.

Busby, Weber, Miller & Donovan, of Chicago, Ill., for plaintiff.
Charles F. Clyne, U. S. Atty., of Chicago, Ill., for defendant.

PAGE, Circuit Judge. Persons owning capital stock of five street railways in Chicago, desiring to effect a unitary control of the properties, executed the agreement out of which grows the question here, viz.: Did that agreement create a joint-stock company or association, taxable under section II G (a) of the federal Revenue Act of 1913 (38 Stat. 172)? Such a tax was paid by the plaintiff under protest, and it brings this (and four similar suits) against the defendant, a former internal revenue collector, to recover the money paid on the ground that it was an illegal tax. The question arises upon a demurrer to the declaration.

It is strongly urged upon the court that this case presents a trust similar to what is known as the Massachusetts Trust, and that it comes within the purview of and is governed by *Crocker v. Malley*, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601. However, I find that it has features which show it to be quite different from the *Crocker Case*. The Supreme Court in that case said:

"The trust that has been described would not fall within any familiar conception of a joint-stock association."

And:

"If we assume that the words 'no matter how created or organized' apply to 'association,' and not only to 'insurance company,' still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association, when they are admitted not to be partners in any sense, and when they had no joint action or interest and no control over the fund. On

(275 F.)

the other hand, the trustees by themselves can not be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such. * * * We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated."

In *Eliot v. Freeman*, 220 U. S., 186, 31 Sup. Ct. 361, 55 L. Ed. 424, the court said:

"The language of the act [of 1909], * * * 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment."

Section 38 of the act of 1909 reads:

"That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or of any state or territory of the United States or under the acts of Congress applicable to Alaska," etc., "shall be subject to pay annually. * * *" 36 Stat. 112.

The act of 1913 reads:

"That the normal tax * * * shall be levied, assessed, and paid annually upon the entire net income arising or accruing * * * 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."

It is contended that the words "no matter how organized" in the act of 1913 relate to insurance companies only, but the court is of the opinion that those words relate back to the words "every corporation, joint-stock company, or association," so that what is meant is that all such concerns (not including partnerships) are included and are taxable. *Eliot v. Freeman*, supra.

There are material differences between the so-called trust in this case and the trust in *Crocker v. Malley*. The trustees here, except for certain fixed things, are not principals at all, but are mere agents of the committee hereinafter referred to. The parties who conceived and drew up the agreement in question simply built up an organization by the use of language that reads in many respects much like the old corporation law of Illinois. They superimposed that organization upon the four or five corporations owning the street railway system of the city of Chicago, by placing the legal title to the capital stock of those corporations in the trustees named, who are to do certain specified things only, and by providing for a committee, which controls even the power of the trustees to vote the capital stock of the street railway companies. This committee is elected by what is called participating shareholders, who hold certificates of common and preferred participating shares issued by the trustees in lieu of the capital stocks of the corporations. The whole agreement is shot through with provisions for control by the committee, particularly upon page 25:

"And from time to time the trustees may give proxies to any person or persons to vote such stock; but in voting upon any of such stock the trustees shall follow the directions or instructions, if any, that may be given to the trustees by the committee."

And again, on page 30, where it undertakes to enumerate the powers of the trustees, they use this language:

"Subject to any rights of the trustees of the said collateral trust indenture dated January 3, 1910, as specified therein, and subject to the terms of the written approval or consent of the committee in any case where under the terms of this trust agreement such approval or consent is authorized or required, the trustees shall have such power," etc.

Again:

"To invest at any time * * * any sum or sums * * * which the committee may approve."

And again, in (i), to—

"vote upon any of the shares, constituting any part of the deposited securities, in favor of any lawful consolidation, merger, or reorganization of the properties, franchises, or shares of any of the companies * * * upon such terms and conditions as shall be approved by both the committee and the trustees."

In *Crocker v. Malley* the Supreme Court does not undertake to say whether there could be such a thing as an association not organized under some law; but I am of the opinion that there can be such an association and that the organization here shown is within the statute.

It is claimed by counsel that, if any organization ever becomes an association, it thereby necessarily becomes a partnership; but there are, in my opinion, certain limitations and conditions that prevent the agreement here from creating an ordinary partnership.

The demurrer is sustained.

In re HURLBURT MOTORS, Inc.

(District Court, S. D. New York. December 6, 1920.)

No. 791.

1. Bankruptcy Ⓒ484—Expenses of receivership under involuntary proceeding fall on petitioners, where respondents are solvent.

The expenses of a receivership, under an involuntary proceeding in bankruptcy opposed by respondents, fall on petitioners, regardless of the amount of their bond, where respondents are found solvent.

2. Bankruptcy Ⓒ484—Estate of respondents in involuntary proceeding, found solvent, liable in first instance for receiver's expense to extent of profits.

Though respondents in an involuntary proceeding in bankruptcy are found solvent, their estate is liable in the first instance for the receiver's debts and compensation, to the amount and only to the amount of profits during the receivership, with recourse by respondents over against petitioners for any lost profits and the fee of their counsel.

In Bankruptcy. In the matter of the Hurlburt Motors, Incorporated, alleged bankrupt. On application for dismissal of petition and turning over of assets. Order made.

A petition in bankruptcy was filed against the respondents on June 15, 1920, and a receiver appointed. The respondents unsuccessfully moved to vacate

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

the receivership, though the receiver was changed. He has conducted the business at a profit of some \$2,000 pending the proceedings, which came on to be heard in the District Court before a jury, which on November 29, 1920, found the respondents solvent. They now apply for an order dismissing the petition and directing the receiver to turn over the assets. Questions therefore arise as to who shall pay the receiver, his attorneys, and any of his unpaid debts. Among the latter is an unliquidated claim arising in tort from the injuries to a workman employed by the receiver during the conduct of the business, who has not yet presented any claim.

Harry L. Ettinger, of New York City, for petitioners.

Harold G. Aron, of New York City, for respondents.

Alex H. Jackson, of New York City, for prospective tort claimant.

Harry Zalkin, of New York City, for receiver.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is settled law in this Circuit that under circumstances similar to this the costs of administration fall upon the petitioners, regardless of the amount of the bond. In *re Lacov*, 142 Fed. 960; In *re Wentworth Lunch Co.*, 191 Fed. 821, 112 C. C. A. 335; In *re Aschenbach Co.*, 183 Fed. 305, 105 C. C. A. 517; In *re Independent Machine & Tool Co.*, 251 Fed. 484, 163 C. C. A. 478. It is true that in *Re Weissbord* (D. C.) 241 Fed. 516, it was held that the relief was limited by the bond given, and reliance was placed upon *In re Spalding*, 150 Fed. 120, 80 C. C. A. 74 (C. C. A. 2d). The report in *Re Spalding*, supra, does not disclose the facts in detail, but apparently the case was one of a claimant to some fund in the receiver's hands; certainly it was not an application by Spalding to recover his property. In any case the later decisions control, and there can be no question that the petitioners are liable in the first instance.

[2] The receiver and the prospective claimant, however, insist that they are to have their claims paid first, and that the respondents must then have recourse over to the petitioners. That is the chief question in issue. This was directly held in *Re T. E. Hill Co.*, 159 Fed. 73, 86 C. C. A. 263 (C. C. A. 7th), a case approved obiter in *Re Charles W. Aschenbach*, supra. The contrary was, however, ruled in *Beach v. Macon Grocery Co.*, 125 Fed. 513, 60 C. C. A. 557 (C. C. A. 5th), *Weston v. Watts*, 45 Hun (N. Y.) 219, and *People v. Jones*, 33 Mich. 303; the last two cases being in equity. In *Pittsfield National Bank v. Bayne*, 140 N. Y. 321, 330, 35 N. E. 630, the right of the receiver to commissions was agreed in some cases to exist; but the receiver was denied relief because his possession was not legally assumed. It must be conceded that the matter is open to doubt in this court. In *re Independent Machine & Tool Co.*, supra, does not pass on it, because the alleged bankrupt had there consented to the appointment of the receiver, which could not be treated thereafter as a wrong, certainly as between itself and the receiver. Besides, that was a case where the alleged bankrupt attempted to surcharge the receiver's accounts, thus making him personally liable for debts contracted while receiver, for which he was under no circumstances liable. I think that the rule is that the defendant's or respondent's estate is not liable for the receiver's debts or his

compensation beyond the amount of the profits realized or improvements arising through profits. *Tex. & Pac. Ry. Co. v. Bloon*, 164 U. S. 636, 17 Sup. Ct. 216, 41 L. Ed. 580; *Tex. & Pac. Ry. Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81 (only showing what is the Texas law); *Bartlett v. Cicero, etc., Co.*, 177 Ill. 68, 52 N. E. 339, 42 L. R. A. 715, 69 Am. St. Rep. 206; *Knickerbocker v. Benes*, 195 Ill. 434, 63 N. E. 174. As to anything more, the receiver and his creditors have the responsibility only of the plaintiffs or petitioners.

Therefore, if the receiver had in his hands no more than the original value of the property seized, he would be obliged to turn back everything to the respondents and look wholly to the petitioners for his compensation and so would his creditors. The respondents not only did not consent, but actively opposed the seizure; they could not be required to pay the expenses. It appears, however, that the receiver has now in his hands more than the amount of property received by about three thousand dollars. This is obviously not a profit till his debts and his own allowances are paid, and there is no propriety in paying it over to the respondents. True, their own profits might have been as much or more, and, if so, they have recourse against the petitioners for the loss; but as against the receiver and his creditors they must yield. The proper result, if all could be worked out, would be this: The receiver and his creditors should be entitled to the profits, when ascertained, in payment of their claims, and the petitioners should pay any balance; the respondents should be entitled to collect from the petitioners the allowance of their counsel and any profits they could show they have lost by reason of the mistaken seizure.

Unfortunately, this would take time, and meanwhile the respondents would be kept out of their property, which they need at once, if it is to be saved at all. Some present solution must be found, if only provisional. The best which I can devise is this: The receiver's accounts show an estimated profit of \$3,000; they are in evidence and can be referred to. So much of the assets he should be allowed to retain against his debts and his allowances. He will turn over the other assets forthwith to the respondents. Then he will state his accounts to a special master, who will fix his profits, state his unpaid debts, and fix his allowance and that of his attorney. At the same time the respondents will have the allowance fixed of their counsel, and prove what, if any, profit they have lost during the period of the receivership. When these figures are found, an order may pass directing the petitioners to pay to the respondents their counsel fee and the profits lost by them by reason of the seizure, also to the receiver and his creditors any unpaid balance of his allowance, his attorney's, and his debts. If the petitioners do not pay this unpaid balance, the respondents shall be liable to an amount equal to the difference between the profits as found and the sum retained by the receiver.

In re REISLER.

Ex parte RICHARD E. SAUSE CO., Inc.

(District Court, S. D. New York. June 23, 1921.)

Bankruptcy ⇨407(1)—Delay in prosecuting petition held to bar right to discharge.

Under rules of the District Court providing for issuance of an order to show cause within 20 days after the filing of a petition for discharge, and requiring a bankrupt on filing his petition to pay certain estimated fees of the referee, unless his petition was filed in forma pauperis, a bankrupt held not entitled to a discharge where, after filing his petition without making such payment, he went away, and no action was taken on the petition for three years when he returned, paid the fees, and had notices mailed; his only excuse being lack of money when the petition was filed.

In Bankruptcy. In the matter of John J. Reisler, bankrupt. On motion to confirm report of special master recommending bankrupt's discharge; the Richard E. Sause Company, Inc., objecting. Discharge refused.

This is a motion to confirm the report of the special master recommending that the bankrupt be discharged. On September 29, 1917, the bankrupt was adjudicated; he employed an attorney, not the counsel who appeared in this proceeding, who filed his petition for discharge with the referee on July 17, 1918. He did not at that time pay the referee's indemnity fee of \$47, being in impoverished circumstances, and immediately left for the West, where he remained until March, 1921. At this time he learned that his discharge never had been granted, but that the petition had been left in the office of the referee without action. He communicated with his attorney, who was in the same error as himself, but who, on examining, found that the information was correct. Immediately thereafter, and on March 10, 1921, he paid the indemnity due, and the notices were duly mailed for April 18, 1921. Then for the first time the objecting creditors learned that the petition had been filed.

Upon the hearing before the referee the bankrupt stated the facts as above, and also that his attorney had been in bad health for much, if not all, of the time between the filing of the petition and March, 1921. The attorney was himself called, and testified that he was away from his office practically all the time during the war; that he was taken sick, and he had not been at the office much since that time; that in his absence he had two men take care of his work in the office, but that both these enlisted in the army, as well as his office boy; that there was no one there but two stenographers.

The referee decided that there was no laches on the part of the bankrupt, and granted the discharge; there being no other objection. The specifications of objections to the discharge did not include any of the grounds mentioned in the statute, but relied upon the foregoing facts.

Arnold Lichtig, of New York City, for bankrupt.

Robert A. Fosdick, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). The question whether a bankrupt may be deprived of his discharge by neglect to press his petition to a hearing has, so far as I know, been adjudicated only three times. Judge Holt, in *Re Lederer* (D. C.) 125 Fed. 96, denied a discharge for that reason, and the Circuit Court of Appeals for the Eighth Circuit held the same way in *Lindeke*

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
275 F.—5

v. Converse, 198 Fed. 619, 117 C. C. A. 322. On the other hand, in *Re Glasberg*, 197 Fed. 896, 117 C. C. A. 235, the Circuit Court of Appeals for the Second Circuit allowed a discharge in spite of some delay, the length of which was not stated. The question is whether *In re Glasberg*, supra, applies, because, if it does, it is, of course, conclusive here.

At that time (1912) there was no rule of the District Court providing for the bringing on of petitions after they have been filed; but subsequently rule 10 (now rule 26) was passed, which, so far as relevant, reads as follows:

"In twenty days after petition for discharge shall have been filed with the referee, an order to show cause thereon shall be issued."

The absence of such a rule was mentioned in *Re Glasberg*, and I think it fair to assume that it may have been the basis of the decision. At least there is no reason to suppose that the Circuit Court of Appeals would have disregarded such a rule, had one been in existence at that time. I therefore think that that case was not applicable, and it seems to me that the other two cases are controlling. It is to be noted that the rule mentioned does not in form impose any obligation on the bankrupt, but there has always been in the local rules, under "Authorized Charges for Disbursements and Expenses," a provision that the referees may make certain charges for their indemnity, among which Nos. 1, 3, and 4 prescribe the amounts upon petitions for discharges. It was provided further that—

"The estimated amount of items 1, 3 and 4 shall, in applications for a discharge, be paid by the bankrupt on filing his petition for discharge."

Therefore a duty was imposed upon the bankrupt under these rules of making payment of the indemnity in question, which, if he had performed it, would have automatically set in motion the procedure of the court. His failure was in every sense a default for a period of nearly three years, and it stands unexcused, except on the plea of poverty. But that plea will not serve either. Section 51a (2), being Comp. St. § 9635, provides for a petition in forma pauperis, which is further recognized in our present rule 2. The bankrupt under our rules is therefore charged with the duty, when he files his petition, either to pay the indemnity or to excuse it, as I have stated. These are conditions annexed to his right to a discharge.

The case, therefore, seems to me to be that the bankrupt has not performed those conditions upon which alone the petition could be treated as complete. Of course, if the rules are illegal, and the court has no right to require any indemnity (or a petition in forma pauperis in its stead), then it is true the bankrupt fulfilled all the necessary conditions. Such an illegality is not, however, suggested at bar, and I shall assume the rule to be valid. If so, I see no distinction between failing to file a petition at all, and filing it without satisfying those conditions on which alone any progress can be made upon it. The statute might, it is true, have required creditors to show some prejudice to dismiss a petition for discharge, filed more than 18 months after adjudication; but it has not done so. It has put an absolute limitation upon the right, depend-

ent upon filing the petition in due season. How can the policy of that statute be effected, if the bankrupt may merely file a petition and fail to make it good for any purpose? Creditors have no means of knowing that it is on file; they are not charged with notice of it. At the end of 3, or perhaps of 6 years, it may be revived, and a discharge granted in the face of the assurance, reasonably to be drawn from the statute and the rules, that at the end of 18 months and 20 days the bankrupt's inaction indicates that he does not propose to apply for a discharge at all. Such a result defeats the purpose of the act.

The excuses tendered, assuming any are admissible, which I deny, are in the case at bar quite trivial.

Discharge denied.

THE IVOR HEATH.

(District Court, E. D. Virginia. July, 1921.)

Customs duties ⇨122—**Ship liable for penalty for bringing in smoking opium not shown on manifest; absence of intent being no defense.**

Under Act Jan. 17, 1914, § 8 (Comp. St. § 8801f), providing that, "whenever opium or cocaine, or any preparations or derivatives thereof, shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, * * * such vessel shall be liable for the penalty prescribed" by Rev. St. § 2809 (Comp. St. § 5506), which subjects the master of a vessel from a foreign port which shall bring in any merchandise not shown in its manifest to a penalty equal to the value of such merchandise, a vessel is liable for the penalty prescribed for bringing in smoking opium not shown on its manifest, though importation of smoking opium is prohibited, and though the opium was smuggled in by Chinese members of the crew without the knowledge of the master or any of the officers; the absence of intent being no defense.

In Admiralty. Libel by the United States against the steamship Ivor Heath. Decree for libellant.

Paul W. Kear, U. S. Atty., of Norfolk, Va., and H. H. Rumble, U. S. Admiralty Counsel, of Norfolk, Va., for the United States.

Hughes, Little & Seawell, of Norfolk, Va. (L. T. Seawell, of Norfolk, Va., of counsel), for respondent.

GRONER, District Judge. The Ivor Heath, a British steamship, arrived at the port of Norfolk, on the 23d of November, 1920, from Rotterdam, Holland. Her arrival at Norfolk was the conclusion of a round trip voyage from New York, from whence she sailed in the late summer of 1920, and from which port her crew were shipped. On arrival at Rotterdam the ship was moored to her dock and discharged a cargo of coal; she remained there 7 days, during which time her crew were given shore liberty as often as their duties permitted. The dock at which her cargo was discharged was inclosed with a high fence on the land side and with an entrance by a small gate, at which was a watchman, whose duties appear to have been to allow passage through the gate only to persons entitled to leave or enter the wharf. While

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

the ship was at Rotterdam, a number of Chinese, members of the crew, without the knowledge of the master of the vessel, brought aboard a large quantity of opium, amounting to 560 tins, each tin being approximately 4"x6", and valued, as stipulated between the parties, at \$16,380. The majority of the tins of opium were inclosed in packages, containing approximately a dozen tins each, wrapped in stout paper and tied with string. On the arrival of the vessel in Norfolk, the crew, in accordance with their contract, were paid off and discharged, and the opium was discovered in their baggage as they attempted to land at one of the harbor piers. The presence of the opium on the ship was not shown on the manifest, and upon ascertainment of this fact the collector of the port of Norfolk imposed on the vessel and her master the penalty provided by law, and the libel in this proceeding is brought to enforce the collection of the fine of \$16,380 so imposed.

There is, of course, no question in the case that the master or any of the officers of the ship had any knowledge of the presence of opium on board. It is equally true that, while the vessel was at Rotterdam, an officer was on watch whose duty, presumably, was to see that nothing was brought aboard the ship, except in the regular course. It is likewise true that on arrival at this port, and before the crew were paid off, the immigration officials came aboard and examined the crew, for the purpose of determining whether they were suffering from disease or other thing barring them, or any of them, from entering the country as seamen. It does not appear, however, that beyond the ordinary ship inspection any search was made of the baggage or personal effects of the crew, or that any search of their quarters was made to determine whether they were in possession of contraband. Doubtless the inconvenience of such course, and perhaps, too, the difficulty of retaining a crew under such circumstances, made such a search undesirable. However that may be, the fact remains that some six or eight members of the crew were enabled to bring aboard the vessel several trunks full of the prohibited drug, to conceal the same during the passage, and to bring it unmolested over the side of the ship into a small boat hired by them for the purpose of putting themselves and their baggage ashore.

Section 8 of the Act of February 9, 1909, commonly known as the Opium Act (35 Stat. 614), as amended by the Act of January 17, 1914 (38 Stat. 275 [Comp. St. § 8801f]), provides as follows:

"That whenever opium or cocaine, or any preparations or derivatives thereof, shall be found upon any vessel arriving in any port of the United States which is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes."

Section 2806 (Comp. St. § 5503), referred to in the preceding quotation, provides that no merchandise shall be brought into the United States from any foreign port, unless the master of the vessel has on board a manifest in writing. Section 2807 (Comp. St. § 5504) provides the character of the manifest and what it shall contain, and section 2809 (section 5506) provides that—

"If any merchandise is brought into the United States on any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest," etc., "the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The forfeiture in this case was exacted and the guilty members of the crew prosecuted and punished.

It is insisted now on behalf of the vessel that, since the element of intent to violate the law on the part of the responsible officers of the vessel did not exist, the statute does not apply and the penalty should not be enforced. It is likewise insisted that the opium confiscated, being what is generally known as smoking opium, is neither a preparation nor derivative of opium, and therefore not within the terms of the statute; and it is still further contended that in no event is it merchandise within the provisions of section 2809. In support of these several positions, save the first, the case of *United States v. Sischo* (D. C.) 262 Fed. 1001, is cited, and if it should be held to be controlling would be conclusive of this case; but, although I have fully considered the carefully prepared opinion of Judge Cushman in that case, I am unable to agree either with the reasoning or with the conclusion at which he arrives. To say that smoking opium, because sometimes manufactured out of the ashes of opium that has been smoked, is not a preparation or derivative of opium, is manifestly so incorrect as to require no more than the mere statement of the proposition to refute it, and in my opinion it is equally plain that the tins of opium brought into the country on the *Ivor Heath*, as shown by the evidence, were "merchandise," within the meaning of the statute, and were required, just as any other merchandise, to be included in the manifest, even though that fact would not have entitled it to be brought in.

It is conceded that the opium was brought in from a foreign port; it is also conceded that no mention of its presence aboard the vessel was contained in the manifest. To say that, because its importation is prohibited by law, it loses its substance and character and is not merchandise is incorrect. It was property, and subject to use and ownership. While it is true that opium prepared for smoking purposes is prohibited entrance into the United States, it is also true that Congress, by the imposition of a tax on the domestic product or the product manufactured in this country, has recognized the domestic article as property. In the case of *United States v. Jin Fuey Moy*, 241 U. S. 394, at page 401, 36 Sup. Ct. 658, 659 (60 L. Ed. 1061, Ann. Cas. 1917D, 854), which was a prosecution under the Harrison Act, the Supreme Court says:

"If we could know judicially that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption, when the act itself purports to deal with those who produce it. * * * Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously

the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime."

The two last-named defenses must therefore be set aside. As to the first defense of absence of intent, it is enough to say that, while it may be a hardship to impose upon the owners of the vessel property a liability, often severe in its terms, for unlawful acts of which neither the owner nor his representative is guilty, it is equally true that it is sometimes necessary, in order to prevent the violation of police or health statutes by the evil-minded through the instrumentalities of the innocent. Recognition of such hardship as is now complained of doubtless impelled the action of Congress in the passage of the Act of June 22, 1874 (18 Stat. 186), which provided that in all actions, suits, and proceedings to collect penalties against vessels for violation of acts similar to those here in question, it should be necessary to show affirmatively that the acts were done with the actual intention to defraud the United States, and while this statute was in effect the courts held the evil intent of the master of the vessel a necessary and an essential element to conviction; but this act of 1874 was repealed by the Act of June 10, 1890 (26 Stat. 141), and its repeal is confirmatory of the fact that experience had shown its ineffectiveness to extend grace, and at the same time prevent smuggling, and by its repeal the law, so far as the good faith of the master of the vessel is concerned, was left as before its passage. In the case of *The Queen*, 27 Fed. Cas. 672, No. 16,108, which was decided before the passage of the act making the intent an essential element in the prosecution, it was held that the fact that the master did not know that the nonmanifested goods were on board was not enough to exempt the vessel from liability. "If it were to be so held," said Judge Woodruff, "the door to smuggling would be opened so wide that these statutes would be a dead letter."

So in the case of *The Helvetia*, 11 Fed. Cas. 1061, No. 6345, the evidence showed that the master of the vessel had no knowledge or information at any time that the nonmanifested goods were on the vessel, and that he took all precautions in his power to prevent smuggling, a stronger statement of facts than exists in the instant case; but even those circumstances were held not sufficient to take the case out of the rule or to justify an avoidance of the penalty. See, also, *U. S. v. Hutchinson*, 26 Fed. Cas. 446, No. 15,431; *U. S. v. Missouri*, 26 Fed. Cas. 1273, No. 15,785. In view of what has been said above, it seems to me that the statute makes no qualification; it declares that whenever opium, etc., shall be found upon any vessel arriving in any port of the United States which is not upon the manifest, the vessel or the master shall be liable for the penalty. The passage by Congress of the remedial statute, if it may be so designated, making necessary proof of knowledge and intent on the part of the master, and the subsequent repeal of this statute as above adverted to, conclusively show the legislative intent, and leave to the court no other option than enforcement of the law. Congress has not, however, shut the door to the remission of penalties thus incurred to those who are the innocent victims of the evil machinations of others. Section 5292 of the Revised Statutes (3

Fed. Stat. Ann. [2d Ed.] p. 332; Comp. St. § 10130) provides a method by which under such circumstances they may assert their innocence of wrong intent and appeal for remission of the fine.

In this case the presence on board the vessel of a large number of Chinese, known to be addicted personally to the use of smoking opium, should have put the master of the vessel on notice to be vigilant that the law was obeyed. Something more than was done might have been done in an effort to avoid the difficulties which subsequently ensued, and this is said with a full appreciation of all the rights which the law throws around the individual to be protected in his person and from improper search. Recognizing, however, the difficulties I have pointed out above, and recognizing also that the master of the vessel gave warning to the only member of the Chinese crew who was able to speak English that no smuggling would be allowed, that a guard was kept at the entrance to the wharf at which the vessel was moored, and that a watchman was kept on deck to prevent what unfortunately he failed to do, make this a case in which, perhaps, it would not be improper to invoke the act last above recited; but in the proceeding now before the court no other course is proper than to enforce the penalty, and a decree to that effect will be entered upon presentation.

DONLAN & HENDERSON v. TURNER, DENNIS & LOWREY LUMBER CO.

(District Court, D. Montana. August 4, 1921.)

No. 892.

1. Sales ⇐7—Contract relating to lumber held one of sale, and not of agency to sell.

A contract between plaintiffs, manufacturers of lumber, and defendant, which provided that on payment by defendant of \$20 per thousand feet, which payment was made, title to all lumber in plaintiffs' yard should vest in defendant, to be evidenced by bill of sale, with a similar provision as to lumber afterward manufactured, and by which defendant agreed to market the lumber in the usual course and to pay plaintiffs a percentage of the net proceeds above \$20 per thousand *held* not to create a sales agency, but to be a contract of sale, leaving no interest in plaintiffs except a contingent claim against defendant, dependent on its making sales at a profit, which contingency never happened as to lumber destroyed by fire while in the yard.

2. Insurance ⇐582—Seller not entitled to share in insurance taken for purchaser.

Under a contract by which plaintiffs sold the lumber in their yard to defendant for \$20 per thousand, with an agreement for a share of the profits, if any, made on a resale, and requiring plaintiffs to insure the lumber for \$25 per thousand for the benefit of defendant, which they did, also taking additional insurance in favor of themselves, on the destruction of some of the lumber by fire while in the yard, plaintiffs *held* not entitled to any part of the \$25 per thousand insurance, each party having the right, as it did, to insure its own interest.

3. Joint adventures ⇐4 (4)—Division of expenses in carrying out agreement.

Plaintiffs, manufacturers of lumber, sold the lumber in their yard and that to be manufactured to defendant for \$20 per thousand feet, with an

agreement that defendant should market the lumber, which was to be loaded and shipped to the purchasers by plaintiffs, on defendant's orders, and that plaintiffs should receive a percentage of the profits of resale above the \$20 per thousand. *Held*, that where defendant ordered certain cars shipped to its own order, and before resale and reconsignment, demurrage had been incurred on the cars, such demurrage was not chargeable as an expense against plaintiffs' share of the profits of resale, though increased freight, due to reconsignment, was so chargeable.

At Law. Action by Donlan & Henderson against the Turner, Dennis & Lowrey Lumber Company, a corporation, of Jackson, Mo., with equitable defense. Decree on accounting.

Harry H. Parsons and A. J. Violette, both of Missoula, Mont., for plaintiffs.

Hall & Pope, of Missoula, Mont., and Rees Turpin, of Kansas City, Mo., for defendant.

BOURQUIN, District Judge. [1] Each party alleges the other's defaults in performance of a somewhat novel written contract made April 16, 1920, which contract is as follows: That plaintiffs "sell" and defendant "buys" some 2,000 M feet of lumber in a local yard and all there "to be * * * cut" to January 1, 1921; that immediately "the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per M feet on all" existing lumber, and "shall also pay and advance" the like sum on future lumber, on inventory by the 10th of each month of piles in the yard; that "the vendees shall also loan to the vendors" \$20,000, for which vendors shall execute their note; that to payment of the note, one-half the advance due on future lumber shall be applied by vendee "until * * * fully paid"; that payments or advances and loans shall bear 7 per cent. interest per annum "until * * * fully paid," computed and adjusted monthly upon the "balance thereof remaining against the vendors"; that upon "payment of the advance of \$20 * * * the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable to the vendors for the balance of the purchase price, * * * and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and possession given;" that vendors lease the yard to vendees, subject to the former's use for purposes of the contract; that if vendors fail to perform, vendees have right to use vendors' planer at the yard, "to dress said lumber in order to protect" vendees "against loss on account of the amounts advanced hereunder"; that vendors shall manufacture and grade the lumber in accord with specified rules and standard, hold "vendees harmless against any claim or loss which may arise under said rules or standard," at their expense insure for \$25 per M feet all lumber sold and in yard, loss payable to vendee, and "shall deliver said lumber f. o. b. cars" at the yard, "either dressed or rough, as directed and ordered by the vendees"; that the "vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the

delivery thereof on cars as aforesaid * * * and when each car is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15 per cent., less 2 per cent. trade discount, and less \$20 per thousand feet already paid and advanced, * * * which draft the vendees agree to honor and pay when presented." The evidence is without material conflict, and the facts, brief and direct, are as follows: There was due performance by both parties, and on August 3, 1920, the lumber in yard, on which \$20 per M feet had been paid and bills of sale executed, less some 280 M feet shipped, was some 3,055 M feet. Plaintiffs' unpaid loans, including some \$11,000 additional loan in June, represented by notes due at intervals to October 1st, aggregated some \$20,000, and the insurance secured by plaintiffs on this and some other of their lumber was \$70,000, payable to defendant as its interest might appear and \$60,000 payable to plaintiffs. That day an accidental fire destroyed some 3,015 M feet of said lumber in the yard, and also other lumber of plaintiffs. The parties continued in performance, but market conditions unfavorable, both parties in need of money, some dispute in reference to insurance, and defendant's attitude, first plainly manifest after the fire, that it was but a selling agent for a commission, created dissatisfaction, which culminated in this action commenced on December 20, 1920.

In the meantime plaintiffs had collected all the insurance money, paid \$60,000 of it to defendant, at first disputed defendant's right to the stipulated \$25 per M feet of the contract, later appeared to acquiesce, but had not accounted for the balance of it at time of action commenced. It appears that from the beginning plaintiffs were less clear than defendant in conception of the nature of the contract, the relations and the rights it created; and so when defendant's attitude aforesaid developed by self-serving statements mainly, after the fire, plaintiffs either did not perceive its significance, or were too ill advised to contradict or oppose it, for they seemed to acquiesce till suit brought.

After the fire defendant paid for new-cut lumber inventoried in piles and bills of sale given as follows: \$20 per M for some 514 M feet of August cut, by cash without application of any of it to payment of loans to plaintiffs and overdue; the like in respect to some 401 M feet of September cut; \$20 per M for some 700 M feet of October cut, by crediting it to plaintiffs' account in respect to the balance of insurance money withheld. As the 10th of December approached, both parties indicated intent to perform in respect to the November cut, but neither performed.

Throughout the contract, market conditions were unfavorable, and both parties, in hope of improvement, acquiesced in few resales and shipments. Ten cars were shipped before the fire, and one car after it aggregating some 322 M feet. Some of these cars were ordered and shipped before defendant had resold the lumber, and in consequence before purchasers were found demurrage was incurred in amount some \$600.

When plaintiffs commenced this action they attached all said lumber in the yard, and when defendant answered it also attached the lumber.

The pleadings are in accord with the respective theories of the parties, and as therein both are in the main in error, and as the action (brought at law, with an equitable defense interposed in the answer, and accounting demanded in the reply) has been tried in the nature of an accounting in equity in respect to a divisible, installment contract, the pleadings need be no more than indicated by brief reference to the theories advanced. Plaintiffs' is that the contract is of sale for resale, and that they are entitled to recover what they might have received if the burned lumber had been resold, and to recover the \$20 per M feet of the October cut which defendant credited to balance of insurance withheld; and plaintiffs evidently contemplate some accounting in future in respect to said lumber now in yard, when resold by defendant. Defendant's theory is that the contract is of agency for sale, and that it is entitled to recover all factor's advances (the \$20 per M feet paid), expenses, the balance of insurance, and the loans, terminating the contract and accomplishing final settlement. Both parties abandon certain claims for damages for lost profits, alleged in the pleadings.

To first dispose of defendant's equitable defense of mistake in reducing the contract to writing, and its claim of practical construction in accord with its theory of agency, the mistake was first asserted by it in its amended answer, months after the contract made, performance, destruction of lumber, suit commenced, and is too late. Further, the evidence in support of it is too trifling to warrant discussion; and likewise of the evidence of practical construction, consisting of defendant's belated self-serving statements to that end.

Proceeding to the character of the contract, it has all the elements of sale, and only enough of the indicia of agency to give some color to a claim of the latter. The lumber inventoried and the \$20 per M paid, the absolute property in lumber and money respectively vested in defendant and plaintiffs beyond return, recall, or repayment. Thereafter plaintiffs have no interest in the lumber, save that it be resold for the purposes of the contract, and thereafter the lumber could be attached by defendant's creditors, but not by plaintiffs'. Resale is in accordance with defendant's judgment of time, place, person, price, and terms, save to be in reasonable time and for the highest reasonably obtainable price. The proceeds are defendants, as is any loss of them, plaintiffs having no interest therein, but only in the price as the measure of what, if anything, becomes due them from defendant on resale. Defendant receives the usual trade discount of a buyer, whether or not it concedes it to its vendee on resale. The parties intended and accomplished a sale. The consequences are clear. As owner of the lumber burned, defendant loses its investment therein and its prospective profits, but indemnified to the extent of the stipulated insurance of \$25 per M feet, and, as owner of the lumber not burned, it is obligated to resell in accordance with the contract. In respect to neither is it entitled to recover from plaintiffs any of the \$20 per M by it paid. Nor are plaintiffs entitled to recover what they might have received had the lumber been resold before burned. They sold it to defendant for \$20 per M and its promise to resell, whereupon, if for a price in ex-

cess of the amount due defendant by virtue of the contract, viz. \$20 per M, plus 17 per cent. of the resale price, defendant would pay to plaintiffs the equivalent of such excess. Before resale, no money was due plaintiffs; no debt to them existed. If resale was for an excess price as aforesaid, money would then be due plaintiffs; a debt to them would then be created. The happening of resale alone would determine what, if anything, was due plaintiffs, the amount, and the time of payment. Defendant's promise to pay was not absolute, but was conditional, and plaintiffs' right to payment was not vested, but was contingent.

By reason of destruction of the lumber the condition failed, the contingency did not happen, and both the promise and the right expired.

For in these circumstances the law is that the failure of the event to happen without fault of the promisor prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise. See cases, 13 C. Jur. 114, 631. A like principle is that, if by the express or implied terms of the contract, the promise is conditional on possibility of performance, and performance becomes impossible without fault of the promisor, his liability is discharged. See cases, 13 C. Jur. 640; 7 Halsbury, Laws of England, 429. Still another like principle is that, if expressly or by implication to effectuate an intent presumed in good faith and fair dealing, the parties contemplate continued existence of the subject-matter of the contract in order to accomplish performance, its destruction without fault absolves both from further performance in so far as dependent upon such continued existence. See cases, 13 C. Jur. 643; 7 Halsbury, Laws of England, 430. These principles are controlling here. The sale of lumber made, it was not known that anything would become due plaintiffs, nor amount, nor when. All were contingent, which to determine defendant promised to resell the lumber. It burned, and resale, before possible, became impossible. The contingencies did not happen; the determination was not made. Defendant's promise became impossible without its fault. It is clear the parties contemplated the continued existence of the lumber for resale and to determine, all said contingencies, because by the contract thus only were they to be determined.

It will be conceded plaintiffs' right to any payment, and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects, and the like, plaintiffs would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value in whole discharges it in the instant circumstances of fire and total destruction of the lumber. Both parties understood this, and both insured. The 2,000 M feet first sold to defendant contemporaneously cost plaintiffs \$35 per M feet. They received

\$20 per M from defendant, agreed to insure in defendant's interest for \$25 per M and did insure for \$35 per M the amount they had paid for the 2000 M. Later they secured \$60,000 more insurance, aggregating on all the lumber \$55,000 more than the \$25 per M they agreed to carry for defendant on the lumber burned, and all of which they collected. That some of it was on lumber not sold to defendant does not detract from the implication in respect to their understanding aforesaid.

[2] It is urged by plaintiffs that, as defendant paid them but \$20 per M for the lumber burned, and thereon claim the stipulated insurance of \$25 per M, \$5 thereof is profit which on some equitable principle it ought to share with plaintiffs, even as though secured by a resale of the lumber. This cannot be maintained. In any view of the parties' respective interests in the burned lumber, even as other co-owners, each could insure their or its interest, without liability to share proceeds with the other.

[3] Of their respective interests, they were of the nature of joint adventurers in the proceeds upon resale of the lumber. If for any fortuitous reason, including market conditions, resale was without excess as aforesaid, plaintiffs received nothing; if resale was with excess, plaintiffs received its equivalent; if resale was for less than due defendant, or if no resale could be made, defendant suffered loss accordingly. This determines the chief issue. In the matter of demurrage and excessive freight, the contract bases plaintiffs' right to payment on resale, on the resale price, less express deductions, and less the implied deduction, it is agreed, of freight. Defendant ordered lumber loaded and shipped before sold, and plaintiff complied.

The cars were consigned to defendant at a destination by it named, and when it resold the lumber the cars were reconsigned to the destination of the purchasers. In consequence demurrage was incurred and freight was increased over that of an original consignment to destination of the purchasers. For demurrage or car rent, defendant is not entitled to credit. It is not freight, and freight is the only expense of resale that is by virtue of the contract a credit in defendant's behalf. Shipment before resale may be a departure from the contract, but although therein plaintiffs waived draft upon defendant for the invoice price, they did not also waive the benefit of the contract's protection to them against all expense of marketing the lumber save freight.

The increased freight is "freight," and is a proper credit in defendant's behalf. When plaintiffs dispatched cars before sale, they knew the likelihood of increased freight, and acquiesced therein. All of these shipments have been resold, save one now "in storage" in St. Louis. Defendant assumes to credit plaintiffs with their dues in respect to them from a time subsequent to resale, on the theory it necessarily awaited freight bills.

The contract requires defendant to pay plaintiffs' draft upon shipment. Plaintiffs waived this in respect to lumber shipped before resold, but are entitled to credit from date resale made, whether or not defendant ever received freight bills.

In the matter of the loans, all overdue, defendant is entitled to recover them in amount \$16,171.09, deducting credits to plaintiffs, consisting of exchange paid and conceded and amounts due upon resales of lumber.

The notes provide for reasonable attorney's fees, a cross-complaint being equivalent to a "suit," and \$286.75 are allowed. This is one-half what the local rule in general would allow, but defendant's erroneous attitude in respect to the character of the contract tended to precipitate the litigation and requires the lessening of the ordinary allowance.

In the matter of the insurance of \$25 per M for defendant, by plaintiffs collected and in part withheld, defendant is entitled to recover it with interest from date collected, in total amount \$1,626.67. Against insurance withheld, defendant properly credited to plaintiffs the payment for the October cut of lumber.

In the matter of interest, defendant is entitled to it in accordance with the contract, but to no interest in respect to payments for lumber, save if and when worked out upon resale.

Herein no account is taken of lumber paid for, bills of sale executed, existing, and not resold, including the car in storage, save to determine it is the property of defendant, subject to the contract. Computations are to August 10, 1921, and to conform to the decision the account discloses (and the parties virtually so agree) that \$18,084.51 are due to defendant from plaintiffs. In equity, costs are discretionary, and in view of the circumstances it is believed neither party is entitled to costs.

Decree accordingly.

SEABOARD AIR LINE RY. et al. v. UNITED STATES.¹

(District Court, E. D. South Carolina, at Charleston. May 5, 1921.)

1. Eminent domain ⇄136—Anticipated use of property held too speculative for consideration.

In determining what is just compensation to be paid for a part of a tract of land, held by a railroad company for yard purposes, requisitioned by the government for war uses, the effect of such taking on the value of the remainder of the tract for the intended use is to be taken into account; but where no use had been made of the land by the company, and its use and value for yard purposes is dependent on the future development of sufficient industries or business at the point to require it, which is uncertain, its anticipated value for such use, should such things come to pass, is too speculative to be taken as an element of damages. Nor can any added value given to the tract by improvements made or business created by the government on nearby property be taken into consideration.

2. Eminent domain ⇄202 (1)—Evidence admissible on question of damages for taking.

Where a part of a tract of land held by a railroad company for yard purposes, but not yet utilized, was taken by the government for war use,

¹ This charge is printed at the request of the Department of Justice, the request being based upon the number of cases pending in the federal courts involving similar issues, and the consequent immediate importance and wide interest which attaches to a full expression on the subject of "just compensation."

which, as claimed by the company, destroyed the value of the remainder for yard purposes, evidence that other ground equally available for such purposes could be procured at reasonable cost *held* admissible on the question of damages.

At Law. Action by Seaboard Air Line Railway and others against the United States. Charge to the jury.

Petitioners' requests to charge were read by the court. Petitioners except to refusal to charge in manner and form as asked. Defendant's requests to charge were read by the court. Defendant excepts to refusal to charge in manner and form as asked. Petitioners except to allowance of defendant's requests to charge, as allowed. Defendant excepts to allowance of petitioners' requests to charge, as allowed.

Buist & Buist, of Charleston, S. C., for petitioners.

Francis H. Weston, U. S. Dist. Atty., of Columbia, S. C.

SMITH, District Judge. Mr. Foreman and Gentlemen of the Jury:

The question before you is on what we call an issue to determine the amount of compensation to be paid. The proceedings are to determine what should be paid to the Seaboard Air Line Railway Company, a corporation, by the United States, for the piece of land, 2.6 acres, which the public found itself compelled to take possession of and utilize during the late war, for public ends in a public exigency.

In this country, which is a free country, it is recognized that what is called the common weal, the benefit of the public as a whole, is superior to that of the individual, and that, where the preservation of the country or the commonwealth as a whole is necessary, it has the power, to effect that preservation, to take the private property of individuals, which is necessary in an exigency to effect it. It is another application of that maxim of democratic government which is called the principle of the greatest good for the greatest number.

In so doing, when I say that "the government" has that power, I do not mean the government as a distinct entity from the people, because in a free country, such as the United States is, the government is nothing but the people themselves, and it means that if the acting administration for the benefit of the people at large—you, and myself, and the people at large—in the protection of the commonwealth, or the effecting of any salutary measure for its benefit, finds it necessary, it has the power to use property, which may be that of an individual, for those public purposes.

But, as it is a free country, a country of the people, it is recognized in our constitutional basis of government that to take property of an individual is in some sense taxation for the benefit of the whole community, and it is neither just nor proper that the entire weight of that special form of taxation should be borne by an individual, and therefore it is that the constitutional provision is that, where the government finds it necessary for the public benefit, the public safety, public health, public protection, to take the property of an individual, it must pay to that individual a just compensation. That just compensation, of course, is paid by the country at large, and to the extent that the in-

dividual himself, the taxpayer, contributes to the general burden, he contributes, because the action is for the benefit of the country at large, and therefore the country at large—all of us—join in the contribution of the compensation for the payment, just as we join in the payment of a tax for the support and administration of the government generally. That applies, whether or not the property is the property (as in this case) of a corporation, a railroad corporation (which is a quasi public corporation), or of a private corporation, or of a private individual.

Now, this piece of property was taken by the government under the exigency of a war measure, which is the most severe and requires immediate action, more so than any other exigency known to humanity. It was taken by the country for that purpose, but taken subject to obligation of the country as a whole to pay just compensation to the railroad corporation from which they took it.

It appears from the testimony that some years ago (according to Mr. Rhett's testimony) a number of people interested engaged in the promotion, so to say, of the establishment of a port or landing place or shipping point, and the development of a large body of land which they afterwards called North Charleston. I think he said they bought 4,500 acres, at any rate, a large amount, for \$150,000.

Now, as part of that development, to give value to the enterprise, which, of course, was an enterprise for the purpose of making money for individuals—it was not a humanitarian or philanthropic enterprise, but they bought this for the purpose of an enterprise—very laudable enterprise, because it is by the development of enterprises such as this that the prosperity of the country is carried on; and in order to assist in the development of that enterprise, to give value to their property which they had purchased, a return for profit in their undertaking, one of the first steps they took was to attract the railroads to come to Charleston, to come to that point—have proper terminals at that point.

So they made advances, he said, to the Southern Railway, the Coast Line Railroad, and to the Seaboard, which at that time was tending towards Charleston. He testified, as to the Coast Line and the Southern Railway, he offered them each a right of way as far as their lines extended; if they would build from their tracks to this point, he would give them yards; and he made the same offer to the Coast Line, if they would build that long line of track through there, and they did give them a right of way, and gave them a yard. Of course, when he said "give," it was given for an ulterior purpose. He wanted to have the railroads there, to give a value to the development of this enterprise, and so it was a donation, to result (as he and they hoped) in great value to a very large part.

At any rate, they gave them this right of way, and they set out these different yards. It was a portion of the yard so given for this purpose to the Seaboard Air Line Railway that was the portion taken by the government under this exigency, and that these proceedings have been brought to adjust and settle the proper valuation for, the proper compensation to be paid—the just compensation.

Now, it appears from the testimony that the Coast Line built a spur to North Charleston, and so did the Southern Railway. In the case of the Seaboard Air Line Railway, as he mentioned, and as can be shown, it was not necessary for them to go to the additional expense of building a spur, because their main line ran right straight through North Charleston, as it was; so they, in that case, received only their yard. None of these yards, it appears, were ever developed or improved, or anything done to them, to make them railway yards, by the railroads.

That, however, would not affect this question at all, and even then the evidence shows that the United States government, not very long after the acquisition of this yard by the Seaboard Air Line Railway, took possession of the railroads, and retained possession of the railroad property until January, 1920. So that the railroads could not possibly have developed the yards whilst in the possession of the government, and there is no imputation against them they did not develop them from any lack of value, no adverse imputation on that point, because they were not in a position, if they had desired; but the fact is that the Seaboard Air Line Railway's yard, so far as the Seaboard Air Line Railway was concerned, was never developed. The land is in the same condition; waste, I think they called it, or pine barren, or open land, or wooded land. It remained in this condition, so far as any action of the Seaboard Air Line Railway was concerned. It was intended for a yard, a railroad yard.

Then the war came on, during which the government seized and operated the railroads, and in the summer, in June, 1918, while the war was at its height, the representatives of the public found it necessary, in order to lay the proper tracks, to leave a large area that the government had also requisitioned for the purposes of war, that they should cross with their tracks a small portion of this yard, which they afterwards developed to take in the 2.6 acres.

The government had requisitioned, as you see, a large area of completely undeveloped land above, which they called Filbin, or which belonged to the Filbin Corporation, right there adjacent to Cooper river, and running back, according to the testimony, entirely undeveloped, a large area next to the river; but the government had requisitioned that for the purpose of a munitions supply base and removal port for the soldiers to be sent to France, and for the supplies to be forwarded after them, absolutely necessary for the maintenance of the war and the protection of the country; and in order to get the necessary trackage to carry the material for the utilization of that territory, so requisitioned, and prepare the wharves and the warehouses and the storehouses, and everything that was necessary for the purposes of war, in June, 1918, they found it necessary to cross with their tracks this point of this yard of the Seaboard Air Line Railway.

It appears that the point at which they crossed was (half of it, at least) low ground, marsh, which had never been, as I said before, developed by the railroad, and that the government then filled it up, and laid the necessary trackage across it, and then proceeded to develop the government requisition, and build its storehouses, and fill up the

marshes, and build wharves, and lay tracks, and do whatever was necessary in the matter.

Having seized this 2.6 acres, about nearly a year afterwards, in May, 1919, they having already taken possession under the exigencies of war, they then gave formal notice, 11 months afterwards, that the government would condemn it. They requisitioned it—that is, they condemned it—as essential to their purposes, and they did condemn it, took the 2.6 acres, under those circumstances, from this yard; and the only question before you now is:

“What is a fair and just compensation that they should pay to the railroad company for taking it?”

That they are bound to do. They have taken some of its property, and in any event they are bound to pay something, and it is for the jury to say how much they should pay. That depends on how much is just compensation, fair value, for what they did take, under all the circumstances. Whether it was undeveloped or not, it does not affect the railroad company's right to receive what was a fair compensation, a fair value. If you have a piece of land, which you have not seen fit to develop, and which is taken possession of for public purposes, you are still entitled—although you may not have used it yourself, you are still entitled—to fair compensation. The fact of your using it, or not using it, has nothing to do with it, except so far as using it may show what its value was.

So, in this case, the railroad company is entitled to something in any event, because unquestionably the government has taken the 2.6 acres of its land. The question is: How much? And I charge you as a matter of law that, when a man's property is taken compulsorily, against his will, except in so far as every citizen is supposed to join in the wish that proper measures should be taken for the common weal, or protection of his country; otherwise when he is required to yield it for the public good, he is entitled to full compensation—full compensation, whatever the jury under all the circumstances, finds as full compensation.

[1] Now, in this case, the railroad's position is that this yard was peculiarly adapted for their purposes, present and future, and that the taking of this area of 2.6 acres is equivalent to the destruction of the whole, so far as the value is concerned; that you might just as well take the whole 7½ acres, because the taking of the 2.6 acres is destructive of the purposes for which the railroad owned it—that is, for the purposes of a railroad yard; and if the jury find this to be correct, that the taking of this 2.6 acres is destructive of the uses for which they intended it of the remainder, and leaves the remainder as having no value to them, why then they are entitled to it. Of course, whatever little value applies to the rest of it must be deducted, because that is left to them; but if that remaining value is immaterial, as they claim it is, would mean that they practically would be paid for the whole.

There is an element which comes into the ascertainment of what is the just compensation. You have heard—gentlemen, I charge you, on that, that the railroad company, like an individual, is entitled to what-

ever the property is fairly worth at the time of the taking for the purposes for which it was intended, and which in your opinion it reasonably could within a reasonable period have received on application of the property to such purposes.

Now, to say that they bought it as a railroad yard, when the facts are that it would not be worth while to utilize it for a long distance into the future, is not to mean that it has the value of a present yard in use, because it may be that this enterprise would never have developed. When carried to an extreme, it becomes speculative—so speculative and uncertain that you could not take that as an element of value. If this enterprise failed, there was no further development, no further business there, the further use of this property as a yard would be unnecessary, and therefore the development of the property would not be an element of damage. The claim that they must be paid upon the hypothesis—that you had a well-settled place, teeming with a large population, and functioning with the activity and demand of a number of enterprises—if that is not established as existing at the time, or within a reasonable time, a reasonable period, within reasonable foresight, it does not become an element of value. And the next thing is that whatever additional value might have been given to it by the requisition of the government of the adjacent territory, and its development, is not to be considered by you, in giving the value to this yard.

The government for the public good condemned this large amount of property, and at an immense expense for public purposes has developed it. Well, that was due to the extraordinary circumstances of the existence of a great war, and does not enter into the computation; because fortuitously that happened and may give value to this railroad yard, it is not an element to enter into the computation; because that is an increase in value, not part of a business anticipation, but fortuitously from the general action of the government for the general good. This development is for the general good, and as a part of that general development this piece of property was taken at the same time.

As, for instance, if the government had requisitioned this adjoining property, and developed it to such an extent that there were 10,000 people upon it, say, and by chance they overlooked a small tract owned by an individual, which was necessary for access to it, it would not be possible for that individual to say:

“Yes; I had an old piece of barren, useless property; but now you have created a teeming city of 10,000 people, and I stand up and refuse to sell, refuse to allow you to have it, except at what the jury may find to be a most exorbitant price.”

That would not be permissible. It would not be correct to apply to it the term “blackmail”; but it would be a person making a tortious and improper use of a position that he had not created. That is frequently seen in what is called the “unearned increment”; the increase in the value of property, from the growth of population. Natural growth of that kind, such as the business development around this yard, is a natural and proper element to be considered by the jury in estimating the loss to a man losing his property. That is the unearned increment to

which he is entitled, but not when that unearned value arises from the act of the government for the common good, for the purposes of an exigency, and condemnation and taking of this piece of property was simply as part and parcel of that act of the government for the common good.

So I charge you that that existence of this developed property, which the government has developed at such an enormous expense (I think the testimony was some \$16,000,000) —its existence, with the concomitant value that it would naturally add to adjacent territory, does not constitute an element which you are to consider in estimating the value of this railroad yard.

Now, gentlemen, you are to consider the testimony. Every business man has a right to a reasonable foresight, anticipation of business, a reasonable mercantile anticipation of what is to come. If you buy a piece of land, you are entitled to a reasonable foresight as to what will be the utilization of gradual rise and development of land in the vicinity, and to that sort of increment you are entitled. You are entitled to take the donation (if you call it such) of this railroad yard, and are entitled to whatever value it possessed as a yard, and also what value might come from a reasonable anticipation of the development within a reasonable time; not an uncertain, vague, and speculative period, but a reasonable time.

When I say "donation"—Mr. Rhett testified that he considered his enterprise very much helped by the act of the railroads in coming there, but that would not mean the value proceeding from the railroads. The only value proceeding from this road; he testified that there was a terminal delivery railroad company, a small terminal delivery railroad company, to receive freight from these three railroads, and which had been built one-third by each; and that has been the only testimony produced of any actual payment by the Seaboard Air Line for the taking of this property; but I charge you that is not necessary.

Even if it was an absolute donation, they are entitled to its full value. If a parent devises to me a house, or a man gives me a house, you are not to say, if its condemnation is necessary, that I am not to be paid anything, because it cost me nothing. I am the owner of it, and I am to be paid whatever is the just compensation for the taking, irrespective of what it did or did not cost me. Now, the question is: What is the just compensation for these 2.6 acres of land?

On that I charge you: You are to consider its availability for a railroad yard, but not in the sense that, because you cannot get another railroad yard, you are to pay whatever is demanded. That would be absurd. That would be akin to the illustration you have heard: If a man's leg was taken off, you are to pay him any amount he chooses to demand for his leg, because it cannot be supplied again. So, even if this was the only place for a yard, the railroad company cannot say:

"Unless you can give me another yard, I demand a million dollars."

The full absurdity of such a statement is evident. It is not that anything is to be paid because it cannot be replaced; but the question for

the jury is to say: What is that yard fairly and reasonably worth to the owner, if it had used it?

One of the elements is what it would cost, of course, to get another yard. If you could not get another yard, however, the question is:

"What is it worth to you, its use, what was it worth to you, even if you could not get another yard? Suppose you did lose it—suppose you had 7 acres there and could not get another yard, what does it amount to, to you?"

That is one question.

Another element is:

"Well, what would it cost you to get another yard, the reasonable equivalent of this, for use?"

That is another element, not a hypothetical valuation at all. You see this was a perfectly undeveloped piece of land; but simply what it would cost you to get, within a reasonable time, not at any limited point—if you can get a yard within two miles or three miles. Railroad yards depend upon their propinquity and also upon their accessibility and availability. As to the freight going north, it may be that a yard further removed would save that much hauling. As to a yard nearer Charleston, that would mean that much further hauling. So it need not mean an adjacent yard; but whatever the jury finds to be a reasonable equivalent, at a reasonable distance. And that, gentlemen, I think is pretty much the expression of law. In all these cases, where compensation is asked, it is rather difficult to fix it.

You have heard on that point the evidence of a witness named Strom, who says the railroad can still use this yard. If it used it in its present condition, according to his testimony, it would have two or three tracks which are quite as long as any they would have, and those tracks would be equivalent storage for what could be reasonably expected of business to be developed.

On their outer tracks they would be restricted, I think the testimony of Col. Lamphere was, if they used the diminished 5 acres, instead of $7\frac{1}{2}$ acres, they would lose a storage (I think he said) of 59 cars, or 69—I don't remember. They would lose that storage. The testimony of Mr. Strom, that you have heard, was that, as to one or two tracks, they would have an equal length of storage, very nearly, as if they had kept the whole of the original 7 acres; but as to the five others—other tracks—they would have diminished lengths, which would necessarily diminish the storage.

Now, if it was utilizable—if in the opinion of the jury the diminished remainder was utilizable—for all reasonable expectations, then it is for you to say to what actual amount the real value of the yard was diminished, by the taking away of the 2.6 acres. You have heard the testimony on behalf of the Seaboard Air Line; that the taking of these 2.6 acres would practically destroy the value. That is a matter for the jury. That is your jurisdiction, because this is a question of fact; that is a question for you, whether it does or not.

If what is left could be reasonably used for a yard, to fulfill all immediate or reasonable anticipation of business to be performed within a reasonably future period, it is for the jury to say, if at all, to what

extent the value of the yard was really diminished by the taking away of the 2.6 acres of low land taken and filled up by the government. So it is just for you to say. You have heard the testimony. If they were given 2.6 acres on the other side of Cosgrove avenue, to what extent that would remedy the loss which they suffered. Whether it be correct that Cosgrove avenue is an avenue for business purposes and other purposes, right across, would not mean that the extended portion was practically useless. That is the position of the Seaboard Air Line Railway.

There is one point in there, that the mere existence of Cosgrove avenue does not mean, if they had this yard, they would necessarily be free of all crossing at Cosgrove avenue, because the main line now crosses Cosgrove avenue, and if the throat of the yard, as it originally existed, ended at Cosgrove avenue, as is the case, then all north-bound freight would have to be hauled over the main line, or any other track over Cosgrove avenue; although it is certainly unquestioned, if they attempted to carry 13 tracks, the full complement of the yard, according to the design of Mr. Strom, you would have that many more tracks crossing a public thoroughfare. So you are to consider whether the availability of the two yards immediately—one on the west side, and one on the other side, how they affect it. You have heard the testimony as to that.

[2] I charge you that the Seaboard Air Line is not bound to procure any other yard. It can remain quiet and say:

"You have spoiled my yard. I won't procure any other yard. You must pay me my damages."

And they can put their yard 5 miles off, if they see fit. They are not bound to procure any yard. The admissibility of that testimony is only on the point of showing that equally good yards could be procured without the excessive price demanded by the Seaboard Air Line Railway; and that, gentlemen, is about all the explanation I think it is necessary to make.

You must find something for the Seaboard Air Line Railway, if it is only one cent. They are entitled to something. I say one cent—of course, that is absurd; but I mean they are entitled to something, because their land has been taken; but in that case, if you find that the diminished land still afforded them a yard, still large enough for their reasonable necessities, within a reasonable time, of reasonable foresight, then you must estimate it, not upon the necessity of a yard, but upon what you think a piece of low marsh land of that character in that locality is worth.

What you will do is to give them just compensation for the loss—just to both sides. In these cases, the government does not stand in the position of a private enterprise, which is sometimes empowered to condemn for the purposes of private development. The government is supposed to be condemning for public exigency, and to subserve no private purposes. But none the less they are to pay just compensation to the person whose property is taken; which just compensation is to be borne by the whole country at large.

ELMER v. WALLACE, Com'r of Conservation of Alabama.

(District Court, M. D. Alabama, N. D., at Montgomery. July 19, 1921.)

No. 267.

1. **Injunction** ⇨85(2)—**States** ⇨191(2)—**State officers may be enjoined from enforcing void statute; suit to enjoin officers from enforcing statute not one against state.**

State officers may be enjoined from enforcing a state statute which is void as in violation of rights secured by the Constitution of the United States, and a suit for that purpose is not one against the state.

2. **Commerce** ⇨57—**Provisions of Alabama Shrimp Act held void as imposing restraint upon interstate commerce.**

Alabama Shrimp Act, by section 7, imposes a tax of 5 cents per barrel on salt water shrimp taken from the waters of the state for canning, drying, or shipping within the state. Section 8, while making it unlawful to transport such shrimp by water beyond the boundary of the state unless the usual price paid therefor at the place to which they are transported is higher than paid in the state, also imposes a tax of 20 cents per barrel on shrimp so transported outside, and section 12 prohibits any person who has not for more than a year been a bona fide resident of the state from catching shrimp in its waters for shipment out of the state by water. *Held*, that sections 8 and 12 were manifestly intended to discriminate against canners and packers in other states by imposing hindrances and burdens on the interstate traffic in fresh shrimp, and are void as in violation of the commerce clause of the Constitution.

In Equity. Suit by E. E. Elmer against John H. Wallace, Commissioner of Conservation of the State of Alabama, for permanent injunction. Decree for complainant.

Stokely, Scrivner & Dominick, of Birmingham, Ala., for plaintiff.

Harwell G. Davis, Atty. Gen. of Alabama, and Hugh White, Sp. Asst. Atty. Gen. of Alabama, of Gadsden, Ala., for defendant.

CLAYTON, District Judge. The plaintiff, a citizen of Mississippi, engaged in the shrimp packing business at Biloxi in that state, brought his bill to enjoin the enforcement by the defendant of the act of Alabama approved September 2, 1919, called the Shrimp Act (Gen. Acts Ala. 1919, p. 252). It is averred that sections 8 and 12 of the act are violative of the Constitution of the United States in the particulars hereinafter named. The defendant is Commissioner of Conservation of this state—hereafter called Commissioner—and is charged with the administration of this law.

The act under scrutiny declares all salt water shrimp found in any of the waters of the state to be the property of the state for the purpose of protecting the same and regulating the manner in which they shall be taken and marketed. By way of parenthesis it may be observed that the shrimp belong to the state without this unnecessary legislative declaration. A close season is provided from June 1, to August 1, in each year. An annual license tax is imposed on seines used in catching shrimp and is graduated according to the length of the seines. A like tax is put on each boat used in the industry, the tax on boats owned by nonresidents of the state being double that on boats owned

by residents. A standard of measure for shrimp is established. Ports of entry are provided for, and the Commissioner is authorized to make necessary rules and regulations not inconsistent with the act. Shrimp fishermen and purchasers from them are required to make certain reports to the chief oyster inspector of the state, who, with his assistants, is charged with certain duties.

Sections 5, 7, 8, and 12 of the act are as follows:

"Sec. 5. That it shall be unlawful for any person to use any boat for the purpose of drawing a seine, used in catching shrimp, or hauling or carrying shrimp, without first having secured an annual license due and payable on the 1st of October in each and every year, as follows: for each and every boat owned by a resident of this state, up to five ton capacity, shall be an annual license fee of \$5.00; for every boat, from five to fifteen ton capacity, shall be an annual license fee of \$15.00; and for all boats over fifteen ton capacity shall be an annual license fee of \$25.00; that for all boats owned by nonresidents of this state, used for the purpose of catching or hauling shrimp, within the state up to five ton capacity, shall be due and payable on the 1st of October, in each and every year, an annual license of \$10.00, for every boat, owned by nonresidents, used for the purpose of taking or hauling shrimp within the state, of from five to fifteen ton capacity, shall be paid an annual license fee of \$30.00, and for every boat used by nonresidents of this state for the purpose of taking or hauling shrimp within the state, of over fifteen ton capacity, shall be paid an annual license fee of \$50.00. Said licenses to be issued by the State department authorized by law to administer the laws of this state for the protection of shrimp."

"Sec. 7. That it shall be unlawful to catch or market salt water shrimp for commercial purposes, that is, for canning, drying, or shipping within the State unless a tax of five cents per barrel be paid by the person, firm or corporation, catching the same for the purpose of canning, drying or shipping, or purchasing the same from independent shrimp fishermen for the purpose of canning, drying or shipping, and said tax to be paid but once.

"Sec. 8. That it shall be unlawful for any person, firm or corporation to take, carry or transport by water, any salt water shrimp, taken in the waters of Alabama, except canned shrimp, to a point beyond the boundary line of said State unless the usual market price, paid by canneries and dealers, for shrimp in the fresh state, in the place to which they are so transported, is higher than the price paid for same in this State; provided that every person, firm or corporation, transporting salt water shrimp by water, taken within the state of Alabama to a point outside of the state line, shall pay a tax of twenty cents per barrel upon such shrimp transported beyond the boundaries of said state, except canned shrimp, before said shrimp are permitted to leave the state."

"Sec. 12. That no person who has not been a bona fide resident of the state for more than one year, next preceding, shall be permitted to catch shrimp from the waters of this state, to be shipped out of this state by water."

The plaintiff avers that his packing plant, equipment, and boats purchased for use in connection with his business represent an investment of approximately \$30,000; that he has paid to the state of Alabama on 12 of his boats the license tax required; that the shrimp available for the operation of his business migrate during the year so that at certain times shrimp are to be found off the coast of Louisiana, at other times off that of Mississippi, and at still other times off that of Alabama; and that unless he is permitted to catch shrimp with his own fleet of boats or to purchase shrimp from other fishermen within Alabama waters during the time shrimp are found there, and transport them to his packing plant at Biloxi, then it will be necessary, during such times as the shrimp have migrated to Alabama waters, to

close down his plant and disorganize his force at great and irreparable loss, unless he should resort to the alternative of shipping his shrimp to Biloxi from Alabama by railroad and not by water, and that even in the event of such alternative, still great and irreparable loss would be visited upon him; and that he would, in either case, be damaged to an extent exceeding \$3,000 if this act is enforced. The bill further charges in substance that the act in permitting the free and unlimited transportation in interstate commerce of fresh shrimp by rail, and of canned shrimp by rail and by water, and at the same time imposing restrictions on the shipment in interstate commerce of fresh shrimp by water, does not operate and was not intended to operate for the protection and conservation of shrimp, but was designed and is intended to favor Alabama shrimp packers engaged in the business at Bayou la Batre and other Alabama places to the great detriment and irreparable loss of this plaintiff and other competitors engaged in the shrimp packing industry at Biloxi, Miss., and other points outside of the state of Alabama. The bill is supported by the evidence and, in essential particulars, by the agreed statement of facts.

By consent of the parties in open court the cause is now submitted for final decree upon the bill, the application for perpetual injunction, the agreed written statement of facts, the defendant's answer, admitting material allegations of the bill and denying in short and general terms certain paragraphs of the bill not necessary to mention here, and on the motion of the defendant to dismiss the bill for the want of equity.

It is a familiar rule that the motion to dismiss a bill for the want of equity does not challenge the allegations of facts of the bill, but, on the contrary, so far as such motion is concerned, admits them to be true. Inasmuch as the bill does contain equity, as it will be hereinafter shown, the motion must be denied.

[1] As to the ground of the motion to dismiss the bill for the alleged reason that this is a suit against the state, little, if anything, need be said. All authorities recognize that a state as a sovereign is not subject to suit, that the state cannot be enjoined, and that the state officers when sued cannot be restrained from enforcing the state's laws. However, a void enactment of the state, that is, one in conflict with the Constitution of the United States, is not a law, and being a nullity it confers no authority. Accordingly a state land commissioner was enjoined from proceeding under an unconstitutional act to cause irreparable damage to the defendant's property rights. *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363. Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce. *McNeill v. Southern Ry.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; *Ry. Com. v. Ill. Cent. R. R.*, 203 U. S. 345, 29 Sup. Ct. 458, 53 L. Ed. 760. See other cases cited in *Hopkins v. Clemson College*, 221 U. S. 636-644, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243; *Van Deman & Lewis Co. v. Rast* (D. C.) 214 Fed. 827-831.

[2] While the bill assails the act upon several grounds, the controlling question in the case is whether or not sections 8 and 12 of the

act, hereinabove set out, are a device by the state to regulate or hamper interstate commerce in violation of subdivision 3, par. 8, art. 1, of the Constitution of the United States. Of course, if the answer to the question is in the affirmative, such sections of the act cannot stand. And it matters not that the plan is novel or artful, or that it may foster the shrimp packing industry in Alabama, for if the real object sought is to do this by putting a restriction upon interstate commerce, the attempt must fail. It is hardly necessary to say that the power of Congress over commerce between the states is exclusive of such power on the part of any state, for in constitutional law this is so well settled by the adjudged cases as to be elementary. And it is also equally as well settled that transportation of persons or commodities from one state into another is interstate commerce.

It is well to consider section 7 of the act in *pari materia* with sections 8 and 12. It will be observed that section 7 provides:

"That it shall be unlawful to catch or market salt water shrimp for commercial purposes, * * * or shipping within the state unless a tax of five cents per barrel be paid."

And section 8 provides that salt water shrimp taken in Alabama, except when canned, must not be transported, by water, "to a point beyond the boundary line of said state unless the usual market price, paid by canneries and dealers for shrimp in the fresh state, in the place to which they are so transported, is higher than the price paid for same in this state"; and it also provides that such shrimp taken within the state of Alabama and transported or to be transported to a point outside of the state, by water, shall bear a tax of 20 cents per barrel before the shrimp are allowed to leave the state.

The particular provisions now considered of the act, summarized and analyzed, show: First, that this legislation invites or permits any one to catch shrimp in Alabama waters not to be shipped out of the state in fresh or raw condition, by water, upon the payment of a license and a tax of 5 cents per barrel; second (a) that if the shrimp caught are for transportation beyond the state, then the transportation of them out of the state, by water, is made unlawful, unless the price of shrimp at the point to which they are shipped in another state is greater than the price in Alabama; and that then (b) the tax is quadrupled upon each barrel of fresh shrimp if the transportation is by water.

The act itself and the facts in the case, including the public utterances of the Commissioner, are convincing that the purpose of the Legislature was to build up the shrimp packing industry in Alabama, at Bayou la Batre and elsewhere in the state, by imposing burdens and hindrances upon the interstate traffic in fresh or raw shrimp, with the obvious purpose, the necessary consequence, that Biloxi, Miss., and other places outside of Alabama and the industry there, should be discriminated against, and the industry in Alabama correspondingly favored. However commendable it may be on the part of the Commissioner and the Legislature to endeavor to encourage the development of the shrimp packing industry in Alabama, they cannot do so as it has been attempted here by invading the plenary and exclusive control of interstate commerce committed by the Constitution to the

Congress; and I may say any student of the causes inducing the change of the Confederacy of the United States of America into "a more perfect Union" knows that one of the chief of these causes was the desire to prevent any state, by its own legislation, from discriminating against the commerce and industries of any other state, even though such legislation might result in fostering the enterprises of the state so legislating.

Perhaps it is unnecessary to say more or to answer the insistence on the part of the state that her police power is invoked in the statute to conserve the shrimp in her waters and to provide proper rules for the catching and inspection of the same. If the act did no more than that, it would be unobjectionable. Admittedly the state can conserve and provide rules for the catching and inspection of shrimp and impose reasonable licenses or fees for the enforcement of an inspection law. Undoubtedly the police power is the power not delegated to the federal government but remaining in the states, and can be resorted to in regulating their own welfare, as they understand their welfare, their internal or domestic concerns; and it is also true, to state the proposition in another form, that all police power originally or inherently belonging to the state remains with the state except where expressly or by fair implication it has been taken away by the Constitution of the United States or the laws enacted in pursuance thereof. And, again, it has been said that it is not difficult to know where and when this power begins, but to say when and where it terminates is often a matter of controversy, and therefore is sometimes submitted for judicial ascertainment. It is sufficient to say that the books are full of reported cases illustrating the application of the principle that the state cannot impose restrictions or burdens upon interstate commerce under the pretext of conservation, inspection, or regulation. These cases show that a state has the authority to conserve its resources, e. g., wild animals, birds, oysters, etc.; to protect public safety, morals, and health; to provide inspection regulations of food, gasoline, etc.; and, generally, to do anything within the comprehensive police power of the state inherent in and not surrendered by such sovereignty. On the other hand, these cases vindicate the proposition that a state cannot impinge the power delegated to the federal government, as, for instance, a state cannot require inspection fees so excessive in amount for the enforcement of its laws as to interfere unreasonably with the freedom of interstate commerce; and, furthermore, the state cannot under any guise legislate to promote her own internal commerce or enterprises to the detriment of free commerce between the states and with foreign nations. And this case is but another illustration where the state has attempted to restrict the freedom of commerce between the states.

It is out of deference to the argument made for the defendant that the case of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, is examined. There the statute of Connecticut forbade the possession of game killed or taken in that state for transportation beyond its boundaries. The court held, of course, that this enactment was within the police power of the state. How different this

case is from that is too evident to require a restatement of the facts and features of each or the legal principles governing them.

The defendant cites *State v. Harrub*, by the Supreme Court of Alabama, 95 Ala. 176, 10 South. 752, 15 L. R. A. 761, 36 Am. St. Rep. 195. There the statute prohibited the shipment beyond the limits of the state of oysters taken from the waters of Alabama while such oysters were in the shell, and also inhibited nonresidents of the state to take oysters from the waters of the state. Obviously, the intention of the Legislature was to keep all fresh oysters in the shell in the state for the use of the people of the state, and it was therefore within the police power of the state to do this.

Here the act, under express terms of section 7 and by fairest implication under sections 8 and 12, recognizes fresh shrimp as articles of interstate commerce and permits their shipment in unlimited quantities in such commerce by rail and otherwise, except by water, upon the payment of license and the tax of 5 cents per barrel, and upon making the required reports. Recognizing fresh shrimp as a commodity of general trade and interstate commerce, as the act clearly does, the restrictions attempted to be imposed by sections 8 and 12 against the shipment of such fresh shrimp by water, and the quadrupled tax upon the commodity, are evidently a burden upon interstate commerce, and, as such, hostile to the commerce clause of the Constitution. Perhaps it is not too much to say that further argument, or any argument at all, is unnecessary. The vices in sections 8 and 12 which have been pointed out are sufficient to compel this court to declare that such sections are null and void and that they cannot be enforced.

If further authority for this conclusion is desired, *State v. Ferrandau*, 130 La. 1035, 58 South. 870, Ann. Cas. 1913D, 1170, is in point. There Louisiana sought to create within the state a monopoly of the canning of oysters taken from its waters, just as here the state of Alabama has attempted to do in the canning of shrimp taken from her waters, by prohibiting the shipment of oysters beyond the limits of Louisiana for canning or packing outside of that state, while the act permitted the unlimited traffic in interstate commerce of oysters for any other purpose. The Supreme Court of Louisiana, in a very able opinion by Mr. Justice Monroe, with unanswerable logic, condemned the statute and cited a number of sustaining decisions, among them *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 35 L. Ed. 862, to the effect that—

"A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products of its own or of other states."

It is of doubtful importance here to take note of the other ground advanced by the plaintiff in his attack on this statute, for I think what has been said is sufficient to dispose of the case. It is true that the act makes it unlawful to ship shrimp by water from Alabama to a place beyond the state's boundaries unless the price of shrimp at such place is greater than the price prevailing at the time in Alabama. Man-

ifently, there can be no offense under this particular feature of the act unless shrimp are cheaper at the given time of shipment at, say, Biloxi in Mississippi than at, say, Bayou la Batre in Alabama. And the contention of the plaintiff is that said section 8 of the act, in undertaking to create a misdemeanor without providing any fixed standard for the determination of guilt or innocence or whether there has been any offense at all by one accused of its violation, contravenes well-known principles of criminal jurisprudence and constitutional law. Plainly, this section 8 makes the act of the transportation from Alabama a misdemeanor dependent upon a fact that may exist in another state according to the fluctuating market governing a merchantable commodity. This provision of the act surely is indefinite and uncertain and fixes no immutable standard of guilt, but leaves such standard to the variant and varying prices of shrimp in places beyond the confines of the state. By the terms of the statute the locus of the crime of illegal transportation is in Alabama, and the locus of the fact essential to render the transportation criminal is in another state; for instance, Mississippi. A limited investigation of commentaries and decided cases has not revealed to me any effort at legislation containing provisions very much like sections 8 and 12 of this act. On this phase of the case, and with due deference, it may be said that at least the draftsman of the provision seems to have possessed the ability to invent a novel device, but that the device creates a valid legal offense is doubtful.

I think there is parity of principle in this phase of the act with the principle in the enactment condemned by the Supreme Court in *U. S. v. Cohen Gro. Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. —, decided February 28, 1921; *Internat. Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 Sup. Ct. 853, 58 L. Ed. 1284.

Decree will be entered in harmony with this opinion perpetually enjoining the defendant from enforcing sections 8 and 12 of the act of Alabama approved September 2, 1919, called the Shrimp Act.

ARMOUR & CO. v. LOUISVILLE PROVISION CO.

(District Court, W. D. Kentucky. January 22, 1921.)

No. 52.

1. **Trade-marks and trade-names and unfair competition** ⇔3(1)—**Star cannot be appropriated as trade-mark.**

The word "star," or the symbol of a star, cannot alone be appropriated as a trade-mark, since it does not in any way indicate the origin of the goods.

2. **Trade-marks and trade-names and unfair competition** ⇔3(1)—**Mere word cannot be appropriated, unless it indicates origin or has acquired secondary meaning.**

A mere word cannot be appropriated by an individual or corporation as a trade-mark, unless in itself it indicates the origin of the goods marked thereby, or has by use acquired an exclusively secondary meaning.

3. Trade-marks and trade-names and unfair competition ⇨75—Actual deception of buyers essential to proof of unfair competition.

In a suit to restrain unfair competition, where there was no infringement of a trade-mark, the proof must establish that there was actual deception of the buyers by the defendant, in passing off its goods as those of plaintiff.

4. Trade-marks and trade-names and unfair competition ⇨70(1)—Sales under distinctive mark held not unfair competition.

Sales by defendant under a distinctive trade-mark, though it included a word which was claimed by plaintiff as its trade-mark, do not establish unfair competition, where there was no proof purchasers were deceived thereby, or of any attempts to deceive purchasers, except occasional attempts by tricky retailers.

In Equity. Suit by Armour & Co., a corporation, against the Louisville Provision Company to restrain infringement of the trade-mark and unfair competition. Bill dismissed.

Helm Bruce and Bruce & Bullitt, all of Louisville, Ky., and A. B. Stratton and Offield, Towle, Graves & Offield, all of Chicago, Ill., for plaintiff.

Humphrey, Crawford, Middleton & Humphrey, of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. The bill of complaint was filed August 21, 1918. It alleges that the plaintiff, Armour & Co., and the partnership of the same name, which it succeeded, has, since 1871, been engaged in the business of preparing, putting up, and packing meat products, including hams and bacon, at Chicago, Ill., and elsewhere in the United States, and selling and distributing such meat products through its various agencies in Chicago and elsewhere throughout the United States, and particularly throughout the state of Kentucky and the Western district thereof.

It is further alleged that about the year 1877 the partnership styled Armour & Co., in good faith and without knowledge of any prior rights, had adopted as their trade-mark the symbol of a star, and also as an alternative the word "Star," and that thereafter Armour & Co. used that trade-mark continuously upon hams and bacon of high quality throughout the United States, until that partnership was succeeded by the plaintiff corporation, and it avers that that trade-mark, as associated with hams and bacon, was well known as the trade-mark of the plaintiff and its predecessor. Plaintiff further avers that, by virtue of its acquiring the going business, good will, assets, and trade-marks known as the "Armour Star," it is the sole and exclusive owner of said trade-mark, namely, the symbol of a star and the alternative thereof, the word "Star" as applied to hams and bacon, and that it has extensively exploited and advertised the same throughout the country, including the state of Kentucky. It also avers that said "Star" trade-mark has always been used upon hams and bacon of the choicest selection, and that such hams and bacon are of the highest grades, and that the "Star" trade-mark and the good will appurtenant thereto are of great value to the plaintiff.

It is then averred that the defendant corporation was organized in 1910, and went into the business of preparing, packing, and selling meat products, and became a competitor of the plaintiff; that it had at the time of its organization notice and was well acquainted with the trade-marks and brands of the plaintiff used upon its meat products, but that nevertheless it adopted as its trade-mark for hams and bacon and certain other products the symbol of a star associated with the word "Southern," and adopted as the alternative of that trade-mark the word "Star," also associated with the word "Southern," and that the use of this trade-mark was largely unaccompanied by the name of the defendant.

The plaintiff then avers that the trade-mark "Southern Star," adopted and used by defendant, is a palpable infringement of the "Star" trade-mark of the plaintiff, and had been since the year 1913; that such infringement continued up to the time of the filing of the bill, and that the sale of the meats with this brand thereon had been very large throughout the state of Kentucky, to the great damage of the plaintiff. The bill also alleges that the defendant had made application for the registration, as a trade-mark, of the word "Southern" in connection with the "Star," but that such registration had been refused by the Patent Office.

Many details were stated in the bill, which it is unnecessary to repeat here, with the result that the plaintiff claims that its trade-mark has been infringed by the defendant, to the great injury of the plaintiff, and also that the conduct of the defendant has been unfairly competitive and fraudulent as to the plaintiff's rights in its trade-mark and greatly to its injury. It is thereupon insisted that the plaintiff is entitled to an injunction against the use by the defendant of its trade-mark, and that the plaintiff has been damaged to the extent of \$1,000,000.

The defendant in its answer, after admitting certain averments of the bill, puts in issue all its other statements. Especially does it do this, first, as to plaintiff's claim to the right to appropriate for its exclusive use as a brand or trade-mark the word "star," or any symbol thereof; second, as to the averments that the defendant had in any way used the brand "Southern Star" with any purpose or design to deceive or impose upon the public, or any purchaser or user thereof, or that in fact any purchaser or user thereof had in any way been deceived by anything done by defendant; and, third, in respect to the averments that defendant had ever been guilty of any infringement upon plaintiff's rights, or had been guilty of any sort of unfair competition in respect thereto. On the contrary, defendant avers that during all its existence it had only used upon its products the plainly distinguishable words "Southern Star."

Much testimony was heard at the trial of the issues involved, and the arguments of counsel thereon were elaborate and able, showing careful study and much research. Nevertheless for obvious reasons we think we need not deal at all elaborately with those issues, nor with the testimony heard upon the respective sides. We shall therefore

state (a) our conclusions generally on the issues of fact, and (b) our conclusions, equally general, on the questions of law.

The Facts.

First. We find the fact certainly to be that Armour & Co., alike while it was a partnership and since it transmuted that partnership into the present corporation, has used continuously and very extensively for at least 45 years and throughout the entire country, including Kentucky, the word "Star" in connection with the words "Armour & Co.," or the word "Armour," and also an emblem of a star in connection with those words upon vast quantities of its best hams and bacons. We attach at this point specimens of those marks which are now of special importance, namely:



[That part of the label here printed in black was blue in the original; white background in the oval as here shown was yellow ochre in the original.]

Armour's
STAR

U.S. INSPECTED & PASSED EST 2A

Second. That since 1910 the defendant in the state of Kentucky, with full knowledge of the use by the plaintiff of its words and emblem in that connection, as above explained, has itself used the word "Star" in connection with the word "Southern," and to the extent of about 15 per cent. in connection also with the words "Louisville Provision Company," upon its hams, bacon, and meats prepared in Louisville, Ky., and sold throughout that state. In combination therewith it also used an emblem of a star. We now attach hereto copies of such of the marks and brands used by the defendant as appear to be material, viz.:



[The red of the original label shown just above is here printed in dark cross-shading; the narrow light inner band and the words "Louisville, Ky.," were yellow in the original label.]



U. S. INSPECTED AND PASSED BY DEPARTMENT OF AGRICULTURE
ESTABLISHMENT No. 995
PATERSON P.P.CO., PASSAIC, N.J.

[On the above label the words "Southern Star Brand" and "Ham" were printed in red (here shown white) and black. A red square appeared in each corner of the upper rectangle, here shown white. The narrow white borders here shown around the rectangle, the oval, and in the lower part of the cut were red in the label. Small white designs in the spaces around the oval as here shown were red in the label.]

Third. We also find that Joseph M. Emmart, one of the organizers of the defendant company, was, at the time of its organization, well acquainted with plaintiff's brands and the use thereof.

Fourth. We find that the defendant corporation was organized in Louisville in 1910, and that soon afterwards it begun the use, on bacon

and hams, of the brands, samples of which we have already put in this opinion; that the plaintiff promptly acquired full information respecting those brands and defendant's use thereof; that this action was brought August 21, 1918, but that notwithstanding these facts the testimony heard in plaintiff's behalf does not satisfactorily, and without mere inference or hearsay, show that any purchaser whatever, either for his own use or for sale to others, has been deceived into the use of any of defendant's hams or bacon, or into any purchase thereof, as those of the plaintiff, instead of those of the defendant. On the contrary, the fact that no person of ordinary intelligence was at all likely to be so deceived by defendant's brands and marks was shown clearly by the testimony of so many witnesses that further testimony on that phase of the case was stopped by the court when quite a score of other witnesses were present ready to testify for defendant to the same effect.

In the almost entire absence of any convincing testimony from the plaintiff on this point, the court thought further testimony thereon by the defendant was unnecessary. In saying this, the court does not by any means overlook the testimony of the witnesses for the plaintiff. Quite the reverse, for we have reached these conclusions after a careful study of every part of that testimony, and especially as it bears upon the question of infringement and unfair competition. Six or more of the present or former employees of the plaintiff testified in its behalf as to "confusion" resulting from the defendant's brands. They had been sent to search for it, but, without excluding those parts of it which can fairly be termed hearsay, there is nothing of importance developed as affecting the defendant, though "tricky retailers" (*Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 33, 110 C. C. A. 596, 37 L. R. A. [N. S.] 258) may have been discovered. Other testimony of the plaintiff was also heard, much of which was obviously hearsay; but, remarkable as it may seem, after the lapse of so many years, not one purchaser from either party to this suit testified that he had been in any way deceived or imposed upon by defendant's brands as being those of the plaintiff.

Certainly, taking together all the testimony of all plaintiff's witnesses, it does not, in our opinion, when fairly considered, in any way meet the demands of the onus resting upon the plaintiff, especially in view of the explicit testimony of witnesses for the defendant and of the applicable rules of law so frequently announced by the Circuit Court of Appeals of this circuit in cases presently to be cited. Consequently we find that in Kentucky, and especially in this district thereof, the public have not at any time since defendant began its business been deceived into the purchase or acquisition of defendant's products as those of the plaintiff by the use by defendant of its own brand or otherwise.

Fifth. The plaintiff does not seem to the court to have shown, even *prima facie*, that any such general or specific damages have come to it from anything done by the defendant, or for which the latter could fairly be held responsible, as should entitle the plaintiff to an account-

ing for damages in the premises in respect to a trade-mark. And indeed we rather think that nothing now is really insisted upon by the plaintiff, except an injunction to prevent any unfair competition with it by the defendant.

The Trade-Mark.

The plaintiff in its bill frequently describes its trade-mark. It especially avers that in or about the year 1877 its predecessor in name (the partnership of Armour & Co.) in good faith, and without the knowledge of any prior rights or use that might conflict therewith, adopted as their trade-mark for hams and bacon the symbol of a "star," and also adopted as an alternative for that symbol the word "star." It shows that it, as a corporation, acquired and succeeded to all the rights of the partnership in that trade-mark, and throughout the bill the description of a trademark is always made in the same terms, so that there can be no doubt that the plaintiff's trade-mark, as claimed and asserted by it, is the symbol of a star and as an alternative the word "star." It is indeed, at least negatively, made altogether clear that the words "Armour's Star" in no way constitute the trade-mark claimed by the plaintiff. And there may be some point in this, inasmuch as possibly it could not well be that the use of the brand "Southern Star" would infringe upon the use of one plainly called "Armour's Star."

[1] The symbol of the star and alternatively the word "star" being the one trade-mark claimed by the plaintiff, the question arises whether either the symbol of a star or the word "star" can be appropriated for trade-mark purposes by any single individual. It is somewhat remarkable that many questions pertaining to trade-marks have been treated so variously and with so many distinctions by the courts throughout our broad country that at times it is extremely difficult for the lower courts to determine what is to be regarded as settled. This situation confronts us now in respect to the claim of the right to the exclusive appropriation in its own trade by one corporation of the word "star," one of the oldest words in human language (Genesis, chapter 1, verse 16), and of its counterpart, the emblem of a "star." So intimately connected, indeed, are a star and an emblem or picture thereof that we shall consider both as subject to the same rules of law.

Applicable or at least somewhat illustrative cases are very numerous, and it would seem to be useless for a court of first instance to go extensively into a study or analysis of many of them. We shall therefore confine ourselves to a few cases which appear to be directly in point. The first of these is Galena-Signal Oil Co. v. W. P. Fuller & Co. (C. C.) 142 Fed. 1002, 1007. It decided the very point involved here, and clearly states the reasons therefor. We think those reasons are sound and should be controlling. On page 1007 of the report, Morrow, Circuit Judge, said:

"The action is limited to the charge that the defendant has infringed a technical trade-mark in violation of a right of property wherein the fraudulent intent is presumed. The object of the suit is to restrain a further violation of the alleged right of property. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365. This issue

makes it necessary to consider the nature of a trade-mark. What is it? It has been determined that to acquire the right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctly, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 14 Sup. Ct. 151, 37 L. Ed. 1144. It is manifest that the symbol or representation of a star cannot by its own meaning indicate the origin or ownership of such an article as oil. It can only, then, be by association that its origin or ownership can be so indicated. But the representation of a star is a familiar symbol, and can be found in every character of business and associated with all kinds of products and goods. Standing alone, it is not sufficiently distinctive to answer the requirements of a trade-mark, for the reason that it has been adopted by many manufacturers and producers for all kinds of articles. It can be found all through the *Patent Office Gazette*, but always in connection with some other mark or device to indicate origin or ownership. The symbol or device which one is at liberty to affix to a product of his own manufacture as a trade-mark must be one not previously appropriated, and which will distinguish the article from one of the same general nature manufactured or sold by others. *Manufacturing Co. v. Trainor*, 101 U. S. 51, 54, 25 L. Ed. 993."

Had the plaintiff adopted for its trade-mark the words "Armour's Star," they might possibly have so indicated origin as to make it valid, but not so the word "star" or the symbol of a "star" standing alone, for it seems to be well settled that a word in common use, and which does not of itself indicate origin, cannot be exclusively appropriated by any one as a trade-mark. And especially would this be true of a word which, like "star," may simply indicate a high grade or quality of the article upon which it is used—the word "star" in that connection very appropriately indicating excellence or high quality, and being, therefore, descriptive of the article.

In *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 673, 21 Sup. Ct. 273, 45 L. Ed. 365, it was said of a trade-mark that—

"It may consist in any symbol or in any form of words, but, as its office is to point out distinctively the origin or ownership of the article to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose."

This view was very distinctly reaffirmed in *Standard Paint Co. v. Trinidad, etc., Co.*, 220 U. S. 446, 453, 31 Sup. Ct. 456, 457, 55 L. Ed. 536, as was also the proposition clearly announced in *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, where it was held that—

"A trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become so by association."

In *Kellogg, etc., Co. v. Quaker Oats Co.*, 235 Fed. 657, 149 C. C. A. 77, the Circuit Court of Appeals (Sixth Circuit) held that—

"A descriptive term, which does not indicate the origin of an article, is not the subject of a technical trade-mark."

And it may be remarked in respect to the instant case that the testimony heard was not sufficient to show that there had been established in the public mind a secondary meaning of the word "star."

In *American Tobacco Co. v. Globe Tobacco Co.* (C. C.) 193 Fed. 1015, it was held that the word "Union" cannot be appropriated as a trade-mark. A similar ruling upon the word "Keepclean" was made in *Florence Manufacturing Co. v. J. C. Dowd & Co.*, 178 Fed. 73, 101 C. C. A. 565; the court holding that this union of the two words was altogether descriptive.

In *Greene, etc., Co. v. Manufacturers' Co.* (C. C.) 158 Fed. 640, the word "stud" was held not to be the subject of appropriation as a trade-mark, and in *Hygienic Co. v. Way*, 137 Fed. 592, 70 C. C. A. 553, it was held that the word "muffler" could not be the subject of a trade-mark. Many other cases of the same character might be cited.

[2] These citations would seem satisfactorily to show that no mere word, unless it, per se, indicates the origin of the merchandise or other property upon which it is placed, or has by use acquired an exclusively secondary meaning, can be appropriated as a trade-mark thereon. This would seem to be all that need be said in this connection, but as possibly illustrative of the applicable reasoning we may cite a few cases where geographical names or the names of localities were unsuccessfully attempted to be established as trade-marks.

In *Columbia Mill Co. v. Alcorn*, 150 U. S. at pages 464, 465, 14 Sup. Ct. 152, 37 L. Ed. 1144, speaking through Mr. Justice Jackson, the Supreme Court said:

"Second. The word 'Columbia' is not the subject of exclusive appropriation under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark. In *Canal Co. v. Clark*, 13 Wall. 311, 321, it was held that the word 'Lackawanna,' which is the name of a region of country in Pennsylvania, could not be, in combination with the word 'coal,' constituted a trade-mark, because every one who mined coal in the valley of Lackawanna had a right to represent his coal as Lackawanna coal. Speaking for the court, Mr. Justice Strong said: 'The word "Lackawanna" was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of a region, and of course of the earths or minerals in the region. * * * It must be then considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation.' In *Koehler v. Sanders*, 122 N. Y. 65, it was held that the word 'international' could not be exclusively appropriated by any one as a part of a trade-name, because the word was a generic term in common use, and in its nature descriptive of a business to which it pertains, rather than to the origin or proprietorship of the article to which it might be attached. In *Connell v. Reed*, 128 Mass. 477, it was held that the words 'East Indian,' in connection with 'Remedy,' placed upon bottles of medicine, were not the subject of a trade-mark. In that case Mr. Chief Justice Gray, speaking for the court, said 'that it was at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own, or some other name, in which he has a peculiar right.'"

See, also, the interesting opinion in *Apollo Bros. v. Perkins*, 207 Fed. 530, 125 C. C. A. 192, in which it was held that the geographical name of "Nubia" could not be the subject of a trade-mark. In its opinion in that case (207 Fed. 533, 125 C. C. A. 195) the court said:

"The policy of the law is to foster and not to hamper competition, and it only permits a monopoly in the use of a trade-mark when it has become the absolute and exclusive property of the first user—good against the world. A geographical name can never become such property, and the utmost the first user can insist is that no one else shall so use it as to constitute unfair competition."

Unfair Competition.

We have found it impossible to escape the conclusion that the testimony heard is not sufficient to support plaintiff's claim to a valid trade-mark; but that fact, of itself, does not bar its claim based on the assertion that the defendant has been guilty of unfair competition in connection with plaintiff's brands on hams and bacon. We are thus brought to the consideration of the remaining and probably the most important of the claims asserted in this action.

[3] In *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 30, 31, 110 C. C. A. 600, 37 L. R. A. (N. S.) 258, the Circuit Court of Appeals of this Circuit, speaking through Judge Knappen, said in its opinion:

"The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition. In *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 9 Sup. Ct. 166, 168, 32 L. Ed. 535, Justice Field said: 'The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff. *McLean v. Fleming*, 96 U. S. 245 (24 L. Ed. 823); *Sawyer v. Horn* (C. C.) 4 *Hughes*, 239 (1 Fed. 24); *Perry v. Trufitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84.' In *Howe Scale Co. v. Wykcoff, Seamans & Benedict*, 198 U. S. 118, 140, 25 Sup. Ct. 609, 614, 49 L. Ed. 972, Chief Justice Fuller said: 'The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.' In *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, it was held by this court in an opinion by Judge (now Mr. Justice) Day that the fact even that the defendant deceives the public as to his goods by fraudulent means does not give a right of action unless it results in the sale of such goods as those of the complainant."

Since that case was decided, the same court in many other cases has reasserted the proposition there announced. Notably this was so in *Edward Hilker Mop Co. v. United States Mop Co.*, 191 Fed. 613, where, on page 618, 112 C. C. A. 176, 181, it said:

"The rule is well settled that nothing less than conduct tending to pass off one man's business or merchandise as that of another will constitute unfair competition."

Upon this proposition many cases were cited.

In *De Voe Snuff Co. v. Wolff*, 206 Fed. 423, 124 C. C. A. 305, the court said:

(275 F.)

"A proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby"—citing many authorities also.

In *Samson Cordage Works v. Puritan Cordage Mills*, 211 Fed. at page 608, 128 C. C. A. 208, L. R. A. 1915F, 1107 the court, in speaking of unfair competition, said:

"The existence of a valid trade-mark is not essential to a right of action for unfair competition, * * * in which action the essence of the wrong consists in the palming off of the merchandise of one for that of another"—citing many authorities.

Referring to this latter case the court, in *Auto Acetylene Light Co. v. Prest-O-Lite Co.* (C. C. A.) 264 Fed. 812, said:

"The essence of the wrong complained of consists in the palming off of the defendant's Acetylene gas for plaintiff's Prest-O-Lite gas"—also citing other authorities.

And in *O. & W. Thum Co. v. Dickinson*, 245 Fed. at page 613, 158 C. C. A. 41, the court, speaking through Judge Warrington, said:

"It is to be observed, moreover, that in testing the charge of infringement, as well as that of unfair competition, consideration must be given to the question whether the resemblances so far dominate the differences as to be likely to deceive ordinary purchasers; and the purchasers most to be considered are the ultimate users, rather than jobbers and retailers, since they, like all middlemen, are interested in and have the means of identifying the manufacturers of the goods they purchase."

This proposition is also supported by many citations. Much of what was said by the same court in the very recent case of *Upjohn Co. v. W. S. Merrell Chemical Co.* (No. 3295), 269 Fed. 209, may have importance here, where the facts are such as we have found them upon the testimony to be.

[4] This brings us to the case of *Schlitz Brewing Co. v. Houston Ice Co.*, 250 U. S. 28, 39 Sup. Ct. 401, 63 L. Ed. 822, where it is shown that the question in such cases is "whether any so-called imitation achieves the deception" of purchasers. There is hardly a pretense of testimony in this case that the defendant's brand "Southern Star" achieved a single deception at any time since the beginning of its use by the defendants—a period of at least seven years and probably more. And indeed this is not surprising, when we suppose that any ordinary person looks at one brand while acquainted with the other. The specimens we have heretofore inserted should demonstrate that any ordinarily observant person, looking at either one or the other, or both, could not suppose that the two were the same. Certainly "Southern Star" is a different thing from the simple word "Star" or any emblem thereof, just as it is different from the words "Armour's Star." And it is difficult to consider the testimony and ascertain from it that there have, in fact, been any deceptions, though it may be that one or two persons, possibly "tricky retailers," have themselves attempted to deceive others. This, however, does not appear from any part of the testimony to have been successful, and it may be well at this point to cite further from the opinion in *Rathbone, Sard & Co. v. Champion*

Steel Range Co., 189 Fed. on pages 32 and 33, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258, supra, where the court used this language:

"There is some evidence tending to show an actual deception of customers on the part of dealers by representing defendant's heater as that of complainant. It also appears that on the inside of some of the castings of defendant's heater, due to the use of parts of complainant's heater as patterns, the letters 'A' and 'Sol. A' are found, and that this fact would enable a dishonest dealer to misrepresent defendant's heater as a 'Solar Acorn.' This last consideration does not impress us as important, and there is no evidence of actual deception thereby. So far as concerns actual misrepresentations by dealers of the identity of heaters, not only is the proof thereof not highly convincing, but defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that of complainant. Royal Baking Powder Co. v. Royal, 122 Fed. 345, 58 C. C. A. 499; Hall's Safe Co. v. Herring, etc., Co., 146 Fed. 43, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182."

Of course, we have not overlooked cases like United Drug Co. v. Rectanus Co., 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141; but, while they might support the theory upon which plaintiff brought this action, they seem to have little or no bearing on the case actually presented by the testimony.

Upon these considerations, which might be indefinitely enlarged by citations of authorities, we have come to the further conclusion that the plaintiff has not established the essential element of the relief claimed upon the charge of unfair competition. Not only do the brands upon their respective faces show the distinctive differences between that of plaintiff and that of defendant, but there has been a failure upon the part of the plaintiff to establish by satisfactory testimony the fact of deception of any of those who purchase hams and bacon either for use or otherwise.

It results that the bill must be dismissed.

PORTO RICO COAL CO., Inc., v. EDWARDS, Collector of Internal Revenue (two cases).

(District Court, S. D. New York. August 4, 1921.)

No. L 20-280.

1. Internal revenue ↻7—Income derived from Porto Rico not exempt from excess profits tax.

The fact that a New York corporation derives its income from business in Porto Rico held not to exempt it from the excess profits tax imposed by Act Oct. 3, 1917, § 201 (Comp. St. 1918, § 6336½b).

2. Internal revenue ↻7—Taxation of state corporation not affected by laws relating to Porto Rico where its business is located.

That under Act March 2, 1917, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803ccc), internal revenue laws are not effective in Porto Rico, does not affect the liability of a state corporation for an income tax because it conducts its business in and derives its income from Porto Rico.

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

3. Internal revenue ↷2—National and local income taxes do not constitute double taxation.

The subtraction of a state corporation deriving its income from Porto Rico to an income tax for the benefit of the national government and also by Revenue Act 1918, § 261 (Comp. St. Ann. Supp. 1919, § 6336½z), to a similar tax as a foreign corporation for the benefit of Porto Rico, does not constitute a double taxation.

4. Internal revenue ↷7—State corporation doing business in Porto Rico held subject to income tax.

A New York corporation doing business in and deriving its income from Porto Rico held subject to the income and excess profits taxes imposed by Revenue Act 1918, §§ 230 (a), 301 (a) (Comp. St. Ann. Supp. 1919, §§ 6336½nn, 63367/1aaa).

5. Internal revenue ↷5—Not entitled to rights of citizens of another jurisdiction.

A corporation of New York cannot invoke a supposed immunity from federal taxation granted by the Bill of Rights of Porto Rico (Act March 2, 1917, § 2 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803aa]), merely because it derives its income from that island.

6. Constitutional law ↷286—Internal revenue ↷2—Tax statute not unconstitutional because not applicable to Porto Rico.

A statute imposing internal revenue taxes is not in violation of the Fifth Amendment to the Constitution, as taking the property of those taxed without due process of law, because it is not made applicable to citizens of Porto Rico.

At Law. Actions by the Porto Rico Coal Company, Inc., against William H. Edwards, Collector of Internal Revenue. On demurrers to complaints. Demurrers sustained.

"These cases involve the validity of taxes levied on the plaintiff for the years 1917 and 1918, and paid under duress in the city of New York, and now sought to be recovered in the first cause of action in action No. 1 and in the only cause of action in action No. 2. The plaintiff, which now seeks to recover them, is a corporation organized under the laws of New York, but deriving all its income, with an insignificant exception, from Porto Rico, and doing all its business, owning all its property, and keeping its books of account in that island. The point raised in each action is whether, under the statutes, such a corporation may be so taxed in New York at the same general rates as though the income were derived from the continental United States, or whether it is liable to be taxed only in Porto Rico. The further point involved is whether, if the statutes so tax it, they are constitutional. For the year 1917 only an excess profits tax is involved; for the year 1918, not only that tax, but an income tax of 12 per cent.

Francis W. Aymar and R. Floyd Clarke, both of New York City, for plaintiff.

Richard S. Holmes, of New York City, and Ferdinand Tannenbaum, for defendant.

(a) Excess Profits Tax of 1917.

LEARNED HAND, District Judge (after stating the facts as above). [1] Action No. 1 covers only the excess profits tax levied under title 2 of the Revenue Act of 1917 (Comp. St. 1918, §§ 6336¾a-6336¾f). Section 201 of that act levies such a tax "upon the income of every corporation," and section 206(c) (section 6336¾g) provides how the income shall be ascertained. For the year 1917 it refers back

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

to title 1 of the Revenue Act of 1916 (Comp. St. §§ 6336a-6336x), and by that reference incorporates it, except "as amended by this act." Section 10 of the Revenue Act of 1916, which was itself amended by section 1206 of the very Revenue Act of 1917 (Comp. St. 1918, § 6336j), provides, as so amended, that the tax shall be levied upon "the total net income received * * * from all sources by every corporation * * * organized in the United States," and this must be deemed, therefore, the warrant of authority for ascertaining the amount of the excess profits tax. It includes an income derived from Porto Rico.

[2] To meet this the plaintiff argues as follows: By section 9 of the Organic Act of Porto Rico of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3803ccc) it was provided that all laws should apply to Porto Rico except internal revenue laws. The taxation of the Porto Rican income of a New York corporation under either the Revenue Act of 1917 or of 1918 would violate this section and cannot be justified, unless there be some express provision applying the tax to such income. This is a very condensed statement of the plaintiff's position and may be incorrect. It is mixed up with much irrelevant and incorrect matter, as, for example, that section 9 repealed the Revenue Act of 1916 as to Porto Rico, which it clearly did not, and that the Revenue Act of 1917 did not reinstate it, which it clearly would have done, if it had ever been repealed. But all this is of no moment, because it is conceded by both sides that the excess profits tax never applied to Porto Rico and that is all we have to consider.

The important thing is that the excess profits tax of 1917 has nothing to do with Porto Rico or with its tax system. While it does levy a tax "on" incomes there arising, it levies them against persons living in the United States. In that respect Porto Rico is precisely in the position of Mexico, which could not deem itself prejudiced by a tax levied on the Mexican incomes of citizens of the United States. If the Revenue Act of 1917 or 1918 endeavored to follow the incomes to Porto Rico and to collect them out of the property there, the plaintiff's argument would begin to be relevant, but not till then. The confusion lies in identifying the plaintiff, which is for all purposes a resident of New York, with its income, which happens to arise only in Porto Rico, but which might arise all over the world. The Porto Rican taxes remain as "intact" as ever, however little the plaintiff's income be "intact." By computing the tax on the basis of that income, Porto Rico can be affected only because the plaintiff may withdraw some part of the income which might otherwise remain. It could do that anyway, and the internal revenue laws do not "apply" in Porto Rico, because they make that result possible or even probable.

[3] It is, of course, true that in the case of the tax for 1918 this will result in an apparent double taxation. The plaintiff is taxed on its income in New York, and its income is taxed in Porto Rico under section 261 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6336½z). As to 1917 I should think this would not occur, because section 23 of the Revenue Act of 1916, without the aid of section 261 of the Revenue Act of 1918, would not, I should suppose, give Porto

Rico the right to reach the income of a nonresident. But the point need not be pressed, because, as I have said, it is clearly true for 1918.

There is no final objection to a set of statutes that they involve double taxation, though the implication is against it; but in the case at bar, in spite of what I have said, there is no such duplication. The taxes levied under section 23 of the Revenue Act of 1916 and section 261 of the Revenue Act of 1918 are for the exclusive benefit of Porto Rico, and for the matter of that Congress probably was acting merely as local sovereign when it passed them. The excess profits taxes of 1917 and 1918 and the income tax proper was for the support of the general government. The situation is therefore no different from the case of the plaintiff, if it had drawn its income from New York, or Massachusetts, or any other state of the Union having an income tax. It would have been subject to two taxes on the same property—one for local, and one for general, purposes. There is nothing illegal in such a local tax, when the taxpayer is a nonresident, *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445; *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. 460. While, therefore, I do not mean to imply that the result would be different, even if both taxes had been federal, properly speaking, they were not, and any canon of interpretation derived from that circumstance does not apply.

For the foregoing reasons, I interpret the language of section 10 of the Revenue Act of 1916, "from all sources," as including the Porto Rican income of the plaintiff, and I hold the tax to have been properly levied.

(b) Excess Profits Tax and Income Tax of 1918.

[4] Action No. 2 includes not only an excess profits tax for 1918, but an income tax of 12 per cent. as well. First, as to the excess profits tax:

Section 301(a) of title 3 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6336^{7/10aa}) imposes a tax "upon the net income of every corporation." This income for 1918, under section 320 (a) (3), being section 6336^{7/10ag}, is to be ascertained in the same manner as provided in title 2 of the same act (sections 6336^{1/2a}–6336^{1/2z}); i. e., the income tax title. Part 3 of that title applies to corporations, and is comprised in sections 230–241. Section 230(a), which levies the income tax on corporations, merely repeats the words "every corporation." We must go, therefore, to sections 232 and 233 to learn what is the income to be taxed, and section 233 refers us back to section 213. That defines "gross income," which alone is here material, as "gains," etc., "derived from any source whatever"—substantially the same phrase as in section 10 of the Revenue Act of 1916. It appears, moreover, from section 233 (though apparently only by inference), that the phrase "every corporation," in section 230, means only domestic corporations, because section 233 is divided into two parts, (a) and (b). Part (a) refers to corporations taxable under section 230, while part (b) provides that—

"In the case of a foreign corporation gross income includes only the gross income from sources within the United States."

From all this reference and cross-reference it appears, just as in the case of the excess profits tax of 1917, that the act levies a tax on New York corporations, no matter from where they get their income. The plaintiff argues here, as in the case of the tax for 1917, that section 9 of the Organic Act of 1917 made section 301(a) inapplicable; but the answer is the same, and need not be repeated.

The income tax is dependent on the same considerations as the excess profits tax. As I have said, there was a Porto Rican income tax, which could be collected from the plaintiff under section 261 of the Revenue Act of 1918, which incorporated title 1 of the Revenue Act of 1916; but for the reasons already given the existence of this tax is no reason to relieve the plaintiff from its income tax as a resident of New York. Indeed, I may add that, though I should regard it as irrelevant if the case were otherwise, the record does not disclose that any of the plaintiff's stockholders are citizens of Porto Rico or not citizens of New York.

I conclude that both the excess profits and income taxes for 1918 were correctly levied and paid.

(c) Constitutional.

[5] There is a final argument, based upon the supposition that the statutes, if so construed, violate the Porto Rico Bill of Rights (section 2 of the Organic Act of 1917), which, when once granted, forever limits the legislative action of Congress. The doctrine is a new one, and without authority to support it, that such a Bill of Rights becomes a constitutional limitation. It might be more plausibly stated by saying that the Organic Act extended to Porto Rico the Constitution of the United States, that such an extension could not be revoked, and that the legislation in question was within some of the limitations of that document.

Assuming all the premises, I cannot see that the plaintiff can complain. It has no standing as a Porto Rican to invoke the Porto Rican Bill of Rights. Apparently it assumes that it gets such a status by drawing its income from Porto Rico; but that is the same fallacy which pervaded its argument as to interpretation. It is a resident of New York, and for purposes of the taxation of its income it is quite indifferent from where that income derives. If it wishes to speak with the mouth of a Porto Rican, let it put on the proper mask; it cannot take on a new personality with every territory from which it draws its profit. To choose a state for incorporation is to make that state its parent, not only for the advantages it may grant, but for the limitations it may impose.

[6] The only ground for complaint that I can see is that Porto Rico has been exempted from these taxes, while the plaintiff, who draws its income from Porto Rico, has not. While I cannot be sure that this is the objection argued, I shall answer it against the chance that it may be. Clearly the taxes are not excises. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 573, 574, 15 Sup. Ct. 673, 39 L. Ed. 759; *Id.*, 158 U. S. 601, 637, 15 Sup. Ct. 912, 39 L. Ed. 1108. I do not understand

the language in *La Belle Iron Works v. U. S.*, 256 U. S. —, 41 Sup. Ct. 528, 65 L. Ed. —, decided May 16, 1921, as meaning to overrule that case, although it must be owned that, taken literally, some of it seems to countenance the notion that income taxes are within section 8 of article 1. If *Pollock v. Farmers' Loan & Trust Co.*, supra, is still law, as I understand, on no conceivable theory can these taxes fall within section 8 of article 1 of the Constitution.

As direct taxes the discrimination might be thought to be within the Fifth Amendment. The Supreme Court considered the income tax in *Brushaber v. Union Pac. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414, in respect of its exemptions and discriminatory rates, and held it broadly valid. *La Belle Iron Works v. U. S.* went to even greater lengths in permitting inequality in the assessment of such taxes. These decisions might possibly cover the exemption of a whole district of the United States, though the language in the second may perhaps be a caution against going so far. But in the case at bar the exemption is of a territory having no share in the government of the United States; it is granted by Congress, acting for all the states at their common expense. Obviously, there can be no taking without due process of law in such legislation. That phrase implies some oppression, and the joint action of all the states relieving a territory which has no share in the decision cannot result in oppression. It is a self-denying ordinance, and while its wisdom may or may not be conceded, it cannot be within the Fifth Amendment, which is only designed to protect one class or district from exploitation by others.

Demurrers sustained; judgments dismissing the complaint upon the merits in action No. 2 and in the first cause of action in action No. 1.

UNITED STATES v. VANDERBILT. SAME v. MERRIAM. SAME v. ANDERSON.

(District Court, S. D. New York. August 6, 1921.)

Internal revenue ⇐7—Bequest to executors held "compensation for personal services" taxable as income.

Under a will making bequests to the persons named therein as executors and trustees, and providing that "the bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees," where the executors qualified and were active, the bequests *held*, in part, at least, "compensation for personal services," and subject in part anyway to tax as income, under Act Sept. 8, 1916, § 2 (a), as amended by Act Oct. 3, 1917, § 1200 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336b[a]).

At Law. Actions by the United States against Reginald C. Vanderbilt, against Frederick L. Merriam, and against Henry B. Anderson. On demurrers to complaints. Demurrers overruled, and judgments of respondeat ouster.

The cases arise upon the demurrers to complaints at law to recover the income taxes upon certain legacies left the defendants under the will of Alfred G. Vanderbilt, who died in 1915. The will disposed of a large estate, and set up various independent trusts of indefinite duration. The only parts relevant to these cases are the eleventh and sixteenth clauses, which read as follows:

"Eleventh. I give and bequeath to my brother Reginald C. Vanderbilt five hundred thousand dollars (\$500,000); to my uncle, Frederick W. Vanderbilt, two hundred thousand dollars (\$200,000); to Frederick M. Davies five hundred thousand dollars (\$500,000); to Henry B. Anderson two hundred thousand dollars (\$200,000); to Frederick L. Merriam two hundred and fifty thousand dollars (\$250,000); to Charles E. Crocker ten thousand dollars (\$10,000), and to Howard Lockwood one thousand dollars (\$1,000)."

"Sixteenth. I nominate and appoint my brother, Reginald C. Vanderbilt, my uncle, Frederick W. Vanderbilt, Henry B. Anderson, Frederick M. Davies, and Frederick L. Merriam executors of this my will and trustee of the several trusts created by this my will.

"I direct that no bond shall be required in any state or country to qualify my said executors to act as such or as trustees hereunder.

"The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees."

The defendants, so named as executors and trustees, qualified, and have administered and are now administering the estate. The question is whether the legacies so given are exempt as "bequests," or liable to the income tax as "compensation for personal services."

Roy C. Gasser, of New York City, for demurrants.

Edward F. Unger, of New York City, and C. T. Hendler and Newton K. Fox, both of Washington, D. C., for the United States.

LEARNED HAND, District Judge (after stating the facts as above). There seems to me no question whatever that these legacies, in part, anyway, are "compensation for personal services." When the testator provided that they should be "in lieu of all compensation or commissions to which they would otherwise be entitled as executors and trustees," he could only have meant to substitute the legacies in the place of their statutory compensation. If a substitute, the legacies must themselves have been compensation, and since the commissions would certainly have been for "personal services," the substitute itself was the same. It is true that the form of the compensation is a "bequest," and a "bequest" is exempt; hence there is a verbal contradiction between one part of the statute and the other. Yet I cannot doubt that all bequests are not exempt. Suppose, for instance, that a man agreed to leave another a legacy if he would take care of him while he lived. The legacy would be a "bequest," but can any one suppose that it would not be "compensation for personal services," which would be taxable?

The defendants argue that such legacies are payable, though the executor do not complete his services. That is true. The English rule was that a legacy to an executor was presumably *virtute officii* and in recompense for his services, and he must assent to his appointment. *Lewis v. Matthews*, L. R. 8 Eq. 277. Yet very little was necessary, much less than formal qualification. *Harrison v. Rowley*, 4 Ves. 212. Indeed, in *Brydges v. Wotten*, 1 Ves. & Beam. 134, trustees were allowed their legacies, though they had done nothing, probably be-

cause the legacies were payable before the trustees could qualify. If so, the rule does not truly apply to trustees. In America, where executors generally receive statutory commissions, such bequests have been spoken of as compensation which must be earned. *Matter of Tilden*, 44 Hun (N. Y.) 441; *Renshaw v. Williams*, 75 Md. 498, 23 Atl. 905. In some cases the language of the will apparently indicated as much (*Harper's Appeal*, 111 Pa. 243, 2 Atl. 861), or at least admitted of that interpretation (*Richardson v. Richardson*, 145 App. Div. 540, 129 N. Y. Supp. 941). *Morris v. Kent*, 2 Edw. Ch. (N. Y.) 175, much relied on by the defendants, decides nothing to the point, though the Vice Chancellor in his opinion quotes obiter the English rule that any indication of an assent to qualify is enough.

It seems to me to make no difference whether such bequests be regarded as payable merely on condition of qualification, or only after the services are rendered. I assume the first to be the correct rule, and certainly in the cases at bar the legacies were all payable long before the services could be completed, because there were trusts of indefinite duration, which might extend 30 years or more. The legacies were given with the chance that the executors and trustees might not complete their services. I regard the point, however, as immaterial because the bequests are in either case equally "compensation for personal services." Suppose a master pays his servant in advance, trusting that he will live to complete. Is the hire not a "compensation for personal services"? It is prospective compensation, indeed; but none the less it is not gratuitous, it is given to procure and to pay for the services. At least, how can it be said that it is not compensation, if the servant enters and completes his employment?

Therefore I attach no importance to the point of which so much is made, that the executor becomes entitled to his legacies on expressing his assent. More important is the opposite side of the same rule, that without such assent he does not become entitled. This rule is not because he gets the bequest *eo nomine*; it makes no difference that he is named in the will. Moreover, if the theory were that the bequest is given only to the office, he must qualify, which he need not. The condition that he must assent can only be because such bequests are treated as in recompense for his services, and so the books put it. He must at least undertake to perform while he can. If they were true legacies, he would get them whether he qualified or not.

Demurrers overruled, with judgments of respondeat ouster within 20 days.

FIDELITY & DEPOSIT CO. OF MARYLAND v. JOHNSON et al.

(District Court, E. D. Michigan, S. D. August, 1921.)

No. 360.

1. Receivers ⇨72—**May recover property from adverse claimant only by plenary suit.**

The appointment of a receiver for a defendant does not vest him with the right to possession of property then in the actual possession of a stranger to the cause, claiming in good faith such right of possession adversely to defendant and those claiming under him, and the question of the right of possession as between him and the receiver cannot be determined by a summary proceeding in the cause.

2. Bailment ⇨18(4)—**Possessory lien lost by causing levy of attachment.**

One having a lien on property dependent on possession, as for labor or materials furnished in its repair, loses such lien by causing an attachment on the property and surrendering possession to the attaching officer.

In Equity. Suit by the Fidelity & Deposit Company of Maryland against W. B. Johnson, alias Cowboy Bill, and others. Petition by receiver against John T. Perry. Petition granted.

J. Frank Wilson, of Port Huron, Mich., for petitioner.

John Breining and Shirley Stewart, both of Port Huron, Mich., for respondent.

TUTTLE, District Judge. This is a summary proceeding, brought by the receiver of the assets of the defendants herein, previously appointed by this court in this cause, against the respondent, one John T. Perry, to enforce, by summary order of this court, a claimed right of possession of a certain motorboat and gasoline engine, alleged to be wrongfully withheld from the possession of the petitioner.

The material facts, which are undisputed, are as follows: Prior to the time of the appointment of petitioner as receiver herein, the respondent, while in actual possession of the said boat and engine, claiming an artisan's lien thereon under the laws of the state of Michigan, for his charges for repairing and caring for such boat, had caused an attachment to be levied thereon in an action instituted by him against the owner thereof, who is one of the defendants herein, in one of the state courts, for the recovery of the charges mentioned. Upon the appointment of petitioner as receiver, he intervened, as such receiver, in said action in the state court, and obtained an order dissolving the writ of attachment therein because such writ had been improperly levied. The action in that court was thereupon discontinued by the plaintiff therein, the present respondent. The property involved was at all of the times mentioned, and still is, on the premises of the respondent, although upon the levying of the attachment by the sheriff the latter assumed possession thereof under the writ, taking from respondent a receipt therefor. The order dissolving the attachment contained no provision relative to the delivery of possession or other disposition of the property, and it does not appear that the sheriff

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

has done any act to indicate such a delivery or other disposition of the property by him. Immediately upon the entry of such order, petitioner made an attempt to take actual possession of the property, but was prevented by respondent from doing so on the ground that he had a right of lien on said property because of labor and materials furnished by him in repairing and caring therefor, prior to the time of the appointment of petitioner as receiver. Thereupon petitioner filed in this cause, in which he had been appointed receiver, his petition, praying for an order directing the respondent—

“to desist from further interference with the receiver in taking possession of the said property, or to show cause, if any there be, why he should not be required to surrender or relinquish any claimed right of possession of said property to said receiver.”

[1] The first question which naturally presents itself is whether this dispute concerning the right to possession of the property referred to can be determined in this summary proceeding, or whether petitioner is required to commence a plenary suit, in an appropriate court and proceeding, for the proper relief.

It is well settled that the proper remedy for enforcing a claim by a receiver of the right to the possession of property which at the time of the appointment of such receiver, is in the actual possession of an adverse claimant thereto is a plenary suit against such claimant, and not a summary proceeding in a cause to which adverse claimant is not a party. *Wheaton v. Daily Telegraph Co.*, 124 Fed. 61, 59 C. C. A. 427 (C. C. A. 2); *Horn v. Pere Marquette R. Co.* (C. C. E. D. Mich.) 151 Fed. 626; *Andrews v. Paschen*, 67 Wis. 413, 30 N. W. 712; 34 Cyc. 213.

It is the contention of petitioner that his appointment as receiver operated, in legal effect, in the nature of an attachment upon this property, subject only to the prior attachment issued by the state court, and that when the latter was dissolved said property immediately came, in contemplation of law, into the possession of the receiver, who is now entitled to the aid of this court in preventing interference with such possession by respondent. No authority is cited, and this court has been able to find none, in support of such contention.

While the appointment of the receiver conferred on him the right to the possession of this property as against the owner and all persons claiming under him, which right petitioner could enforce by summary proceedings in this cause, such appointment did not necessarily vest in such receiver the right to possession of property then in the actual possession of a stranger to this cause, claiming, in good faith, such right of possession adversely to the owner and those claiming under him, and the question as to the right of possession, as between such adverse claimant and such receiver, could not be determined, against the objection of the claimant, in a summary proceeding like the one at bar. So, here, as the sheriff obtained his possession from, and by the act of, the respondent, the possession of that officer must be considered, as against the receiver, as that of an adverse claimant within the scope and meaning of the rule mentioned. Respondent,

however, has expressly waived any objection on the ground just considered, and consents that the question concerning the right to the possession of this property be determined, on its merits, by this court in this proceeding.

[2] The only question presented in this connection is whether the respondent, by causing the attachment to be levied on the property, lost his right of lien under which he held possession, just prior to the levy of such attachment. While the courts are not in complete accord on this question, I am satisfied that the correct rule, and that supported by the weight of authority, is that one having a lien on property dependent upon possession thereof (as a lien for the payment of charges for labor and materials devoted to the property is, of course, dependent) waives such lien by the act of causing an attachment to be levied on such property, as such act indicates an intention to surrender possession to the officer levying such attachment, and thereafter his position as plaintiff under the attachment is inconsistent with, and supersedes, his right to a lien on the same property. 17 Ruling Case Law, 606; 25 Cyc. 675; Citizens' Bank of Greenfield v. Dows, 68 Iowa, 460, 27 N. W. 459, and cases there cited. The respondent, then, having voluntarily parted with his possession of the property, which he had been holding under claim of a possessory lien thereon, thereby waived and lost such lien.

It follows that the prayer of the petition must be granted; and it is so ordered.

B. F. STURTEVANT CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(District Court, S. D. New York. May 23, 1921.)

Municipal corporations ⇔ 348—Action at law on surety contractor's bond maintainable only in name of obligee.

A bond by a municipal building contractor, conditioned in part that if the contractor shall pay the sums due to all persons for labor and materials the bond shall be void, contains no promise by the surety to pay subcontractors for labor and materials furnished, and an action at law on the bond for their benefit can only be maintained in the name of the obligee.

At Law. Action by the B. F. Sturtevant Company, on behalf of itself and all others similarly situated, against the Fidelity & Deposit Company of Maryland. On demurrer to complaint. Demurrer sustained.

Demurrer to a complaint upon a surety bond.

The complaint was filed by the plaintiff, a Massachusetts corporation, on behalf of itself and of others similarly situated, against the defendant, a surety company of Maryland. It alleged that the city of Syracuse wished to build a vocational high school, and in pursuance of its municipal powers advertised for proposals to perform all the labor and materials necessary for its construction. These advertisements were circulated, together with a copy of a proposed contract for open bidding, and the bidder was required to execute a bond with sureties for his performance. The successful bidder was the P. J. Sullivan Company, and to it the contract was awarded. The

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

P. J. Sullivan Company and the defendant, as surety, executed the required bond, in the sum of \$28,000, to the board of commissioners of the city of Syracuse.

The condition of the bond was as follows: "If the above bounded the P. J. Sullivan Company, the contractor with the aforesaid board in the aforesaid contract named, shall and will faithfully perform the work and furnish the materials and supplies in and by the said contract signed by it to be performed and furnished and shall faithfully comply with all the conditions and obligations of said contract on its part and in every particular and shall promptly make payment of the sums due to all persons for labor and materials in the prosecution of the work provided for in this contract, then and in that event this obligation to be void."

During the prosecution of the work the plaintiff, at the request of the P. J. Sullivan Company and in reliance upon the bond, furnished heating and ventilating equipment with proper accessories to the value of \$4,001.95 in performance of the contract of the P. J. Sullivan Company with the city. The contractor, the P. J. Sullivan Company, has failed to pay this sum to the plaintiff, having been adjudged bankrupt, and has also failed to perform its contract with the city of Syracuse, causing a loss to the said city in the sum of \$20,775.22, which the defendant has paid. The plaintiff claims that there remains due upon the bond \$7,224.78, out of which it may recover its claim of \$4,091.95. It does not appear whether there are other unpaid subcontractors, or, if so, who they are, where they live, or what is the aggregate of their claims.

The demurrer was on two grounds: (1) For failure to state cause of action; and (2) "that there is a defect of parties plaintiff." The defendant relies upon the well-established decisions in the state of New York that subcontractors may not sue the surety under bonds of the foregoing character, and that in any case all subcontractors must be parties plaintiff. The plaintiff relies upon the fact that the New York decisions are not binding in a federal court, and that it may sue on behalf of itself and all others similarly situated, without joining them as parties plaintiff.

Alice H. Moran, of New York City, for plaintiff.
Daniel Coombs, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). It may be accepted as the law of New York, *Fosmire v. N. S. Co.*, 229 N. Y. 44, 127 N. E. 472, that an action at law will not lie by a subcontractor upon such a bond, while the obligee of the bond is unpaid. This decision I followed in my earlier ruling in the case at bar. It now appears that the city has been paid, and that there is a balance. If so, the reasons given in *Fosmire v. N. S. Co.*, supra, no longer apply, because a recovery upon the bond would not now frustrate its purpose, or deprive the city of its protection. Moreover, that case expressly refuses to decide that a suit by the obligee (in that case the people), presumably for the use of the beneficiaries, might not lie. I regard that as a possibility open under the law of New York in a case like that at bar.

The bond has been treated as though it contained a promise by the defendant to pay the subcontractors, but it does not. Indeed, not even the condition describes an act to be performed by the obligor. Therefore the difficulties arising from a promise to one person to pay a sum of money to another cannot arise. Those difficulties are that if the third person, who is damaged, sues, he is met by the fact that the promise was not made to him; while if the promisee sues, he is met by the fact that he can show no damage from the promisor's failure

to pay money to another person. Therefore I decline to consider whether the rule of *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855, and *Gardiner v. Equitable Office Building Corporation* (C. C. A., April 6, 1921, 273 Fed. 441) should take precedence over the rule in the state courts.

On the other hand, the obligee, the city, could sue upon the bond, and at law could recover damages, except in so far as the recovery were prevented because it would enforce a penalty. In short, the right, though clear at law, would only be forbidden in equity, or at law upon principles directly borrowed from equity. But if the recovery were to the use of the actual beneficiaries, such considerations would no longer obtain. The obligee's right to recover would be as clear at law as before, but a recovery would not enforce a penalty. Therefore the plaintiff might well be able to sue at law in the name of the city to the use of all subcontractors. This has in substance been recognized in federal courts without the aid of the statute of 1894. *Tyler v. Hand*, 7 How. 573, 12 L. Ed. 824; *Stephenson v. Monmouth, etc., Co.*, 84 Fed. 114, 28 C. C. A. 292. But the plaintiff may not sue, except in the name of the obligee, because the condition is not a promise, as I have said, and no action will lie, except upon the bond itself, under *Farni v. Tesson*, 1 Black, 309, 17 L. Ed. 67, a decision authoritative upon me, whatever other courts have decided to the contrary.

Hence it follows that as an action at law the complaint must fail. It may be urged that it should succeed as a bill in equity. I will not say, if the city should refuse to allow its name to be used, and if the plaintiff were so to allege and to join the city and the defendant in a bill in equity, that the suit would fail. Again, I will not say that under equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix) the plaintiff would fail, if, being refused consent by the city to the use of its name, it were to sue the defendant alone in equity in this district, alleging that it could not join the city because it could not serve it, and could not serve the defendant in the Western district, where alone it could serve the city. The difficulty with the present pleading, viewed as a bill in equity, is that it shows no reason for any recourse to equity at all, and, viewed as a complaint at law, it does not speak in the name of the only obligee. In no aspect therefore can it succeed.

Finally, it is unnecessary to say whether the plaintiff may sue on behalf of itself and all others similarly situated under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix). No doubt where, as here, a person, e. g., the city, holds a right in trust for a class, it is usually enough that a single member of the class sue on behalf of himself and all his fellows. Whether, if the plaintiff filed such a bill, that doctrine would apply, I need not now decide.

Demurrer sustained. In view of what was said at the bar, there will be no respondeat ouster.

THE MUSKEGON.

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

No. 781.

1. Maritime liens ⇨21—Putative lienor not bound to inquire as to authority to bind ship.

The putative lienor, under the Maritime Lien Act of 1910 (Comp. St. §§ 7783-7787), is not bound, whenever he gets an order to supply or serve the ship, to institute an inquiry as to the authority of the person by whom the supplies or services are ordered to bind the ship.

2. Maritime liens ⇨25—Services of master stevedore not "necessaries," within Maritime Lien Act of 1910.

The services of a master stevedore are not "necessaries," within Maritime Lien Act of 1910 (Comp. St. §§ 7783-7787), providing for a lien for repairs, supplies, and other "necessaries" furnished to a vessel; the word "necessaries" having reference to the outfitting of the ship, as opposed to her carriage of freight.

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

In Admiralty. Libel in rem by master stevedores against the vessel Muskegon. Libel dismissed.

Decree affirmed 275 Fed. 348.

The libelants are master stevedores, and loaded the vessel Muskegon, in April and May, 1919, while in the port of New York. The Muskegon was registered in that port and owned by a New York corporation, and was under charter to the Caravel Steamship Lines, also a New York corporation, under a charter which required the charterers to pay all such charges. The loading was done under contract with the charterers, and there was no clear evidence that they made any representation as to its ownership, beyond saying that it was "our" ship. The contract was made before the ship arrived at the pier, and the libelants visited the cargo there laid out, and were told that, if the charterers were able to get the Muskegon, they would employ the libelants as stevedores. This was the extent of their knowledge that the ship was on charter. During the loading the master twice objected to the stowage, and called up the charterers, who directed the libelants to conform to his wishes. The charterers have become bankrupt, but before that time the libelants sent a bill to them, charged against "Muskegon and owner." Later they made claim against the owners personally.

E. Curtis Rouse, of New York City, for libelants.
Earle Farwell, of New York City, for claimant.

LEARNED HAND, District Judge (after stating the facts as above). [1] I shall assume, without deciding, that the libelants had no notice that the Muskegon was on charter. If so, they may recover, but only in case the Maritime Lien Act of 1910 (Comp. St. §§ 7783-7787) applies. The putative lienor is not bound, whenever he gets an order to supply or serve the ship, to institute an inquiry; else he would never be safe, and the act would be idle. The *Yankee*, 233 Fed. 919, 926, 147 C. C. A. 593; The *Oceana*, 244 Fed. 80, 83, 156 C. C. A. 508. Whether it is enough to charge the lienor with notice that he knows the ship to be on charter, and the order to come from the charterer, I need not say. The *Yarmouth* (C. C. A.) 262 Fed. 250; The

George Dumois, 68 Fed. 926, 15 C. C. A. 675. I agree that *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512, and *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, do not rule that question.

[2] With this fact presupposed, the case raises squarely the question whether services of a master stevedore are "necessaries" within the act of 1910. He stands in a different position from the stevedore himself. He has no lien (*The Seguranca* [D. C.] 58 Fed. 908), as does the stevedore (*The Harrie M. Bain* [D. C.] 20 Fed. 389; *The Main*, 51 Fed. 954, 2 C. C. A. 569). He ranks with repairmen and suppliers of the ship, and must show that he gave credit to the ship, being entitled to the same presumptions. *Norwegian S. S. Co. v. Washington*, 57 Fed. 224, 6 C. C. A. 313; *The Luckenbach*, 212 Fed. 388, 129 C. C. A. 64. Yet a lien he may have for the rendition of the services, if the facts warrant the conclusion. In this respect he is quite in the same position as a tower, who may have a lien, and in foreign ports presumptively does have one. *The J. Doherty* (D. C.) 207 Fed. 997, 1001; *The Hatteras*, 255 Fed. 518, 166 C. C. A. 586; *The Alligator*, 161 Fed. 37, 88 C. C. A. 201.

If the act of 1910 was intended to establish rules of proof and procedure for all classes of maritime liens, both master stevedoring and towage liens would fall within it. As to master stevedoring, this has been decided by Judge Neterer in *The Rupert City* (D. C.) 213 Fed. 267-269, and as to towage, by the Circuit Court of Appeals of the Fifth Circuit in *The Yarmouth*, supra, 262 Fed. 257. The contrary was decided by Judge Veeder in *The J. Doherty*, supra, and *The Hatteras*, supra, and the last ruling is of course authoritative in this court. Moreover, Judge Veeder, in *The Oceana* (D. C.) 233 Fed. 139, appears to have ruled that the statute did not cover master stevedores, though that point was not presented on the appeal. 244 Fed. 80, 156 C. C. A. 508.

This being, for the present, anyway, the fixed law, it seems to me clear that the master stevedore's lien is in the same class as towage, and that in this circuit the act of 1910 includes neither, whatever may be the rule in the Fifth or the Ninth. The reason why the act has been thought to exclude towage is that the word "necessaries" is to be read ejusdem generis, and includes only the outfitting of the ship, as opposed to her carriage of freight. For this reason the statute did not affect all maritime liens, but only those which were related in kind to repairs and supplies, except as specifically added. But stowage is as little akin to repairs and supplies as towage. Each is a part of the earning of freight; properly each is a part of the carriage, for the ship must lift her cargo before she can carry it. Hence, if towage is not ejusdem generis with repairs and supplies, I can see no rational distinction between it and stowage or discharge. It must result, therefore, that liens for these remain as they were, unaffected by the act of 1910, and that there was no lien here, since the ship was in her home port.

Whether any of the language of *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 11, 41 Sup. Ct. 1, 65 L. Ed. —, will be thought to change the ruling in *The Hatteras*, supra, is not for me

to say. It is at best doubtful, for the case was very different. If it be eventually settled that the act of 1910 covers all kinds of liens for work or materials, then of course I shall be wrong; but for the present I have only to apply the rule as I find it, and I can see no distinction between the case at bar and *The Hatteras*, supra, which would leave possible an intelligible rule for general application.

The libel is dismissed, with costs.

In re LONG.

(District Court, S. D. Florida. January, 1921.)

Bankruptcy ⇨314(1)—**Loan to bankrupt of proceeds of insurance policy on life of deceased brother, of whose estate he was administrator, held provable, though made by his mother, and homestead exemption set apart to him.**

A loan of the proceeds of an insurance policy on the life of the lender's deceased son to the surviving son, who was administrator of decedent's estate, to be used, however, in the continuance of the partnership business of the two sons, was provable against the bankrupt estate of such survivor, though a homestead exemption had been set apart to him, and claimant was his mother.

In Bankruptcy. Petition by Mrs. Rebecca Long to review an order of a referee sustaining objections to her claim against the bankrupt estate of Dennis F. Long, doing business as D. F. & C. P. Long. Petition granted, order reversed, and cause remanded, with directions.

C. M. Cooper, Chas. P. & J. J. G. Cooper, of Jacksonville, Fla., for bankrupt.

Marks, Marks & Holt, of Jacksonville, Fla., for creditors.

CALL, District Judge. April 5, 1917, an involuntary petition in bankruptcy was filed against Dennis F. Long, doing business as D. F. & C. P. Long. In due course an adjudication in bankruptcy was had and a trustee appointed. January 28, 1918, Mrs. Rebecca Long, mother of D. F. Long, the bankrupt, filed a claim against the bankrupt estate for \$4,620.77, money loaned the bankrupt.

The agreement on which the claim is predicated is in writing and attached as proof of claim, as follows:

"I hereby agree and consent to and authorize Dennis F. Long, as administrator of the estate of Charles P. Long, deceased, to use in the business of D. F. & C. P. Long, of which business I am a part owner, as sole heir of Charles P. Long (subject to the rights of creditors of said estate), all the proceeds from life insurance policy or policies of said Charles P. Long now in the hands of said D. F. Long, as administrator, to wit, the sum of five thousand seventy and ⁹⁹/₁₀₀ dollars (\$5,070.99). He shall pay me interest thereon at the rate of eight per cent. (8%) per annum, payable semiannually, and shall repay to me, my executors, administrators, or assigns, the said sum on or before Feb-

bruary 1, 1915, except such part thereof, if any, as might be properly paid out to creditors of said estate.

"Executed in duplicate this 24th day of June, A. D. 1914.

"I hereby consent to the above conditions.

"Rebecca Long.

"Dennis F. Long,

"As Administrator of the Estate of Chas. P. Long, Deceased."

Six objections to the allowance of this claim were filed by the trustee as follows:

"1. Because it affirmatively appears that said claimant is not a creditor of his bankrupt estate.

"2. Because said claimant is not in fact a creditor of this bankrupt estate, holding a claim payable in bankruptcy.

"3. Because the said claim as made and filed herein does not constitute such a claim or demand as is provable in bankruptcy.

"4. It affirmatively appears that said claim, if any, is against Dennis F. Long, as administrator of the estate of Charles P. Long, deceased, rather than against Dennis F. Long, trading as D. F. & C. P. Long.

"5. Said proof of claim shows upon its face that the demand of said claimant is subordinate and inferior to the debts of bona fide creditors of this bankrupt estate.

"6. It affirmatively appears that the claimant, Mrs. Rebecca Long, was a joint owner and/or a partner in the business operated by Dennis F. Long under the name and style of D. F. & C. P. Long, and as such is not entitled to participate in the proceeds of this estate until the claims of creditors are first satisfied, or that as a partner she is personally liable to the creditors of this estate."

On April 16, 1919, the referee sustained the objections of the trustee on the first four grounds. It is this order which the claimant seeks to have reviewed. The facts surrounding this matter may be concisely stated as follows:

Prior to 1913 a partnership in the wholesale and retail liquor business existed in Jacksonville, Fla., between the two brothers, D. F. and C. P. Long, under the firm name of D. F. & C. P. Long. In January of 1913 C. P. Long died intestate, leaving as his sole heir at law his mother, the claimant. D. F. Long was duly appointed the administrator of the estate of C. P. Long. On February 21, 1913, the administrator petitioned and was authorized as such administrator to continue the business of the partnership. From that time the business was conducted under the firm name of D. F. & C. P. Long until the filing of the involuntary petition in bankruptcy. The testimony taken shows that the money, proceeds of the life insurance policies, was used in the business, and that it was a loan, and not an investment. The business conducted by the bankrupt was treated by the creditors in this proceeding and by the bankrupt as belonging to the bankrupt.

The referee, in making the order disallowing the claim, seems to have been influenced by the considerations that homestead exemptions had been set apart to the bankrupt, and that the paper attached as proof of the claim was signed by the bankrupt as administrator and that technically the claimant was making the loan to him as such administrator. I do not think there can be any doubt but that the money was loaned to be used in the business and that it was the intention and understanding of the parties that such use of it was to be made; and

further I do not think the fact that a homestead exemption had been set apart to the bankrupt should have any weight in deciding whether the claimant had a provable claim. The fact that the claimant was the mother of the bankrupt might have caused the proofs to be scrutinized more closely; but, if the proofs established a provable claim, the claimant was entitled to have it allowed, even though she was the mother of the bankrupt.

Under the circumstances of this case, as shown by the testimony, I am of opinion that the claim should have been allowed, and that the order of the referee was erroneous. The petition to review will therefore be granted and the order of the referee reversed, and cause remanded to the referee, with directions to allow the claim as unsecured.

It will be so ordered.

AMERICAN & BRITISH SECURITIES CO. v. AMERICAN & BRITISH MFG. CORPORATION.

(District Court, S. D. New York. July 30, 1921.)

Creditors' suit ⇄33—Receiver may contest mortgage.

A receiver appointed in a creditors' suit represents all general creditors for whose benefit the suit is brought within the meaning of New York Lien Law, § 230, and may contest the validity of a mortgage on property of the defendant.

In Equity. Suit by the American & British Securities Company against the American & British Manufacturing Corporation. On motion. Denied.

Campbell, Flaherty, Turner & Strouse, of New York City, for receiver.

Louis H. Strouse and William H. Griffin, both of New York City, for petitioners.

Choate, Hall & Stewart, of Boston, Mass., for Charles F. Choate, Jr.

Walter A. Hall, of New York City, for petitioner Empire State Finance Corporation.

William H. O'Hara, of Bridgeport, Conn., for petitioner Blue Ribbon Body Co.

Larkin, Rathbone & Perry, of New York City, for petitioners Wolfe, Wilson, Godfrey, Greebe, and Leary.

Winthrop & Stimson, of New York City, for petitioners G. W. McNear, Inc., and Colt.

Wm. Dewey Loucks, of New York City, for defendant.

LEARNED HAND, District Judge. This motion comes up upon rule nisi and petition to which an opposing affidavit has been filed. From these papers and the other papers on file it appears that this is a sequestration suit in which a simple creditor has with the defendant's consent obtained the appointment of a receiver, alleging that the affairs of the corporation are involved, and that executions and attachments will waste the assets unless the court takes them

over to conserve them. The petition alleges that a third party, a corporation, signed and delivered a note to the defendant which the latter indorsed over to the petitioner, which thus "bought" the note. The answering affidavit alleges that the transaction was a direct loan by the petitioner to the defendant, which took this form. I shall accept this interpretation of the transaction, and also that the collateral pledged was the property of the defendant. This does not certainly appear, but there is no other plausible interpretation, and nothing in the petition contradicts the allegations of the answer. The loan was secured by bills of sale of two motor cars, signed by both the defendant and the third party, and followed by a "trust receipt" signed by the third party corporation in whose possession the cars now are. This third party is apparently an agent for the defendant. Both petition and answer are woefully inartificial, and from their vague statements it is impossible to be certain of just what occurred.

If all this be true, the situation is one of a loan with a pledge, the property remaining in the possession of the pledgee's agents as such, it is in every sense a chattel mortgage, and, as it was not filed, it is void against a creditor. Lien Law (Consol. Laws, c. 33) § 230.

The only question open is whether the receiver represents creditors within the meaning of section 230 of the Lien Law. A trustee in bankruptcy, of course, does so represent them. *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. Apparently so also would a receiver appointed in a judgment creditors' bill. *Kitchen v. Lowery*, 127 N. Y. 53, 27 N. E. 357. Here we have a judgment creditors' bill, filed not, it is true, on behalf of a single creditor and after judgment and execution, but for the benefit of all creditors. Under *Re Metropolitan Street Railways Receivership*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, such a bill as this must be regarded as equivalent for these purposes to a single creditor's bill after judgment. The prerequisite of judgment and execution is merely procedural, and is waived by the answer consenting to the appointment of a receiver. The receiver when appointed is vested with the same rights as though there had been judgment and execution. He seizes and distributes the assets for the benefit of all creditors, not, as is often supposed, in any sense in the interest of the debtor. Therefore he represents the creditors who can no longer levy on the assets, and as against him an unfiled chattel mortgage is void.

The motion is therefore denied on the ground that the mortgage is void.

SAMPSON v. SILVERMAN et al.

(District Court, D. Rhode Island. July 22, 1921.)

No. 135.

1. Patents \Leftrightarrow 283 (1)—Claim of inutility by infringer not favored.

The contention by an infringer that the device which he infringes constituted no advance in the art is not received with favor.

2. Patents \Leftrightarrow 328—55,488, for design for collar holder, valid and infringed.

The Sampson design patent, No. 55,488, for a design for collar holder, *held* valid and infringed.

In Equity. Suit by Samuel Sampson, doing business as the Hol-Tite Collar Company, against Charles Silverman and Archibald Silverman, doing business as Silverman Bros. Decree for complainant.

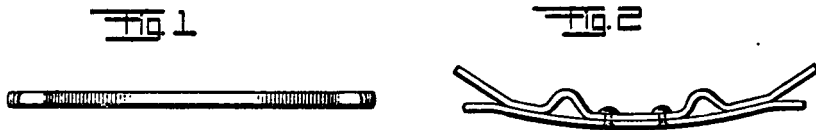
Roberts, Roberts & Cushman, of Boston, Mass., for plaintiff.

Horatio E. Bellows, of Providence, R. I., for defendants.

BROWN, District Judge (orally). The bill charges infringement of design patent No. 55,488, June 15, 1920, to Samuel Sampson, for collar holder.

The charge of infringement, and infringement after notice, is established. The defendants have stood upon their rights, and now insist upon their right to manufacture the alleged infringing article, and state that they are the owners of design patent No. 58,295, July 5, 1921, to Charles Silverman, for collar holder. They invoke the presumption of difference arising from a subsequently issued patent.

The essential feature of the design of the Sampson patent in suit is exhibited in Figure 1. Figure 2, which is an edge view of the entire structure, comprises on its upper portion features which relate wholly to mechanical functions; and the only part of Figure 2 which relates to design, properly speaking, is that which illustrates an edge view of what is shown in Figure 1.



United States patent No. 1,214,205, January 30, 1917, to J. A. Mariner, for collar holder, shows a device of the same class with a bowed front constituting the visible part of the collar holder. The ends, however, display a loop or backward fold of the material. It is urged that this patent is an anticipation of the design of the patent in suit.

A characteristic difference in the patent in suit is the upturned outer ends of a single thickness of material, and the absence of loops or folds, which are characteristic of the Mariner design and which are inherent in his mechanical construction. The design of the patent in

suit, therefore, is not to be regarded merely as a variation caused by upturning the ends of Mariner's bow-shaped front. The substitution of a single thickness of material with upwardly turned and more graceful ends requires more than a copying of Mariner. Although the patent in suit relates solely to matter of design, the mechanical differences from Mariner seem to afford an answer to the suggestion that a mere turning up of the ends of Mariner's design would be obvious and easily accomplished. A different mechanical construction was necessary in order to develop the design of the patent in suit.

In dealing with patents for design we must bear in mind that simplicity of line is often more desirable than ornate treatment, and that the evidence afforded by public acceptance of a design is entitled to special weight. Those who manufacture articles of ornament appealing to the public, and who adduce evidence showing a high degree of public satisfaction with the design, and who also adduce evidence from other manufacturers of their acceptance of the design and their application for licenses to manufacture, may invoke the doctrine that the presumption of validity is to have weight with a court, especially against an infringer, who, by copying the design, had added his own evidence to its value and utility.

[1] The contention by an infringer that the device which he infringes constituted no advance in the art is not received with favor. *Löhnbeuter v. Holthaus*, 105 U. S. 94, 96, 97, 26 L. Ed. 939 (a design patent); *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 616, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Aurora Mantle & Lamp Co. v. Kaufmann*, 243 Fed. 911, 914, 156 C. C. A. 423.

In *Westinghouse Co. v. Wagner Co.*, 225 U. S. 604, 616, 32 Sup. Ct. 691, 695 (56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), it is stated:

"The patent was itself evidence of the utility of claim 4, and the defendant was estopped from denying that it was of value."

[2] While on first inspection it may appear that the design could easily have been produced, yet in view of the evidence as to its development, the acceptance of it by the trade, and of the thought required to apply the design to a different mechanism, so as to obviate less graceful, or perhaps objectionable, features of prior structures, the court should not give undue weight to any superficial impression made upon it by the simplicity of the design, and should dispose of the case with due regard to the knowledge and experience of those engaged in a business in which designs of simple character are often of great commercial importance.

I am of the opinion that the patent in suit is valid, that the defendants infringe, and that the plaintiff is entitled to an injunction.

A draft decree may be presented accordingly.

In re HALLBAUER.

(District Court, S. D. Florida. December, 1920.)

Bankruptcy ⇨184(1)—**Writing held to constitute valid mortgage.**

A writing, "Sold to R., Tampa, Fla., two Apperson cars, Nos. 21458, 21340, \$5,500.00. Paid"—signed by bankrupt, held to constitute a valid mortgage to secure a loan; the bankrupt placing such cars in his salesroom and demonstrating them for sale in all respects the same as other cars in his salesroom.

In Bankruptcy. In the matter of A. L. Hallbauer, bankrupt. On petition of R. L. Young to reclaim automobiles. Petition denied.

See, also, 275 Fed. 126.

N. B. K. Pettingill, of Tampa, Fla., for petitioner.
Jackson & Withers, of Tampa, Fla., for trustee.

CALL, District Judge. This cause comes on for a hearing upon the petition to review an order of the referee sustaining exceptions to the petition of R. L. Young to reclaim certain automobiles from the possession of the trustee in bankruptcy. The claim of the petitioner is that he on the 22d day of March, 1920, purchased from the bankrupt two Apperson automobiles for the price of \$5,500. The bankrupt on said day delivered to the petitioner a paper writing in the words and figures as follows:

"Tampa, Fla., March 22, 1920.

"Sold to R. L. Young, attorney, Tampa, Fla., two Apperson cars, Nos. 21458, 21340, \$5,500.00. Paid.
A. L. Hallbauer."

The testimony and findings of the referee show this state of facts. These two cars were received in Tampa, the bill of lading had attached to it a draft for the amount the dealer was to pay, which with war tax and freight amounted to \$5,703.76. The petitioner paid the bankrupt the sum of \$5,500, which the bankrupt deposited in his bank with other sums, took up the bill of lading, received the cars from the railroad, and placed same in his salesroom, demonstrated same for sale, and apparently treated them in all respects the same as other cars in his salesroom. It also appears that the bankrupt was the Tampa agent for the Apperson car. It further appears that the petitioner, acting for himself and another, had previously loaned money to the bankrupt for use in his business; that he did not buy the cars for his individual use, nor was he a dealer in automobiles.

The referee found, after reviewing the testimony, that the transaction between the petitioner and the bankrupt was a loan, and the paper writing produced at the hearing was a mortgage. Taking into consideration that Hallbauer abandoned his business, so that an involuntary petition in bankruptcy was filed on May 8, 1920, and a receiver appointed in the proceeding prior to the appointment of a trustee, that application was made to make this trustee a party defendant to a foreclosure

proceeding, together with the other facts appearing from the evidence, I think the order of the referee is correct.

The petition to review will therefore be denied.

In re HALLBAUER.

(District Court, S. D. Florida. December, 1920.)

Bankruptcy §184(1)—Mortgage on car in salesroom of bankrupt held invalid against trustee.

A chattel mortgage on an automobile in the salesroom of a dealer, even though recorded, was not good as against subsequent creditors without actual notice, and hence not good as against the trustee in bankruptcy; such automobile being dealt with by the dealer as his own property, which he had full power and right to sell.

In Bankruptcy. In the matter of A. L. Hallbauer, bankrupt. On petition of the General Securities Company for delivery of an automobile in possession of the trustee, or for permission to foreclose a mortgage thereon. Petition denied.

See, also, 275 Fed. 125.

N. B. K. Pettingill, of Tampa, Fla., for petitioner.

Jackson & Withers, of Tampa, Fla., for trustee.

CALL, District Judge. This cause coming on to be heard upon the petition to review an order of the referee upon the petition of the General Securities Company that a certain automobile in the possession of the trustee be either delivered to it or that it be authorized to foreclose a mortgage upon said automobile held by it to secure a promissory note in the amount of \$3,366 and exceptions filed by the trustee. The referee heard the testimony of the witnesses and made findings of fact, which seem to be supported by the testimony accompanying the referee's certificate, as follows:

The mortgage in question was duly executed on January 20, 1920, and filed for record on January 24th, to secure a loan from the petitioners to the bankrupt of \$3,366, made on the first-named day; that said car remained in the possession of the bankrupt in his salesroom, and was offered for sale with the other cars therein; that the agent of petitioner from time to time checked cars in the possession of the bankrupt upon which petitioner had mortgage and other liens, and it was within the knowledge of the petitioner that said car was offered for sale along with other cars in the salesroom of the bankrupt.

Upon this state of facts the referee overruled the exceptions filed by the trustee. It is this order which is sought to be reviewed in this proceeding. It is but justice to the referee to say that apparently the ruling was the result of following an order made by the judge of this court in a chancery case.

Since the making of the order in the chancery case, I have had occasion in this and other cases to make a fuller examination of the ques-

tions here involved, and have reached the conclusion that I erred in the ruling relied upon by the referee. Among the recent cases I have examined is *Boice v. Finance & Guaranty Corporation*, 127 Va. 563, 102 S. E. 592, 10 A. L. R. 654, a case decided by the Virginia court, where the question arose between the mortgagee and purchaser of an automobile, and seems decisive of the question here involved.

It is evident from the record of this case that the bankrupt was a dealer in automobiles doing business in the city of Tampa, with sales-rooms where such automobiles were exhibited for sale, with salesmen demonstrating such cars with a view of making sales of same. It is also evident that the petitioner was fully cognizant of such facts, and, being so cognizant, allowed the automobile to remain in the possession of the bankrupt and be offered for sale and dealt with as his property which he had full power and right to sell. In the instant case the loan was made on January 20, 1920, recorded the 24th of said month, and bankruptcy proceedings commenced May 8th.

As I understand the cases on this subject, the recordation of the mortgage and the constructive notice attached to such recordation will not validate the lien as against subsequent purchasers or creditors under conditions above stated. The trustee, under the amendment to the Bankruptcy Act (Comp. St. §§ 9585-9656), occupies the position of a judgment creditor. In this class of cases it is not a question of actual fraud; the law strikes down such a mortgage, because in the contest between the lienor and a creditor, the lienor, who by his acts has placed it within the power of the debtor to secure credit on the strength of the possession of the property and apparent dominion over it, must suffer rather than the creditor. Actual notice of the lien would present a different question in the case of a purchaser. I quote from the case above referred to:

"Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage regardless of its size, value, or capacity for identification. The powers which the dealer is permitted to exercise over the property in such case are inconsistent with a mortgage thereon."

I am therefore of the opinion that the trustee's exceptions should have been sustained, and the petition denied.

WESTERN & A. R. R. v. RAILROAD COMMISSION OF GEORGIA et al.

(District Court, N. D. Georgia. September 12, 1921.)

No. 171.

Courts ¶328(3)—**Value of right of way and future maintenance of side track not considered in determining jurisdiction of court.**

On application for injunction, pendente lite and permanent, by a railroad against the Railroad Commission of Georgia, to prevent the enforcement of an order requiring the putting in of an additional side track on the railroad's right of way, wherein the petition discloses that the total cost of the construction will be \$1,260, injunction pendente lite will be refused, because the amount involved is insufficient to give the court jurisdiction; the value of the portion of the right of way to be occupied by the track not being a matter which can be considered, because not taken from the company, and cost of future maintenance not being involved.

In Equity. Suit by the Western & Atlantic Railroad against the Railroad Commission of Georgia and others. On application for injunction pendente lite. Application denied.

An application for injunction, pendente lite and permanent, was made by the Western & Atlantic Railroad against the Railroad Commission of Georgia, to prevent the enforcement of an order requiring the putting in of an additional side track at Smyrna, Ga. The petition, though averring the amount involved to be more than \$3,000, discloses that the total cost of the construction would be \$1,260, and the estimated annual cost of maintenance to be \$200. There is no allegation of the value of the land of the right of way to be occupied thereby.

Tye, Peeples & Tye, of Atlanta, Ga., for petitioner.

J. K. Hines, of Atlanta, Ga., for defendants.

Before BRYAN, Circuit Judge, and BEVERLY D. EVANS and SIBLEY, District Judges.

SIBLEY, District Judge. No right is involved of the violation of which this case is but an instance, because the general right of the Railroad Commission to require the construction of side tracks is not questioned. The propriety of requiring the construction of this particular track is alone in issue. The cost in material and labor is stated in the petition to be but \$1,260, and this amount alone is involved. The value of the portion of the right of way to be occupied by the track is not to be considered, because the land is not taken from the company, but is only devoted to a railroad purpose, for which it was acquired and is held. The cost of future maintenance is not involved now, because that is an incident of the future use. The maintenance cost for some years will be slight, and if the business done over the track does not justify its maintenance, the question of its abandonment will be open then.

Because we think the amount involved is insufficient to give the court jurisdiction, an injunction pendente lite will be refused.

WILLIAMS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 1, 1921. Rehearing Denied

October 10, 1921.)

1. Grand jury ⇨8—Statute relating to “jurors” held applicable to grand as well as petit jurors.

Judicial Code, § 277 (Comp. St. § 1254), providing that “jurors” shall be returned from such parts of the district from time to time as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur unnecessary expense or unduly burden the citizens of any part of the district with such service, *held* applicable to grand jurors as well as petit jurors.

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

2. Grand jury ⇨8—Failure to enter court’s order directing clerk and jury commissioner to place names in jury box did not affect legality of grand jury.

That court’s order directing the clerk and the jury commissioner to place in the jury box the number of names as required by Judicial Code, § 276, as amended by Act Feb. 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1253), and section 277 (Comp. St. § 1254), was not entered upon the minutes, did not render the grand jury drawn from such names illegal, so as to invalidate the indictment returned by it.

3. Embezzlement ⇨28—Counts held to sufficiently describe property embezzled by bank officer.

In a prosecution of a bank officer for embezzlement, in violation of Rev. St. § 5209 (Comp. St. § 9772), counts of indictment charging the willful and fraudulent embezzlement of “moneys, funds, and credits” of the bank theretofore received by him, “to the amount and value of” specified amounts, a more particular description of which was to the grand jurors unknown, with intent to injure and defraud the bank, *held* to sufficiently describe the property embezzled.

4. Embezzlement ⇨29—Count of indictment held sufficient.

A count of an indictment charging that the vice president of a national bank, having control over its moneys, funds, and credits, did willfully and unlawfully, with intent to deceive the comptroller, draw a check upon the bank for a specified amount, by himself as an officer of drawer corporation, and willfully and unlawfully caused such amount to be applied in payment of the check, with intent to deceive the comptroller, having no authority from such corporation to draw such check, or cause its payment, and not being an officer thereof, *held* sufficient to charge a violation of Rev. St. § 5209 (Comp. St. § 9772), making it a crime for an officer of an association to embezzle, abstract, or willfully misapply any of its funds.

5. Indictment and information ⇨110(13)—Count charging bank officer with abstracting described rates from credits of bank held sufficient.

Count of indictment charging that vice president and agent of a bank did knowingly, willfully, unlawfully, and feloniously and with intent to deceive any agent appointed as comptroller to examine the affairs of the bank, “abstract” from credits thereof certain specifically described promissory notes belonging to the bank, and constituting part of its assets, *held* sufficient to charge a violation of Rev. St. § 5209 (Comp. St. § 9772), making it a crime for an officer or agent of an association to embezzle, abstract, or willfully misapply any of its moneys, funds, or credits, as against the contention that the word “abstract” was too indefinite.

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

Charles L. Williams was convicted of embezzlement, and he brings error. Affirmed.

L. E. Dadmun, of San Diego, Cal., for plaintiff in error.

Robert O'Connor, U. S. Atty., and Wm. Fleet Palmer, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The indictment upon which the plaintiff in error was tried contained 27 counts, the trial resulting in a verdict of not guilty under four of them, a disagreement of the jury as to fourteen, and a verdict of guilty under nine, namely, 16, 17, 19, 21, 22, 31, 33, 34, and 35, upon which last-mentioned counts the judgment complained of was based. Our inquiry, therefore, must be confined to those counts only, and to such portions of the very voluminous record as are pertinent thereto; the record, however, containing a full transcript of the proceedings on the trial, the laborious examination of which has satisfied us that, as respects the *facts* of the case, certainly there is no ground upon which we would be justified in interfering with the result reached in the trial court.

One of the assignments of error insisted upon by the plaintiff in error is that the trial court erred in denying his motion to quash the indictment on the ground that the grand jury that returned it was not a legal body, for the reason that the court made no order directing the clerk and the jury commissioner to select jurors to be put in the grand and petit jury box. In support of the motion the clerk was called as a witness and gave this, among other, testimony:

"There was no order made by the court directing myself and the commissioner to select jurors to be put into the grand and petit jury box. There was no order of that kind made. The jury commissioner and clerk put the names in the box without a special order of the court to do so. The court did not at any time order and direct myself and the commissioner to select names from the different counties in this district and place them in the jury box to constitute petit and grand juries. The court did not make any order directing a certain number of names to be selected and drawn and put in the jury box. I can't turn to any order made in relation thereto. No such order was made. I put in the box—that is, the jury box—names of persons which were thereafter to be used as petit and grand jurors, without the court having first made an order directing me so to do. Q. Just prior to selecting the names for this grand jury box, which composed this grand jury, did you and the commissioner meet and select names to be put in the box before the grand jury was selected? A. I can't give you the date now that we put them in. I don't know whether it was immediately preceding the drawing of the grand jury or some time preceding. Q. Well, you did do so, though, previous to selecting the grand jury? A. Yes. Q. On more than one occasion after the commissioner was appointed by the court? A. Yes. Q. How many occasions? A. On two or three; I am not certain. Q. Have you any minute entry of those occasions? A. No."

Section 276 of the Judicial Code (Comp. St. § 1253) prescribes that both grand and petit jurors shall be publicly drawn from a box containing at the time of each drawing the names of not less than 300 persons possessing the qualifications prescribed in the preceding section,

which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein.

By Act Feb. 3, 1917, c. 27, 39 Stat. 873 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 1253) the above-mentioned section was so amended as to confer upon a "duly qualified deputy clerk" the same authority as was therein given the clerk.

Section 277 of the Judicial Code (Comp. St. § 1254) is as follows:

"Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."

[1] That section is applicable to grand, as well as petit, jurors. *Agnew v. United States*, 165 U. S. 44, 17 Sup. Ct. 235, 41 L. Ed. 624; *Spencer v. United States*, 169 Fed. 562, 95 C. C. A. 60.

The clerk also testified that when the grand jury that returned the indictment in question was drawn more than 300 names were in the box, and the record also shows that the judge of the court had directed the clerk and jury commissioner regarding the statutory requirements, although it does not appear that such order was entered upon the minutes of the court. The record of the case, however, is absolutely destitute of anything tending to show that the plaintiff in error was in any way prejudiced thereby.

In *United States v. Reed*, 27 Fed. Cas. 727, the court, composed of Circuit Justice Nelson and District Judge Hall, held that under the act of August 8, 1846 (9 Stat. p. 73, § 3), providing that no grand jury should be summoned in the federal courts except upon an order for a venire, to be made by a judge, a verbal order given to the clerk, though not entered of record or filed, was sufficient. And in the Case of *Fries*, 9 Fed. Cas. 826, 923, Circuit Justice Iredell ruled that the required venire, issued with the sanction of the court, had the same effect as though the express order of the court had been annexed thereto.

In *United States v. Caplis et al.* (D. C.) 257 Fed. 840, where a plea in abatement to an indictment for a conspiracy was based on the allegation that the jury commissioner who assisted in the drawing of the grand jury which returned the indictment was not a well-known member of the principal political party in the district opposed to that to which the clerk belonged, the District Court, in overruling the plea, referred to a similar ruling made by Circuit Judge Pardee and District Judge Swain in the case of *United States v. Chaires et al.*, in the Circuit Court for the Northern District of Florida (40 Fed. 820), where the court said:

"An inspection of this statute shows that the work of preparing the names of the persons possessing the qualifications of jurors, and placing them in the box, is to be done by the clerk of the court and a jury commissioner to be appointed by the judge. The duty to be performed by these parties is clearly and specifically prescribed in the statute. It may be considered, and probably is, mandatory; but it is entirely distinct from the duty devolving, under the statute, upon the judge. The plea under consideration relates entirely to the performance of the duty of the judge. By the statute the judge is to appoint a commissioner, who shall be a citizen of good standing, who shall reside in the district in which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs. The question is whether this part of the statute is mandatory or directory; whether, in appointing a jury commissioner, the judge, while endeavoring to comply with the law, must make no mistake of fact or of judgment, but must, at the peril of all subsequent proceedings, be sure to appoint a citizen, not only of standing, but of good standing, and not only a known, but a well-known, member of the principal political party opposed to that to which the clerk belongs. The statement of the question, and the nature of the case, satisfies us that the statute in this particular is directory, and not mandatory. What is the standard for a citizen in good standing? By what rule is it to be determined who is a well-known member of a political party? Considering that the judge has knowledge, judicial or otherwise, as to the political party of the clerk, by what rule is the judge to determine which is the principal party opposed? Suppose that the clerk is an Independent or a Prohibitionist? In case of a challenge to the array of jurors, or a plea in abatement, who is to try the issue? All matters and questions come back to the judge. The judge, in the exercise of a sound discretion, under the responsibilities of his office, directed by the statute, passes upon the qualifications of the jury commissioner he appoints, and his action would seem to be final and conclusive, except, perhaps, in the court that can call the judge to account for misbehavior in office. Particularly must this be the case where neither injury nor prejudice nor oppression is apparent nor is averred."

By Act Feb. 26, 1919, Congress made this addition to section 269 of the Judicial Code:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. p. 1181, Comp. St. Ann. Supp. 1919, § 1246.

Prior to that amendment the general rule was that for such irregularities as did not prejudice the defendant he had no cause for complaint. *Agnew v. United States*, 165 U. S. 36, 44, 17 Sup. Ct. 235, 41 L. Ed. 624, and cases there cited; 24 Cyc. of Law & Proc. 217, where may be found cited many decisions of the courts, and where it is said:

"The statutory provisions with regard to making up the jury list are ordinarily held to be merely directory, and errors and irregularities in failing to comply strictly with their provisions, which are not prejudicial to the parties, do not invalidate the list, or furnish any ground for challenging the array; but a substantial compliance with the law is necessary, and a disregard of the material provisions which make up the essential features of the system, and are designed to secure and preserve a fair and impartial trial, is not a mere irregularity, and is ground for challenging the array, even though it does not affirmatively appear that any injury has resulted therefrom."

See, also, *Apgar v. United States*, 255 Fed. 16, 166 C. C. A. 344.

[2] We are of the opinion that the fact that the order of the court below directing the clerk of the court and the jury commissioner thereof to place in the jury box the number of names as required by the

statute was not entered upon the minutes, did not render the grand jury that returned the indictment in question an illegal body.

It is urged on the part of the plaintiff in error that neither of the counts under which he was convicted and upon which he was sentenced states facts sufficient to constitute a crime, and therefore that his demurrer to each of them should have been sustained.

Count 19 alleged the willful and fraudulent embezzlement by the defendant of the "moneys, funds, and credits" of the bank theretofore received by him "to the amount and value of \$20,000," a more particular description of which was to the grand jurors unknown, and with intent to injure and defraud the said bank.

Count 34 alleged the willful and fraudulent embezzlement by the defendant of "moneys, funds, and credits" of the bank theretofore received by him, "to the amount and value of \$2,000," a more particular description of which was to the grand jurors unknown, with intent to injure and defraud the said bank.

Count 35 alleged the willful and fraudulent embezzlement by the defendant of "moneys, funds, and credits" of the bank theretofore received by him, "to the amount and of the value of \$3,000," a more particular description of which was to the grand jurors unknown, with intent to injure and defraud the said bank.

In *Sheridan v. United States*, 236 Fed. 305, 149 C. C. A. 437, where the plaintiff in error was convicted under two counts of an indictment which charged him with abstracting and converting to his own use "certain moneys, funds, and credits" of a certain national banking association, and alleging that the depositor in each instance "was a depositor and creditor" of the bank, and that the intent of the plaintiff in error was "to injure and defraud said national banking association and said depositor and creditor," the majority of this court sustained the validity of the indictment, saying, 236 Fed. at page 310, 149 C. C. A. at page 442:

"It is not ground of demurrer to an indictment under section 5209 that the property is described as certain moneys, funds, and credits of the bank of a specified amount in dollars, as it was described in this case, where, as here, it is followed by the averment that a more particular description is to the grand jury unknown"—citing *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; *Breese v. United States*, 106 Fed. 680, 45 C. C. A. 535; *United States v. Voorhees* (C. C.) 9 Fed. 143.

[3] Applying that ruling to counts 19, 34, and 35 of the indictment in the present case, it is obvious that they must be held valid.

Count 31 charged, in effect, that the defendant, on the 29th day of January, 1917, at the time being vice president and agent of the American National Bank of San Diego, Cal., and as such having the management and control of its moneys, funds, and credits, did, with intent to deceive any agent of the Comptroller of the Currency who might be appointed to examine the affairs of said banking association, knowingly, willfully, and unlawfully misapply certain of such moneys, funds, and credits, to the amount and value of \$46,219.10, a more particular description of which moneys, funds, and credits was to the grand jurors unknown, by making and drawing this check:

"American National Bank.

"San Diego, Cal., Jany 29, 1917. No. —.

"Pay to the order of Cash \$46,219.10, Forty-Six Thousand two hundred nineteen & ¹⁰/₁₀₀ Dollars.

Fidelity Construction Co.

"By C. L. Williams, V. Pt."

—which said check was then and there perforated as follows:

"A. N. B., 1-29-17,"

—and did knowingly, willfully, and unlawfully, and with intent as aforesaid, cause to be paid upon and applied to the payment of said check the sum of \$46,219.10 of the moneys, funds, and credits and the said association, a more particular description of which said moneys, funds and credits is to the grand jurors unknown; and said defendant, Charles L. Williams, did not at the time he so made and drew said check as aforesaid and caused to be paid upon and applied to the payment of said check the said sum of \$46,219.10 as aforesaid, nor at any other time have authority from the Fidelity Construction Company, nor from any one whomsoever, to so make and draw said check and cause to be paid upon and applied to the payment of said check the said sum of \$46,219.10; and the said Charles L. Williams is one and the same person as the said C. L. Williams whose name is signed to said check as aforesaid; and the said Charles L. Williams was not then and there nor at any other time vice president of said Fidelity Construction Company; and the proceeds of said check, being the aforesaid sum of \$46,219.10, were by the said Charles L. Williams then and there knowingly, willfully, and with intent then and there to deceive any agent of the Comptroller of the Currency appointed to examine the affairs of the said Banking Association, applied on the books of said Banking Association to the liquidation of certain notes, to wit:

Note dated June 22, 1916, signed with the name of Lizzie M. Belden and Frank E. Belden, in the sum of \$30.

Note dated March 24, 1916, signed with the name of H. Le Main, in the sum of \$41.50.

Note dated February 16, 1916, signed with the name of F. E. Godfrey, in the sum of \$55.

Note dated April 16, 1916, signed with the name of H. L. Richards, in the sum of \$100.

Note dated March 29, 1916, signed with the name of R. W. Place, in the sum of \$150.

Note dated November 25, 1914, signed with the name of Rowland T. Bent, in the sum of \$1,000.

Note dated November 25, 1914, signed with the name of Rowland T. Bent, in the sum of \$1,000.

Note dated November 15, 1915, signed with the names of William H. Randall and Sarah Randall, in the sum of \$200.

Note dated May 9, 1916, signed with the name of W. N. Howden, in the sum of \$100.

Note dated January 3, 1916, signed with the name of Margaret A. Gibbons, in the sum of \$30.

Note dated December 30, 1915, signed with the names of J. M. Chatterson and Ida C. Chatterson, in the sum of \$4,700.

Note dated April 29, 1915, signed with the name of C. M. Holmquist, in the sum of \$330, upon which there had been paid the sum of \$80.

Note dated December 16, 1915, signed with the names of F. L. Botsford and A. G. Botsford, in the sum of \$4,500.

- Note dated December 14, 1914, signed with the names of J. Clyde Kutzner and Nannie A. Kutzner, in the sum of \$1,170.
- Note dated May 12, 1916, signed with the name of Frank Von Tesmar, in the sum of \$608.58.
- Note dated June 29, 1916, signed with the name of Frank Von Tesmar, in the sum of \$76.55.
- Note dated July 31, 1916, signed with the name of Frank Von Tesmar, in the sum of \$57.47.
- Note dated October 3, 1916, signed with the name of Frank Von Tesmar, in the sum of \$9,000.
- Note dated November 23, 1916, signed with the name of Frank Von Tesmar, in the sum of \$400.
- Note dated December 1, 1916, signed with the name of Frank Von Tesmar, in the sum of \$3,000.
- Note dated December 11, 1916, signed with the name of Frank Von Tesmar, in the sum of \$12,500.
- Note dated December 11, 1916, signed with the name of Frank Von Tesmar, in the sum of \$500.

—a more particular description of which notes was to the grand jurors unknown, and all of which constituted part of the assets of the bank.

The statute upon which all of the counts here involved were based (R. S. § 5209 [Comp. St. § 9772]), in so far as applicable, declares:

“Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association * * * or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, * * *” shall be punished in a prescribed way.

In the case of *Batchelor v. United States*, 156 U. S. 426, 429, 15 Sup. Ct. 446, 447 (39 L. Ed. 478), in considering that statute, the Supreme Court said:

“By the settled rules of criminal pleading, and by the previous decisions of this court, the words ‘willfully misapplies,’ having no settled technical meaning (such as the word ‘embezzle’ has in the statutes, or the words ‘steal, take, and carry away’ have at common law), do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished, but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. Without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause. *United States v. Britton*, 107 U. S. 653, 661, 669; *United States v. Northway*, 120 U. S. 327, 332, 334; *Evans v. United States*, 153 U. S. 584, 587, 588.”

In that case the court held that the attempt there made to set forth how the misapplication was made, and that it was unlawful, was too indefinite and uncertain.

[4] In the present case, however, the indictment, in our opinion, does clearly and specifically show how the alleged misapplication of the \$46,219.10 of the moneys, funds, and credits of the bank was made, and that it was so made by the defendant with the alleged unlawful intent to deceive the Comptroller of the Currency; for it expressly alleges that the defendant, as agent and vice president of the bank, had

as such the management, direction, and control over its moneys, funds, and credits, and did on a specified day willfully and unlawfully, with intent to deceive the comptroller, draw a check upon the bank for \$46,219.10 in the name of Fidelity Construction Company, by himself as its vice president, and, with the alleged intent, willfully and unlawfully caused \$46,219.10 of the moneys, funds, and credits of the bank to be applied in the payment of that check, which money was thereupon willfully and unlawfully applied by the defendant on the books of the bank to the liquidation of certain specified promissory notes with the intent to deceive the comptroller, he, the defendant, having no authority from the Fidelity Construction Company to draw said check or to cause its payment, and not being at the time or at any time vice president of that company. See *Evans v. United States*, 153 U. S. 584, 593, 14 Sup. Ct. 934, 38 L. Ed. 830; *United States v. Eno* (C. C.) 56 Fed. 218, 220; *Breese v. United States*, 106 Fed. 680, 685, 45 C. C. A. 535; *United States v. Morse* (C. C.) 161 Fed. 429, and numerous cases there cited.

Count 33 alleged, in substance, that on January 29, 1917, the defendant, at the time being vice president and agent of the bank, did knowingly, willfully, unlawfully, and feloniously, and with intent to deceive any agent appointed by the Comptroller of the Currency to examine the affairs of the said banking institution, abstract from the credits thereof certain specifically described promissory notes belonging to the bank and constituting part of its assets.

[5] While the word "abstract" is not a word of settled technical meaning like the word "embezzle," as used in the statutes defining the crime of embezzlement, or the words "steal, take, and carry away," as used to define the crime of larceny at common law (*U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; *Batchelor v. U. S.*, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478), there can, in our opinion, be no misunderstanding of the true meaning of the allegation of the willful and felonious abstraction by an officer and agent of a bank of certain specifically described promissory notes constituting a part of its assets; the words "steal, take, and carry away" could not make its meaning plainer. We therefore have no difficulty in sustaining the validity of count 33.

The sufficiency of counts 16, 17, 21, and 22, charging the willful and unlawful entry in the books of the bank of specifically described false entries by the defendant with intent to deceive the comptroller, does not, we think, admit of question.

We have given very careful consideration to the very full and painstaking charge of the learned judge of the court below to the jury, and are of the opinion that it embraced the substance of all of the defendant's requested instructions that were appropriate and proper, and was without any error of which the plaintiff in error can justly complain.

The judgment is affirmed.

UNITED STATES v. DELATOUR.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1921.)

No. 5563.

1. Public lands ⇨120—Clear and convincing evidence required for cancellation of patent for fraud or mistake.

A mere preponderance of evidence is insufficient to justify a chancellor in avoidance of a patent for fraud or mistake, which may only be done on clear, unequivocal and convincing proof of such fraud or mistake.

2. Appeal and error ⇨1009(3)—Findings of trial court on conflicting evidence presumptively correct.

Where a court of equity has considered conflicting evidence and made its findings and decree therein, they must be deemed presumptively correct by the appellate court, which may lawfully reverse them only for obvious error of law, or some serious mistake of fact, in the consideration of the evidence.

3. Corporations ⇨29(2)—As against a collateral attack organization held sufficient to validate deed to corporation.

Under Cobbey's Ann. St. Neb. 1909, § 4119, providing that, "Every corporation, previous to the commencement of any business except its own organization, * * * must adopt articles of incorporation and have them filed in the office of the Secretary of State, * * * and domestic corporations must also file with county clerk," as construed by the Supreme Court of the state to authorize a domestic corporation to do business when its articles have been filed with the county clerk, a deed conveying land to a corporation, signed after the filing of its articles with the county clerk and delivered on the day they were filed with the Secretary of State, *held*, as against collateral attack, valid and effective as a deed of a de facto corporation.

4. Public lands ⇨120—Evidence held insufficient to warrant cancellation of patent for fraud.

Findings of the trial court that the evidence was insufficient to sustain claims of the government that a conveyance of lands by defendant was fraudulent, and made for the purpose of qualifying him to make entry of public land, and that he made and presented false affidavits of residence for the purpose of deceiving the officers of the land office, *held* justified.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Suit in equity by the United States against Samuel P. Delatour. From the decree, the United States appeals. Affirmed.

Thomas S. Allen, U. S. Atty., of Lincoln, Neb., and Frank A. Peterson, Asst. U. S. Atty., of Omaha, Neb., for appellant.

J. G. Beeler, of North Platte, Neb. (Beeler & Crosby, of North Platte, Neb., on the brief), for appellee.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. On January 4, 1909, the defendant, Samuel P. Delatour, filed in the land office in North Platte, Neb., his application under the Kinkaid Act of April 28, 1904, 33 Stats. 547, 5 Comp. Stats. § 4576, and the Homestead Act, section 2289, U. S. Rev. Stats., 5 Comp. Stat. § 4530, to enter 640 acres of arid land in the

state of Nebraska as his homestead. He made his final proof before the register and receiver of the proper land office of his compliance with these laws on October 9, 1912, and, on April 18, 1913, the United States issued to him a patent for the land. On August 29, 1917, the United States filed a bill in equity against him in the court below to avoid this patent for alleged fraud, in that, when he applied to enter the land, he made a false affidavit that he was not the proprietor of more than 160 acres of land in any state or territory, and that he made his application honestly and in good faith to obtain a home for himself; in that on October 9, 1912, when he made his final proof, he made a false affidavit and presented false affidavits of witnesses, to the effect that he established his residence upon the land in controversy in March, 1909, and had thereafter continuously resided thereon, except for short periods of absence, and had placed improvements of the value of \$800 upon the land; and in that by means of these affidavits he intentionally deceived the officers of the land office, and induced them to recommend the issue and to issue the patent to him, and thereby to defraud the United States. The defendant in his answer to this bill denied these charges. The issues thus formed were tried, and the court below found for the defendant thereon and dismissed the bill. From this decree of dismissal the complainant has appealed.

The evidence in this case was conflicting. The court below heard and considered it, and upon it made its findings and founded the decree which this appeal challenges. The rules of equity by which that challenge must be tried, are these:

[1] A mere preponderance of evidence is insufficient to justify a chancellor in the avoidance of a contract, a fortiori, a patent to land for fraud or mistake. It is indispensable to such an avoidance that the evidence of such fraud or mistake shall be "clear, unequivocal, and convincing"; that it shall be "that class of evidence which commands respect, and that amount of it which produces conviction." *Maxwell Land-Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 1029 (30 L. Ed. 949); *United States v. Budd*, 144 U. S. 154, 161, 162, 12 Sup. Ct. 575, 36 L. Ed. 384; that it shall be "plain and convincing beyond reasonable controversy," *Thallmann v. Thomas*, 111 Fed. 277, 282, 49 C. C. A. 317, and the cases there cited.

[2] Again, where a court of equity has considered conflicting evidence and made its findings and decree thereon, they must be deemed by the appellate court to be presumptively correct, and unless an obvious error of law, or some serious mistake of fact has been made in the consideration of the evidence and the decision of the case, its findings may not be lawfully disturbed. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *North American Exploration Co. v. Adams*, 104 Fed. 404, 408, 45 C. C. A. 185. Let us test the two questions which this appeal presents by these rules.

The first question is, Did the evidence so clearly prove beyond reasonable controversy (a) that the defendant was the proprietor of more than 160 acres of land in any state or territory (Comp. Stats. § 4530) on January 4, 1909, (b) that he made a false affidavit that he was not such a proprietor on that day in order to deceive the officers of the land

office and to defraud the United States, and that thereby he succeeded in so deceiving the former and defrauding the latter that the finding and decree of the court below to the contrary ought to be reversed? The established facts relevant to this issue are that from 1884 to the time when this fraud is alleged to have been committed the defendant had been and was a ranchman, engaged in raising stock on the arid lands he owned in Nebraska; that he had built in 1889, and thereafter until 1908 had lived in and occupied a house on his ranch; that in 1887 his wife had died and he had never married again; that his house was near the land here in controversy; that in 1908 the defendant was living in his ranch house, and had become the owner of 4,680 acres of semiarid lands, on which he and three of his full grown sons were maintaining a herd of cattle and raising them and cultivating some parts of this land that they had irrigated. The lands in controversy adjoined the lands owned by the defendant. He testified that in this year 1908 he was very desirous of keeping his sons upon the 4,680 acres of land he owned, to give them an interest therein and thereby secure their continued assistance in carrying on his business, and that to accomplish this purpose he and his sons organized the La Tour Land & Cattle Company, a corporation, on March 27 and 28, 1908, and that he conveyed to it all the land he owned on April 13, 1908. The articles of incorporation of this company were executed by the defendant and his sons on March 27 and 28, 1908. They were filed in the office of the proper county clerk on April 13, 1908, and on that day the defendant made a warranty deed of all the lands of which he was the proprietor to the La Tour Land & Cattle Company. On January 4, 1909, the articles of incorporation of this company were filed in the office of the Secretary of State of Nebraska, and on January 4, 1909, the defendant filed his application and made his affidavit to enter the land in controversy as his Kinkaid homestead.

[3] Counsel for the plaintiff contend that the defendant never was qualified to enter these lands as such a homestead, because (1) the La Tour Company failed to become a corporation qualified to take the title thereto by reason of the failure to file its articles with the Secretary of State until long after the defendant's deed to it was made, and (2), because the formation of the corporation and the conveyance of the 4,680 acres were fraudulent devices of the defendant to evade the statutory provision that disqualified any one who was the proprietor of more than 160 acres of land from entering the Kinkaid homestead. In support of their first reason for this contention they cite the provision of the Nebraska statutes that—

"Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them filed in the office of the Secretary of State and recorded in a book kept for that purpose, and domestic corporations must also file with county clerk, in the county where their headquarters are located." *Cobbey's Annotated Statutes of Nebraska, 1909, § 4119.*

But the Supreme Court of Nebraska, whose interpretation of the statute of its state controls in the absence of any constitutional or com-

mercial question, has held that the filing of the articles of a domestic corporation with the proper county clerk under this statute, although they are not yet filed with the Secretary of State, qualifies the corporation to do business as such, and renders its transactions as a de facto corporation impervious to collateral attack. *Lusk v. Riggs*, 70 Neb. 713, 97 N. W. 1033. In the case in hand the articles of incorporation were filed with the county clerk more than six months before the defendant made his deed, and they were filed with the Secretary of State on the day that deed was delivered. Under this state of facts no error of law is discovered in the conclusion of the court below, that, as against a collateral attack like that here made, the corporation was qualified to take, and that the defendant was divested of title to his lands by his deed of April 13, 1908.

[4] In support of their claim that the incorporation of the La Tour Company and the conveyance of the 4,680 acres of land were fraudulent devices of the defendant, conceived to evade the inhibition of the taking of a homestead by a proprietor of more than 160 acres, and fraudulently to acquire this Kinkaid homestead, counsel for the plaintiff call attention to evidence to the effect that the defendant, after the corporation was organized, held the largest interest in and managed its business, that when a mortgage which he had made on this land before the corporation was organized came due, he, as an individual, gave a mortgage upon the land after it had been conveyed to the corporation; that he made other mortgages thereon in the same way; that he paid the taxes on it by his individual check; that \$5,000, which the defendant's son Eugene paid into the corporation for his interest in it when it was organized, went into the defendant's individual bank account; that he paid this \$5,000 and 10 per cent. interest back to Eugene in 1911, when his sons withdrew from the business and the corporation; that the corporation never issued any certificates of stock or had any checking account, or kept any books beyond a record of the organization of the company and the election of its officers; and that on December 26, 1912, after the defendant on October 9, 1912, had made his final proof for the Kinkaid homestead, the La Tour Company conveyed the 4,680 acres to the defendant. But, if the defendant had conveyed this 4,680 acres to the La Tour Company to qualify himself to take the Kinkaid homestead he would have been likely to have been very sure to see that certificates of stock were issued by the corporation to the sons who became interested therein and to himself, that after such conveyance the mortgages on the land were made and the taxes were paid by the corporation, and that books were kept to show these transactions. It was not unnatural that the \$5,000 which Eugene paid to the corporation for his interest therein should have gone into the personal account of the defendant, for that \$5,000 was paid for stock in or for an interest in the property of the corporation which it had received from the defendant, and for which it owed him the \$5,000. The defendant testified that when the corporation was formed and when he conveyed the 4,680 acres to it on April 13, 1908, he did not have in contemplation filing upon the lands here in controversy; that his purpose was to interest his sons and give them a share in the land

conveyed so that they would stay with him and assist him to carry on the business; that after the conveyance to the corporation he kept the general management of that business, his youngest son stayed and worked with him at the ranch house, his eldest son lived on and operated the north ranch, his second son, the irrigated farm—both parts of the 4,680 acres, and Eugene, who was unable to perform manual labor, invested his \$5,000 and was elected county clerk; that the operation of the ranch in this way proved unsuccessful, and in 1910 and 1911 the boys all notified him that they were dissatisfied, and withdrew from the business and the property, and after that in 1912 the corporation conveyed it back to him. This account of these transactions which the defendant gave is not improvable. The lands which the defendant owned and conveyed were semiarid; it was impossible to cultivate and raise crops upon them without irrigation; they were generally useful, if at all, for grazing purposes only. If the defendant on April 13, 1908, had made the deed to qualify himself to take the Kinkaid homestead, he probably would not have waited until January 4, 1909, before he attempted to apply for it, and when all the evidence on this subject is thoughtfully considered it fails to convince that the court below made any mistake in its finding that it was insufficient to justify it in concluding that the defendant with intent fraudulently to evade the prohibition of the statute and to acquire the Kinkaid homestead by deceit and fraud, formed the La Tour Corporation or conveyed the 4680 acres to it. On the other hand, this evidence impresses the mind with the view that the defendant had no such purpose or intent in the transactions which have been discussed.

The second question is, Did the evidence in this case so clearly prove beyond reasonable controversy that with intent to deceive the officers of the land office and to defraud the United States of the lands in controversy the defendant, on October 9, 1912, made a false affidavit and presented false affidavits of witnesses to the effect that he established his residence upon the land in controversy in March, 1909, that he had thereafter continuously resided thereon except for short periods of absence, and that he had placed improvements of the value of \$800 thereon, and did such false affidavits deceive the officers of the land office, induce them to issue the Kinkaid patent to the defendant, and defraud the plaintiff of the land so patented? The testimony that conditions the answer to this question, as is not unusual in cases of this character, is conflicting. Counsel for the respective parties have quoted and pressed upon our attention the parts of it favorable to their respective clients, and all the testimony upon this subject has been carefully read and considered. It is so voluminous that a repetition or review of it here would serve no good purpose. If the answer to the question now under consideration were to be drawn from the evidence for the plaintiff alone perhaps it might be in the affirmative. If it were to be drawn from the evidence for the defendant alone a negative answer could not well be denied. The result is that when all the testimony is taken together, it fails to persuade that the court below made any serious mistake in its conclusion, it failed to present that "clear, unequivocal, and convincing" evidence of "that class which commands respect and of

that amount which produces conviction" required to prove that the defendant fraudulently made false affidavits regarding his compliance with the requirements of the Homestead Laws with intent to deceive the officers of the land office and to defraud the United States, and the decree below must be affirmed.

It is so ordered.

DUKES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 21, 1921.)

No. 1900.

1. **Criminal law** ⇨395—**Internal revenue** ⇨42—**Evidence obtained by unlawful search inadmissible; liquor held secured by illegal search.**

Where a sheriff and his deputy, without a warrant of arrest or search warrant, entered defendant's house through an open door, and seized whisky which was on a table by which defendant was standing, the fact that defendant did not object, or that he then said they might look around, which they did, finding more in another building, *held* not to make the search or seizure lawful, nor to render the evidence so procured admissible against defendant in a criminal prosecution.

2. **Internal revenue** ⇨47—**Prosecution must prove that whisky charged to have been illegally removed from distillery was untaxpaid.**

In a prosecution under Rev. St. § 3296 (Comp. St. § 6038), for illegal removal or concealment of whisky on which the tax had not been paid, the amount being less than five gallons, the prosecution had, in view of the provisions of Comp. St. §§ 6030, 6102, 6104, the burden of proving to the satisfaction of the jury beyond a reasonable doubt that the whisky so charged to have been removed or concealed was untaxpaid.

In Error to the District Court of the United States for the Western District of South Carolina, at Rock Hill.

Criminal prosecution by the United States against Moses Dukes. Judgment of conviction, and defendant brings error. Reversed.

Dobson & Vassy, of Gaffney, S. C., for plaintiff in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (J. E. Marshall, Asst. U. S. Atty., of Greenville, S. C., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. This case was tried in the District Court of the United States for the Western District of South Carolina, at the March term, 1921. The plaintiff in error here, who was the defendant below, and will be referred to as defendant, was convicted, judgment entered, and the case was brought by writ of error at the instance of the defendant to this court.

The defendant, who was without counsel here, submitted the case on the record without argument. The United States attorney for the

Western District of South Carolina made oral argument and also filed brief. The indictment in the case is as follows:

"In the District Court of the United States in and for the District Aforesaid, at the September Term of 1920.

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oaths present that one Moses Dukes, on the 25th day of December, in the year 1919, in the said division of said district, and within the jurisdiction of said court, did unlawfully remove, and did aid and abet in the removal of, certain distilled spirits, to wit, two and one-half gallons, upon which the tax imposed by law had not been paid, from a distillery to the grand jurors unknown, to a place other than a distillery warehouse provided by law, to wit, Cherokee county, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

"Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place and within the jurisdiction aforesaid the said Moses Dukes did unlawfully conceal, and did aid and abet in the concealment of, certain distilled spirits, to wit, two and one-half gallons, which had theretofore been removed from a certain distillery to the grand jurors unknown, to a place other than the distillery warehouse provided by law, to wit, Cherokee county, he the said Moses Dukes, at the time he did so conceal, and did aid and abet in the concealment of, said distilled spirits, then and there well knowing the same to have been removed as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The indictment, as will be seen, is drafted under section 3296 of the Revised Statutes (Comp. St. § 6038), which section is in the following language:

"Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, or in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months more than three years."

The testimony introduced at the trial was that of W. W. Thomas, sheriff of Cherokee county, S. C., and H. H. Lockhart, his deputy, both of whom were offered by the United States. Their testimony, in substance, was that, in consequence of information they had received of the violation of the liquor laws, they went out together to the premises of the defendant on the 25th day of December, 1919, on what they called a raid. When they reached their destination they passed by the house in which the defendant lived, to where they saw several negroes congregating in the woods. They waited there a short while watching the negroes, and then went back to the house. When they arrived there several people, both white and colored, were on the outside. This was on the morning of Christmas Day, and the people on the outside were just standing around. Neither of the witnesses saw the defendant until Lockhart, who preceded Thomas, went around

and walked in the back door of the house. The door was open, and the defendant was in the room standing to the right of the witness as the latter walked in. The witness saw on a table in the room a gallon jug and a quart can, both of which, upon examination, were found to contain corn whisky, the jug being about half full. The witness Lockhart had taken up the quart can, when the other witness, Thomas, came in at the front door. Neither one had a warrant of any kind, either for the arrest of the defendant or any other person on the premises, nor did either have a warrant for the search of the house or the premises. Witness Lockhart, when he saw the whisky in the jug and can, said: "Mose, what are you doing with this?" The defendant did not object to the coming in of the witnesses. Whilst in the room he told them that what was found in the jug and can was all the liquor there was in the house, but they might look around. After this, upon further examination, the witnesses found in an outhouse, about 15 feet from the dwelling, some small vessels containing altogether about two or three gallons of corn whisky. The witness Lockhart testified that he was acquainted with ordinary blockade liquor, and that in his opinion the whisky found was blockade. All the vessels and contents were seized and carried away by the witnesses.

Section 3296 of the Revised Statutes, together with certain other sections, of what are known as the Internal Revenue Laws, are repealed by the National Prohibition Act, commonly known as the Volstead Act (41 Stat. 305).

See *United States v. Boze Yuginovich*, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided by the Supreme Court of the United States, October term, 1920; also *Reed v. Thurmond*, which was decided by this court November 24, 1920, and reported in 269 Federal Reporter, 252.

These decisions however, do not seem to affect this case for the reason that the acts upon which the alleged offense of the defendant is based were committed on December 25, 1919. The National Prohibition Act did not become the law until January, 1920, and the reservation in the said act, as we understand the decision of the Supreme Court in the case above cited, preserves the right to prosecute offenses against the existing laws where the acts were committed before the National Prohibition Law became effective.

[1] With this question eliminated, there remains for our consideration, as we view it, only two propositions involved in the action of the trial court and the bill of exceptions and assignments of errors based thereon by the defendant; one being the objection by the defendant to the admission of the testimony of the two witnesses, Thomas and Lockhart, offered by the government, and the other the motion of the defendant for a directed verdict of acquittal.

The first proposition is based on the fact that the two witnesses went upon the defendant's premises and into his dwelling house without warrant of arrest or warrant of search, and that the evidence offered was obtained under these circumstances, and is therefore inadmissible against him in his trial for an alleged criminal offense. It may be said that the testimony shows that the witnesses did not go upon the

premises or enter the dwelling house of the defendant at his invitation or by his permission. So far as shown by the testimony the witnesses were in the house before the defendant was aware of their presence. They came upon an adverse errand under the belief, upon information they had, that the defendant was guilty of a crime, and they were seeking evidence in support of a criminal charge.

It is argued that the defendant made no objection to the entry of the witnesses, either upon his premises or into his dwelling, and therefore that it was a peaceful entry, and that the rule excluding testimony against a person accused of crime on his trial, such testimony having been obtained by search without warrant, does not apply. We do not agree to this proposition. These two witnesses, one the sheriff of the county in which the defendant lived, and the other his deputy, crossed the defendant's threshold and invaded his castle without warrant of law. There is no suggestion that objection on the part of the defendant, to either the entry of these officers into his dwelling or the seizure by them of his property, would have caused them to desist. On the other hand, it is more than likely that any protest or show of resistance on the part of the defendant would have led to more aggressive action on the part of the officers.

In *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. —, in which the opinion was rendered by the Supreme Court of the United States on the 28th of February, 1921, this question of unreasonable searches and seizures is fully discussed. *Gouled* and another were indicted for a conspiracy to defraud the United States in one count, and in another for the use of the mails to promote a scheme to defraud. On the trial of *Gouled* the prosecution proposed to offer in evidence certain papers, which had theretofore been surreptitiously taken from the office of the defendant by one acting under the direction of the intelligence department of the army. The trial court admitted the papers on the ground that they were obtained without the use of force or illegal coercion. In this connection the court says:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures, and if for a government officer to obtain entrance into a man's house * * * by force or illegal threat or show of force amounting to coercion, and then to search for and seize his private papers, would be an unreasonable and therefore prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will, in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

It is further contended that the acquiescence of the defendant in what the witnesses had done, and his permission, as it is alleged, for them to look around, takes this case without the scope of the case above cited. We feel constrained to disagree to this proposition. It is reasonable to conclude that the defendant, in the presence of the sheriff of the county and his deputy, who were in his dwelling and by their

action making it known to him that they were seeking evidence in aid of a criminal charge against him, was in a state of mental trepidation. He was no doubt overawed by the presence of these two officers under the circumstances; therefore what he said or did should not be used to his disadvantage in a subsequent trial of the case in which evidence against him was being sought. Besides, in our opinion, the sheriff of the county, accompanied by one of his deputies, making entry without authority into the home of a citizen, is such a show of force as is contemplated by the decision of the Supreme Court in the *Gouled Case*.

The Fourth Amendment to the Constitution prohibits unreasonable searches and seizures, and the Fifth Amendment protects an accused person from being compelled to testify against himself. A close relation therefore exists between these two amendments, and it is well said by Justice White, afterwards Chief Justice, in delivering the opinion of the Supreme Court of the United States in the case of *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, commenting upon the decision in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, referring to the two amendments:

"That both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

And further in the opinion is the following quotation from a note to *Gilham's Case*, 2 *Moody*, 194, 195:

"The human mind, under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail."

Whilst the *Bram Case* is confined primarily to the rules of law relating to the admissibility of alleged confessions in criminal trials, yet it presents the purposes of the Fourth and Fifth Amendments to the Constitution in such forceful and impressive language that we cite it as bearing upon the proposition that whatever the defendant in this case may have said, when confronted by the sheriff and his deputy, who had wrongfully entered his dwelling in pursuit of evidence to sustain a charge of crime against him, should not be accepted as testimony in his trial.

We conclude, therefore, that the testimony of Thomas and Lockhart was inadmissible, because of the circumstances under which it was obtained, and that it should have been excluded upon objection by defendant's counsel.

The defendant's motion for a directed verdict of acquittal was based upon the principle which we have already discussed, that the testimony introduced by the government on the trial was obtained by illegal search.

[2] A further ground stated as a basis of the motion is in the following language:

"That there is no testimony as to the stamps. There is no testimony in this case that stamps were not on the whisky, even if illegally found."

We think it is fair to give the defendant the benefit of this latter ground, for, although it is very inaptly stated, it can be readily seen that the purpose was to make the point that there was no sufficient evidence that the distilled spirits found in possession of the defendant were untaxpaid. The indictment charges the quantity of untaxpaid spirits alleged to have been illegally removed and concealed to be two and one-half gallons, and the testimony is that the distilled spirits found were in several small vessels, altogether containing less than five gallons.

In order to pass upon this question we must resort to the method prescribed by the Internal Revenue Laws, and the regulations in aid of their enforcement, with respect to the collection of taxes upon distilled spirits, and the requirements as to the presence of stamps, marks, and brands upon packages containing such spirits.

A package or cask of less capacity than five wine gallons containing distilled spirits was not required by law to have upon it any stamps, marks, or brands denoting the payment of the tax on the contents. The following sections of the Internal Revenue Laws will throw light upon this subject:

Sec. No. 3289. "All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States." Comp. St. § 6030.

Section 3320, as amended by the act of July 16, 1892, and as further amended by the act of August 27, 1894 (Comp. St. § 6102), is in part as follows:

"Whenever any cask or package, containing five wine gallons or more, is filled for shipment, sale, or delivery on the premises of any rectifier who has paid the special tax required by law, it shall be inspected and gauged by a United States gauger whose duty it shall be to mark and brand the same and place thereon an engraved stamp, which shall state the date when affixed and the number of proof gallons, and shall be in such form as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury."

Section 3323, as amended by the act of July 16, 1892 (27 Stat. 200 [Comp. St. § 6104]), provides that—

"Every package of distilled spirits containing five wine gallons or more, filled on the premises of a wholesale liquor dealer, who has paid the special tax required by law, shall be marked, branded, and stamped by such wholesale liquor dealer, in such manner and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe."

Taking these sections in connection with the other provisions of the law, and the regulations governing the stamping of original casks and packages of distilled spirits, to the end that they might be removed from the distillery warehouse or the general bonded warehouse in which they were stored, it will be observed, as we have stated above, that no cask or package of less capacity than five wine gallons, containing distilled spirits, required the presence upon it of stamps, marks, or brands to denote the payment of the tax on the contents. The retail liquor dealer was the instrumentality through which distilled spir-

its, in packages, casks, or vessels holding less than five wine gallons, were distributed to the public for consumption.

In contemplation of law, the retail dealer bought his stock of distilled spirits from distillers, wholesale liquor dealers, or rectifiers, and the spirits were bought in barrels, casks, or packages, bearing the stamps, marks, and brands to evidence the payment of the tax. From these containers the retail dealer dealt out distilled spirits to purchasers in quantities of less than five gallons, as before stated. The law protected the spirits sold by the retailer from seizure or confiscation, unless it was shown that it had been taken from an untaxpaid package. Therefore when distilled spirits were found in a vessel of less capacity than five wine gallons, the law presumed that it was taxpaid, and the burden was upon the party alleging the contrary to prove it, and in a criminal case to prove it to the satisfaction of a jury beyond a reasonable doubt.

The nonpayment of the tax is an essential element of the offense denounced in section 3296, and the burden was upon the government in this case to prove that fact beyond a reasonable doubt, in order to warrant a verdict of conviction. The witness Lockhart testified that he was acquainted with blockade whisky, and that in his opinion that found in the possession of the defendant was of such character. He did not testify that the species of distilled spirits known as "blockade" differed from that on which the tax had been paid in color, flavor, odor, or in any other respect. We do not think that this evidence was sufficient to prove the fact that the distilled spirits found in the defendant's possession was illicit.

Following in line with what we have said, our conclusion is that the judgment of the trial court should be reversed, and the case remanded, to the end that a new trial be granted and subsequent proceedings had in harmony with the views we express.

Reversed.

ADAMSON et al. v. ALEXANDER MILBURN CO.

(Circuit Court of Appeals, Second Circuit. July 8, 1921.)

No. 128.

1. Contracts ⇨143—As made by parties cannot be altered by court.

The court must interpret a contract as made by the parties, and cannot change the contract so made by construction, and read into it words which the parties did not themselves put there.

2. Contracts ⇨147(2)—Construed according to intention of parties, to be deduced from language used.

In the construction of contracts, the court must, if possible, ascertain and give effect to the mutual intention of the parties, to be deduced from the language the parties have employed.

3. Patents ⇨183, 196—Offer and acceptance held to create a binding contract of sale of patent rights, and not merely an option.

An offer to assign patent rights and rights under pending application and future improvements conceived by inventor for a cash consideration, to be payable on agreement by assignee's attorneys as to the breadth and

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

patentability of the claims, accepted by the assignee on condition that its attorneys, who were to pass on the breadth and patentability of the claims, could await the first report of the Patent Office on the claims before committing the assignee to the cash payment, *held* to create a binding contract of sale, and not merely an option to purchase the patent rights.

4. Patents ⇔183, 203—Whether there was a failure in performance of contract of sale held for jury.

In an action for breach of contract to pay a cash consideration for patent rights and rights under pending application and future improvements conceived by inventor, on agreement of defendant's attorneys as to the breadth and patentability of the claims, the question of whether there was such a failure in the breadth and patentability of the claims as would not protect the purchaser of the patent in the manufacture, sale, and use of it, and so justify the defendant's instruction to his attorneys to drop the matter prior to an adverse report from such attorneys, *held* for the jury.

5. Patents ⇔183, 203—Whether attorneys had sufficient time for agreement as to breadth and patentability of claims sold held for the jury.

In an action for breach of contract to pay plaintiffs a cash consideration for patent rights and rights under pending application and future improvements conceived by inventor, on agreement by defendant's attorneys as to the breadth and patentability of the claims, the question of whether a sufficient time had elapsed for the attorneys to make the necessary investigations and agree as to the breadth and patentability of the claims *held* for the jury.

6. Patents ⇔183, 203—Whether attorneys had agreed as to the breadth and patentability of claims of patents assigned held for the jury.

In an action for breach of contract to pay plaintiffs a cash consideration for patent rights and rights under pending application and future improvements conceived by inventor, on agreement by defendant's attorneys as to the breadth and patentability of the claims, the question whether the attorneys had in fact agreed as to the breadth and patentability of the claims *held* for the jury.

7. Patents ⇔183, 203—Failure of purchaser's attorneys to reach agreement as to breadth and patentability of claims made condition precedent to payment of consideration held no defense in action for consideration.

Where payment of cash consideration for patent rights and rights under pending application and future improvements conceived by inventor was made conditional on agreement by purchaser's attorneys as to the breadth and patentability of the claims, the failure of the attorneys to reach such agreement was no defense in seller's action for such consideration, where the purchaser's acts of intervention had prevented them from reaching such an agreement.

8. Contracts ⇔221(3)—Money payable notwithstanding failure of contingency due to defendant.

If the payment of money is contingent upon the happening of a particular event, and that event does not take place because the defendant prevents it, the money is payable nevertheless.

9. Contracts ⇔282—Rejection of work required to have been done to satisfaction of particular person cannot be arbitrary.

Where something is to be done to the satisfaction of a particular person, and it is not simply a matter of personal taste, fancy, or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be arbitrary or unreasonable.

10. Patents ↻183, 203—Purchaser could not refuse to pay consideration on attorneys' refusal to examine into merits or withholding of consent on unreasonable grounds.

Purchaser who had agreed to pay cash consideration for patent rights and rights under pending application and future improvements conceived by inventor, on the agreement of his attorneys as to the breadth and patentability of the claims, could not withhold payment on the plea that the condition precedent had not been complied with, if the attorneys had without reason refused to examine into the merits or had withheld their assent on fictitious or unreasonable grounds.

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

Action by Ernie Adamson and others against the Alexander Milburn Company. Judgment of dismissal, and plaintiffs bring error. Reversed, complaint reinstated, and new trial granted.

The action was commenced in the state court, and was removed into the United States District Court on defendant's petition, the controversy being between citizens of different states. The plaintiffs Adamson and Van Pelt are citizens and residents of the state of New York, and Swiggert and Levinson are citizens and residents of the District of Columbia. The defendant is a corporation, and is a citizen and resident of the state of Maryland.

Ernie Adamson is the inventor of an acetylene gas generator, for which patent No. 1,079,823 was issued to him by the United States Patent Office on November 25, 1913. The other plaintiffs acquired an interest in the patent from the inventor, so that all of the plaintiffs were owners of various interests in the patent and the improvements thereon afterwards conceived by the inventor.

At the time the writing sued upon was signed Adamson had also applied for another patent for an improved acetylene gas generator, which patent was subsequently issued to him on September 2, 1919, as patent No. 1,314,780. The offer which resulted in the contract sued upon was to assign to the defendant the patent issued in 1913 and the rights under the application then pending for a patent for the improved generator and all designs and improvements on generators conceived by Adamson prior or subsequent to the date of the offer.

The action is at common law for a breach of a written contract.

The complaint alleged that on August 15, 1918, the plaintiffs entered into a written agreement wherein the plaintiffs sold to the defendant certain patent rights in the Adamson Acetylene Generator, with the right to manufacture and vend the same for three years, for a consideration of \$5,000 and a royalty of \$1 for each generator manufactured. It is alleged that by the terms of the agreement the defendant promised to pay to plaintiffs the sum of \$5,000 within a reasonable time from the date of the contract, together with the royalty for each generator manufactured, and that defendant also promised to proceed with the manufacture and sale of the generators within a reasonable time. Then it is alleged that a reasonable time has long elapsed, but that defendant has failed to pay to the plaintiffs the said sum of \$5,000, and has

failed to commence the manufacture and sale of the said gas generators; that if the defendants had proceeded within a reasonable time to carry out the terms of the contract it could have manufactured and sold 5,000 gas generators, and by reason of its failure to do so the plaintiffs were damaged in the sum of \$5,000; and plaintiffs asked judgment in the sum of \$10,000.

The plaintiffs alleged that they had duly performed their part of the contract, except that they had not delivered or tendered the documents necessary to transfer title to the patents, the reason for their not doing so being that defendant, prior to the time when the title was to be transferred, had notified the plaintiffs that it would fail to carry out the agreement upon its part, and that it would not accept any tender or delivery of the documents necessary to pass the title.

The defendant in its answer, among other things, alleged:

"That under and pursuant to the terms and conditions of the understanding between the parties, this defendant merely acquired an option or right to purchase the patents, inventions, and devices of the plaintiffs in the event that the defendant and its patent attorney or attorneys approved the claims and representations of the said plaintiffs with respect to said generator, and that unless and until the said claims were so approved this defendant should not be liable to the plaintiffs; that the said claims and representations of the said plaintiffs were never approved by the said defendant or by its patent attorney or attorneys, and that the said agreements never became operative nor of any binding force or effect other than as an option of which the defendant did not avail itself. Wherefore defendant demands judgment that the complaint be dismissed, with costs."

The case was tried before the court and a jury. At the close of the plaintiffs' case the defendant moved to dismiss the complaint on the ground that the plaintiffs had failed to make out a cause of action. Before this motion was disposed of counsel for the plaintiffs stated that he did not think that the plaintiffs had shown that defendant was obliged to manufacture generators, and the claim for royalties was therefore abandoned. The court granted the motion and dismissed the complaint.

Almy, Van Gordon & Evans, of New York City (William S. Evans, of New York City, of counsel), for plaintiffs in error.

A. Parker-Smith, of New York City (Robt. B. Honeyman, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). It appears that the plaintiffs submitted to the defendant an offer in writing dated August 15, 1918. That writing contained a detailed description of the claim and advantages of the acetylene generator patent which Adamson had applied for on August 14, 1918, and was offering to assign to defendant. It also included an offer to assign to defendant the patent issued to Adamson on November 25, 1913, being patent No. 1,079,823, and all designs and improvements on generators conceived by Adamson prior or subsequent to the date of the writing, on the

conditions named in the offer. This writing was signed by the plaintiffs. There then was appended to it the following:

"The above and foregoing offer this 15th day of August, 1918, is hereby accepted, subject to our letter dated August 15, 1918.

"The Alexander Milburn Co.,
"A. F. Jerkins, President."

The above document we shall call the plaintiffs' letter. It contained the following important provision, which later it will be necessary carefully to consider in order that we may ascertain what kind of an agreement it was that the parties made:

"The payment of the above-named cash considerations of \$5,000 shall not be demanded or payable until a sufficient time shall have elapsed for the respective attorneys representing the parties to have been able to make the necessary investigations and agree upon the breadth and patentability of the claims, which it is understood will be of such a nature as to substantially protect the purchaser of the patent rights in the manufacture, sale, and use, a model of which said device has this day been left at the office of the Alexander Milburn Company. Provided that the attorneys may agree, if they see proper, to await the first report of the Patent Office upon the claims."

The defendant in its acceptance of the plaintiffs' offer, as above appears, made its acceptance "subject to our letter dated August 15, 1918." That letter we shall call the defendant's letter. In this letter defendant stated that it accepted the offer contained in plaintiffs' letter "substantially as set forth, subject, however, to" two conditions. The first of these need not be considered. The second was as follows:

"It is understood and agreed by this company, Mr. Ernie Adamson and his partners, that the clause, 'provided that the attorneys may agree if they see proper to await the first report of the Patent Office on the claims,' is intended and shall mean that the patent attorneys of this company, Messrs. Foster, Freeman, Watson & Coit, through the person of Mr. J. A. Watson, or his successor, is privileged to determine to await the first report on the Patent Office under the claims before committing this company to the cash payment of \$5,000."

The defendant's letter was signed by its president. Then followed:

"Approved on behalf of Messrs. Adamson & Company.

"Ernie Adamson.

"August 15, 1918."

The court below in dismissing the complaint held that the writings which these parties signed did not create a contract, and that there was nothing more than an offer on the plaintiff's part to sell, which offer the defendant was at liberty to accept or not at any time in the future as it saw fit.

There is no question but that the plaintiffs' letter contained an offer to sell. The consideration was to be \$5,000, together with a royalty for a term of 3 years, of \$1 per generator manufactured. The consideration was not to be payable, however, until a sufficient time had elapsed for the respective attorneys representing the parties on both sides to be able "to make the necessary investigations and agree upon the breadth and patentability of the claims, which it is understood will be of such a nature as to substantially protect the purchaser of the patent rights in the manufacture, sale, and use." And then it was added

"that the attorneys may agree, if they see proper, to await the first report of the Patent Office upon the claims."

The letter of defendant accepting the plaintiffs' proposal simply modified the prior provision that payment need not be made until the respective attorneys representing the parties had been able to do certain things, and made it more specific. It stated that the clause providing "that the attorneys may agree, if they see proper," etc., "is intended and shall mean that the patent attorneys of this company, Messrs. Foster, Freeman, Watson & Coit, through the person of Mr. A. J. Watson, or his successor, is privileged to determine to await the first report on the Patent Office under the claims before committing this company to the cash payment of \$5,000."

The real question is as to the effect of the defendant's letter of acceptance. Did that letter constitute a conditional acceptance of an offer to sell, the condition being that the respective attorneys after the necessary investigations, and if defendant's attorneys so desired after the first report of the patent on the claims, should be able to "agree upon the breadth and patentability of the claims," which it was understood would be of such a nature as substantially to protect the purchaser?

[1, 2] It is not the province of courts to make new contracts for parties. They have no right to alter a contract by construction. Their duty is restricted to the interpretation of the contract as the parties made it for themselves. They have no right to sustain or reject a contract according to its wisdom or its folly. They must, if possible, ascertain and give effect to the mutual intention of the parties. And that intention is to be deduced from the language the parties have employed. The courts cannot read into contracts words which the parties did not put there.

The District Judge in construing the writings said:

"Therefore this clause, speaking of Mr. Adamson for the moment as a layman, and Mr. Jenkins appearing to be a layman, was drawn by these laymen in a very comprehensive manner. It might perhaps have been better expressed, but it contains, in my judgment, the clear intent that this was in effect nothing more nor less than an option until and unless the attorneys for the respective parties were able to make the necessary investigations and agree upon the breadth and patentability of the claim. To give any other construction to this paper, then the words 'agree upon' are utterly useless and have no meaning. It seems to me that the theory of the contract was, to put the matter colloquially, 'I, Adamson, have a device which I am satisfied is patentable.' To that Jenkins answers, 'Very well. When your attorneys and mine can agree upon the breadth and patentability of the claim this offer of yours, which I am willing to undertake, will go into effect, and the \$5,000 shall be paid.' Any other construction, in my judgment, is utterly inconsistent with the written paper."

[3] We are unable to concur in the construction which the District Judge has given to the writings. In arriving at the conclusion he reached he appears to have been influenced greatly by the thought that a man would not, to use his expression, "buy a pig in a poke." And thus he finds a "clear intent" that the agreement was nothing more nor less than an option. The language the parties used impresses us differently, and we do not feel warranted in holding that the de-

fendant acquired or was intended to acquire a mere option. The word "option" is not found in the writing, and there is not a word of testimony in the record showing that at any time during the negotiations any reference was ever made to an option, or that at any time afterwards, up to and including the final rejection by the defendant of the agreement, anything was said by either party as to the existence of an option. The language used is not the language employed to give an option. If an option was intended, the writings bound no one and the parties went to considerable trouble to no purpose. What happened was this: The plaintiffs made an offer in writing to assign absolutely to the defendant certain patent rights for a certain consideration, which was not payable until a specified event. The terms of the offer provided that "the acceptance of this offer shall be deemed complete when an indorsement is made across the face thereof by the proper administrative officer of the prospective purchaser named herein." That indorsement was made, but subject to a modification which the plaintiffs accepted, and which need not now be considered, as it did not change the nature of the transaction. It does not appear to us that the nature of the transaction is doubtful or in the least degree ambiguous. It was an offer to sell and an acceptance thereof. There is no consideration mentioned to support an option, and there was none in fact. Indeed, it seems on reflection quite incredible that one who thought he had at that particular and critical time a device which he regarded as of considerable value would give an option thereon for an indefinite time and without any consideration whatever and one which was, therefore, not binding. It is more credible to assume that the parties intended a binding contract of sale. The subject of the sale is specified, and the consideration and the time and manner of payment are set forth. We think the court was in error in holding that the writings gave the defendant a mere option.

After the writings had been signed it appears that the plaintiffs turned over to the defendant's attorney, Mr. Watson, a model of the device and the application for the patent, and asked his co-operation in getting the application in a form satisfactory to him. Mr. Watson investigated the matter and caused investigation of the state of the art to be made. He then informed the plaintiffs' attorney that so far as he could see the claims set forth in the application sufficiently covered the device as described and disclosed by the model, and the attorneys for the respective parties were in apparent agreement.

The following is an excerpt from the testimony of the plaintiff Adamson as to a conversation which took place between his attorney, Phillips, and defendant's attorney, Watson, in his (Adamson's) presence, in August, after the writings had been signed. His testimony was as follows:

"Mr. Phillips introduced me to a gentleman by the name of Mr. Watson, and Mr. Phillips told Mr. Watson that I was the inventor of certain improvements in acetylene gas generators which were involved in the contract about which he and Mr. Watson had had a previous conversation when I was not present; and Mr. Phillips then asked Mr. Watson if he had read or gone into the case, and what he thought about it, and what action was in his opinion

necessary. Mr. Watson said that he had read the papers, and that so far as he could see the specifications and claims covered the device."

Mr. Phillips testified to a later conversation he had with Mr. Watson in the Patent Office in Washington in August, after the writings were signed. His testimony was as follows:

"The substance of his conversation was that he had talked with the examiner in there, and that he had looked at the file, and that, as I remember, he said that he thought that the claims as prepared in my office covered the invention as disclosed in the application and by the drawings."

Mr. Phillips testified to a subsequent conversation he had with Mr. Watson (of course after the writings were signed), as follows:

"He [Watson] said that he would expedite the matter as quickly as possible; that he had read the specifications, claims, and that he felt that the claims probably covered the invention as disclosed in the specification and the drawings, but that he had turned the matter over to his expert, a Mr. Bryant, who would look into the art of record which he had in his office, he having himself probably taken out more patents on acetylene gas generators than all of the rest of the patent attorneys in the United States, and as soon as Mr. Bryant had completed his investigations he would, if necessary, broaden the scope of the claims, and add such additional claims as he might see fit so to add, and I was very glad indeed to have him tell me that."

The next development was that the defendant instructed its attorney that he was to do nothing further in the premises. At the same time the president of the defendant company sent to the plaintiff Adamson the following letter, dated October 8, 1918:

"The latest model of your generator, which was made up under your last instructions, was returned to us from the medical depot. We have, in consequence, for the first time been able to test same, and regret to advise you that the tests show that the generator is practically inoperative, and is not in a form which can be used. The generator is entirely contradictory of all of your claims, and from a practical standpoint is utterly worthless.

"Enclosed please find two charts and condensed reports of tests which speak for themselves.

"We have notified Mr. Watson to discontinue any further action in the matter. If you have a more perfect device to submit, we will be pleased to examine same."

Thereafter the defendant refused to pay the cash consideration specified in the writings and refused to manufacture the generators and pay the royalties. Its refusal was not on the ground that the device was not patentable and that a patent issued on the application would not contain claims so broad as to protect the purchaser in the manufacture and sale of the device, but upon the ground that it would not operate properly.

After the receipt of the letter of October 8, 1918, above referred to, the plaintiff Adamson continued to prosecute the application for the patent, and on September 2, 1919, the patent was issued, being patent No. 1,314,780.

No part of the consideration specified in the letter of August 15, 1918, has ever been paid, although payment was demanded. This action was commenced to recover it in the state court on April 20, 1919. The action was removed to the United States District Court, and defendant filed its answer on July 9, 1919. The trial of the cause was

not, however, commenced until May 5, 1920. At the trial the plaintiffs offered to show that the patent as granted protects the owner of the patent in the manufacture, sale, and use of the device. This the court declined to permit, on the ground that the contract to become effective required an agreement on the part of the attorneys for both sides, and that condition had not been fulfilled.

The ground, and the sole ground, which led the defendant to instruct its attorney to discontinue any further action in the matter, was that the device would not operate properly.

It appears that prior to the granting of the patent a small model of the device of the patent was submitted to the medical department of the government, which turned it over to the Bureau of Standards, which made a report that the device would not operate. There is some evidence in the record that there was an understanding between Adamson and the defendant's president, Jenkins, that the test was not to be made on the small model submitted; and the former, when he learned that the small model was used as a test, expressed much surprise to Jenkins that he had allowed the tests to be made on the small model, which he "knew would not operate properly." There was testimony, too, tending to show that the test was improperly made, the device having been overcharged, the carbide holder being "completely full of carbide," so as to leave no room for the necessary expansion. Adamson testified that he had operated the device both in small and in larger sizes. But it seems that defendant, without the advice of its own patent attorneys, and without any adverse report from them, although they had been designated by it as its representatives in the matter, assumed the responsibility of directing them to abstain from proceeding further because of the failure of the particular device to work which had been submitted to the medical department.

[4] It is not, of course, for this court to say whether there was such a failure "in the breadth and the patentability of the claims" as would not protect the purchaser of the patent in the manufacture, sale, and use of it, and so justify the defendant's instruction to his attorneys to drop the matter. That question would have been a proper one for the jury under appropriate instructions if the case had ever been permitted to get that far.

[5, 6] The plaintiffs had a right to go to the jury upon the question whether in the words of the contract a sufficient time had elapsed for the attorneys of the respective parties to make the necessary investigations and agree upon the breadth and patentability of the claims. There was some evidence from which it might be inferred that the attorneys were in fact in agreement as to the breadth and patentability of the claims. The plaintiffs, therefore, had a right to submit that question to the jury if they so desired.

The plaintiffs undertook to give to the defendant a specified device, with claims of such a nature as to protect the defendant in purchasing the patent rights. It was a question for the jury whether they had done so.

[7, 8] As this case must go back for a new trial, it may be proper for us to call attention to the fact as respects the understanding that

the purchase of the plaintiffs' rights in the device was made dependent upon the attorneys reaching an agreement as "to the breadth and patentability of the claims," that the defendant would not be entitled to object that such an agreement was not reached provided it was prevented by the defendant's own wrongful intervention. It is undoubtedly the law that if the payment of money is contingent upon the happening of a particular event, and that event does not take place because the defendant prevents it, the money is payable nevertheless. *Mogulewsky v. Rohrig*, 104 App. Div. 147, 148, 93 N. Y. Supp. 590.

[9, 10] We think it also not improper to point out that where something is to be done to the "satisfaction" of a particular person, and it is not simply a matter of personal taste, fancy, or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be arbitrary or unreasonable. A simple allegation of dissatisfaction without a good reason is no defense. *Parlin & Orendorff Co. v. City of Greenville*, 127 Fed. 55, 60, 61 C. C. A. 591; *Bowery v. National Bank*, 63 N. Y. 336; *Russell v. Allerton*, 108 N. Y. 289, 15 N. E. 391; *Duplex Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709; *Doll v. Nobel*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398; *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Ark.-Mo. Zink Co. v. Patterson*, 79 Ark. 506, 96 S. W. 170. And if in the instant case there had been no instruction given by the defendant to its attorneys to refuse to proceed further, and the attorneys had without reason simply refused to examine into the merits, or had withheld their assent on fictitious or unreasonable grounds, the defendant could not refuse to make the payment on the plea that the condition precedent had not been complied with. *Williston on Contracts*, vol. 1, 75, 76. In *Thurman v. City of Omaha*, 64 Neb. 490, 90 N. W. 253, the contract provided that it should be subject to the legal opinion of an attorney as to the legal status of the thing purchased. It was held that the action of the attorney had to be reasonable and well founded. In the case at bar the matter upon which the attorneys were to agree related to "the breadth and patentability of the claims." But when the plaintiffs asked to be permitted to introduce evidence to the effect that the patent as granted and as in evidence "will and does protect the owner of the patent in the manufacture, sale, and use of the device," the court refused to permit it to be shown stating that he did so because the contract to become effective required an agreement on the part of the attorneys for both sides.

The judgment is reversed, and the cause remanded, with directions to reinstate the complaint and grant a new trial.

GEORGE CUTTER CO. v. METROPOLITAN ELECTRIC MFG. CO.

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 259.

1. Patents ⇨109—Absence of oath to new claims changing invention invalidates patent.

The absence of an oath to an amendment substituting new claims in an application is fatal to the patent, where the new claims involve a change in the actual invention, and not merely in mechanical details.

2. Patents ⇨295—Prima facie case free from reasonable doubt required to warrant preliminary injunction.

Where a preliminary injunction is sought the burden is on complainant to establish a prima facie case free from reasonable doubt, and the presumption arising from the grant of the patent is not alone sufficient, nor is a prior adjudication sustaining the patent where new and material facts are alleged which raise a reasonable doubt of validity.

3. Patents ⇨328—Preliminary injunction on No. 920,490, for metering panel boards for electric power distribution, held not warranted.

An order granting a preliminary injunction on the McWilliams patent, No. 920,490, for a metering panel board for electric power distribution, reversed on the ground that the answer alleging failure to make oath to the claims in issue and invalidity for prior use raised issues which should only be determined on final hearing.

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

Suit in equity by the George Cutter Company against the Metropolitan Electric Manufacturing Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

C. P. Goepel, of New York City, for appellant.

Drury W. Cooper and Thomas J. Byrne, both of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The suit involves four patents: No. 920,490, issued May 4, 1909; No. 931,464, issued August 17, 1909; No. 936,252, issued October 5, 1909; and No. 1,137,413, issued April 27, 1915—all for metering panel boards for electric power distribution.

The injunction complained of involves only patent No. 920,490 to one McWilliams, and for the purpose of this appeal it will be necessary to consider only such patent. Claims 1, 5, 6, 9, and 10 of the patent here considered were held valid and infringed in the Seventh circuit. *Beachey et al. v. McWilliams*, 224 Fed. 717, 140 C. C. A. 257. Infringement is admitted. The requirement for the improvement of the art which this invention covers grew out of the requirements of office buildings and apartment houses where tenants pay for electricity consumed in lighting their respective premises. For a single tenant occupying the entire building the incoming wires running through a single meter are registered. All the energy consumed and the necessity of distribution so as to record the proper charges, is not presented in such case. Where there is more than one tenant in a building, a

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

plurality of meters are required. From time to time there are changes made by the tenants in rearranging suites or lofts in buildings, and with it must follow changes in the circuits between each meter and the varying number of lamps whose currents are registered by it from time to time. Convenience and need for inspection require a common location for all the meters, and some mounting for the meter ends of the consumption circuits that should eliminate the time and trouble otherwise required to identify and register the wiring of the circuits to the several respective meters, as their requirements increase or diminish. It was found more economical in congested districts, where the area served by a central station is small, to generate direct currents and to distribute them through three wires. This gave rise to what is known as the three-wire system of distribution in large cities. This added connections at the place where the meters were located. The object of the invention is stated as follows:

"The object of the invention is to facilitate the interchanging of the consumption circuits with the meter circuits so that any consumption circuit may be readily connected to any meter, and as many consumption circuits as desired may be readily connected to any one meter.

"It is also an object to provide a compact, economical metering panel board usable in connection with such a system."

There are six consumption circuits and six meters accommodated on the device, which comprises a base consisting of a slab *A* of marble or other suitable insulating material, upon which are mounted, first, the three terminals of a three-wire circuit, *a*, *b*, *c*; second, the terminals for six meters, h^1 , h^2 , h^3 , h^4 , h^5 , and h^6 , two for each meter, and therefore twelve in all; third, three "bus bars," *d*, *e*, *f*, connected to the meter terminals, the third or neutral bus bar, *f*, having downward extensions, f^1 and f^2 , at the sides; fourth, a series of stationary metal strips or conductors, six in number, i^1 to i^6 . They, like the extensions f^1 and f^2 , extend longitudinally of the board, and each is connected to one of the several pairs of the meter-circuit terminals h^1 to h^6 . Fifth, along the lower half of the right and left hand edges of the board are permanently mounted the pairs of consumption circuit terminals k^1 to k^6 , each of which is adapted for connecting with an electric circuit extending to a room or other portion of an apartment or floor of a building. Each of these pairs of terminals is connected to the neutral base board extension f^1 to f^2 , while its mate is connected to one of a series of six laterally conducting strips j^1 to j^6 . These strips constitute the sixth group of instruments comprising the device, and they may be mounted on the opposite side of the insulating slab for the meter bars i^1 to i^6 , or they may be otherwise separated therefrom. But in either location provision is made for connecting any consumption circuit bar j^1 to j^6 with any meter bar i^1 to i^6 , and such means is shown as a plug or screw which penetrates holes provided in each at the point of superposition. That is, some or all of the lighting circuits may be connected with any meter by the simple act of plugging in the plugs or screws. The patent provides that the consumption circuit bars are mounted in staggered relation. The advantages referred to are as follows:

"By referring to the drawings it will be noted that one set of conductor bars is arranged alternately so that one bar leads to a terminal at one edge of the board while the next adjacent bar leads to a terminal at the opposite edge of the board. It will also be noted that in the preferred form these terminals include fuses and switches. The advantage in this alternate arrangement is that it affords double the area for the terminal connections for any given length of board, and consequently shortens the vertical conductor bars, and the board itself. Terminals consisting of switches are considerably wider than the conductor bars, and an ordinary board, to accommodate them, has to be much longer than it would have to be to accommodate merely the horizontal conductor bars; furthermore the vertical bars have to be very long to enable them to cross all of the horizontal bars. By my arrangement in which the terminal connections are grouped symmetrically on two sides of the vertical bars and the horizontal bars are led to them alternately, first on one side and then on the other, the vertical bars are just about half as long as they would be if grouped all on one side of the board."

Claims 1, 5, 6, 9, and 10 are involved. The appellee refers to claim 6 as best illustrative of the claimed invention. It reads as follows:

"6. A system of electrical power distribution including consumption circuits extending from districts of consumption to a panel board, bus bars on said board connected to said consumption circuits, meter circuits, other bus bars on said board connected to said meter circuits, means for interchangeably connecting the bus bars associated with the consumption circuits with the bus bars belonging to the meter circuits, one of said sets of bus bars being provided with terminals arranged along the two edges of the board, and connected to their bars alternately, substantially as described."

The advantages claimed are the ease of adjustment of the circuits to meters and readjustment in the hands of the most inexperienced. Such a need for adjustment arises when searching out and testing and identifying each wire with respect to the meters with which it is connected, or separating it from the tangle of wires on the conduit, or to make the proper connection of wires leading into the rooms of a particular tenant, becomes essential. When the wires leading to a tenant's apartment or suite are put upon one meter, the wires become fully identified, and are ready for instant adjustment or such care as the conditions require. The staggered arrangement of the consumption conductor bars is emphasized in the quotation above.

The answer and affidavits of the appellant interposed new defenses which were not before the court in *Beachey et al. v. McWilliams*, supra.

The answer pleads that the letters patent are void by reason of the fact that more than two years prior to the filing of the application for said letters patent, prior to the alleged invention thereof, there was a prior use in the United States, among other places, the Essex Hotel, in the City of New York. It is further pleaded that one Skeel, of Chicago, prior to the alleged invention of the patent in suit, in fact conceived the idea of the substantial and material parts of the patent, and that what the invention covers were well known in the art prior to the time of the alleged invention. In support of this, the file wrapper of the patent in suit is attached. This was not before the court in the Seventh circuit (224 Fed. 717, 140 C. C. A. 257). A defense is further interposed for the reason that it is asserted that the claims in suit are invalid because they are not supported by an oath. The claim is advanced that the file wrapper and contents indicate that the original

claims were rejected and canceled in the Patent Office; that the claims now in the patent were inserted by amendment three years after the application was filed; and that no supplemental oath was made by the inventor. From this it is argued that he has never made oath that he was the inventor of the device of the claims of the patent in suit. If this be a fact, it offers a defense. *Steward v. American Lava Co.*, 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139. The file wrapper and contents show that claims 1, 2, and 3 were rejected on the patent to Mayer, No. 473,848. McWilliams then canceled claims 1, 2, and 3. The other claims remaining were renumbered 1, 2, 3, 4, and 5. Claim 5 was rejected and canceled by McWilliams, and four new claims were added and numbered 5, 6, 7, and 8. Adopting the suggestion of the examiner under rule 96 of the Patent Office, five new claims were inserted. An interference was then declared between claims 1, 3, 4, 5, 7, 9, 11, 12, and 13 of the McWilliams application and claims 12, 14, 15, 16, 18, 5, 7, 10, and 11 of the Skeel application, and those claims were involved in counts 1 to 9 of the interference proceedings. The interference proceeding was finally determined in favor of Skeel; McWilliams canceled the claims in the interference, 9 to 13, and added ten new claims. These now appear numbered 1 to 10, respectively. It will be noted that in the present suit claims 1, 5, 6, 9, and 10 are involved. No oath was made when these new claims were added to his application. The examiner was then requested to pass to issue the remaining claims in his application not involved in the interference, but those were rejected under date of December 4, 1908. It therefore appears that McWilliams canceled from his application all the claims that he made in his original application and all that he entered subsequently by amendment prior to November 17, 1908, together with the claims that he incorporated at the suggestion of the examiner, and which were in interference with Skeel. Thus, it is clear that McWilliams has made no oath to any of the claims entered by him in his application at any time prior to November 17, 1908, and which are described in the specific structure embodied in claims 1 to 10 of the patent in suit. He has made no oath at any time that he was the inventor of the structure embodied in these claims filed by him November 17, 1908, which, as mounted, form the basis of the patent in suit.

"The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent." Section 4892 of the U. S. Revised Statutes (Comp. St. § 9436).

"If claims to the matter which has been described or illustrated in the application, but not claimed previously, be presented, a supplemental oath is required on the ground that the statute requires the applicant's oath not to what is described, but to what is claimed." *Rogers on Patents*, p. 37.

Did McWilliams make oath to a different subject-matter from that claimed in the patent in suit? The appellant contends that this history of the occurrences in the Patent Office, together with what is new in the patent, answers the question in the affirmative.

We think that this question should be passed upon at final hearing, and presents a question of sufficient debatable character as to make it

a subject for consideration at final hearing rather than to pass upon it against the appellant on an application for an injunction ad interim. By acquiescence in the rejection by the Patent Office and the cancellation of his other claims, in the interference with Skeel, McWilliams admits that he is not the inventor of his original claims to which he made oath; at least, such is the ruling against him. Nor is it sufficient answer to say that the drawings alone protect the appellee. If a new set of claims had been filed and appended to the original specifications without any change in the specifications, then such claims could not be supported on the drawings alone. *Windle v. Parks, etc., Co.*, 134 Fed. 381, 67 C. C. A. 363. Drawings, at best, constitute only an illustrative representation of the alleged invention. To reduce an invention constructively to practice, it is required that the complete description, under oath, be submitted, a description such as will enable anyone skilled in the art to reproduce the invention. This is the compelling reason for the rule and safeguards the fundamental consideration which the law imposes for the grant of letters patent. It is imperative that claims be made to the invention sought to be protected. McWilliams' oath went only to the matters then described and to what was then claimed in the specifications annexed to such oath. The terms of the oath "are described and claimed in the annexed specifications." It doesn't say what is shown in the drawings alone. Specification means the description referred to. It does not include anything else than that described and claimed in the original description of the claims, and if the original description does not describe, nor the original claims claim, the subject-matter of the claims now in suit found in the device, there is therefore an utter lack of support by an oath of the invention in suit. Inventions are either generic or specific, and it does not answer to say that the change involved is merely a mechanical detail or the narrowing of the scope if, in fact, the claims were not originally asserted. It does not follow that one making an oath for a generic invention equally makes oath to a specific invention. If such were a permissible doctrine, a patentee of a broad invention would be enabled to bring within his oath and thus claim priority of every subsequent invention of a more specific nature. While it is possible for one who has a broad invention to restrain, for a time, a subsequent specific invention, he cannot use the specific invention without paying tribute to the inventor of the specific device. While it is true that under some patents specific claims to one species can be made under generic claims to the genus, that can only be done where full support therefor is found in the description, and it is fully supported by an oath. Where changes are allowed as to mechanical details to make some detail operative, it involves changes subservient to the invention actually claimed; but a change in the actual invention, even though slight, may render the oath of no value because that change in the actual invention would present a different invention than the one sworn to. It has been held that in the reissue cases it would open the door to fraud by the insertion of a different invention than the one sworn to.

[1] Under such circumstances, the absence of an oath to an amendment to the claims in suit is fatal to the patent. *Steward v. Ameri-*

can Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139; Mich. Central R. R. v. Consol. Co., 67 Fed. 121, 14 C. C. A. 232; Kiefer Co. v. Unionwerke (D. C.) 218 Fed. 487; Ney Mfg. Co. v. Swineford Co. (D. C.) 211 Fed. 469.

After describing a panel board, the inventor here claimed as his invention the combination of elements comprising it. But the file wrapper indicates that Skeel was granted the preference of the inventive thought. The claims then offered by McWilliams indicate an improvement over the device which was in interference over the Skeel device which was in interference, and which consisted of an alleged combination of elements. The idea seems to be the distributing bars arranged alternately on opposite sides of the board. That did not consist in narrowing the scope of the invention, but consisted in adding to the original invention the staggered relation after what was originally claimed.

Skeel stated as the object of his invention:

"This invention relates to metering electrical distribution systems, and is designed to provide an organization and apparatus which is particularly simple and compact, and which will admit of changes being made in the connection between the load circuits and the meters for distributing the permanent connections and with a minimum of effort and a rearrangement of parts.

"The present invention aims to provide a device or apparatus which is installed at the time a building is wired, and is constructed originally to provide for the probable maximum number of meters for independent users and the probable maximum number of load or translating circuits, and is adapted to be quickly altered for various appropriations of floor or office space of different users."

Now, McWilliams stated that his purpose is to provide a device of the class described, having "one set of conductors arranged alternately so that one conductor leads toward one edge of the board for connection in the circuit, while the conductors of either side thereof lead toward the opposite edge of the board for connection to other circuits." This seems to be the purpose of the substituted claims. They are more than mere changes in mechanical details. At least, such was the representation to the Patent Office when they were filed with the dignity of an amendment and new claims, and it was on the representation that the claims as filed anew were for a different invention than that of Skeel's invention.

The grant was allowed upon the theory not only that the structure was different from the prior art, and as it existed when McWilliams filed his application, but different from the subject-matter involved in the interference. No one is entitled to a patent on what was known in the prior art, because the very essence of an invention is that it was not known in the prior art.

In addition, the Essex Hotel use is averred to have occurred in 1901; if so, it was a prior use which would defeat the appellee. The appellee contends that the proof as to this is not sufficient to satisfy the court below beyond a reasonable doubt, but we think that it was sufficient, in view of what is now learned from the records of the file wrapper and contents to have been the condition of the prior art before the

grant of the invention, to have required the court below to await the determination of the final hearing before rejecting it by granting an injunction. At final hearing, where the question of the validity of the patent is attacked by the claim of prior use, and where the effort is supported only by oral evidence, such prior use must be established beyond a reasonable doubt. The reason therefor is that the burden of proof is entirely on the defendant to overcome the legal presumption carried by the patent itself. The reason for the rule is also that the power of observation of different persons differs; the power of recollection of different persons differs; the power of any person to recollect is dependent largely upon the lapse of time between the event and the time of giving testimony, and such testimony may be affected by reasons personal to the witness.

[2] But where a preliminary injunction is sought, the burden is upon the plaintiff to establish a prima facie case free from reasonable doubt. The presumption flowing from the grant of the patent alone does not entitle the inventor to his preliminary injunction.

The appellee recognizes this rule, but relies upon 224 Fed. 717, 140 C. C. A. 257, as its support. However, the decision in this case did not prevent the appellant setting up such new matters as it has done here. A prior adjudication is not a finality. It is limited to the relativity to the decision and facts in the prior case. A prior decision does not prevail in a subsequent case where the facts are different from those in the prior case or in addition to those of the prior case in respect of matters that establish a new state of facts. *Cons. Valve Co. v. Safety Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Paul Steam System Co. v. Paul* (C. C.) 129 Fed. 757; *Hall Signal Co. v. Genl. Ry. Signal Co.*, 153 Fed. 907, 82 C. C. A. 653.

[3] We think that the defense interposed here makes out a case of unwise use of the discretion of the District Judge in granting the preliminary injunction, and, without passing upon the sufficiency of the defenses interposed, we think that the demands of justice require that the injunction be dissolved and the merits of the defenses be passed upon at final hearing.

Order reversed.

BEATTIE MFG. CO. v. SMITH et al.

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 229.

1. Patents ◊328—713,230, for inturning edges of collar blanks, held valid and infringed.

Maitland and Beattie patent, No. 713,230, for an improved machine for inturning the edges of fabric blanks in the manufacture of collars and cuffs, *held* valid and infringed, it being a decided improvement in the art, not anticipated by anything in the prior art.

2. Patents ◊328—972,272, for separate heating of bed-plate infolders in collar folding machines, held infringed.

Smith patent, No. 972,272, for the separate heating of the bed-plate infolders in machines for folding collar and cuff blanks, *held* infringed,

and the evidence insufficient to show that the infringer's predecessor in business employed similar heating units in such folders prior to the application for such patent.

3. Patents ↯328—972,320, for expanding and contracting dies in collar folding machines, held valid.

Beattie patent, No. 972,320, for automatically expanding and contracting the die in collar folding machines, *held valid*, as indicating invention.

4. Patents ↯328—972,495, for incorporating heating resistance coils in folders of collar folding machines, held valid.

Beattie patent, No. 972,495, for incorporating heating resistance coils in the folders of collar folding machines, *held valid*, there being nothing anticipatory in the prior art.

5. Patents ↯328—1,071,677, for producing circular movement of infolders in collar folding machines, held valid.

Maitland and Beattie patent, No. 1,071,677, for moving the infolders of collar folding machines in a circular path, *held valid* and infringed.

6. Patents ↯289—Mere laches will not bar relief on final hearing in infringement suit.

Though knowledge of the infringement of a patent and long-continued acquiescence therein may be fatal on a motion for a preliminary injunction, it will not prevent the court from granting such relief as may be just and equitable on final hearing; mere laches, unaccompanied by circumstances, amounting to an equitable estoppel, not shutting out a party from all relief in a court of equity.

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

Suit by the Beattie Manufacturing company against Margaret D. Smith, trading and doing business under the name and style of the E. H. Brown Manufacturing Company, and another, for infringement of patents. Decree for complainant (266 Fed. 701), and defendants appeal. Affirmed.

Harry Hayward Allen, of Washington, D. C. (Samuel S. Watson, of New York City, of counsel), for Margaret Heald Smith.

Frank C. Curtis, of Troy, N. Y., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. This suit is for infringement of patents Nos. 713,230, 972,272, 972,320, 972,495, and 1,071,677. They all relate to folding machines. Each patent was sustained, and the appellants were held to infringe, in the court below. We shall treat each patent separately and in the order as above.

[1] Patent No. 713,230 was issued on November 11, 1902, to John Maitland and William J. Beattie, the appellee's assignors, and is for a machine for folding collar blanks. The invention relates to improvements in the machine for inturning the edges of fabric blanks in the manufacture of collars and cuffs, and particularly the style of machine used for folding collars. The object of the invention is to simplify the construction of such a machine and to facilitate the adoption of the same to different sizes and styles of blank. Claim 3 only is in issue. It provides as follows:

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

"(3) In a folding machine, former mechanism comprising in part a former-plate and a former-block split part way of its length, one member thereof being bent to conform to the edge of said former-plate and secured thereto, and the other member being provided with means for securing the same to a supporting member of said former mechanism, substantially as described."

This feature of the machine is for the supporting of the thin sheet metal die plate or former-plate which determines the shape of the folder blank, and over the edge of which the edge of the blank is in-turned by the folders. The former plate is a very thin sheet metal, and requires an immediate support to which it is attached. It is constructed so that the support can be readily mounted upon the die-head or former-head of the machine. The die-head is provided with a slide-way or seat, which is adapted to interchangeably receive and support the former-blocks for all forms of former-plate. The former-plates must differ in outline according to the blank to be folded. The former-block which is attached to the die-head must always be the same in order to be interchangeable with the other former-blocks, and the portion of the former-block to which the thin former-plate is directly attached must conform generally to the form of the edge of the particular thin former-plate. The former-plates thus adapted for folding the bands of collars are narrow and very irregular in outline, and the task was to machine a solid piece of metal onto a former-block of such necessary complex shape that one portion of it would be of standard form interchangeable with other former-blocks in attachment to the die-head. The portion to which the irregular former-plate is directly attached must conform to the shape of the thin former-plate. This was a difficult and expensive task, but the inventor accomplished this by splitting the former-block partway of its length, having one of the members thus formed left in its original straight form, while the other member was made so as to readily bend to conform to the shape of the former-plate which is to be attached to it. This was done by bending this member of the split former-block without machine work upon it. The result is that all the former-blocks have the members whereby they are attached to the die-head of the same shape and dimensions, while the other members to which the thin former-plates are attached can be made of different forms, in each case corresponding to the shape of the former-plate to be attached thereto. The art shows that for many years the makers of folding machines had felt obliged to separately fashion the whole folder-block for each particular form of folder-plate. This consumed time and required labor and expense. The inventor has overcome this, thus eliminating a great deal of loss of time and labor. These machines are equipped from time to time with differently shaped templets corresponding to the shapes of the respective blanks to be folded in making different styles of collars. The thin sheet metal templet plates riveted to the heavy metal blocks, which blocks in turn are removably mounted upon the die-head, which swings outward and from the bed of the machine, make possible the interchangeability of templets varying greatly in shape. If a solid block be employed to conform to the shape of and support each of these dif-

ferent irregular forms of templets, these different supporting blocks would have to be attached to different parts of the die-head. By employing a split former-block, the inventor was able to accomplish what had been previously considered impossible. He did this by attaching the different folder-blocks interchangeably always to the same points of the die-head, while also having the folder-block conform in each case to the particular form of the templet plate employed, no matter how irregular its shape.

There is infringement in the manufacture and use of appellants' machine. This is beyond question. What was accomplished was a decided improvement in the art. Nothing in the prior art anticipated it.

We think this patent is valid and infringed.

[2] Patent No. 972,272 is dated October 11, 1910. The application was filed February 14, 1908. The inventor is George W. Smith, appellee's assignor. It is for a folding machine. It relates to machines for folding collar and cuff blanks. The object of the invention was to construct a folding machine in which the bed-plate infolders will be heated by electricity, and that one operation of the foot pedal will cause the head of the machine carrying the die to press down upon the goods, and cause the infolders to fold the edges of the goods over the die, and also press the bed of the machine forward against the infolders, thus pressing the fold smoothly and uniformly over the edges of the die while the die remains within the fold. By removing the pressure from the foot pedal, the infolder is moved backward from over the die, and the head of the press carrying the die will move upward from the bed of the press, leaving the operator the free use of both hands for handling the goods. The prior art shows no disclosure of separate means for heating the bed and for heating the infolders. Claims 1, 2, and 7 are involved, and read as follows:

(1) In a folding machine, a rigid frame, a bed-plate movable within the frame, means within the bed-plate for heating the same, a die-plate adapted to co-operate with the bed-plate for clamping between them a blank to be folded, slidable infolders for folding the edges of a blank over the die-plate, each folder being provided with means for the insertion of heating means, means for simultaneously operating the infolders, and means for pressing the bed-plate and die-plate into co-operative relation, turning the edges of the blank over said die, and forcing said bed and die against the infolders to press the turned edges of the blank.

(2) In a folding machine, a rigid frame, a bed-plate movable within said frame, means for operating the bed-plate, means within the bed-plate for heating the same, a die-plate adapted to co-operate with the bed-plate for holding a blank on the bed-plate, infolders for turning the edges of the blank over the die-plate, each infolder being provided with means for the insertion of heating means independent of the bed-plate heating means.

(7) In a folding machine, a rigid frame provided with a bed-plate adapted to be heated, a movable die arranged to clamp blanks to be folded on the upper surface of said bed-plate, infolders adapted to turn the edges of said blank over the edge of said die, and means for producing pressure between the bed-plate and the die and infolders, each of said infolders being provided with means for the insertion of heating means separate of the bed-plate heating means.

The invention permits the infolders to be more highly heated than the bed. This is desirable. Having the infolding elements heated to

the highest temperature which can be employed without scorching the goods is very desirable. In the folding operation the blank is in contact with the bed for a longer period than it is with the infolders, because the blank must be laid upon the bed before the infolders move in over the edges of the blank, and cannot be removed from the bed until after the infolders have been fully withdrawn. It would therefore be safe to have the infolders more highly heated than the bed, because they are in contact with the blank for less time than the blank is in contact with the bed. The claims are not limited to any particular form of heating mechanism, electric or otherwise. The testimony shows that, prior to the date of the application of this patent, Simplex heating units had been commonly known, and could be obtained from the Simplex Heating Company of various sizes, as might be desired. They comprised each a casting hollowed out to receive the electric resistance coils embedded in a bed of insulating material, and these units could be mounted by means of bolts upon a desired part of the machine. The patent provides in its specifications that the underside of the infolders have hollow spaces adapted to receive suitable heating means. A box is provided attached to the underside of the bed-plate, in which are placed suitable resistance coils for generating heat by electricity. And it is immaterial whether the box is of hollow casting of an electric heating unit such as the Simplex heating unit, or whether it is a box forming a chamber into which a complete electric heating unit is installed. The electric heating mechanism in the bed of the appellant's top machine comprises an electric resistance coil placed in a recess formed in the underside of the bed-plate and closed by a bottom plate which is clamped to the bed-plate. The ends of the coil project down through the bottom plate, where they are connected with the circuit wires. Thus the bed forms the box or head-plate for the coil instead of having the coil embedded in a separate and complete heating unit. This falls within the claims which provide "means within the bed-plate for heating the same."

We think the appellant's structure falls within the description of each of the claims and infringes the same.

We agree with the court below that the effort to show that one Brown, the predecessor in the business of the appellant, Margaret Heald, did in 1902 or 1903 employ Simplex or similar heating units in the folders of a folding machine, is not satisfactory to establish that fact. The correspondence indicates that it was not until 1908 that Brown learned how to make such a heating unit satisfactorily.

[3] Patent No. 972,320 is dated October 11, 1910, and was issued on the application filed on May 21, 1908. The inventor is William J. Beattie, the assignor of the appellee. This invention relates to two machines of the same type, for folding collar and cuff blanks. The object of the invention, as given by the patentee, is to construct a machine the folder plates of which will be heated, and the folding and pressing of the goods will be over the edge of the die, while the die is upon the blank on the bed-plate of the machine. Claims 6 and 8 are involved, and are as follows:

(6) In a machine for folding collar and cuff blanks, a vertically movable bed-plate, a die of thin sheet material comprising a fixed section and a slidable section, said die adapted to clamp blanks upon the bed-plate, slidable folder plates adapted to fold the edges of said blanks over the edges of said die, means for raising the bed-plate to press the folded blanks against the folder plates, means for supporting and lowering said die, and connections operated by said means for moving the slidable die section endwise to lengthen the die as said die is lowered.

(8) In a machine for folding collar and cuff blanks, a die therefor of thin sheet material formed of a plurality of sections, one of which is slidable longitudinally of the die, a swinging die-head supporting said die, means engaging said slidable die section to move the same, and a connection attached to said moving means and hinged to a fixed part of the machine eccentric to the axis of oscillation of the die-head.

The construction here is for automatically expanding and contracting a partly collapsible die. The new improvement in the art accomplishes a very material saving of time in the folding operation. By automatically expanding the die to full dimensions by the downward movement of the die into engagement with the blank on the bed, thus permitting the die to remain expanded throughout for the folding and pressing operations, and automatically contracting one end of the die by the upward movement of the die as it rises from the bed with the folded and pressed blank retained upon the die plates, the inventor accomplishes the improvement.

The movement of the movable member of the templet is accomplished in one direction by a swing and in the opposite direction whereby the templet is expanded to maximum dimensions by means of a cam actuated by a link or rod pivoted upon the frame of the machine eccentrically to the axis of oscillation of the die-head. The appellant infringes this invention, but it is sought to escape infringement by reference to the prior art patents, in which eccentric mechanism has been employed to expand or contract a collapsible die or templet for the purpose of withdrawing the templet from the folded edges of the blank before they are pressed. The prior art does not suggest expanding the die as it is lowered upon the bed, keeping it expanded not only during the pressing operation as well, but using it as a means for lifting the blank from the bed, and then contracting the die to permit a removal therefrom of the folded and pressed blank. This is accomplished by the present patent. The best reference referred to is Fenwick's patent, No. 688,460. The vital difference is that in the prior art patents the die contracting and expanding mechanism was so constructed as to contract the movable templet plate or plates out from the infolding edges of the blank before those infolding edges were pressed, and in none of these do they show a construction employing a movable templet plate which remains within the folded edge of the blank during the pressing operation, and then serves to raise the folded and pressed blank from the bed, and therefore is automatically withdrawn from the infolded edge of the blank to release the blank. In this respect, the improvement is new. The fact that these advantages seem to be much appreciated by the trade, and that this new method of folding has rendered obsolete the prior method of collapsing the

die before the folding operation, is strong evidence of an advance in the art, and we think indicates invention.

[4] Patent No. 972,495 is dated October 11, 1910, and was issued and granted to W. J. Beattie, the assignor of the appellee, on an application filed August 15, 1908. It relates to machines for folding collar and cuff blanks. The object of the invention was to construct a folding machine, the infolders of which will be heated, and the folding and pressing of the goods will be over the edges of the die while the die is upon the blank on the bed of the machine. This patent relates to the Smith patent, No. 972,272, because it has to do with the most practical means for incorporating the heating resistance coils in the folder. It was found that the Simplex heating units had to be made with thick castings, and that they were slow in conducting the heat to thin sheet metal plates mounted on the infolder blocks. The problem was to make the folder itself the housing for the resistance coils instead of incorporating the coils in a separate complete unit to be attached to the folder block. By dividing the folder block into two parts, separately screwed or bolted together, one or both of the members thus formed was hollowed out forming, between the members, a chamber. The coil was mounted within this and projected out from beneath the two block members. Thus the inventor accomplished this problem. Claim 1 is involved, and reads as follows:

(1) In a machine for folding collar and cuff blanks, a heated bed-plate, a die adapted to press blanks upon said bed-plate, infolders adapted to move inwardly and fold the edges of the blanks over said die, each of said infolders being chambered and formed in two parts separably connected together, and an infolder plate attached to one of said parts, electric heating means within said chambers adapted to be supplied with current by electric wires from without, whereby the infolder plate of each infolder may be independently heated, means for moving said infolders to fold blanks over the die, and means for pressing the said blanks between the heated bed-plate and the folder-plates.

In appellant's machine we find each infolder blank comprising a casting hollowed out on its underside, the thin bottom plates to complete the closing of the chamber for the heating coil. The bottom member of the folder-block is thinner than the bottom member of the folder-block shown in this patent, but it has in the appellee's device the appellant's two members complete—the chamber which receives the heating coils in substantially the same manner called for by the claim. There is a difference in the form of the two members of the folder-block by the fact that the terminals of the coils are led out from between the block members at the end instead of at the side of the folder-block. But this does not avoid the claim of the patent in suit. We find nothing in the prior art which anticipated what was here accomplished.

[5] Patent No. 1,071,677 was dated August 26, 1913. It is on an application filed by Maitland & Beattie, appellee's assignors, on August 18, 1905. It relates to an improvement in a machine for folding collar blanks, and consists of a novel construction and combination of parts. The invention relates to automatic and power machines as

distinguished from hand machines. It includes a bed and means for folding certain sides of a collar or cuff blank on one of the plain surfaces of the bed and the others parts on the under surface of the bed, whereby a much narrower blank, such as is used for the blanks of some collars, can be folded than is possible with a folding machine which folds all sides of a blank simultaneously. The edges of the fabric blanks are inturned or folded over the former-plates by means of folder-plates movable to and fro on the surface of the bed, after which the former-plates movable to and fro on the head, commonly called folder-heads, withdraw from the folders, and the folders press between the folder-plates and the body to fold and press the edges of the blanks; the operation of the former or folder-plates being the same as that of hand machines formerly used. Claims 8 and 9 are involved, and are as follows:

(8) In a folding machine, the combination with two folder-plate sections, on one side of the machine, provided with a slide connection extending lengthwise of the plate sections, of a single actuating crank connected by a close-fitting connection with each section, whereby a circular motion is imparted to the plate sections, and means for operating the cranks, substantially as described.

(9) In a folding machine, the combination with two folder-plates adapted to fold one side of a blank and portions of two other and oppositely disposed sides, of a slide-connection between the plates extending lengthwise of their neighboring parts and transversely of the other parts which are adapted to fold portions of the opposite sides of the blank, a plate-actuating crank connected by a close-fitting connection with each of such folder-plates, whereby a circular motion is imparted to the plate sections, and means for operating the cranks, substantially as described.

By moving the infolder in a circular or arcuate path, the infolders at a corner of the collar can be overlapped in any desired direction and at any desired angle of one side edge of the blank with respect to the inbearing end edge of the blank. With the circular movement of the inventor's infolder, the infolder can be moved through an arc of 90 degrees, and, in case of an acute angle corner in a blank, the throw of the eccentric can be eliminated so that the last folded edge on the side or end of the blank, as it may be, is not thrown out beyond the outer edge of the blank. This shows novel construction that is made within the claims. The crank for each folder exercises, through the sliding connection, a controlling and guiding effect upon the other folder in accomplishing the circular movement. There is nothing, in the prior art which shows such a relationship or result, nor is such a result accomplished. The principal prior patent relied upon is Fenwick's, No. 688,462. But Fenwick provides for a movement in two straight lines, one at right angles to the other, while the very essence of the construction set forth in the patentee's claim here is the production of a circular movement. The claims make this statement. There are no equivalents between the two mechanical devices provided for in this patent and in Fenwick's. They do not accomplish the same result, because the machine of the patent in suit produces a circular movement of the infolders, while the essential movement of the Fenwick patent is two straight line movements at right angles to the

other, or an L-shaped movement. Nor do they operate in the same manner. In producing the curved movement of the machine in the patent in suit, the eccentric guides the infolders along the curved path, while in the Fenwick machine the cranks have no guiding function with respect to the infolder, but merely push them inwardly and outwardly.

We think as to each of the patents in suit the appellee is the sole owner thereof, and that the appellant infringes the claims of each of the patents sued on.

[6] A defense of laches is interposed. Mere laches, unaccompanied by circumstances which amount to an equitable estoppel, will not shut out a party from all relief in a court of equity. On an application for a preliminary injunction, knowledge of the infringement and long-continued acquiescence therein may be fatal on a motion for such an injunction. However, on final hearing, it will not prevent the court from granting such relief as may be just and equitable. *Taylor et al. v. Sawyer Spindle Co.*, 75 Fed. 301, 22 C. C. A. 203. There is no testimony in this record which justifies the claim that the appellee is guilty of any laches which would justify a court of equity refusing to grant the relief prayed for in this bill of complaint.

We think these various patents have done much to advance the art, and the claims which we have found are infringed should be accorded the full rights of monopoly which were granted by the issuance of the patent in each instance.

Decree affirmed.

DE REES v. COSTAGUTA et al. *

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 247.

1. Appeal and error ⇨173(9)—**Defense of res judicata, not presented below, not considered.**

On appeal from a decree, a claim that an earlier decree is a flat bar to the present proceeding cannot be considered, where such defense was not raised by any pleading, and the appellate court does not have the earlier roll before it.

2. Injunction ⇨144—**Receivers** ⇨36—**Sufficiency of alleged cause may be challenged.**

One who prays for any preliminary relief, such as a receivership and injunction, may always be challenged as to the sufficiency of his alleged cause of action.

3. Injunction ⇨132—**Receivers** ⇨3—**Not per se subject of suit in equity.**

Such matters as a receivership and preliminary injunction cannot per se be the subject of suit in equity.

4. Partnership ⇨17—**Intention controls as to relation.**

In determining whether a partnership exists between persons, as between themselves, the court must look at the agreement and intention of the parties between them.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 56, 66 L. Ed. —.

5. Evidence ⇨397(5)—Formal document of partnership not enlarged or varied by parol.

Where evidence of relationship between persons, question being whether or not a partnership exists, is contained in a formal document, such document must speak for itself and it cannot be enlarged or varied by parol.

6. Partnership ⇨5—Relation held not created by agreement.

An agreement held not to create a partnership, because there was no intent to create community of interest in the whole property or business, which is the essence of partnership, the document contemplating no more than the creating of a new department in an old business, to be managed by plaintiff, who had no interest in the profits until a balance was struck.

7. Courts ⇨273—No accounting in federal court against person brought in as having a lien in absence of partnership.

Where plaintiff seeking an accounting failed to show partnership, on which any lien on property in the district depended, but did show a right to an accounting, there can be no accounting against defendant, brought in under Judicial Code, § 57 (Comp. St. § 1039), as a person without a lien cannot invoke such section.

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

Bill in equity by Henry S. De Rees against David Costaguta and others, individually and as copartners composing the copartnership of David Costaguta & Co. and others. From a decree dismissing the bill, plaintiff appeals. Modified and affirmed.

See, also, 254 U. S. 166, 41 Sup. Ct. 69, 65 L. Ed. —.

The bill alleges that plaintiff was a member of a copartnership, the two partners being himself and the firm of David Costaguta & Co. (hereinafter called Costaguta). He is a resident of New Jersey; all the individual defendants except Taffell are nonresident aliens, residing in Buenos Aires, where the firm of Costaguta has its home office and transacts the major portion of its business. Taffell is an alien, resident in New York, and agent for Costaguta. The corporate defendant (hereinafter called trading company) is chartered by New York.

The partnership alleged is pleaded as existing by written contract, a document drawn and executed in Buenos Aires and in the Spanish language. By order of the trial court plaintiff produced and filed a literal translation of this contract, which was then regarded as part of the bill. This document (omitting some plainly irrelevant portions) is as follows:

In the city of Buenos Aires, the first of November 1917, between Messrs. David Costaguta, of the one part, and Mr. Henry S. De Rees, of the other, the following has been agreed:

1. Messrs. David Costaguta & Co. establish in their own house a special section which will be called "hosiery section," for the purchase and sale of hosiery in general and other articles of knit goods or any other line of goods, which by common accord it is agreed to exploit, authorizing Mr. De Rees to manage the section.

2. Messrs. David Costaguta & Co. will pass on and fix the credits and conditions of sale for the clientèle.

3. Mr. De Rees, during his stay in Buenos Aires, shall submit to the approval of Messrs. David Costaguta & Co. the arrangements of purchases, whereas when he goes to North America or Europe to make purchases he shall have complete liberty of action, within the sums which Messrs. David Costaguta & Co. shall fix in writing.

4. [Relates to expenses, whereof some "shall be charged to the section" and some "for the exclusive account" of Costaguta & Co.]

5. On October 31st of each year a balance shall be struck, and the deductions which it shall be deemed advisable to make in the merchandise as well as in the credits, shall be determined by common accord between Messrs. David Costaguta & Co. and Mr. De Rees. From the resulting profits, there shall be deducted six per cent. (6%) annual interest on the capital which Messrs. David Costaguta & Co. may have supplied to the section, and the remainder shall be distributed in the following proportion: Fifty-five per cent. (55%) to Messrs. David Costaguta & Co. and forty-five per cent. (45%) to Mr. De Rees. The losses shall be borne in the same proportion. The calculation of interest shall be made every six months, an account current being established with the disbursements and receipts of funds, and in case the earnings of the fiscal period do not cover the interest, the balance shall be passed to the following period.

6. [Relates to monthly withdrawals for "personal account" by De Rees.]

7. Mr. De Rees may withdraw his share of the profits only to the amount of fifty per cent., being under the obligation to leave the balance thereof on deposit with Messrs. David Costaguta & Co., drawing an annual interest of six per cent. (6%).

8. It shall be the duty of Mr. De Rees to devote all his activity to the service of the section, and he obligates himself not to participate directly or indirectly in any other commercial business, nor to be interested in any other manner foreign to the section. It is agreed between the parties that the violation by Mr. De Rees of what is provided in the preceding sentence shall entitle Messrs. David Costaguta & Co. to not recognize in favor of Mr. De Rees the profits which are earned during the fiscal period in which the violation has taken place.

9. (Immaterial.)

10. The parties reserve the right to terminate the present agreement by giving notice of three months by registered letter. In case Mr. De Rees is absent, Messrs. David Costaguta & Co. will advise him by cable, which they shall address to the last address indicated by Mr. De Rees.

11. Both Messrs. David Costaguta & Co., and Mr. De Rees on receiving the notice of termination of the present contract may request the liquidation of the merchandise existing in the house, in the Custom House, in transit, or in course of manufacture, pertaining to this section, Mr. De Rees obligating himself to give his co-operation up to the moment the liquidation be terminated, and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. De Rees the amount corresponding to him in installments which are established in the following article.

12. In case this agreement is terminated and the preceding article is not applied in so far as it refers to an eventual liquidation of the stock in hand, a balance shall be made, observing with regard to deductions the form indicated in article 5, and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. De Rees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%.

13. In case of the death of Mr. De Rees, Messrs. David Costaguta & Co. will liquidate the stock in hand within the period of one year from the date of death; they will make a balance and pay the heirs of Mr. De Rees the amount which belongs to him, in the installments which are indicated in the preceding article. Interest at the rate of 6% annually will be paid also to the heirs.

[Signed by the copartnership of Costaguta in firm name, and by plaintiff.]

Under this agreement De Rees worked for some time, buying hosiery in the United States, usually for shipment to South America, and sometimes to be sold again in North America.

Differences arose between plaintiff and Costaguta, and on August 22, 1919, De Rees gave notice of termination under paragraph 10 of the contract. Transactions in hosiery in the United States had been carried on by De Rees in the firm name of Costaguta. At the expiration of the three-month period, the bill alleges that there was on hand in New York merchandise belonging to the "hosiery section" of large value, and Costaguta had bank accounts

in and near New York containing the commingled moneys of the Costaguta firm generally and of the so-called "hosiery section."

In January, 1920, Costaguta caused to be incorporated the trading corporation, which the defendant partnership entirely controlled, and to this company there was transferred all the property, including cash, of Costaguta, arising not only out of hosiery, but out of other transactions in New York and perhaps in the United States.

While not specifically alleged, it is a fair inference from the bill that Costaguta is charged with refusing any part to De Rees in the liquidation or winding up of the "hosiery section."

On these allegations plaintiff prayed for a receiver to "take and administer the property and liquidate the affairs of the said copartnership," i. e. the hosiery section, together with appropriate demands for a receivership pendente lite, with injunctions against all the defendants assigning or transferring any property belonging to said section.

The trading company was duly served with subpoena. All the individual defendants were returned not found. Thereupon plaintiff applied for service on the nonresident defendants pursuant to Judicial Code, § 57 (Comp. St. § 1039). The trading company appeared generally and the nonresident defendants specially in order to object to the jurisdiction. Plaintiff then moved for the above-indicated relief pendente lite, and after hearing the trial court refused all relief and wholly dismissed the bill, from which decision this appeal is taken.

Erwin, Fried & Czaki, of New York City (Frederick M. Czaki and Marion Erwin, both of New York City, of counsel), for appellant.

A. Delafield Smith and Walter H. Merritt, both of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The record submitted is most confused, and stuffed with matter irrelevant to any question before us, viz. affidavits by which one party or the other sought to induce the trial court to grant or refuse a receivership.

[1] Plaintiff brought an earlier suit to accomplish the same purpose here sought. That bill was dismissed for lack of jurisdiction, and appeal taken direct to the Supreme Court, which dismissed the appeal (*De Rees v. Costaguta*, 254 U. S. 166, 41 Sup. Ct. 69, 65 L. Ed. —). Thereupon the present bill was filed, and it is now urged that the earlier decree is a flat bar to the present proceeding. We cannot entertain this question on this record. Such a defense is not raised by any pleading, and we have not the earlier roll before us.

[2] It is, however, plain that since any injunctive relief or any receivership pendente lite could only be granted if the bill contained a well-pleaded cause of action, the hearing below was in effect one upon general demurrer to the bill as amended by adding to it the contract hereinabove set forth. It being elementary that one who prays for any preliminary relief may always be challenged as to the sufficiency of his alleged cause of action, we shall proceed to consider the cause as upon a motion to dismiss, on the ground that the bill does not set forth any cause of action entitling plaintiff to the relief demanded.

[3] This is primarily a bill for an accounting; an account is prayed for, and without it the bill would fail, for such matters as a receiver-

ship and preliminary injunction cannot per se be the subject of suit in equity.

The right to an account, and therefore to all other relief, and to an account in the courts of the United States, depends upon the simultaneous possession by plaintiff of the following legal rights:

(1) He and Costaguta must have been partners, not only in respect of their joint or several liabilities to the outside world, but inter sese;

(2) As such partner he must possess or be entitled to a lien upon partnership property within the jurisdiction of the court, and

(3) Even if a partner in his relations with Costaguta he must be entitled to eject the latter from the position of liquidating partner.

It may well be that plaintiff has been permitted so to deal with the outside world that third parties may hold both him and Costaguta as partners when one at least of the quasi firm never intended that relation. *Sun., etc., Co. v. Kountz Line*, 122 U. S. 583, 7 Sup. Ct. 1278, 30 L. Ed. 1137.

It is both unnecessary and unprofitable to discuss the maze of decisions seeking definition of the partnership concept. Cf. 20 R. C. L. 823 et seq. The matter is one of general law, and we must apply the doctrine of our highest court as stated in *Meehan v. Valentine*, 145 U. S. 611, 620, 12 Sup. Ct. 972, 36 L. Ed. 835. Cf. *Re Kobre*, 224 Fed. 104, 106, 139 C. C. A. 660.

[4, 5] We must therefore look at the "agreement and intention of the parties themselves [which] should govern all the cases," and in this case that intention is contained in a formal document which must speak for itself, and which the plaintiff cannot enlarge or vary by parol, though (as may be noted) no such endeavor is made in this bill. Plaintiff says, in substance, that he rests upon the agreement.

[6] Upon consideration of what plaintiff calls the partnership articles, we hold that that contract created no partnership inter sese between Costaguta and De Rees, because there was no intent to create that "community of interest with the other partners in the whole property and business," which is the essence of partnership under the decisions ruling with us.

Plaintiff's theory is, and necessarily must be, that the "hosiery section" was in and of itself a partnership entity. On the contrary, section 1 plainly contemplates no more than the creation of a new department in an old business, which plaintiff was "to manage"; when at the home office De Rees is reduced by sections 2 and 3 to the position of an important clerk, and his "complete liberty" in North America or Europe is limited to such sums as Costaguta might put at his disposal.

It is admitted in the bill that all the hosiery bought by De Rees was bought in the name of the Costaguta firm, and it is evident from the whole purport of the written agreement that what was so bought became instantly, not the property of the hosiery section entity, but of Costaguta.

This is the essential lack of community interest on the part of De Rees; he had no community in that which he acquired for the hosiery

section, and his interest in the profits did not arise until under section 5 a balance was struck and the resulting profits ascertained. And even to his share of the profits his instant right was limited to 50 per cent; the balance being, under section 7, retained by Costaguta, obviously by way of security. Again, the forfeiture provided for in section 8 in the event of plaintiff's not devoting "all his activity to the service of the section" is wholly inconsistent with that equality of opportunity and authority normally inherent in a partner.

Perhaps the most important consideration is that by any reading of sections 11 and 12 the absolute right of liquidation and sole custody of all assets belong to Costaguta alone. Under such an agreement all that plaintiff could ever have on winding up is a demand against the sole authorized liquidator, i. e. Costaguta.

[7] It is, however, urged that even such absolute right to liquidation as Costaguta possesses does not take away De Rees's right to an account, and it may be admitted that this is true. But assuming its truth, he cannot have an accounting against persons who can only be brought in under Judicial Code, § 57, unless he is a full partner with lien upon the partnership property, such lien as was recognized in Hoyt v. Sprague, 103 U. S. 613, 625, 26 L. Ed. 585.

If, as we have held, plaintiff and Costaguta were never partners in terese, then plaintiff never had a lien, and if he has no lien he cannot invoke section 57.

For these reasons it is not thought necessary to inquire into the exact limitations of service by advertisement under the Code section referred to; but because the nature of the relation between the parties was such that there never could be any assets of the hosiery section upon which De Rees had a lien, it is thought plain that this bill does not disclose a cause of action upon which recovery can ever be had.

Therefore the decision below was essentially proper, but is modified so as to dismiss the bill as against the nonresident defendants for lack of jurisdiction, and as against the American European Company on the merits, and, as so modified, the decree appealed from is affirmed, with costs.

MIMS v. REID.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1921.)

No. 1884.

1. Courts ⇐347—Federal courts may follow state statutes permitting amendments.

Both federal and state statutes, permitting amendments of pleadings, omit to cure defects and avoid dismissals on technical grounds, are highly remedial and to be liberally construed; and, while federal courts are governed primarily by the federal statutes, if a state statute provides a more liberal remedy, not negatived by the federal statutes, it should be given effect under the conformity statute (Rev. St. § 914; Comp. St. § 1537).

2. Courts ⇨344—Federal court may allow amendment changing form of action.

The authority of a federal court under Rev. St. § 954 (Comp. St. § 1591), providing that the court "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion and by its rules prescribe" is not limited to the allowance of such amendments as do not change the form or cause of action, but it may in its discretion allow amendments under all circumstances when the ends of justice will be promoted thereby.

3. Courts ⇨344—Court held authorized to permit amendment of process to conform to declaration.

Under Rev. St. § 954 (Comp. St. § 1591), and also under Code Va. 1919, § 6103, a federal court *held* authorized to allow amendment of a writ in trespass on the case to conform to the declaration, which was in trespass on the case in assumpsit for breach of contract.

In Error to the District Court of the United States for the Western District of Virginia, at Harrisonburg; Henry Clay McDowell, Judge.

Action at law by John W. Mims against Legh W. Reid. Judgment for defendant, and plaintiff brings error. Reversed.

D. O. Dechert, of Harrisonburg, Va. (Wm. F. Keyser, of Luray, Va., on the brief), for plaintiff in error.

J. K. M. Norton, of Alexandria, Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. The writ, executed on September 16, 1920, summoned the defendant, a citizen of Pennsylvania, to answer the plaintiff, a citizen of West Virginia, of a plea of trespass on the case. The declaration was for trespass on the case in assumpsit, setting out first the common counts in assumpsit and then specially a contract by defendant to pay plaintiff reasonable compensation for his services in procuring a purchaser for a tract of land, the procuring of the purchaser at the price of \$100,000, and debt of the defendant to the plaintiff of \$10,000 as reasonable compensation. The action was commenced in Page county, Va., and removed to the District Court for the Western District of Virginia.

[1] The defendant prayed and was granted oyer of the writ. Whereupon he demurred to the writ, on the ground that the writ is in tort and the declaration for breach of contract. The plaintiff moved to amend the writ to conform to the declaration. The motion to amend was refused, the demurrer was sustained, and the action dismissed "for want of jurisdiction of the person of the defendant."

In connection with the Conformity Statute, R. S. § 914 (Comp. St. § 1537), the following statutes of the United States and of the state of Virginia are to be considered:

Section 954, U. S. R. S., Act of 1789 (Comp. St. § 1591), provides:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause

and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The act of 1872 (R. S. 948 [Comp. St. § 1580]) is of similar import:

"Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

By section 6103 of Virginia Code 1919, it is provided:

"A defendant, on whom a valid process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement. And in every such case the court may permit the writ or declaration to be amended so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just. If the process be not a valid process, the suit or action shall be dismissed upon motion of the defendant who may appear specially for that purpose."

If the federal and state statutes cover the same ground, the federal statutes control. But the federal statutes as well as the state statute are highly remedial, and intended to do away with the persistent evil of dismissal of actions for errors of pleading and practice. All such statutes should be liberally construed. *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883. Therefore, if the state practice is less liberal in allowing amendments, the federal courts will, of course, follow the federal statute. *Mexican Con. R. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715. Conversely, if the state statute provides a remedy for an evil of this sort, not expressly or impliedly provided, but not negatived by the federal statute, the remedy of the state statute should have force in the federal courts, according to the conformity statute. *West v. Smith*, 101 U. S. 263, 265, 25 L. Ed. 809; *Stone v. Speare* (C. C.) 175 Fed. 584; *Henderson v. L. & N. R.*, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. Ed. 211; *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858. For example, the federal statutes do not go to the length of expressly providing that a change may be made in the form of the action from contract to tort or from trespass to debt, or that the plaintiff may set up a new cause of action by amendment. But if a statute—as for instance, the statute of Maryland—provides that an amendment in furtherance of justice may be allowed to the extent of changing a writ from one form of action to another, the state statute would be enforced as in no way inconsistent with the federal statutes.

[2] We think, however, the federal statutes themselves are amply broad to allow amendment of the writ to correct the variance without resort to the state statute. The test, we venture to think, under the federal statutes, should not be whether the amendment will introduce an additional cause of action, or substitute a new cause of action, or convert an action from tort to contract or from contract to tort. It is

true there are a number of federal cases stating these to be tests, but we find no express adjudication of the Supreme Court to that effect, except *Shields v. Barrow*, 17 How. 129, 144 (1854) 15 L. Ed. 158. In the later case of *Tilton v. Cofield*, 93 U. S. 163, 166 (1876) 23 L. Ed. 858, the court says:

"This subject was fully examined in *Tiernan's Executors v. Woodruff*, 5 McLean, 135. It is there shown that both in the English and American courts amendments have been allowed, in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action." *Oliver v. Raymond* (C. C.) 108 Fed. 927; *Williams v. Wm. B. Scaife & Sons* (D. C.) 227 Fed. 922.

The sole controlling test should be whether the ends of justice will be promoted by the amendment—that is, whether the allowance of the amendment will substantially promote the right of the parties to a fair and expeditious trial of the cause, or seriously impair that right. No question of practice or procedure can extend beyond that. Limiting the discretion of the court to cases where the amendment does not in a technical sense change the cause of action or introduce a new cause of action would often defeat the ends of justice. For example, the plaintiff may, in good faith, believe that the conduct of the defendant in a particular matter was a tort when it was in reality a breach of implied or express contract. His mistake as to the facts or the law should not have the effect of casting him out of court, unless the rights of the defendant can be preserved in no other way. Of course, the substitution by amendment of a new cause of action should not affect the right of the defendant to interpose the statute of limitations, or any other defense, as if a new action had been commenced. *Union Pac. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.

This discretion to allow amendments under all circumstances when the ends of justice will be promoted by facilitating adjudication of the rights of the parties without unnecessary costs is incidental to judicial power. Neither federal nor state statutes create it. The statutes merely declare the power and enjoin the courts to use it. In fact, the supposed reluctance of the courts to break away from the old technicalities and exercise fully their inherent judicial power of amendment has led to the enactment of many statutes, enjoining upon them the freer exercise of their power. Progress of judicial conception in this direction is illustrated by Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that a suit brought in equity which should have been brought as an action at law becomes an action at law by a mere transfer to the law side, with such alterations of the pleadings as shall be essential.

The rule of justice which many courts have reached, and to which all are tending, is that when one man has brought another into court in good faith, seeking adjudication of their controversy concerning a particular transaction or subject—"the object of the plaintiff in bringing the suit" (*West v. Smith*, 101 U. S. 266, 25 L. Ed. 809)—he will not be turned out against his will, if the court has the power to keep him in, without adjudication of the merits of the controversy. This does not mean that the plaintiff may, by amendment, bring in a new subject of controversy independent of and unrelated to the subject

originally set out. The distinction is nowhere better stated than by the Virginia court in *New River Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300:

“The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action different from that declared on, and different from that which plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases, the original and amended declarations and the count or counts in each, are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts, and of making amendments to a declaration.”

The same distinction is made in *Taylor v. Atlantic C. L. R.*, 81 S. C. 574, 62 S. E. 1113. Pleadings, writs, verdicts, judgments—all judicial documents and proceedings—should be changed by amendment or substitution after notice and on proper terms to correspond to the facts, unless the amendment or substitution will deprive the defendant of a substantial defense or introduce an independent and unrelated controversy.

For these reasons it is evident that the variance between the writ and declaration, due to the failure to write in the writ after the words “trespass on the case” the words “in assumpsit,” should be corrected by amendment of the writ.

The objection is made that the defendant suffers hardship in being required to answer a declaration in assumpsit when he is notified to meet an action in tort. In its practical aspect the objection is technical. The writ, whether in trespass on the case or in assumpsit, gives the defendant no information as to which one of the numerous kinds of tort he is charged with, or what kind of breach of contract is alleged against him. The writ brings the defendant into court, but it gives no idea of the case he is to meet. He prepares his defense entirely on the allegations of the declaration. There seems to be no reason why the summons or writ commencing an action should not be the same in all cases.

[3] Even if the power to amend the writ in this case were not inherent in the judicial office and not within the contemplation of the federal statutes, the Virginia statute in express terms confers the power. There can be no doubt that the writ was a valid process, for it was perfect in form and duly served. The statute enacts that for “any variance in the writ from the declaration” there is only one remedy for the defendant, the plea of abatement; and it seems to express the general practice on the subject. *Chirac v. Reinicker*, 11 Wheat. 280, 302; 21 R. C. L. 1323; *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 46 S. E. 366, 63 L. R. A. 896, 102 Am. St. Rep. 941, 1 Ann. Cas. 225.

The statute provides that in every such case of variance of the writ from the declaration the court may permit the writ or declaration to be amended upon such terms as to it shall seem just. The court has no authority to interpolate into the statute the limitation that the writ cannot be amended when the variance is substantial or vital. If the variance is not substantial, no amendment is necessary. The court had acquired jurisdiction by service of a valid writ, and had full authority under its inherent power, as expressed in both federal and state statutes, to amend the writ to conform to the declaration.

Reversed.

KENNEDY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1882.

1. Carriers ⇨38—Indictment for falsifying accounts of interstate carrier held sufficient.

An indictment under Interstate Commerce Act Feb. 4, 1887, § 20, par. 7 (Comp. St. § 8592) for falsifying the records of an interstate carrier, need not charge that such records were records prescribed by the Interstate Commerce Commission.

2. Carriers ⇨38—Evidence held to sustain conviction for falsifying records of carrier.

Uncontradicted evidence, including that of defendant, held to sustain a charge under Interstate Commerce Act Feb. 4, 1887, § 20, par. 7 (Comp. St. § 8592), of willfully failing or neglecting to make full, true, and correct entries in the accounts and records of an interstate carrier of facts appertaining to the carrier's business.

3. Criminal law ⇨1168(1), 1172(1)—Conviction legal on one count which warrants sentence not reversed for error in rulings on evidence, and instructions.

Where a conviction on one count of an indictment, sustained by undisputed evidence, warrants the sentence imposed, the judgment will not be reversed for errors in the charge or rulings on evidence.

4. Carriers ⇨38—Memoranda kept by clerk held part of carrier's records.

Memoranda kept by the car clerk of a railroad company, devised by him as a part of the system of his office, held records of the company.

5. Criminal law ⇨799—Comments of court on argument of counsel held not error.

Comments of the court in its charge on arguments made by defendant's counsel, which were outside the record and tending to prejudice the jury, held not error.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

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

John I. Cosgrove, of Charleston, S. C. (W. Turner Logan, of Charleston, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. [1] The defendant, John J. Kennedy, a clerk in the Charleston freight office of the Southern Railway Company, was convicted on an indictment under subdivision 7, § 20, Act Feb. 4, 1887, as amended (Comp. St. § 8592). The indictment charges, in counts 1 and 4, willfully making false entries in records kept by an interstate carrier; in counts 2, 5, and 7, willfully neglecting and failing to make full, true, and correct entries of facts appertaining to the business in records kept by an interstate carrier; and, in counts 3, 6 and 8, willfully altering and falsifying records kept by an interstate carrier. Each count specifies the alleged records and the facts alleged to constitute the offense. There was a demurrer to the indictment on the ground that there was no allegation that the records referred to in the indictment were accounts, records, or memoranda prescribed for carriers engaged in interstate commerce by the Interstate Commerce Commission.

Subsection 5 provides that the Commission may, in its discretion, prescribe the forms of any and all accounts, records, or memoranda kept by the carrier. Subsection 6 provides a forfeiture by the carrier for failure to keep the accounts, records, and memoranda on the books in the manner prescribed by the Commission. Subsection 7 provides:

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor."

The statute evidently was framed to accomplish two distinct purposes: First, that all accounts, records, and memoranda of the carrier, whether prescribed by the Commission or not, should be true and correct; second, to secure uniformity and prevent secret dealing, that the accounts, records, and memoranda prescribed by the Commission should be used exclusively. Hence it was unnecessary to charge that the records alleged to have been falsified were prescribed by the Commission.

[2] The following is a summary of the material evidence adduced by the government: The Southern Railway Company and other interstate carriers delivered cars of hay, corn, and other products to the Charleston Terminal Company. The terminal company in turn placed them on the side tracks of the dealers to whom they were consigned. If the cars were consigned "order notify," the rule of the carriers was that the buyer should open and unload the car in his warehouse only

on his presentation of the bill of lading, either to the railway company or the terminal company, which showed that he had paid the draft to which the bill of lading was attached. Kennedy was car clerk in the office of the Southern Railway Company, charged with the duty of issuing directions as to the disposition of cars. He kept in his office a book in which was entered a complete record of each car, including the information whether it contained an open or order notify shipment. When the car went to the terminal company he sent a manifest or memorandum to it, indicating whether the car was open or order notify; that is, whether it was to be delivered to the consignee at once or only on presentation of the bill of lading. Kennedy's duty was to keep a true copy of this manifest in the Railway Company's office.

All the cars mentioned in the indictment were order notify, and intended for one C. F. Boyd, on payment of the drafts and production of the bills of lading to which they were attached. In order that Boyd might get these cars without paying the drafts and producing the bills of lading Kennedy falsely indicated, on the manifests sent to the terminal company as records to be kept by it, that the charges had been paid, or omitted from such records the letters indicating that the shipments were order notify, and kept in the railway office what purported to be copies of these manifests which were not copies, in that they did not contain the words indicating that the railway had the bill of lading for an order notify shipment, or contained the words indicating order notify which did not appear in the manifest sent to the terminal company. After the discovery of the transactions and the consequent loss to the Southern Railway Company, Kennedy signed a letter exculpating Seay, the city freight agent, and taking upon himself the entire blame. According to the testimony of Gregory, the special agent of the government, Kennedy said that Boyd had made a tool of him, and explained the manner in which he had made the manifests sent to the terminal company indicate that the cars were free, and those retained as carbon copies in his office indicate that they were held as order notify. Kennedy gave to the special agent a number of letters written to shippers by his direction, assuring them that their goods were in the Southern Railway warehouse, and that Boyd expected to be able to pay for them soon. These letters were not mailed for fear they would get him in further trouble. This evidence, if true, made a perfectly clear case of deliberate falsification of the records of the carrier as charged in the indictment.

Defendant testified that the manifests were not railway records, but memoranda kept for his own private information as to the handling of the cars; that he had the cars delivered to Boyd without seeing the bills of lading on Boyd's assurance that he had "that fixed," which he understood to mean that Boyd had the bill of lading in his hand, or had an uncertified check and was going to deposit it, or had the agent's orders for him to receive the car free on his assurance that he would pay for it in a day or two or some future day; and that he released the cars on the direction of Seay, his superior. Defendant also offered to show that it was the custom of the carriers in Charleston to release

order notify cars on the promise of shippers to pay the draft and produce the bill of lading.

Anxious consideration of the testimony offered by the defendant leaves no escape from the conclusion that it furnishes no denial and no defense to the plain case made out by the government. Assume the customary violation of the carrier's orders by frequent release of order notify cars without the surrender of the bills of lading under the direction of the freight agent, and such direction to Kennedy in these instances; assume their release on the faith of Boyd's statements that he had the bills of lading, or uncertified checks, or the authority of the freight agent to get the cars without them; assume the memoranda or manifests kept by Kennedy in the carrier's office and in its business to be kept for his own convenience as clerk, and not as a record of the carrier—the undisputed testimony still proves a plain violation of the statute as charged in the seventh count.

The bill of lading and the record book in the defendant's office showed that the shipments were order notify. The charge in the seventh count and the proof was that car No. 28736 was consigned order notify, and was so entered on the waybill and on the car book kept by Kennedy. In the memorandum or manifest sent by Kennedy officially to the terminal company to indicate the car and whether it was free or order notify, and to control the terminal company in handling the car, he deliberately and intentionally omitted the words "order notify." This was beyond all dispute willful neglect and failure to make a full, true, and correct entry of facts appertaining to the carrier's business of handling the shipment. Hence in any view of the law and the facts there was no possible escape from conviction on the seventh count, and conviction on that alone would support the sentence.

[3] This being so, no errors in the charge or in the exclusion of testimony as to custom would warrant a reversal. Amendment, 1919, § 269, Judicial Code (Comp. St. Ann. Supp. 1919, § 1246); *Dye v. U. S. (C. C. A.)* 262 Fed. 6, 9; *Sneierson v. U. S. (C. C. A.)* 264 Fed. 268, 275.

[4] There is, however, no ground for the contention that the memoranda or manifests kept by Kennedy when he sent the originals to the terminal company were not records or memoranda of the carrier. On the contrary, we think on Kennedy's own testimony the District Judge was right in charging the jury that they were records of the carrier. He testified that they were not included in any inspection, that they remained in his possession, and that he destroyed them when he saw fit. But he also testified that they were devised by him as car clerk as a part of "the system" of his office, for his information and convenience in the transaction of the carrier's business. He did not deny the testimony of the government witnesses that these manifests or memoranda were actually found among the records of the Southern Railway's freight office. There was also uncontradicted testimony that they were usually kept, and that they were essential as copies of the originals sent to the terminal company. Indeed, it is evident these copies were essential memoranda for the use of the railway company as checks on the

terminal company. When, therefore, the defendant willfully omitted the notation "order notify" on the original sent the terminal company and entered it on the purported copy retained, and entered on the original "One car B. L. surrendered up here chgs. paid," or the words "B. L. up here," and omitted them from the purported copies retained, he willfully made false entries, and willfully neglected to make full, true, and correct entries of facts appertaining to the business of the carrier in records kept by the carrier.

Even if proof of the custom of the agents of the carrier to release cars without surrender of the bills of lading would justify or excuse the defendant in directing the terminal company to deliver the cars, this proof would not justify or excuse the violation of the statute in procuring the release by means of false entries on the records and memoranda of the carrier.

The letters written to the consignees, though not sent, the letter signed by defendant to the freight agent, assuming all responsibility, and portions of defendant's statements made to the government agents, were obviously in the nature of admissions and confessions, and there was no error in charging the jury on those subjects.

[5] The only remaining assignments of error are those relating to the arguments of counsel and the comments of the District Judge thereon in the course of his charge. The record contains this statement:

"Counsel for the defendant both made arguments on his behalf to the jury. In the course of his argument, Mr. J. I. Cosgrove, among other things, in substance, said to the jury, that the jury must remember that 'the case is between the United States, a gigantic government that can spend all the money and get all the witnesses that expense will allow them; that it has special agents and detectives and attorneys, all anxious to prosecute and convict; and poor John J. Kennedy, a mere boy, with no one to help and protect him, without friends. That this great government does not spare expense to obtain results, and its detectives and assistants to the Department of Justice have been after poor Kennedy to obtain a victim.'"

"That Mr. W. T. Logan, in the course of his argument, among other things said in substance that the 'defendant had been dragged into the United States court away from his own court, and that the only safety and salvation for you is in the state courts.'"

In commenting on these appeals the trial judge said to the jury that the United States court was as much the people's court—their court—as the state courts; that the United States government had been improperly described as a "monster pursuing this individual who happens to be poor"; that it was the duty of the government agents to discover crime and prosecute criminals; that to say that this meant that the government as a whole is prosecuting, in the sense of annoying or persecuting, the individual, unless such a plot is exposed by the evidence, is absurd. It is due to the intelligent counsel for defendant to say, we cannot doubt that as soon as the heat of combat had subsided they must have recognized and deeply regretted that their zeal had betrayed them into an attempt to appeal to the supposed prejudice of the jury, meriting explicit condemnation. They cannot complain that the presiding judge used language which though strong was descriptive, in removing from the mind of the jury any effect of such an improper

appeal. Nor can they complain that they were allowed to complete their arguments without interruption.

In other respects the charge was too favorable to the defendant, in that it submitted to the jury questions as material in deciding the guilt or innocence of the defendant, whereas, in our view, if the jury believed the undisputed testimony of the government and the whole of the testimony on behalf of the defendant, he was guilty as charged in the indictment.

Affirmed.

HILL v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 1, 1921.)

No. 2863.

1. Counterfeiting ⚡16—Indictment for having in possession counterfeit notes must allege guilty knowledge.

An indictment for having in possession a falsely altered and spurious bank note, but containing no averment that the accused knew it to be altered or spurious, *held* not to charge an offense.

2. Counterfeiting ⚡16—Indictment and information ⚡61—Indictment for passing spurious Federal Reserve bank note held sufficient; not necessary to allege matter of judicial notice.

In an indictment for uttering and passing a falsely altered and spurious note issued by a specified Federal Reserve bank, it is not necessary to allege that such bank is engaged in the banking business, of which fact, in view of the statute creating such banks, the court will take judicial notice.

3. Counterfeiting ⚡16—Indictment for passing altered Reserve bank note need not set out copy of note before alteration.

An indictment for uttering and passing as genuine a note which had been issued by a named Federal Reserve bank as a genuine note for \$1, but which had been falsely altered so that it purported to be a note for \$10, with knowledge of such fraudulent alteration, which indictment contained a photographic copy of the note as altered, *held* not insufficient because it did not set out a copy of the note before alteration.

4. Counterfeiting ⚡16—Photographic copy of altered bank note may be used in indictment.

An indictment for knowingly uttering and passing a falsely altered bank note *held* not insufficient because it used a photograph as a substitute for an averment of the tenor of the altered note.

5. Counterfeiting ⚡8—Alteration of bank note to be material need not be such as to deceive experienced and prudent persons.

To constitute a material alteration of a bank note which will subject one knowingly uttering and passing it as genuine to criminal liability, the alteration need not be such as would deceive experienced and prudent persons.

6. Counterfeiting ⚡18—To warrant conviction for passing altered bank note it must be shown to have been genuine before alteration.

To warrant conviction for knowingly uttering and passing as genuine a bank note which had been falsely and fraudulently altered, it must be shown that the note was a genuine bank note before alteration.

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

Criminal prosecution by the United States against Elzey B. Hill, alias Edward G. Howe. Judgment of conviction, and defendant brings error. Reversed.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

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

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Plaintiff in error was convicted on two counts of an indictment which charge or attempt to charge him (a) with publishing, uttering, and passing a falsely altered and spurious Federal Reserve bank note with guilty knowledge, and (b) with having in his possession a falsely altered and spurious bank note.

[1] The latter count is challenged because no violation of any statute of the United States is disclosed. We think the exception well taken.

Nowhere in this count is it alleged that plaintiff in error knew that the bank note in his possession was altered or spurious. This was a fatal omission. *U. S. v. Carll*, 105 U. S. 611, 26 L. Ed. 1135. The count of the indictment here under consideration is not as full or complete as the one condemned in the *Carll* Case.

Neither in the government's brief nor on the oral argument do we find a serious attempt to justify or excuse the absence of this necessary allegation.

The other count upon which plaintiff in error was convicted we quote in full:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Elzey B. Hill, alias Edward G. Howe, on, to wit, the 7th day of July, in the year of our Lord one thousand nine hundred nineteen, at East St. Louis, in the county of St. Clair, in the state of Illinois, in the Eastern district aforesaid, and within the jurisdiction of said court, did then and there willfully, knowingly, falsely, unlawfully, and feloniously publish, utter, and pass to Walter J. Gillen as true and genuine a certain falsely altered and spurious circulating bank note, to wit, a certain Federal Reserve bank note, which had been issued by the Federal Reserve Bank of St. Louis, Mo., to pay to the bearer on demand the sum of \$1, but which had been falsely altered so that the bank note purported to be a bank note issued by the Federal Reserve Bank of St. Louis, Mo., of the denomination of and constituting a contract of said Federal Reserve Bank of St. Louis, Mo., to pay to the bearer on demand the sum of \$10, the face of which said altered Federal Reserve bank note is in words and figures following: [Photograph of face of note]—and the back of which said altered Federal Reserve bank note is in words and figures following: [Photograph of back of note]—he, the said Elzey B. Hill, alias Edward G. Howe, then and there well knowing that said Federal Reserve bank note had been falsely altered as aforesaid, with the intent in him, the said Elzey B. Hill, alias Edward G. Howe, to damage and defraud the said Walter J. Gillen, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

Counsel for plaintiff in error vigorously attacked this count on numerous grounds. Unfortunately we have no assistance from counsel for the government. To all intents and purposes, the government has defaulted, resting its case on an assertion that it "expresses the confident expectation that we will not be able to find reversible error in the record." These confident assurances can hardly be accepted as an answer to the specific and well fortified criticism of opposing counsel.

[2] It is first contended that this count of the indictment fails to allege that the Federal Reserve bank is engaged in the banking business, an alleged requirement of the statute. In view of the act of Congress creating the Federal Reserve bank (38 Stat. 251), we think the court was justified in taking judicial notice of the fact that the Federal Reserve Bank of St. Louis is an association engaged in a banking business. *Matter of Dunn*, 212 U. S. 374, 29 Sup. Ct. 299, 53 L. Ed. 558; *Beck v. Johnson* (C. C.) 169 Fed. 154; *Leonard v. Lennox*, 181 Fed. 760, 104 C. C. A. 296.

[3] More serious is the urge of counsel to the effect that the indictment fails to apprise the plaintiff in error of the character of the alterations. In other words, the pleader failed to set forth the genuine instrument.

It is claimed that a photographic representation of the altered instrument does not sufficiently apprise the accused of the offense with which he is charged so that he may prepare himself to meet the issue. It might have been the safer practice to set forth either by precise words or by exact copy the bank note as it appeared originally and the bank note as it was altered. But we are not satisfied that this was not in substance what was done. The Federal Reserve Bank Act prescribes that "the comptroller of currency shall * * * cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations * * * as may be required," etc. Section 9799, subd. 9, United States Comp. St. Ann. Supp. 1919. Other provisions may be found in the statutes concerning these matters. Examination of the indictment shows that the altered note was truly set forth, and it clearly appears that before altered it was the usual form of Federal Reserve bank note. It also further appears that the alteration consisted of a change from \$1 to \$10.

We have, therefore, a situation where the pleader, in apprising the accused of the nature of his offense, described with great particularity and accuracy the altered Federal Reserve bank note. Accused was also told of some of the material changes made in the original note, and by reference to an original bank note (specific and detailed in view of the statutes) was fully informed as to the alterations.

In other words, where the statute and extensive general use accurately and fully informs an individual of the language, form, and appearance of a lawful Federal Reserve bank note, and the fraudulently altered note is set forth by way of a photograph, the accused is apprised of the situation as fully and fairly as if the pleader had in addition pointed out and enumerated the differences between the original and the altered note. As these Federal Reserve bank notes of any single denomination are all similar, and as they are in most extensive circulation, we think the plaintiff in error can hardly urge surprise or failure to inform him of the crime which he was called upon to meet.

This conclusion is more readily reached because the gist of the offense is not the altering of a bank note, but in uttering a fraudulently

altered note. Surely greater particularity would be required in pleading forgery than in uttering or possessing a forged negotiable instrument.

[4] The objection that the pleader made use of a photograph as a substitute for the averment of the tenor of the altered bank note is not well taken. It does not appear that the altered bill was photographed, nor is it material whether the altered bill is presented in the indictment as the product of the district attorney's pen or of the photographer's work. In either case counsel was advised fully of the essential facts, and it is quite immaterial whether such information was conveyed by pen and ink, by the typewriter, by the use of the printing press, or in part by use of the camera. There is, in the present case, no assertion or claim that the photographic copy did not apprise the defendant as fully as the altered note itself would have apprised him, and it was, of course, impossible to produce the bank note in its original state, because either the defendant or some other individual made that impossible.

[5] It is finally urged, and with force and ability, that the alterations must not only be material, "but must be reasonably calculated to deceive an unsuspecting person of ordinary prudence." Because the modifications in the present bank note were so crude and the work so coarse, counsel earnestly argues that no reasonably prudent person could have been deceived thereby, and therefore no crime committed. In support of this argument, our attention is called to various salient features of the altered bank note, which, it is claimed, would have caused the aforementioned reasonably prudent individual to reject the note as spurious. It is not necessary to set forth in detail the facts upon which this argument is based. For we reject the premise on which it is founded. To hold that the material alterations must be of such a character as to deceive the reasonably prudent individual would be destructive of the purposes of the law. In fact, it would lead to the most absurd results.

For whose protection was this law enacted? For the discerning and discriminating alone? Are the illiterate and inexperienced to be left with no protection? Obviously not. Certainly Congress never intended that liability could be avoided provided the criminal's work was so coarse and crude that only children, the unwary, or the uneducated or the inexperienced, or the trusting and confiding citizen would be deceived thereby. In order to secure protection against one who utters a forged note, must the individual know that upon one side of the Federal Reserve bank note of the denomination of \$1 is the picture of George Washington, while on the face of the \$10 note there appears the likeness of Andrew Jackson? And must he know that on the other side of the \$1 note appears the picture of an American eagle, while on the opposite side of the \$10 note appears a harvest scene? Or, to be more particular, must one seeking protection against the fraud of another be chargeable with the knowledge that on the Federal Reserve note, near the figures "1" as they appear on the same side as the picture of Washington there also appears the word "one" while on the opposite side no such word "one" appears near the figure "1"?

But it is unnecessary to pursue the subject further. The statute is explicit, and we conclude that one who either materially alters a note or who, with guilty knowledge and criminal intent, passes the note thus altered, may not escape liability because of the ignorance or the confiding nature of the party to whom it is passed. Certainly in the present case there can be no controversy over this issue, for the altered note was not only quite similar to the original, but it actually did deceive a business man.

[6] Finally, it is argued that the government failed to show that the alleged bank note in question was, before it was altered, the genuine bank note of the St. Louis Federal Reserve Bank. This objection is well taken. Nowhere have we found any evidence tending to establish the genuineness of this bank note before alteration. True, the language and appearance of the body of the note is that of a Federal Reserve bank note. But of what bank? Until properly signed and issued by a Federal Reserve bank, such a piece of paper is not a bank note. The crime charged was not committed unless it is shown that the alterations were on a duly issued Federal Reserve bank note.

The judgment is reversed, and a new trial on count 4 of the indictment ordered.

DALTON-KELLY COAL CORPORATION et al. v. TAPLIN et al.

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

No. 1905.

Appeal and error ⇐1174—Order granting preliminary injunction modified on condition of execution of substitute bond.

An order, granting a preliminary injunction in a suit by a minority stockholder of a coal company, alleging fraud in a contract for the sale by the company of a large quantity of coal to a defendant corporation, modified on condition of the execution of a bond by such corporation sufficient to protect the rights of the coal company.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Huntington; Charles A. Woods, Judge.

Suit in equity by F. E. Taplin, trustee, and others, against the Dalton-Kelly Coal Corporation and others. From an order granting a preliminary injunction, defendants appeal. Modified, on conditions.

E. L. Hogsett and John H. Holt, both of Huntington, W. Va., for appellants.

Douglas W. Brown, of Huntington, W. Va., and C. F. Taplin, of Cleveland, Ohio (Rolla D. Campbell and Fitzpatrick, Campbell, Brown & Davis, all of Huntington, W. Va., on the brief), for appellees.

Before KNAPP and WADDILL, Circuit Judges, and BOYD, District Judge.

PER CURIAM. The facts of the case are briefly these: The complainant, F. E. Taplin, trustee, a minority stockholder in the Main

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

Island Creek Coal Company, filed his bill against the Dalton-Kelly Coal Corporation, the Atlantic Fuel & Steamship Company, the officers and directors of the Main Island Creek Coal Co., A. J. Dalton, and John A. Kelly, charging that said Dalton and Kelly own a majority of the stock of Main Island Creek Coal Company and are respectively its president and secretary and treasurer, and that by reason of their official position, and as the owners of the majority of the stock of the company, they caused the Dalton-Kelly Coal Corporation and the Atlantic Fuel & Steamship Company to be organized, with a view of diverting the assets of the Main Island Creek Coal Company, and that through the instrumentality of said two companies, which they also dominated and controlled, they had largely diverted and transferred away from said company valuable parts of its assets; the specific charge being that the Dalton-Kelly Coal Corporation caused to be made with the Main Island Creek Coal Company, the latter company acting through John A. Kelly, its secretary and treasurer, and the Dalton-Kelly Coal Corporation through G. M. Angell, secretary, alleged to be a tool of the said Dalton and Kelly, a contract for the purchase by the Dalton-Kelly Coal Corporation from the Main Island Creek Coal Company of 350,000 tons of coal, at the price of \$6 per ton, f. o. b. at mines, the same to be delivered during the period beginning July 20 and ending December 31, 1920; that the price of \$6 per ton was grossly inadequate, and resulted in serious loss to the Main Island Creek Coal Company, and was a fraud upon that company, perpetrated in the manner indicated by Dalton and Kelly by means of the organization and operation of the said two companies, and by reason of their dual relation to and domination of said several companies.

The case was heard in the District Court upon bill, answer, and affidavits. All of the defendants, save one Jones, a director in the Main Island Creek Coal Company, who acted in co-operation with the complainant—that is to say, all three of the corporations mentioned, and the officers and directors of the Main Island Creek Coal Company, and the said A. J. Dalton and John A. Kelly individually—positively denied every averment of complainant's bill that charged collusion and fraud on the part of either of the companies, or any of their officers or directors, or of any of said individuals, and particularly that there was any wrong thought of in connection with the contract for the sale of 350,000 tons of coal at the price of \$6 per ton, and; on the contrary, they averred that the contract was greatly beneficial to the Main Island Creek Coal Company, and was made and entered into particularly in the interest of said last-named company.

The decree appealed from enjoined and restrained the Dalton-Kelly Coal Corporation, Atlantic Fuel & Steamship Company, all officers, directors, agents, and servants of each of said corporations, and A. J. Dalton and John A. Kelly from selling, alienating, or in any manner disposing of, or transferring, the moneys, choses in action, securities, assets, or effects whatsoever, of either of said Dalton-Kelly Coal Corporation or Atlantic Fuel & Steamship Company, and from in any manner disposing of or transferring any documents contract obligations accounts, or papers belonging to or in the possession and control

of either of said last-named corporations, and of said A. J. Dalton and John A. Kelly, and the said Dalton and Kelly were restrained from selling, alienating, or in any manner disposing of the stock held by them, either in their own names or by reason of the beneficial ownership, in the said Dalton-Kelly Coal Corporation or the Atlantic Fuel & Steamship Company. The appellants urge the dissolution of the injunction, assigning many errors to the action of the court in granting the same, and insist that the same was improvidently awarded, and that its continued operation will result most seriously to them financially.

The conclusions reached by this court, upon full consideration of the whole testimony and the arguments of counsel thereon, taking into consideration the practice properly controlling on the application for a preliminary injunction, are:

First. That the injunction against the Atlantic Fuel & Steamship Company should be dissolved, the evidence in our judgment failing to show such connection with, interest in, or complicity on the part of the said company, or its officers and directors, in any of the transactions involved in the suit, as would warrant the injunction against said company or its officers and directors.

Second. That the injunction against the Dalton-Kelly Coal Corporation, A. J. Dalton, and John A. Kelly, taking into account the contract in question between the said two companies, and the dominating control the said Dalton and Kelly hold and exercise over the same, should be modified as follows: That the injunction against the said defendants should stand dissolved upon the execution by the Dalton-Kelly Coal Corporation, or some one for it, of a bond in the penal sum of \$100,000 with good security, payable and conditioned to pay, carry out, and perform the final decree entered in this cause, in connection with the contract for the purchase of 350,000 tons of coal, by the said company from the Main Island Creek Coal Company, the said bond to be executed before the clerk of the District Court, and to be approved by the judge of said court or one of the judges of this court.

The execution of this bond should reasonably safeguard the interest of complainant, and cannot properly be objected to by the appellants, in the light of the fiduciary relation that A. J. Dalton and John A. Kelly, the owners of the Dalton-Kelly Coal Corporation, hold and bear to the Main Island Creek Coal Company, of which complainant is a minority stockholder, and especially in the light of the admission on the part of the defendants that the contract complained of resulted favorably to the said Dalton-Kelly Coal Corporation to the extent of approximately \$61,000, though said last-named company, and the said A. J. Dalton and John A. Kelly, insist that the contract was in all respects a fair and profitable one for the Main Island Creek Coal Company to have entered into, and that the Dalton-Kelly Coal Corporation was solely interested in any profits thus arising.

The giving of this bond is in no manner to prejudice or affect the interest of the Dalton-Kelly Coal Corporation, or of the said Dalton and Kelly individually, or any of the defendants, upon the final hear-

ing on the merits of the cause, nor should the giving of the bond affect the liability of the complainant under the injunction bond executed by him; and by the modification of the injunction and requiring said bond the court means in no wise to express or indicate any opinion on the merits of the cause.

Third. That the costs of this appeal should be borne equally between the complainant and the Dalton-Kelly Coal Corporation.

BIRKESTRAND v. CHICAGO, M. & ST. P. RY. CO. et al.
(Circuit Court of Appeals, Eighth Circuit. July 26, 1921.)

No. 5747.

1. Railroads \Leftrightarrow 278(3)—**Shipper falling from car held guilty of contributory negligence.**

A shipper of live stock who, while himself moving car to the railroad chute according to custom, went upon the top thereof in the dark without a lantern and was injured by walking off while going the length of the car to release the brake, held guilty of gross negligence as matter of law, barring recovery from the railroad.

2. Trial \Leftrightarrow 141—**Court may direct verdict where evidence is undisputed.**

A court may withdraw a negligence case from the jury and direct a verdict for the plaintiff or the defendant where the evidence is undisputed and of such a 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 Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Action by W. J. Birkestrand against the Chicago, Milwaukee & St. Paul Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

C. G. Lee, of Ames, Iowa (Lee & Garfield, of Ames, Iowa, on the brief), for plaintiff in error.

Charles R. Sutherland, of Chicago, Ill. (Hughes, Sutherland & O'Brien, of Cedar Rapids, Iowa, on the brief), for defendants in error.

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

TRIEBER, District Judge. The plaintiff, a farmer and stock raiser, applied to the station agent of the railway company, at Cambridge, Iowa, for two cars to ship some sheep from Cambridge to Chicago, Ill. On January 20, 1919, he called at the station, and selected two cars on the side track in the yards at Cambridge, some short distance from the chute or depot provided for the loading of stock. He alleges that, in violation of section 2116 of the Iowa Code, the railway company failed and refused to switch the cars to the chute or depot, and directed him to perform this service; that he was wholly inexperienced and unfamiliar with the proper methods of such work, which facts were

known to the defendants, and they neglected to instruct him how to perform such work; that the railway company had neglected to properly light the depot grounds and yards at the time and place plaintiff was required to perform such services; and that while performing such work, and exercising ordinary care in attempting to move the cars, as directed by the defendants, he fell from a car and was seriously injured.

The answer, in addition to a general denial, pleaded that the accident was due wholly to plaintiff's negligence, and also pleaded that prior to the accident he had executed a shipper's contract, and it, among other provisions, contained one "that the shipper would at his own risk load said live stock."

There was a trial to a jury, and at the close of plaintiff's evidence the court, on motion of defendants, directed a verdict in their favor.

The testimony of the plaintiff establishes the following facts: That during the afternoon of January 20, 1919, he had brought his sheep from his farm to the stockyards of the defendants near its station in Cambridge. He placed the sheep in the stockyards, and was told by the station agent to select his cars, a number of stock cars being on the stockyards track at the time. One car was at the chute, which had been assigned to a Mr. Inglis. The other cars were west of the stockyards. He selected the first car west of the one that was at the chute, and another that stood the fourth car from the chute. Having selected his cars, he went to the station agent and gave him the number of the cars, and the agent had the cars billed, and thereupon the plaintiff executed the live stock contract, which contained the provision set out in the answer. He was told to get a pinch bar to be used for starting or moving the cars. He then went back to the cars, bedded them, and went home, as he did not desire to load until late in the evening. He had a talk with Mr. Inglis, another shipper, and secured the pinch bar for use in moving the cars. Mr. Inglis told him that he would load his car right after supper, and suggested that he come in and they would help each other to load their cars, but, owing to the bad roads, plaintiff did not arrive at Cambridge until after 8 o'clock. At that time the Inglis car had been loaded, but was still standing at the chute. He was accompanied by his son and a hired hand when he came in the evening. They shoved the Inglis car further east, then loaded the first car, after moving it to the chute, and switched it until it bumped against the Inglis car. The second car was about 300 feet from the chute. It was a dark night, but the plaintiff had a lighted lantern with him. In order to move the second car, it was necessary for him to go to the top of the car in order to set the brake when it reached the chute. He saw that the brake was at the east end of the car, but ascended to the top of the car on the west end, and did not take the lantern with him. After he had reached the top of the car, he started to walk lengthwise to the east end of the car where the brake was, and, it being dark, he walked off the car and suffered the injuries complained of. He also testified that he had on three former occasions made shipments of sheep over the defendant's railroad, had helped others to load their

cars, and knew that it was customary for shippers to move and load their own cars.

The court held that the plaintiff's evidence showed that it was his own negligence in going on the car on a dark night, without a lantern, although he had one at the time, and therefore he was not entitled to recover.

He knew that the place where the cars stood and where they were to be loaded was not lighted; that the brake was on the east end of the car yet he climbed to the top of the car on the west end; although he had a lighted lantern, he did not take it with him when he went on the car, although he knew the night was dark, and then walked from the west end of the car to the east end where the brake was.

[1] Upon these facts there is no room for a difference of opinion among reasonable men that he was guilty of gross negligence, which alone caused him to fall off the car.

[2] While undoubtedly questions of negligence in actions like this are ordinarily for the jury under proper directions as to the principles of law by which they should be controlled, it is well settled by the decisions of the Supreme Court of the United States and this court, as well as all other national courts, that a court may withdraw a case from the jury and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed and is of such a 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. *Phoenix Insurance Co. v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18, 27 L. Ed. 65; *Schofield v. Chicago & St. Paul Ry. Co.*, 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Southern Pacific Co. v. Pool*, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; *Claus v. Northern Steamship Co.*, 89 Fed. 646, 32 C. C. A. 282; *Chicago, Rock Island & Pacific R. R. v. Baldwin*, 164 Fed. 826, 90 C. C. A. 630; *Chicago, etc., Railway v. Kroloff*, 217 Fed. 525, 529, 133 C. C. A. 377.

The court committed no error in directing a verdict for the defendant, and the judgment is affirmed.

KNIGHT et al. v. KNIGHT.

(Circuit Court of Appeals, Eighth Circuit. August 10, 1921. Rehearing Denied October 29, 1921.)

No. 5567.

Divorce ⇨168—**Validity of nunc pro tunc final decree by court having jurisdiction not subject to collateral attack.**

Validity of nunc pro tunc final divorce decree, entered 14 years after rendition of interlocutory decree by the judge who had rendered the interlocutory decree, and who had jurisdiction of the parties and the subject-matter, on a finding that the court had signed a final decree,

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

which through inadvertence had not been presented to the clerk and had become lost, entered as of the date when such other final decree had been signed, cannot be attacked by persons not parties to such proceedings in action in another state, on the ground of insufficiency of evidence to sustain such finding.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by Joseph E. Knight and others against Louise G. Knight. Decree for defendant, and plaintiffs appeals. Affirmed.

Edward Engerud, of Fargo, N. D. (A. G. Divet, D. B. Holt, and John S. Frame, all of Fargo, N. D., and S. B. Bartlett and J. F. Callahan, both of Casselton, N. D., on the brief), for appellants.

T. H. McEnroe, of Fargo, N. D., for appellee.

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

HOOK, Circuit Judge. This is a controversy over the right of Louise G. Knight to a distributive share in real and personal property in Cass county, N. D., comprising the estate of S. H. Knight, who died intestate in California in January, 1914. She claims as the widow of the deceased. The plaintiffs, now appellants, are the children of the deceased by former marriages. They contend that Louise G. Knight is not his widow, because she had not been lawfully divorced from her husband, B. W. Bonfoey, in the superior court of Los Angeles county, Cal., before her marriage with the deceased.

It appears that, in an action for divorce by B. W. Bonfoey against Louise Bonfoey in the court at Los Angeles, an interlocutory decree was duly entered October 3, 1904, and in accordance with the laws of that state the decree provided that upon the expiration of one year a final decree of divorce should be entered. The final decree might be entered upon motion of either party, or by the court upon its own motion. Kerr's Civil Code, § 132. No final decree was in fact entered until 1918, but the parties proceeded upon the assumption that it had been a few days after the expiration of the year. In 1905 Mrs. Bonfoey, after the supposed divorce, married one Gordon in California. Gordon met his death by accident in 1909. In 1910 she married Knight in California, and they lived together in that state until his death in 1914. The North Dakota court, exercising probate jurisdiction of his estate there, entered a decree of distribution assigning to Mrs. Knight her share as widow under the laws of that state. It was discovered early in 1918 that no final decree of divorce in the Bonfoey case had been entered in California, and her right as Knight's widow was challenged by the plaintiffs. It was first challenged in a suit for partition of the estate, but the Supreme Court of North Dakota, where the case went, held it was a collateral attack upon the order of distribution, and therefore inadmissible. The plaintiffs next began this suit in the District Court of the United States for the District of North Dakota, directly attacking the order of distribution. The court below held with Mrs. Knight, and this appeal by plaintiffs followed.

While the partition proceedings in North Dakota were going on, an amended final decree of divorce in *Bonfoey v. Bonfoey* was entered nunc pro tunc in the California court upon a finding from proof that upon the expiration of a year from the interlocutory decree, to wit, about October 4, 1905, the judge of the court who had entered the interlocutory decree had actually signed a final decree, but that by inadvertence it had not been presented to the clerk and entered as such, and had become lost. The nunc pro tunc decree recites:

"And it appearing that said court did after the expiration of one year from the entry of said interlocutory decree to wit, on or about the 4th day of October, 1905, sign a final order and decree in conformity to said interlocutory decree, but that the same was through inadvertence not presented to the clerk and not entered by the clerk of said court and has become lost."

It may be observed in passing that the judge who made this finding and entered the final decree in 1918 as of 1905 was the same judge who rendered the interlocutory decree in 1904. The evidence upon which the above finding and the final decree were made does not appear upon the judgment roll. The point of plaintiffs' attack is the validity of the nunc pro tunc final decree of divorce.

The California court had jurisdiction of the parties to *Bonfoey v. Bonfoey* and of the subject-matter of the case. It also had power to consider and determine whether a final decree had been in fact duly rendered and signed, but not entered of record through inadvertence or mistake, and, if so, to cause it to be entered nunc pro tunc. This the California court has done, and it has violated no rule of law that would justify a court in North Dakota in holding its decisions for naught. If the California court erred within the exercise of its jurisdiction, there was the place for correction by appeal, not North Dakota. The plaintiffs contend that to authorize the entry of such a decree there should have been evidence of the actual rendition at the proper time by minutes or writings of some sort upon the records of the court's proceedings. But that is a question of proof, not of jurisdiction in its proper sense. Since the court in California had full jurisdiction of the parties in *Bonfoey v. Bonfoey*, both of whom resided there, and of the subject-matter of the action, and also to make its records speak the truth, the case is not like those in which the Supreme Court has so often questioned the validity of decrees of divorce when attacked in other states than where rendered. The entry of the decree in 1918 as of 1905, when it was actually rendered and signed, was upon Bonfoey's application, and it occurred when both parties, Bonfoey and his former wife, now Mrs. Knight, were before the court. Even if minutes upon the court's proceedings in 1905 were essential as proof, it does not appear upon the face of the decree attacked, or the judgment roll, that there were none. The plaintiffs, not parties to that record, are seeking in North Dakota a review of the evidence back of the decree to the same extent as if they were prosecuting an appeal in California. It needs no citation of authorities that such a position is untenable.

The decree of the court below is affirmed.

OLYMPIA SHIPPING CORPORATION v. MORSE DRY DOCK & REPAIR CORPORATION.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1921.)

No. 1896.

1. Judgment \Leftrightarrow 570(6)—Order of discontinuance on stipulation of the parties is not judgment nor bar.

An order of discontinuance on stipulation of the parties is not a judgment nor a bar, but leaves the situation the same as though suit had not been brought.

2. Compromise and settlement \Leftrightarrow 20(2)—Maritime liens \Leftrightarrow 43—Failure to pay notes for settlement of libel for repairs restores parties to original status.

Where an agreement for settlement of a pending suit to enforce a maritime lien expressly provided that the settlement should not be effective unless the sum agreed on was paid and notes given for a part of the sum were not paid, libellant held to have the right to return the notes and bring suit on his original claim.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by the Morse Dry Dock & Repair Corporation against the Olympia Shipping Corporation. Decree for libellant, and respondent appeals. Affirmed.

Walter F. Welch, of New York City, for appellant.

William F. Purdy, of New York City (Macklin, Brown, Purdy & Van Wyck, of New York City, and Hughes, Vandeventer & Eggleston and John W. Eggleston, all of Norfolk, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. In June and July, 1919, at the port of New York, the appellee, Morse Dry Dock & Repair Corporation, furnished "repairs, supplies, and other necessities" to the steamship Parthian, then owned by the appellant, Olympia Shipping Corporation, to the claimed amount and value of \$30,000.17, for which it filed a libel against that vessel in the Southern District of New York. Afterwards and pending trial an arrangement was made by which the appellee agreed to accept \$25,000 in full—\$15,000 in cash and \$10,000 in short-time notes—on condition that the notes be paid at maturity. Accordingly, in January, 1920, on stipulation of the parties, an order was entered discontinuing the suit.

The notes were not paid, and after all of them became due this libel in personam was filed in the Eastern District of Virginia, where jurisdiction was obtained by attachment of the schooner Ruth E. Merrill, belonging to appellant, the libellant suing for its original bill of \$30,000.17, less the \$15,000 which had been paid. The defense set up was the compromise and settlement of the claim in the New York suit, the contention being made that the court below was without jurisdic-

tion because the appellee's only remedy was an action on the unpaid notes in a court of common law.

But the treasurer and general manager of appellee, with whom the compromise arrangement was personally made, testified that he was unwilling to discharge the lien on the Parthian unless the entire \$25,000 was paid in cash, that he consented to take the notes only on condition that if they were not paid when due "the claim would revert to its original condition as to amount, lien," etc., and that this was agreed to by the appellant; and the latter's treasurer and general manager, who represented it in the negotiations, virtually admitted that the notes were accepted on that condition.

[1] The mere statement of these facts is sufficient to show that the appeal is without merit. When a suit is discontinued the situation is the same as though it had never been brought. *Loeb v. Willis*, 100 N. Y. 231, 235, 3 N. E. 177; *Hanson v. Hanson*, 234 Fed. 853, 856, 148 C. C. A. 451. In the latter case it is said:

"There can be no such thing as a discontinuance on the merits, because on discontinuance the merits are not in issue or determined. Such an order is not a judgment nor a bar."

[2] The agreement to accept \$25,000, partly payable in notes, was upon the express condition that the notes should be paid as they matured, and the failure to meet that condition left the appellee free to return the dishonored notes, as it did at the trial, and to take any lawful proceeding to collect the original debt. An accord without satisfaction is a nullity. And it is well settled that the acceptance of notes in payment of a repair bill, under the facts here established, does not waive or discharge a maritime lien or preclude the repairman from enforcing such a lien. *The Emily B. Souder*, 84 U. S. (17 Wall.) 666, 21 L. Ed. 683; *Robins Dry Dock & Repair Co. v. Chesbrough*, 216 Fed. 121, 125, 132 C. C. A. 365.

The decree appealed from will be affirmed.

Ex parte MARGRAVE.

(District Court, N. D. California, First Division. August 9, 1921.)

No. 17294.

Indians ⇨38(2)—Selling liquor to Indian a "felony."

The offense of selling liquor to an Indian in violation of Act Jan. 30, 1897, § 1 (Comp. St. § 4137), which provides that any person convicted of such offense "shall be punished by imprisonment for not less than sixty days and by a fine of not less than \$100 for the first offense and not less than \$200 for each offense thereafter," is a "felony," as defined by Penal Code, § 335 (Comp. St. § 10509), and not within the jurisdiction of a commissioner, whose jurisdiction is limited by statute to misdemeanors.

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

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

Habeas Corpus. Application by Fred Margrave for writ to secure discharge from custody. Writ granted.

Louis J. Schino, of Merced, Cal., and Frank E. Murphy, of Stockton, Cal., for petitioner.

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

RUDKIN, District Judge. Application for a writ of habeas corpus. Section 7 of the Act of June 2, 1920, 41 Stat. 731, provides as follows:

"That the United States District Court for the Northern District of California shall appoint a commissioner for the Yosemite National Park, who shall reside in said park, and who shall have jurisdiction to hear and act upon all complaints made of any violations of law, or of the rules and regulations made by the Secretary of the Interior, for the government of said Yosemite National Park, and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this act.

"Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this act prescribed for the government of said Yosemite National Park, and for the protection of the animals, birds, and fish in said park, and to try persons so charged, and if found guilty impose punishment and to adjudge forfeiture prescribed.

"In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States court for the Northern district of California, and the United States District Court in said district shall prescribe rules and procedure and practice for said commissioner in the trial of cases and for appeals to said United States District Court."

The petitioner was convicted of the crime of selling intoxicating liquor to an Indian, and is now imprisoned in the county jail of the city and county of San Francisco under and by virtue of the sentence imposed by the commissioner thus appointed. The jurisdiction of the commissioner to impose the sentence complained of is the sole question presented by the present application.

The crime of selling intoxicating liquor to an Indian is defined by section 1 of the Act of January 30, 1897, (29 Stats. 506; Comp. St. § 4137), and the punishment prescribed is imprisonment for not less than 60 days and by a fine of not less than \$100 for the first offense, and not less than \$200 for each offense thereafter.

A felony is defined by section 335 of the federal Penal Code of 1910, as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." (Comp. St. § 10509).

That the crime of selling intoxicating liquor to an Indian is a felony as thus defined does not admit of question. *United States Express Co. v. Friedman*, 191 Fed. 673-677, 112 C. C. A. 219; *Morgan v. Ward*, 224 Fed. 698, 140 C. C. A. 238.

It follows from this that the commissioner was without jurisdiction to impose the sentence complained of, and the petitioner is entitled to his discharge. Let an order be entered accordingly.

UNITED STATES v. O'LEARY.

(District Court, S. D. New York. July 29, 1921.)

Bail §79(1)—Remission of penalty of forfeited recognizance denied to defendant, making willful default.

Remission of the penalty of a forfeited recognizance denied as to the defendant, who made willful default by absconding, but granted as to his bail, not shown to have been an accomplice, except as to the amount of the expense imposed on the government by the default.

At Law. Action by the United States against Jeremiah A. O'Leary. On motion for remission of penalty of forfeited recognizance. Denied as to defendant, but sustained in part as to bail.

Francis G. Caffey, U. S. Atty., of New York City.
Thomas B. Felder, of New York City, for defendant.

LEARNED HAND, District Judge. It is quite true that under Rev. Stat., § 1020 (Comp. St. § 1684), this motion lies after the term has expired at which judgment was rendered on the recognizance. U. S. v. Jenkins, 176 Fed. 672, 100 C. C. A. 224 (C. C. A. 4th); U. S. v. Traynor (D. C.) 173 Fed. 114. Also that Judge Neterer was justified in ruling out the evidence now offered in exoneration when he tried the action on this recognizance. U. S. v. McGlashen, 66 Fed. 537. Again it has been held that, in spite of the words of the statute, the forfeiture will be remitted against the bail, though the default was willful. Per Mr. Justice Nelson, U. S. v. Santos, 5 Blatchf. 104, Fed. Cas. No. 16,222. Finally, if the default was not willful, it makes no difference that the defendant was found guilty. U. S. v. Smart, 237 Fed. 978, 150 C. C. A. 628 (C. C. A. 8th).

That there was a willful default in this case admits of not the slightest doubt. The defendant absconded and secreted himself successfully for three weeks, till betrayed by his accomplice. For that long he successfully defied all efforts to apprehend him. His application now, especially at the end of two years after judgment, has as little to commend it to my discretion as I can well conceive. It is denied.

As to his bail there is no evidence that she was an accomplice to his absconding; possibly she was, but I cannot say so. I will therefore hold her only as surety against his default to the amount which the United States can show it was damaged by that default. These damages will be the cost of preparing for the trial at which the defendant failed to appear, the costs of searching for the defendant and apprehending him, the costs of obtaining judgment on the recognizance, and the costs of this application, including the fees of the special master and expenses of the reference.

Motion of defendant denied in toto; motion of bail granted, to the extent that she is held liable only for the costs as above set forth. Since execution has already been returned unsatisfied against the defendant, her liability is already absolute. Referred to Samuel H. Hitchcock, Esq., to compute costs as aforesaid. If the bail does not bring on the hearing within 20 days, the motion will be denied as to her.

CASTNER, CURRAN & BULLITT, Inc., v. HAMILTON, Collector of Customs.

(District Court, E. D. Virginia. September 3, 1921.)

1. Seamen ⇨11—Statute relating to hospital expenses of alien seamen held to apply to aliens on American ship.

Act Cong. Dec. 26, 1920, providing for payment by ship of hospital expenses of alien seamen, is not a seamen's benefit statute, but was intended to supply an omission in the existing Immigration Law (Act Feb. 5, 1917 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼a et seq.]), and to make certain of the provisions of that law applicable to cargo vessels as well as to passenger ships, and applies to hospital expenses of members of crew of an American vessel who are aliens.

2. Seamen ⇨13—American ship not required to return diseased seamen to foreign country.

Where aliens shipped on American vessel at New York and were taken sick on a return trip at Norfolk, Act Cong. Dec. 26, 1920, could not be construed to require the vessel to return the aliens to the country from whence they originally came, if a cure could not be effected within a reasonable time.

Mandamus proceeding by Castner, Curran & Bullitt, Inc., against Norman R. Hamilton, Collector of Customs of the Port of Norfolk. Writ denied.

Hughes, Little & Seawell, of Norfolk, Va., for petitioner.

Paul W. Kear, U. S. Atty., and H. H. Rumble, U. S. Admiralty Counsel, both of Norfolk, Va., for respondent.

GRONER, District Judge. The Winding Gulf, an American steamship, on arrival at the port of Norfolk from a European port in January, 1921, was boarded by the immigration officials, who removed to the hospital several members of the crew, found to be suffering from one or another of the diseases mentioned in section 35 of the Act of Congress of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼_{ass}), entitled "An act to regulate the immigration of aliens to, and the residence of aliens in, the United States." Subsequently, upon the discharge of the seamen from the hospital, a claim for the cost of hospital treatment was made against the owners of the vessel, payment was refused, the ship was denied clearance, and this petition was filed, praying for a mandamus against the collector of the port.

No further statement is necessary, unless it be to mention the fact that the diseased members of the crew, for whose hospital expenses the vessel is denied clearance, were shipped from the port of New York,

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

and were completing a voyage from this country to Europe and return, when their diseased condition was discovered. The decision of the case involves the construction of the Act of Congress of December 26, 1920 (41 Stat. 1082) entitled "An act to provide for the treatment in hospital of diseased alien seamen," reading as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that alien seamen found on arrival in ports of the United States to be afflicted with any of the disabilities or diseases mentioned in section 35 of the act of February 5, 1917, entitled, 'An act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' shall be placed in a hospital designated by the immigration official in charge at the port of arrival and treated, all expenses connected therewith, including burial in the event of death, to be borne by the owner, agent, consignee, or master of the vessel, and not to be deducted from the seamen's wages, and no such vessel shall be granted clearance until such expenses are paid or their payment appropriately guaranteed and the collector of customs so notified by the immigration official in charge: Provided, that alien seamen suspected of being afflicted with any such disability or disease may be removed from the vessel on which they arrive to an immigration station or other appropriate place for such observation as will enable the examining surgeons definitely to determine whether or not they are so afflicted, all expenses connected therewith to be borne in the manner hereinbefore prescribed; Provided, further, that in cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be possible within a reasonable time to effect a cure, the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came, upon such conditions as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall prescribe, to insure that the aliens shall be properly cared for and protected, and that the spread of contagion shall be guarded against."

[1] On behalf of petitioners it is insisted that the term "alien seamen," used throughout the act, has no reference or application to members of the crew of an American vessel, even though they be aliens; that by settled maritime law a seaman on an American vessel is an "American seaman," and therefore not an "alien seaman," whatever his citizenship may be; and that the act consequently applies only to the crews of foreign ships. In support of this view the cases of *In re Ross*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581, *The Blakeley* (D. C.) 234 Fed. 959, *The Laura M. Lunt* (D. C.) 170 Fed. 204, *The Santa Elene* (D. C.) 271 Fed. 347, *The Marie* (D. C.) 49 Fed. 286, *The Kestor* (D. C.) 110 Fed. 432, *The Eudora* (D. C.) 110 Fed. 430, and *The Ester* (D. C.) 190 Fed. 216, are cited as controlling. These cases hold that service on an American vessel makes the person so serving, whatever his nationality, for the time being an "American seaman," and as such entitled to the protection and subject to the obligations of the laws passed by Congress on behalf of American seamen. Counsel for the petitioner urge with considerable force and plausibility that, if due effect be given to this doctrine, the crews of American vessels, wherever their permanent allegiance may be, are eliminated from the provisions of the act; for, they say, a person may not be an American seaman and an alien seaman at one and the same time.

This position might be tenable if the act could be regarded as original legislation complete in itself; for under such circumstances it would, perhaps, not be going too far to say that Congress, in the use of the

descriptive term found in the act, had in mind the change in the alien's status while serving on an American vessel, and intended to give effect to the same. But in the view that I take of the matter the object and purpose of Congress in passing the act of 1920 was not, as claimed by petitioner, to enact a seaman's benefit statute, but to supply an omission in the existing immigration law (Act Feb. 5, 1917), and to make certain of the provisions of that law applicable to cargo vessels as well as to passenger ships; the particular provisions being those contained in section 35 regarding the detention and treatment at the expense of the vessel of diseased alien members of a crew of any vessel carrying passengers between a port of the United States and any foreign port, to prevent thereby the spread of loathsome and contagious diseases, and to place all aliens, whether found on American or foreign vessels, freight as well as passenger, under the jurisdiction of the immigration officials, because the public safety required it.

It is true the act of 1920 is not in terms an amendment of the former act; but by reference, as well as by reason of the subject-matter treated, it is so interrelated with it that it seems impossible to escape the conclusion that Congress by its passage intended to make the penalties of section 35 of the old law apply to all vessels alike, and that this object was the real purpose of the legislation. The most casual consideration of the act of 1917 shows that Congress made no distinction in the terms "aliens" and "alien seamen." Throughout they are used interchangeably. In the section immediately preceding section 35 provision is made that any *alien seaman* (italics added) who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States, etc. It cannot, of course, be contended that this section is inoperative as applied to aliens who were of the crew of American vessels, or that their employment on such vessels entitled them by virtue of that fact to entry into the United States on any other or different footing than an alien otherwise employed. Reference to other sections of the former act but fix this conclusion more definitely, and confirm the view that the words "alien" and "alien seamen," as used there, are synonymous terms, and that, though the alien may become, for many purposes, by virtue of his signing on an American vessel, an American seaman, he nevertheless continues, so far as the laws relating to immigration are concerned, both an alien and an alien seaman.

That it was competent for Congress to legislate so as to include both classes of aliens, or, in fact, all classes of aliens, wherever employed, cannot, of course, be questioned; and it seems to me equally clear that the descriptive language employed in the act of 1920 was intended to have the same meaning as in the earlier immigration statute, which, as has been seen, it was designed to supplement and correct. In both statutes the term "aliens" and "alien seamen" must be held to have been used as commonly accepted and understood. It follows that the contention of petitioner that the rule pronounced by the Supreme Court in the Ross Case should be held applicable, and therefore controlling, is for the reasons stated overruled.

[2] It is, however, further insisted by petitioner that the intention of Congress to exempt American vessels is disclosed by reference to that portion of the act which provides that—

“In cases in which it shall appear to the satisfaction of the immigration official in charge that it will not be possible within a reasonable time to effect a cure, the return of the alien seamen shall be enforced on or at the expense of the vessel on which they came.”

“Return where?” is asked, and frankly the answer is difficult to give; for, of course, it is not thinkable that Congress intended to require of the shipowner the return of the diseased seaman at the ship’s expense to the country from whence he originally came, where, as in the case at bar, he shipped at an American port; and while admittedly the language used in the act is broad, and if literally construed may seem to afford ground for such contention, yet a consideration of the whole act, and of the circumstances which impelled its passage, make it quite impossible to believe that Congress intended any such unreasonable hardship, for, as was said by the Supreme Court in *Trinity Church v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226:

“Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”

It may therefore be safely said that, without something more than is now contained in the act, the courts may be counted on, if so grotesque a demand should be made, to deny its effectiveness, and not to extend its terms so as to impose upon American shipping, already heavily burdened, absurd or impossible conditions.

Upon the whole case I am of opinion that the mandamus should be refused; and it will be so ordered.

WILLIAM H. HASKELL MFG. CO. v. NELSON BLOWER & FURNACE CO.
Petition of COMMERCE TRUST CO.

(District Court, D. Massachusetts. August 10, 1921.)

No. 949 Equity.

1. Corporations Ⓒ415—**Directors may mortgage all of corporation’s property.**

Under Corporation Law of Massachusetts, § 4f, providing that a corporation is authorized to hold, purchase, mortgage, or lease real or personal property as the purposes of the corporation may require, and section 19, providing that the board of directors may exercise all of the powers of the corporation except such as are conferred by law or by the by-laws of the corporation on the stockholders, the directors of the corporation, there being no statute or by-law to the contrary, may execute a valid mortgage on all the property of the corporation for the purpose of furthering its interests in its business.

2. Corporations ⇨415—Authority to president to give mortgage limited to debt specified.

A resolution of the board of directors of a corporation authorizing its president to execute a mortgage for \$25,000, to secure a note to be given for money borrowed, *held* not to authorize nor validate a provision in the note making the mortgage security for prior loans, or giving the lender a lien therefor on any property which might come into its possession.

3. Corporations ⇨559 (5)—Invalid claim not validated by decree reserving rights on surrender of property to receivers.

A provision, in a decree appointing receivers, for a corporation that the surrender to the receivers of property of which a creditor had taken possession should be "without prejudice to such rights as it may have acquired by virtue of such possession," *held* not to entitle the creditor to enforce a claimed lien on the property or its proceeds which had no legal validity.

4. Corporations ⇨547 (1)—Liens given on any property in possession of creditor held not to extend to property constructively in its possession.

Where a sheriff was in possession of property of a corporation under an attachment, an arrangement with the sheriff or with his custodians to hold possession subject to the attachment for a mortgagee for the purpose of foreclosure *held* not to give the mortgagee possession for the purposes of other claimed liens.

5. Corporations ⇨547 (1)—Possession under mortgage held not attributable to other claimed liens.

Possession of property taken by a mortgagee under a mortgage securing a note and providing that on payment of the amount of the note the mortgage should be void and that in case of sale of the property any surplus after payment of the mortgage debt should be paid to the mortgagor, *held* not to constitute possession for the purposes of other liens claimed by the mortgagee.

In Equity. Suit by the William H. Haskell Manufacturing Company against the Nelson Blower & Furnace Company. On petition of the Commerce Trust Company. Petition granted in part.

Robert G. Dodge, of Boston, Mass., for petitioner.
Judd Dewey, of Boston, Mass., for receivers.

BINGHAM, Circuit Judge. In this proceeding the Commerce Trust Company seeks to establish a mortgage for \$25,000 given it by the Nelson Blower & Furnace Company on the 23d day of August, 1919, in which the latter company purports to mortgage all its corporate assets, tangible and intangible, patents, patent rights, trade-marks, trade-names, good will, and other evidences of good will of whatever kind and description, and all its leaseholds, plant, and equipment, including all its machines and machinery now owned or which may hereafter be acquired by it while any sums secured by this mortgage or any interest thereon remain unpaid; the same being subject to two prior mortgages to the Marlin Rockwell Corporation.

The property covered by the above mortgages has been sold by the receivers. The sum derived from the sale of property subject to the two mortgages to Marlin-Rockwell Corporation is not sufficient to satisfy the balance due on them. The sum derived from the sale of the property subject to the mortgage to the Commerce Trust Company, and

not subject to the mortgages to Marlin-Rockwell Corporation, is more than sufficient to satisfy the mortgage of the Commerce Trust Company.

The petitioner also seeks to assert a lien on this balance and apply the same in satisfaction of what remains due it on three prior notes given by the Nelson Blower & Furnace Company to the petitioner. Two of the notes are dated August 1, 1919, for \$25,000 each, and due October 1 and November 1, 1919, respectively. The third note is for \$8,247.42 and is dated August 19, 1919, and due October 18, 1919.

[1] The facts in relation to the mortgage of August 23, 1919, are as follows:

On August 22, 1919, a meeting of the directors of the Nelson Blower & Furnace Company was duly called and held. Three of the four members constituting the board were present—Messrs. Nelson, Marshall, and Stone—and it was voted:

"That the corporation borrow from the Commerce Trust Company a sum not exceeding twenty five thousand dollars (\$25,000) and that the president, Albert H. Nelson, be authorized to sign a note for the amount so borrowed upon such terms as seem expedient and that he be authorized to execute a mortgage of all the personal property of the corporation to the said Commerce Trust Company for a sum not to exceed twenty-five thousand dollars (\$25,000) in the name and behalf of the corporation and that the seal of the corporation be attached thereto."

Albert H. Nelson was the president of the company. He was also a director and a stockholder owning 533 out of 1055 shares of common and preferred stock; both classes of stock having voting powers. Acting under the authorization of the above vote, Nelson obtained a loan of \$25,000 from the trust company and gave the mortgage signed "Nelson Blower & Furnace Company, by A. H. Nelson, President." The note secured by the mortgage was a collateral note containing sweeping provisions. It was signed by the Nelson Blower & Furnace Company, by A. H. Nelson, President. It also bore the following indorsements: "A. H. Nelson," "Nelson Machine Co., by A. H. Nelson, Pres." The note and mortgage, the two notes of August 1, 1919, and the note of August 19, 1919, will be found in petitioner's Exhibit 1, all of which are referred to and made a part of this finding.

At the time the note and mortgage were negotiated, a certified copy of the above vote of the board of directors was given to the petitioner.

The by-laws of the corporation contain the following provisions relating to the board of directors:

"Section 12. In addition to the powers and authority by 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 agreement of association and the articles of organization or by these by-laws, directed or required to be exercised or done by the stockholders."

Section 13 contains a list of express powers, the eighth one being:

"To delegate any of the powers of the board in the course of the current business of the corporation to any standing or special committee, or to any officer or agent, or to appoint any persons to be the agents of the corporation

with such powers, including the power to subdelegate, and upon such terms as they deem fit."

Albert H. Nelson at the time these notes were executed was the general manager as well as the president of the Nelson Blower & Furnace Company. An agreement employing him as general manager for one year was entered into August 19, 1918, and thereafter extended for an additional year. This agreement will be found in petitioner's Exhibit 4, which is made a part of this finding.

In the articles of agreement and organization of the corporation appear the following:

"The property and affairs and business of the corporation shall be managed by a board of directors, who may exercise all such powers of the corporation as are not by law or by the by-laws required to be otherwise exercised. Without restricting the generality of the foregoing, the board of directors shall have power to purchase any property which the corporation may have the right to acquire, and to enter into any contracts which they may deem advantageous to the corporation, and fix the price to be paid by the corporation for any such property; and also shall have power, without the vote or assent of the stockholders, to sell, lease, or otherwise dispose of, and transfer, unless it is otherwise specifically provided by law or by this agreement, any or all of the property of the corporation."

The by-laws also contain the following provisions:

"Section 24. The president shall be the chief executive officer of the corporation. He shall preside at all meetings of the stockholders and directors. He shall have general and active management of the business of the corporation, and shall see that all the orders and resolutions of the board are carried into effect, subject, however, to the right of the directors to delegate any specific powers, except such as may be by statute exclusively conferred on the president, to any other officer or officers of the corporation."

"Section 26. He shall, in addition to the foregoing specific powers and duties, have the general powers and duties of supervision and management usually vested in the office of president of a corporation."

A Massachusetts corporation, under the Act of 1903, c. 437, § 4(f), is authorized:

"To hold, purchase, convey, mortgage or lease within or without this commonwealth such real or personal property as the purposes of the corporation may require."

Section 19 provides:

"The board of directors may exercise all of the powers of the corporation, except such as are conferred by law, or by the by-laws of the corporation, upon the stockholders."

And section 40, so far as here material, provides:

"Every corporation * * * may, at a meeting duly called for the purpose by a vote of two-thirds of all its stock, or, if two or more classes of stock have been issued, of two-thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their voting power, or make any other lawful amendment or alteration in its agreement of association or articles of organization, or sell, lease or exchange all its property and assets, including its good will and its corporate franchise, upon such terms and conditions as it deems expedient."

On September 26, 1919, the Nelson Blower & Furnace Company was put into the hands of receivers by a decree of this court. The receivers contend that the mortgage, being of all the property of the corporation, including its good will, is invalid for the reasons: (1) That the authority to mortgage given to the corporation under section 4(f), supra, relates to authority exercised as an ordinary incident of carrying on the business of a manufacturing corporation, and that a mortgage of all the property of a corporation calls for the exercise of authority in excess and beyond that ordinarily incident to the carrying on of the business of such a corporation; and (2) that, while a corporation may, at a meeting duly called for the purpose, by a vote of two-thirds of its voting stock, sell, lease, or exchange all its property and assets, including its good will, the authority conferred by section 40 by implication prohibits the directors from undertaking to mortgage all of its property.

So far as I am able to learn, these provisions of law have never been construed by the Massachusetts court, but it seems to me that section 4(f) vests in the corporation power to convey, mortgage, or lease the whole or any part of its property. This section does not undertake to define how these powers shall be exercised; that is provided for in other sections. By section 19 authority to exercise all the powers of the corporation, except such as are conferred by law or by the by-laws upon the stockholders, is vested in the board of directors. The only section relating to powers which are to be exercised by the stockholders is section 40. That section points out how fundamental changes in the organization of a corporation may be brought about, such as a change of name, change in the nature of the business, and changes involving a sale, lease, or exchange of all the property and assets of the corporation, including its good will. The execution of these powers it confers on the stockholders, at a meeting duly called for the purpose, by a two-thirds vote. A sale or lease of all the property and assets of a corporation looks to the determination of its business; and the power to exchange all of its assets is in furtherance of the power conferred permitting a change in the nature of its business. The word "mortgage" is used in section 4(f), but is omitted from section 40, and its omission in the latter section was apparently intentional, for a mortgage of all the corporation's property does not contemplate or necessarily require that it should cease business and, if made with an honest intent, would be to further the purposes of the corporation. In this case there is no question of a fraudulent purpose. The mortgage was made to further the interests of the corporation in the conduct of its business.

In view of the foregoing I am of the opinion that the power vested in the corporation to mortgage its property is to be exercised by the board of directors, whether the mortgage be of the whole or any part of its property, and that the mortgage in question was duly authorized by the vote of the directors.

The remaining question is whether the petitioner has a right to the balance of the fund derived from the sale of the mortgaged property, after satisfying the Marlin Rockwell mortgages and its mortgage of August 23, as security for the payment of the two notes of August 1,

1919, for \$25,000 each, and the note of August 19, 1919, for \$8,247.42, by virtue of a collateral stipulation contained in the note of August 23, or by virtue of a like stipulation contained in the prior notes of August 1 and August 19.

The petitioner claims that about four days prior to the appointment of the receivers it took possession of all the property of the corporation for the purpose of foreclosing its mortgage, and that it continued in possession and control of the property down to the appointment of the receivers, when it surrendered possession to the receivers, having first procured the insertion in the decree appointing the receivers the following stipulation:

"That the Commerce Trust Co. surrender to the receiver such possession as it may have acquired of the property of the respondent under mortgage held by it without prejudice to such rights as it may have acquired by virtue of such possession."

That this stipulation preserved and was intended to preserve whatever possessory rights it had acquired in its attempted foreclosure, not only for the purpose of perfecting its security under the mortgage but for the purpose of acquiring security to be applied in satisfaction of the notes of August 1 and August 19; one of the collateral stipulations in the mortgage note and in the prior notes being as follows:

"Collateral security and collateral as used herein mean not only the above-described collateral, but all other property of whatever kind or nature of the undersigned, or in which the undersigned has an interest, which is, or may, at any time be under the control of the holder by virtue of this agreement, or otherwise; obligations as herein used mean not only the principal and interest of this obligation, but of all other obligations and liabilities of whatever nature at any time due by the undersigned, or by the indorser or indorsers, or guarantor or guarantors hereof (or of the individual members of the undersigned) to the holder hereof, or to become due whether heretofore or hereafter contracted."

[2] It is objected on the part of the receivers: (1) That under the vote of the board of directors of August 22, the president of the corporation was not authorized to give a note containing a stipulation whereby the mortgaged property, should it come into the control of the mortgagee, might be held as collateral security for prior notes or future obligations; that he was authorized to borrow a sum not exceeding \$25,000, with a discretion as to the rate of interest and the time of payment, and to mortgage all the property of the corporation to secure that loan only; that a certified copy of the vote of the board authorizing the loan and mortgage was delivered to it at the time the negotiation took place, and that it knew the limitations placed upon the president's authority in procuring the loan and giving the mortgage. And I find and rule that such was the case and that this collateral stipulation in the mortgage note is without force and validity. This finding and ruling is based on two assumptions: (1) That the petitioner in its attempted foreclosure took and retained actual possession and control of the property and held the same down to the date of the appointment of the receivers, and (2) that it was understood and intended by the provision above quoted from the decree that any possession which

it had obtained of the mortgaged property might be availed of by it, not only to perfect its lien under the mortgage (which covered after-acquired property), but to assert a lien as security for the prior notes.

[3] I do not think that the above-quoted provision in the decree was intended to cover or should be construed as reserving any right in the petitioner to the fund derived from the sale of the mortgaged property as security for the three notes of August 1 and August 19 or any other obligation than the one secured in the mortgage. It was not brought to the attention of the court at the time the receivers were appointed that the petitioner claimed the right to assert a lien on the mortgaged property as security for these earlier notes, and no claim of the kind was made until a year or more after the appointment of the receivers, when this petition was filed. If such a claim had been made at the time the hearing was in progress asking for the appointment of receivers, in which this petitioner participated, I am very sure that its assertion would have been regarded as sufficient ground for refusing the receivership, for the court required the withdrawal of the attachment placed by a creditor upon the property some fifteen days before the appointment of receivers before entering the decree.

[4] Neither am I able to find that the petitioner ever obtained actual possession and control of the property covered by the mortgage. Some 15 days prior to the time the petitioner undertook to foreclose its mortgage, all the property of the corporation was attached in a suit brought by a creditor of the corporation, and at the time of the attempted foreclosure the sheriff and his keepers were in the exclusive possession and control of the property under the attachment and so continued down to the time of the appointment of the receivers. The petitioner never dispossessed the sheriff and his keepers, but went to the premises where the mortgaged property was located and notified the mortgagor that it was there to take possession and foreclose its mortgage. Later, with the knowledge and permission of the sheriff, the petitioner, for the purpose of continuing and maintaining on its behalf and subject to the attachment the possession which it claims to have taken under its mortgage, employed in their private capacity the persons who were then employed by the sheriff as keepers. This may have been sufficient to answer the requirements of delivery and retention of possession by a mortgagee under Revised Laws of Massachusetts, c. 198, § 1, to perfect the petitioner's rights in after-acquired property covered by the mortgage, had there been any. But I find and rule that it did not vest in the petitioner such control of the property as would entitle it to hold the same as security under the terms of the collateral stipulations contained in the notes of August 1 and August 19.

[5] I further find and rule that if the petitioner in its attempted foreclosure acquired exclusive control of the property, it was not entitled, notwithstanding the collateral stipulations in the notes of August 1 and August 19, to hold the property as security for these notes, as the mortgage of August 23 not only provided that, on the payment of the \$25,000 secured by the mortgage and of the interest, "this deed as also the aforesaid note shall be void," but also that "upon any default in

the performance or observance of the foregoing condition" the mortgagee might sell the property at auction, and out of the money arising from the sale "retain all sums then secured by this mortgage, whether then or thereafter payable, including all costs, charges, and expenses incurred or sustained by it or them in relation to the said property, or to discharge any claims or liens of third persons affecting the same; rendering the surplus, if any, to grantor or its successors, or assigns." The petitioner, had it sold the property for condition broken, would have been required after satisfying the mortgage, including the expenses incurred in relation to the sale and the discharge of the Marlin Rockwell mortgages, to pay the surplus to the mortgagor. This stipulation supplanted any prior stipulations in the notes of August 1 and August 19 so far as the property covered by the mortgage of August 23 is concerned and disentitled the petitioner to a lien on the surplus to secure these prior notes, if in its absence it would have been entitled to one.

GENERAL ELECTRIC CO. v. OHIO BRASS CO. *

(District Court, D. New Jersey. October 28, 1920.)

No. 8113.

Patents ↩328—925,561, for suspension of high-tension line, not infringed.
Buck and Hewlett patent, No. 925,561, relating to "suspension of high-tension lines," held not infringed.

In Equity. Bill by the General Electric Company against the Ohio Brass Company. Bill dismissed.

Fish, Richardson, Herrick & Neave, of New York City (Charles Neave, Clarence D. Kerr, and William G. McKnight, all of New York City, of counsel), for plaintiff.

Charles M. Nissen, of Chicago, Ill. (Drury W. Cooper, of New York City, of counsel), for defendant.

LYNCH, District Judge. The plaintiff alleges infringement by the defendant of its Buck and Hewlett patent, No. 925,561, which relates to "suspension of high-tension lines." The defendant not only denies infringement, but attacks the validity of the patent. The claims of the patent in issue are Nos. 1, 2, 3, 4, and 6.

"Suspension of high-tension lines" means the manner of suspending wires for the transmitting of electricity at high voltage from the place where it is generated to the place where it is to be used.

It is asserted, in behalf of the plaintiff, that prior to the application for the patent in suit an increase in voltage in long-distance transmission systems was a thing very much to be desired. These systems started at very low voltages, and they got up gradually to 20, 30, 40, 50, and 60 thousand volts to be transmitted long distances, and the system in use in those days carrying a voltage as high as 60,000 was the old

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

*Decree affirmed 276 Fed. —.

familiar combination of telegraph pole, cross-arms, wooden pins sticking out of the cross-arms, and glass or porcelain insulators on the top of the wooden pins, to which insulators the passing electric wire was fastened. As the voltage was increased the size of the insulators was also increased. Various shapes of insulators were used to which the wires were fastened.

It does not seem to be disputed that it was not only possible, but the general practice, to conduct up to 60,000 volts of electricity over this old system.

So Buck and Hewlett in 1907 "invented certain new and useful improvements" in suspension of high-tension lines, and in their specifications and claims stated as follows (underlining mine):

"The present invention relates to overhead suspension of electric conductors and more especially to conductors of power circuits of high potentials from 60,000 to 100,000 volts.

"Heretofore it has been the standard practice to provide the poles or cross-arms with pins upon which were placed vertical insulators to which the conductors were directly and rigidly attached. These insulators, in order to adapt them for use with high potential circuits, were made up by superposing a plurality of petticoats one above the other, the number of such petticoats varying with the voltages of the currents, and accordingly the insulators for use with high potential circuits were necessarily of large dimensions, the dimensions varying with the cube of the potential above 60,000 volts. Besides being expensive, these old forms of insulators were objectionable on account of the leverage strains which any side motion of the conductor imposed thereon. * * * Where the conductor wire is rigidly attached to the insulator, as has been the practice heretofore, it soon becomes crystallized near the point of attachment due to the swaying of the conductor span under the influence of the wind. Furthermore, it has been the practice to support a conductor in short spans in order to relieve the insulators of the excessive leverage strains, and as a consequence a large number of expensive poles or towers have been necessary.

"The object of this invention is to provide a system whereby a high potential conductor may be effectually and reliably supported and insulated at a reasonable cost.

"In carrying out our invention, *we do away with the usual insulators and their pins* and provide *at certain of the supporting towers a vertical series of insulators flexibly connected to each other and attached by a hook joint at the upper end to the under side of a cross-arm of the tower and at the lower end by an ear or other suitable connection to the suspended conductors. At certain other towers the conductor is dead-ended through a horizontal series of flexibly connected insulators on each side of the cross-arm and a jumper connection joins the dead ends of the conductor and hangs freely by gravity below the cross-arm.* The dead-ending of the conductor will occur at angles in the conductor in order to take the side stress due to change in direction thereof, *and is preferably used at least at every fourth or fifth tower on tangents or straight sections in order to prevent longitudinal waves of the conductor due to wind.* * * *"

Claim 1. "In a system of *high-tension lines suspension, the combination of periodically dead-ended spans joined by jumper connections and intervening spans freely suspended* beneath cross-arms of the supporting towers."

Claim 2. "In a system of suspension for high-tension power circuits, the combination of conductor spans dead-ended at the cross-arm through two chains of *insulators flexibly connected to each other* and to the cross-arm and a jumper connection between the adjacent ends of the spans and *hanging freely by gravity* beneath the cross-arm."

Claim 3. "In a system of high-tension line suspension, the combination of *periodic spans dead-ended* on opposite sides of a cross-arm or support through series of insulators flexibly connected and electrically connected by depending

jumper wires and intervening spans *freely suspended* beneath cross-arms of the respective supporting towers."

Claim 4. "In a system of high-tension line suspension, the combination of spans each *dead-ended* to its cross-arm through *series of flexibly connected insulators*, each series of connected insulators having flexible connection with the supporting cross-arm."

Claim 6. "In a system of high-tension line suspension, the combination of towers provided with the cross-arms of conductor *spans freely suspended beneath said cross-arms* by series of flexibly connected disk insulators.

The particular instance of infringement set out in the *prima facie* case of the plaintiff relates to a certain construction in the Sanitary District of Chicago, Ill. The system of suspension in use in this Chicago district was primarily a pin insulator system, a system recognized by the patent to be the standard system for suspension for the transmitting of circuits of high potentials up to 60,000 volts. For some time the only wires strung along the poles of the Sanitary District were wires fastened to insulators pinned on cross-arms, these wires transmitting from 40,000 to 44,000 volts. Necessity required the placing of three additional wires on the existing poles, and, there not being sufficient space on the cross-arms to place three additional pin insulators, it was decided to place one pin insulator on the top of each pole over which one of the additional wires was strung and suspended underneath the lower cross-arm of each pole two sets of insulators and underhang one wire to each of these sets. In this manner the three additional wires were provided for. These wires were intended to and did transmit the same amount of voltage as the wires strung across the top of the cross-arms, namely, 40,000 volts.

The defendant had nothing to do with the original construction or maintenance of the Chicago sanitary system, nor did it have anything to do with the fixing of the amount of voltage to be carried by any of the wires running along that system. It merely manufactured and sold, among other electrical appliances, insulators, and these insulators were used for various purposes such as guying poles, wireless work, dead-ending, and other forms of suspension.

When the three extra wires were added to the sanitary system the defendant furnished the insulator units which were hung underneath the lower cross-arms of the poles for the purpose of suspending the two underhung wires, and it is this contributing act—selling these units in series of three for use in the sanitary system—which the plaintiff urges amounts to infringement.

The patent in suit is a combination of well-known elements. Insulators, wires, cross-arms, poles, all of the parts of the patented combination, as well as the practice of dead-ending, were well known in the prior art, and the only invention, assuming that there was an invention, was in their new arrangement.

"A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or non-composite instrument. Whoever uses it without permission is an infringer of it. Whoever contributes to such use is an infringer of it." *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816.

"When the terms of a claim in a patent are clear and distinct, * * * the

patentee, in a suit brought upon the patent is bound by it." *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

Buck and Hewlett made it plain that their invention related to the mechanical system of arranging electrical units, not in the individual characteristics of those units. The claims were specific and to the point.

Should not the patent in suit, if valid, be confined to the sphere which it intended to cover; that is to say, should it not be restricted to its particular features?

So in considering the question of infringement the court must compare the claims of this patent with the features of the two underhung wires of the Chicago sanitary system.

I find:

(1) That the first claim relates to a system of high-tension lines suspension. The system of high-tension lines suspension contemplated by the patent, as I construe the definition in the patent itself, rates as a high potential a line carrying from 60,000 to 100,000 volts. The system of the Sanitary District had a potential of approximately 40,000 volts. This system, as well as other systems, had been successfully operated by pin insulators, and underhung wires were only placed on the poles when additional wires were necessary and there was no room for them on the pin insulators attached to the top of the cross-arms.

(2) The first claim reads "periodically dead-ended spans joined by jumper connection." There are no "periodical dead-ended spans" in the Sanitary District, but there were spans occasionally dead-ended over railroad crossings. In the prior art it was an old practice to dead-end at railroad crossings, streams, and the like, and the sanitary system showed only the old art in this respect.

There was a reason for the periodical dead end in the plaintiff's patent. Free suspension under the cross-arm was used in four out of every five spans, and in order to avoid a swaying of the conductor as stated or periodical intervals they dead-ended these wires and put tension on them in the longitudinal direction to keep them from swaying. In the Sanitary District that function is entirely absent, because the dead ends are eliminated along the whole line except at railroad crossings.

(3) Taking up the two wires of the Sanitary District which are supported by suspension insulators, we find where the dead-ending takes place that instead of the jumper wire being freely suspended by gravity, as is called for in the claims of the patent in suit, that it is connected to the line on each side of the cross-arm and outside of the dead-ended portions and rigidly connected to the conductor by a three-way clamp at each end into which the vertical end of the jumper at each side extends and is secured so that there is no pivotal action at this point, but a purely rigid connection. The jumper is bent at right angles at the lower end of each vertical part and supported by a series of insulators underneath the cross-arm. This construction strikes me as being the direct opposite to a "freely suspended by gravity" jumper.

And lastly, regarding the insulators themselves, it is my opinion.

that the patent in suit contemplates the use of insulators with flexible connections; that is, connections which would allow a free lateral swaying of the conductor and free swaying of each unit of the insulator with respect to the other unit. At line 52 of the specifications of the patent in suit we find, "in carrying out our invention, we do away with the usual insulators and their pins and provide at certain of the supporting towers a vertical series of insulators flexibly connected to each other," etc., and in claim 6 "conductor spans freely suspended beneath said cross-arms by series of flexibly connected disk insulators."

The insulators sold by the defendant for use in the Sanitary District were of a different type. They were of the type known as the cap and pin type. The connections between the units of the defendant are rigid pins having a flat head at the lower end fitting in a socket with a cotter pin underneath the flat sides of these heads to prevent the very possibility of lateral swaying. The flexibility contemplated by the patent in suit to exist between each unit of the insulators does not appear to be present in the series of insulators furnished by the defendant.

I think I have pointed out that the two wire addition to the Chicago Sanitary District lines is substantially different from the system contemplated by the patent in four material respects.

The plaintiff adds that there is other evidence of the defendant offering its insulators for sale for the purpose of this patented system and refers to defendant's catalogue published before the commencement of this suit. Therein are illustrated the defendant's insulators in use not only in the Chicago District already referred to, but also in the transmission system of the Hydro-Electric Power Commission of Ontario, a 110,000-volt line, and the 100,000-volt line of the Southern Power Company of Charlotte, N. C. I fail to find, however, that either of these two transmission systems resembled the system contemplated by the plaintiff's patent. The essential features of the plaintiff's system do not appear to be present in either of them. Should the court hold that selling, or offering for sale, insulators for a 100,000-volt system in itself amounts to infringement of a patent which calls for a specified use of those insulators in conjunction with a specified use of the other elements of the combination? I do not think so.

The invention relates to a mechanical arrangement of instrumentalities by the patent description and claims; yet the interpretation asked is that the patent should be construed to cover and necessarily include features not embodied therein.

This I cannot agree to. Not being convinced that this defendant has infringed the patented system of the plaintiff, a decree will be entered dismissing the bill.

NATIONAL LABORATORY & SUPPLY CO. v. UNITED STATES.

(District Court, E. D. Pennsylvania. August 31, 1921.)

No. 6606.

Eminent domain ⇨147—**Just compensation for taking of leasehold determined.**

The just compensation to which a manufacturing partnership was entitled by reason of the taking for public use by the United States of its leasehold quarters in which it conducted its business determined as measured by the expense and delay incident to removal to and fitting up of new quarters, secured and admitted to be of equal value to the old.

Action by the National Laboratory & Supply Company against the United States. On trial hearing without a jury. Judgment for plaintiff.

Evans, Bayard & Frick, of Philadelphia, Pa., for plaintiff.
Chas. D. McAvoy, U. S. Atty., of Philadelphia, Pa.

DICKINSON, District Judge. The purpose of this trial is to determine the compensation to which plaintiff has a right for the taking of its property for public use.

General History of the Case.

The plaintiff is a partnership engaged in the business of doing special work for dentists, embracing artificial teeth, crown work, and plates. It occupied for its business purposes space on the ninth floor of the Reading Terminal building at Twelfth and Filbert streets. The space occupied was made up of six rooms numbered 910 to 915. The title was by a lease for five years from January 1, 1918, at an annual rental of \$1,600. Two of the rooms were sublet at \$35 per month each making the net rental paid by plaintiff \$1,180. The volume of business claimed to have been done is measured by average receipts for the six months preceding March, 1918, of \$1,000. per month; 8 to 10 employees, skilled and unskilled; a weekly pay roll (exclusive of sums paid the working partners) of \$265, or an average wage per workman of about \$30. The two partners themselves worked at the bench, and drew \$135 per week. The work done was special, in that the dentists took "impressions" of what was to be done for their patients, and sent these "impressions" to the plaintiff, by whom the actual constructive work was done, the dentists themselves doing only the fitting and adjusting. The conditions under which the plaintiff's part of the work was done called for despatch, demanded promptness, and it was required to keep itself equipped for such work and have in its employ workmen who were skilled and resourceful. The rooms occupied by plaintiff were commandeered by the quartermaster's department of the army, and the plaintiff was forced to vacate on short notice. It secured quarters in five rooms, No. 208 to 212, inclusive, in the Flanders building at Fifteenth and Walnut streets, having somewhat more space than it before occupied. The old rooms were

specially equipped for the business there done. The work of removal involved the tearing out of built-in benches; the abandonment and consequent loss of the value to plaintiff of alterations and repairs made to the former rooms to accommodate the premises to its use; the expense of moving machinery and appliances to the new location, including breakage incident to a hasty removal; the damage done to fixtures and fixed machines in taking them down from one place and setting them up in another, and the loss of the value of letter heads and other stationery supplies, which had been made useless by the change of address. In addition to the above, plaintiff was put to the expense of installing electricity and gas in the new rooms by introducing wiring and pipes in the equipping of the new quarters. The whole work of removal compelled an interruption of plaintiffs' business, and a claim is made for consequent loss of trade covering a period of from six to eight months. It is of course conceded that plaintiff must be recompensed. The sum of money which meets the requirements of just compensation in the views of the parties varies from less than \$500 to nearly \$4,200. Just compensation, or even fairly adequate recompense, in a case of this kind is difficult to determine. We will first follow the line of the claim as presented, making the required fact findings, and then determine how much of this claim may be found to be the compensation to which plaintiff has by law a right. The claim of the plaintiff seems to be based upon a few general facts translated into terms of money as follows:

(1) The change of location of the business involved a loss of trade the value of which is estimated at.....	\$1,500.00
(2) Wages were required to be paid during the interruption of work the sum of which was.....	1,275.00
(3) The plaintiff had expended in the improvement of the vacated premises moneys the benefit of which is claimed to have been lost. The aggregate of these expenditures was.....	88.74
(4) There was likewise expended in the improvement of the premises to which the plaintiff moved the claimed sum of.....	<u>1,049.10</u>
Making a total of.....	<u>\$3,912.84</u>

Of the items classified as 4 the defendant admits \$478.44.

The Issues Raised and Fact Findings Thereon.

The act of Congress commands that the plaintiff be awarded "just compensation." These words have no technical or purely legal significance. What do they mean? They are in themselves expressive of the meaning intended. The plaintiff was required to vacate the premises then occupied by the firm for its business purposes. Its property other than its leasehold was not commandeered. The obligation then was cast upon the plaintiff to minimize the damage consequences. One way of doing this, and the way followed without criticism, was to secure quarters elsewhere. A measure of damages would be the value of the leasehold which it surrendered. This measure was not applied by either party, nor are we asked to apply it, nor have we been given the means which would enable us to apply it. Another measure which the parties attempted to apply, and which we are asked to

apply, is afforded by a comparison between the quarters vacated and those to which plaintiff moved and the conditions before and after the removal as affected thereby. An analysis of this measure will disclose the following subdivisions:

1. The value of the leasehold surrendered and that of the one acquired. There is a substantial admission that, when the removal was fully accomplished, these leaseholds were of equal value. Because of this admission and the lack of evidence from which to make any other finding this item is found to be nothing.	\$ 0.00
2. The cost of removal, including the expense of installing the business in the new place. The evidence from which to make this finding is not satisfyingly clear, but we find the sum claimed by the plaintiff for this item was expended, to wit:	1,049.00
3. An expense incidental to the removal was the wages paid between the vacation of the old quarters and the equipment of the new. The evidence as to this item is not very definite, but the finding is made that the wages diverted to the work of removal was the sum of	400.00
4. Another at least possible incident of the cost of the removal of a business from one location to another is the effect upon the volume of business done. There may be a gain or a loss. The burden was upon the plaintiff to show such a loss, if any. Irrespective of the question of law of whether such a consequence is so far direct that it may be included in the compensation to which a party is entitled we make the fact finding that no loss was shown. This item is in consequence placed at nothing.	0.00
5. The old quarters were equipped to serve the purposes of plaintiff. The fact finding is made that the expenditures for this purpose, so far as shown, were \$88.74. Inasmuch, however, as this item is disallowed for reasons hereafter stated, it is now set down in this statement of compensation as nothing.	0.00

The total compensation is found to be	\$1,449.10
---------------------------------------	------------

Conclusions of Law.

1. This court has jurisdiction of the cause and the parties. The case is not in tort, but although one sounding in damages is in effect a feigned issue to determine the "just compensation," to which plaintiff has a right because of the lawful taking of its property for public use. The District Courts of the United States have jurisdiction to decide upon such claims within the jurisdictional sum prescribed by the Acts of Congress (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991).

2. The "just compensation" to which plaintiff has a right is the award of a sum which will restore to plaintiff the money loss consequence of its property being commandeered by the United States.

3. No finding is made of whether a loss of business profits is to be included in the compensation allowed, because no evidence was introduced from which the fact finding could be made of the sum of any such loss.

4. The cost and expense of equipping the location taken into the possession of the United States should not be included in the compensation awarded when, as in the instant case, compensation is claimed and allowed for the cost and expense of the equipping of a new location, which is accepted as a substitute for the location taken and for any value the new location may have which is less than the old. To allow the expense of equipping both the old and the new locations would be a duplication of compensation.

5. The plaintiff is entitled to judgment for the sum of \$1,449.10, less \$366.01, or a balance of \$1,083.09, with interest thereon from July 1, 1918.

Answers to Requests for Findings of Facts and Conclusions of Law.

The requests for findings are granted so far as found in the foregoing opinion, and are not so far as there not found.

Judgment.

Judgment is rendered in favor of the plaintiff for the sum of \$1,388.88, with costs of suit.

CASTNER, CURRAN & BULLITT, Inc., v. LEDERER, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. August 18, 1921.)

No. 7428.

1. Internal revenue ⇐7—Computation of "invested capital" of corporation for purpose of excess profits tax.

The invested capital of a corporation formed by the combination of two business concerns for the purpose of excess profits tax under Act Feb. 24, 1919, § 326 (Comp. St. Ann. Supp. 1919, § 6336⁷/₁₆₁), held to be the value of the property as agreed upon by the parties at the time of the combination and for which stock was issued to each party.

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

2. Words and phrases—"Actual cash value;" "value in actual cash."

"Actual cash value" and "value in actual cash" and other like expressions convey the thought of the sum which can be obtained at a fair sale—i. e., the market value.

[Ed. Note.—For other definitions, see Words and Phrases; Second Series, Actual Cash Value.]

At Law. Action by Castner, Curran & Bullitt, Incorporated, against Ephraim Lederer, Collector of Internal Revenue. On trial hearing without a jury. Findings made.

Thomas Raeburn White, of Philadelphia, Pa., for plaintiff.

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Every chain of thought leading to a conclusion has a beginning. We begin with one, to be followed to the conclusion to which it leads, by assuming the purpose of Congress to tax corporations. The next link in the chain is that this tax is to be measured and graded, not by the net income of the corporation, but by the relation of this income to the "invested capital" which contributed to its production. A statutory definition of "invested capital" thus became necessary. In order to find terms by which to define it, there was further need to have clearly in mind the nature of the corporations to be taxed and the modes of their organization. The corporation must have a capital invested in the business in which it was engaged. It was usual in corporations having much capital to measure it in terms of money. In this way was expressed the thought of how much the capital might lawfully be and also how much it in fact was. The interest of the contributing members in this was expressed in shares. In this way we came to have the expressions "authorized capital" and "capital paid in." Contributions thus made to the capital of the corporation might be made in lawful money and these moneys invested by the corporation in property for which the corporation had use or contributions might be made in property. All laws providing for the formations and regulation of corporations permit such contributions of property at least in part. The acknowledgment of contributions to capital took the form usually of certificates issued to contributors expressed in shares of the total contributions and also in terms of money. The possessions of many corporations, the right to share in which was evidenced by these certificates, came to be such that the money terms used in the certificates lost their old and took on a new meaning. Because of this there came into use terms and phrases expressive of the distinction between what was real and what was fictitious capital.

The lawmaker was willing to accept the first as an element in the computation of the tax. He wanted also to exclude the latter. When contributions to capital had taken the form of what is commonly called "cash," the sum so contributed was "included in invested capital." The next subject with which he dealt was that of contributions in some form of property other than "cash." Here was a difficulty. He sought to cope with it by distinguishing between "tangible" and "intangible" property. Doubtless the introducer of these words would himself admit that they do not express very definitely the thought meant to be conveyed. Any one, however, who went upon a hunt for a better expression would have a long search. The difficulty is inherent in the subject. No one gets very far in the science of politico-economics (especially that part of it which deals with what is called "value" and "money") before he is impressed with the vagueness and indefiniteness of many of the ideas of which he is expected to form a concept and with the poverty of our language, in its supply of words and phrases, to express with exactness the thought meant to be conveyed. Accepting for the moment this classification of property, we are directed to include "tangible" property in "invested capital." "Intangible" property (of which good will, trade-marks, etc., are given us as illustrations), acquired by the corporation by purchase, we are further directed to

include at the purchase price. Such property, if contributed as capital in consideration of shares in what the corporation owns, is to be included at a valuation not exceeding its value "in actual cash" at the time contributed nor exceeding the nominal value of the stock issued therefor and subject to the further limitation that not more than one-fifth of the total capital stock shall be so issued. This, with the addition of accretions or so-called "surplus," whether contributed or earned, is all which is permitted to be "included in invested capital." The application of this law to the facts of this case can be best made after a statement of the facts. We may premise that no question arises concerning a "cash" stock contribution of \$300,000, nor are we concerned with any "intangible" property acquired by purchase (of which there was none), nor with the value of the "intangible" property for which shares of stock issued, because this value is admitted to exceed \$300,000, the limitation prescribed by the act of Congress (Act Feb. 24, 1919, § 326 [Comp. St. Ann. Supp. 1919, § 6336^{7/161}]). The only questions with which we are concerned are: (1) How much of the property which was contributed was, in the language of the statute, "tangible"? and (2) What was then its value?

The Facts.

A statement of the facts in this case may be made one of great complexity or very broad, short, and simple. We prefer the latter at the possible cost of making it so general as to be in all respects not strictly accurate. For present purposes, however, it is a true statement. The plaintiff is a Delaware corporation with a total issued capital stock of \$1,500,000, of which \$300,000 is first preferred stock issued for "cash." The corporation is the result of a combination of two business ventures and two property interests. One we will call the "Castner" and the other the "Hyams" interest.

The Castner.

This began originally as a partnership back in the early '50's. It had a very successful business career, and without further following its history was incorporated under the laws of New Jersey by the same name as the present plaintiff. It was engaged in selling coal both on its own account and for others on commission. The commission business was on a del credere commission basis. It had contracts with a number of mines in the Pocohontas and New River coal fields whose total outputs it sold. All its customers were its own. It directed the points to which shipments were made, including points at tidewater for shipment abroad. The business it did was profitable as well as otherwise successful.

The Hyams Interest.

Godfrey M. Hyams came later into the coal business. He concerned himself with it because of his connection with and interest in the Virginia Railway, known to railroad and high finance fame as the "Rogers Road." His original motive was to divert or at least bring a large coal trade to that road. Large and powerful financial

interests were enlisted in his aid. Assistance was rendered through the Tidewater Company, a construction and financing corporation, which had been organized to build the Virginia Railroad. Hyams secured control of a corporation engaged in the coal business in Boston, Mass. He also acquired wharfing and coal-handling facilities in Boston and Providence, and built up a marine equipment, including steamers on the Great Lakes, and prepared for the construction of cargo ships. His wharf and terminal facilities he held under an agreement of lease with an option of purchase. His fleet consisted largely of contracts with shipbuilders. The preparations he had made to do business were ample for any trade, but he found he could command none. The control both of the coal and the customers was in other hands, as were also the facilities for distribution. This discovery drove him to seek a combination with the Castner people, who, among other advantages, had known coal depots scattered all along the sea-going trade routes.

The Combination.

A combination thus offered advantages to both parties and was made. A first step toward it was to reach a relatively fair valuation of the interests to be combined. This was accomplished by putting a like value upon each. The combination took the form of a new corporation. It was organized, as already stated, under the laws of Delaware. The capital of the new corporation consisted of all which belonged to the two former ventures with \$300,000 of fresh cash capital contributed by Hyams. For this there was issued to him shares of first preferred stock of a nominal value in that sum. Shares of the nominal value of \$600,000 were issued to each interest in consideration of the making over to the new corporation of what was represented in the business of both the old ventures. This gave the corporation a nominal capital of \$1,500,000. It was given the name of the old Castner Corporation. This was doubtless to save the good will of the old business.

Some Observations.

It will be recalled that the act of Congress imposes no limitations upon "invested capital" in the form of contributions of "tangible" property. The limitations are restricted to "intangible" property. It will likewise be observed that the capital of the plaintiff corporation is made up of "cash" and "property" contributions, without any division indicated of the latter into "tangible" and "intangible." It is to be further observed that, if the two contributions were of like value, for the purpose of ownership it made no difference (as the first preferred stock did not share beyond what was paid for it) what nominal value was placed upon what was contributed. Each owned half of the whole, whatever its value. The whole was accordingly valued at \$1,200,000, and, calling the capital stock \$1,200,000, the property which the stock had come to represent constituted the "invested capital." The name given to it, whether the name was expressed in terms of money or otherwise, was merely a name. When, however, the "invested capital" came to be expressed in terms of money for taxing purposes, the name

became all-important. Its practical importance is shown by a contract of the findings we are asked to make. The plaintiff asks us to find the total value of the "invested capital" (exclusive of "intangible" property in excess of \$300,000) to be \$4,151,138.20. The defendant asks for a finding of the value of the same property of \$725,509.10.

The Law of the Case.

In the view we have taken of "the real question involved" in the instant case no question of law arises. The whole question is one of fact, to wit, the value of the property for which the \$1,200,000 of stock was issued. There is no need to construe the act of Congress (further than already done), and none to determine what is "tangible" and what "intangible" property so far as these are questions of law.

Findings of Facts.

We have passed upon the requests for findings of facts presented by the parties respectively. There is, however, but one finding to be made, and it is hereby made as follows:

The value of all the effects and property of the plaintiff (inclusive of the \$300,000 of so-called "cash") was at the time affecting this tax levy \$1,500,000, and so far as it is a question of fact the "invested capital" of the plaintiff is found for taxing purposes to have been that sum.

Conclusion of Law.

So far as the above conclusion is one of law, it is so found as such.

Discussion.

[1, 2] The considerations which have led us to the conclusion stated may be briefly summarized. The act of Congress, it is true, does not limit the valuation of "tangible" property acquired by an issue of stock to the nominal value of the stock so issued, as it does in the case of "intangible" property. None the less, one who contributes property to the capital of a corporation makes a declaration of its fair value. It is the common or joint declaration of the contributor and the corporation. As such, it is, as against the declarants, evidence at least equally as convincing as other declarations of opinion made or procured subsequently when the interests of the parties have shifted. Moreover, the kind of property to which these latter opinions relate and the kind of values which the opinions contemplate are of the most elusive, illusory, kaleidoscopic, and chameleon-hued character. "Actual cash value," "value in actual cash," and other like expressions convey the thought of the sum which can be obtained for them at a fair sale. This means market value. None of the witnesses who testified to the values given had any such test in mind. The best market value test of the value of the assets of a corporation is afforded by the price at which its stock sells. This although the best practical test, is a poor one, because it is affected perhaps least of all by the value of what the corporation has viewed merely as property. This in the case of a going concern would ordinarily be a small percentage of its value as part of a profitable enterprise. No better illustration of the kind of results to which such

opinions lead can be afforded than by the summary given us of this opinion value of a number of contracts for ship constructions and of wharf construction, including even contracts on the cost plus basis. The aggregate (after deducting the contract prices) is \$3,425,569.10. The opinion increment of value of the items reaches as high as one and one-third times the original contract price. How are such figures reached? The process is simple enough. The valuation is made as of the date of July 6, 1916. The witness takes the highest price per ton which he had heard of paid for a real ship in esse "about" that date (otherwise a price paid when prices were at their very highest). He in consequence assumes that the ship, if constructed, would then have such a value per ton, and by deducting the contract price from the valuation thus given he gets the value of the contract. We do not mean to state that this is the line of thought avowed, but that it is the one followed no one who heard these witnesses could doubt. One of the most philosophical of lawyers has stated that "the administration of the law witnesses the struggle of the judiciary to gratify their desire to be logically consistent and at the same time to show some common sense." The common sense motive behind this provision of the act of Congress is to have some check on the inflation to which the capital of many corporations has been subjected so that for taxing purposes at least overstated capital may be deflated. "Tangible" property, having an "actual cash value," must surely have something more of substance about it than anything suggested by these valuations. There is another check upon these valuations given us, which we mention with some diffidence, because no point has been made of it, and neither plaintiff nor defendant has had an opportunity to answer it. We may in consequence be wholly wrong about it. We see that it may be a "point no point," inasmuch as, although a valuation of tangible property aggregating over \$300,000 is put forward, we have no valuation of the "intangible property" beyond the statement and admission that its value exceeds \$300,000. There must, notwithstanding, be something in the point unless the total valuation of both tangible and intangible property reaches figures almost fabulous. The point is this: Exclusive of "intangible" property and the \$300,000 cash stock, the valuation now placed on the property is \$3,851,138.20. This is the same property which (including the \$300,000 of intangible property and all the additional value it may have had) the parties themselves valued at \$1,200,000. By the agreement of July 6, 1916, the Castner Corporation sold all it had to the plaintiff corporation in consideration of \$300,000 of second preferred and \$300,000 of common stock, or \$600,000 in all. By this very paper the value of all "the tangible assets" is placed at the net sum of \$360,000. Its "intangible assets" were thus valued at \$240,000. The proportions make the total valuation look about as such valuations go. Certainly none too low. Now comes the point. We are told now, what was then agreed to be the fact, that the Castner and Hyams property had a like value. The Castner property, we know upon the very best of evidence, had, so far as it was tangible, a net value of \$360,000. How, then, could any one be persuaded that the Hyams

tangible property, put in at the same valuation, could have a value over ten times as great? There is every reason to believe that the Castner good will and other intangible assets was all there was. This is confirmed by the summary, which claims nothing for the intangibles other than what came from Castner. The only answer possible is to value the Castner good will at about \$2,750,000. We find the evidence which forces such a result unconvincing. The fact conclusions reached are as follows:

(1) The value of the tangible property of the plaintiff on July 6, 1916, other than the cash contributions to its capital was \$900,000.

(2) The value of its intangible property was \$300,000.

(3) The value of its tangible property in cash represented by stock contributions was \$300,000.

(4) The total invested capital of the plaintiff on the basis of which the rate of net income is property to be determined was \$1,500,000.

We have found the valuation of the whole property of the corporation in July, 1916, or its "invested capital" to have been (exclusive of the \$300,000 cash contribution) \$1,200,000. Of this \$300,000 was the value of the "intangibles," leaving \$900,000 for the "tangibles." This is more than twice the value the defendant concedes, which is \$423,569.10. The latter valuation, however, allows nothing for the Hyams interest, assuming (as plaintiff in its summary does) that the "intangibles" came from Castner. Plaintiff values the Hyams "tangibles" at \$3,425,569.10; the defendant at nothing. We have valued them at \$600,000, or \$450,000 in net results effect. We have reached this result by refusing to accept or be convinced of the correctness of plaintiff's valuation. The artificiality of this summary of values is shown by the figures. The valuation is made up of a number of items. Some of them are of vessels in esse or in posse valued on a per ton dead weight basis. The total, however, is \$425,569.10 in excess of \$3,000,000. These are the exact figures of the Castner cash assets item of \$425,569.10. It would have been much simpler had the valuers stated that they had raised the cost price contractual values an even \$3,000,000. This is what they did, whether aware of it or not. The striking of these exact figures was not arithmetical coincidence. What we have done is to reduce this \$3,000,000 boost to \$600,000, or, in another way of looking at it, to what in results effect is \$450,000. In doing this we have been liberal to the plaintiff. We have reached the valuation made influenced largely by the thought that it does not lie in the mouth of defendant to say that Hyams contributed ~~nothing~~ of value to the combination or even no "tangible" property of value beyond the \$300,000 cash contribution to stock. The defendant admits that the "Castner" interests contributed \$360,000, net value) in "tangible" property and \$300,000 in "intangible." The Castner people admitted the Hyams contribution to be equal in value to their own. This was a self-denying declaration of practical evidential value. The finding is justified that the contributions were of equal value. Defendant has conceded a valuation to the Castner contribution of \$60,000 more than the owners at the time claimed for it. How can it with good grace be claimed that that

for which the Castners in effect made an even trade had no value? We find its value to have been \$600,000, and the Castner contribution to have had a like value. The parties so valued both contributions before they were as much interested as now to over value. They were even then under the temptation to make the valuation high. The real value of each contribution did not, it may be, exceed \$360,000. They could, however, be trusted to make the relative valuation a sound one. The valuation reached was \$600,000 for each. The defendant cannot be heard to complain of this valuation now, because he admits the Castner contribution to have been worth \$660,000. The horse sense of accepting the \$1,200,000 valuation made by the parties at the time, we think, commends itself. Indeed, following the defendant's admission of the Castner values, the total valuation might be made \$1,320,000, or, including the \$300,000 cash contribution, \$1,620,000. The justification for the finding of a valuation of \$1,200,000, or \$1,500,000 in all, is found in the legal evidence, in that there is opinion evidence that the total value is \$4,451,138.20. The finding of a less value has in consequence evidential support. This finding indicates the judgment which should follow it. We do not have at hand the data from which the judgment to be entered on this basis can be figured. As a consequence we do not now enter judgment, but retain jurisdiction of the cause for this purpose, and counsel for either party may move for the proper judgment with costs.

DEAN v. CITY OF SAN DIEGO.

(District Court, S. D. California, S. D. August 12, 1921.)

No. E-61.

1. Public lands ⇐224½, New, vol. 11A Key-No. Series—Pueblo lands passing to successor city determined by patent.

A city of California has no title to any lands as successor to a Mexican pueblo except such as were included in its claim presented to and confirmed by the Board of Land Commissioners appointed under Act March 3, 1851, nor outside the boundaries described in the patent issued pursuant to said act.

2. Navigable waters ⇐37 (8)—After-acquired rights to land under water not inuring to grantee.

St. Cal. 1911, p. 1357, granting to the city of San Diego the right to make certain uses of lands under the waters of San Diego Bay, but expressly prohibiting any conveyance or transfer of the same, did not inure to the benefit of a prior grantee of the city of lands in the bay to which it had no title, and such conveyance being wholly ineffective and void may be so adjudged irrespective of the rights of the city under the act.

In Equity. Suit by Charles E. Dean against the City of San Diego. Decree for defendant.

E. H. Gruel and Frank G. Tyrrell, both of Los Angeles, Cal., for plaintiff.

S. J. Higgins, City Atty., and Arthur F. H. Wright and C. G. Selleck, Deputy City Atty., all of San Diego, Cal., for defendant.

BLEDSON, District Judge. For an expressed consideration of \$10, the city of San Diego, through appropriate officers, on the 12th day of September, 1871, "granted, bargained and sold, released and quitclaimed," to plaintiff herein, "* * * all the right, title, interest, estate and claim whatsoever of the said city of San Diego, of, in and to" two certain pieces of property designated therein as "submerged and overflowed lands" and which the proofs show to be situated beneath the waters of the Bay of San Diego and below the line of ordinary high tide. A part of the property, as I understand the situation, is now occupied by, and is a part of, the United States Marine Base. Plaintiff's deed was never placed of record until the fourth day of March, 1916. He, being a citizen of Louisiana, now seeks in this suit to quiet the title to said parcels of land as against the city of San Diego, alleging the lands to be of the value of \$100,000. The lands have never been assessed for taxation.

The controlling theory of plaintiff's case seems to be based upon the proposition, adverted to by him for the first time in his reply brief, to the effect that the predecessor of the city of San Diego, the pueblo of San Diego, became the owner and possessed of the property in question, under and pursuant to the terms and provisions of Mexican law, at a time anterior to the acquisition by the United States of America of the territory now forming the state of California.

Plaintiff's claim is stated thus in his reply brief:

"As early as 1845, a survey and map was made by Henry D. Fitch, under the authority of the Mexican government. This survey and map were regularly approved by Don Pio Pico, then Governor of California, and countersigned by the secretary, Don Matias Moreno. Under the laws of Spain and Mexico, this assignment was known as a juridical possession, and no further action on the part of the government was necessary to vest title thus assigned in the pueblo authorities for the use and benefit of the inhabitants of the pueblo.

"* * * It will be conceded that the surveying department of the United States government has defined the boundaries of the pueblo lands of San Diego, following the same exterior lines as fixed by the Mexican government in 1845, by Henry D. Fitch, except the water line. Instead of running from Point Loma to Los Chollas, in an easterly direction, as done by Fitch, the American surveyor, Hays, followed the meanderings of the bay at ordinary high tide."

I discover no proofs in the case which justify the contention thus stated, particularly no proofs of an investiture by the Mexican government of the pueblo of San Diego with "juridical possession." *Graham v. U. S.*, 4 Wall. 259, 18 L. Ed. 334. Assuming, however, that the facts are as stated in the reply brief just quoted, I am firmly of the conclusion that, under the repeated rulings of the courts of the United States and of the state of California, plaintiff's claim to the land, in virtue of the deed relied upon, is without merit.

It is the fact, abundantly shown by the evidence, that the land purporting to have been conveyed to plaintiff as above stated lay under the navigable waters of the Bay of San Diego, below the line of ordinary high tide. Under and pursuant to and in conformity with the act of

Congress of the United States of March 3, 1851 (9 Stat. 631), the government of the United States, by its patent, granted certain lands to the city of San Diego. This patent recites, among other things, that on the 14th day of February, 1853, "the president and the trustees of the city of San Diego, as claimants, filed their petition" with the Board of Land Commissioners, provided for in said act, for the confirmation of title to the pueblo lands of San Diego in the state of California; that pursuant to such petition the said Board, on the 22d day of January, 1858, rendered its decree of confirmation in favor of the claimants, holding the claim made by the claimants valid and decreeing the confirmation of the same. The patent further recites that—

"The land of which confirmation is made is situated in the county of San Diego and is known as the pueblo or town lands of San Diego."

The patent shows that in due course the decree of the Board of Commissioners became final and that thereupon, pursuant to the said statute and the decree of said Board, it became the duty of the United States Surveyor General to survey the said lands so claimed and confirmed, which was done, and upon such survey so made and pursuant to the terms, descriptions, courses, and distances thereof, the patent of the United States to the city of San Diego, as above referred to, was issued and delivered. That patent shows, upon the face of the map attached thereto, and pursuant to the courses and distances of the detailed description, that the lands lying within the limits of the Bay of San Diego, lands below ordinary high tide, were not included in the grant. By a reference to the courses and distances specified, this is put beyond cavil in that the first station of the patent is located "in mound of earth on the shore of the Bay of San Diego" (*U. S. v. Pachecom*, 2 Wall. 587, 590 [17 L. Ed. 865]), the boundary line "thence meandering along the shore of the Bay of San Diego at the line of ordinary high water," etc.

[1] The settlement and determination of land claims in California arising out of Spanish or Mexican grants has been a fruitful source of litigation both in the state and federal courts. The reports of the courts of last resort in both jurisdictions are filled with adjudications concerning these claims and having to do particularly with a consideration and construction of the Act of March 3, 1851, referred to. By emphatic and reiterated declaration, it has been determined beyond all possibility of successful contradiction that whatever claim to lands a Spanish or Mexican pueblo may have had under the Spanish or Mexican law, whether the same had ripened into a perfected title or not, or whether juridical possession had been conferred or not, or whether the claim was merely an inchoate and equitable one or not, it was the duty of such pueblo, and those representing it, to file and present its application for confirmation of its claim of lands, secured under such Spanish or Mexican law or authority, to the Board of Land Commissioners, under and pursuant to the terms and requirements of the Act of 1851, and within the period permitted therein. And it has likewise been determined, in the same conclusive manner, that as to any lands

claimed or sought to be claimed by any such pueblo, pursuant to Spanish or Mexican law or authority, with respect to which no application for confirmation was actually entered or presented to said Board of Land Commissioners by such city or pueblo, in conformity with the requirements of said act, the same devolved upon and became the property of the government of the United States of America. Likewise, it has been held and declared that, irrespective of the nature of the claim, or application for confirmation, actually made by such pueblo, the determination of the Board of Land Commissioners provided for in the act, subject to and controlled by the appeal to the courts provided for therein, conclusively determined and fixed the nature, extent, and boundaries of the property actually belonging to such pueblo, in virtue of such Spanish or Mexican law or authority, and thereby determined the amount which said pueblo or one holding title under it, was thereafter entitled to claim, as against the United States or those holding title under it. *U. S. v. Fossat*, 20 How. 413, 15 L. Ed. 944; *More v. Steinbach*, 127 U. S. 70, 78, 8 Sup. Ct. 1067, 32 L. Ed. 51; *Beard v. Federy*, 3 Wall. 478, 18 L. Ed. 88; *Townsend v. Greeley*, 5 Wall. 326, 335, 18 L. Ed. 547; *Grisar v. McDowell*, 6 Wall. 363, 374, 18 L. Ed. 863; *U. S. v. Halleck*, 1 Wall. 439, 456, 17 L. Ed. 664; *Botiller v. Dominquez*, 130 U. S. 238, 255, 9 Sup. Ct. 525, 32 L. Ed. 926; *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 Pac. 62; *Ainsa v. New Mexico & Arizona R. R. Co.*, 175 U. S. 76, 84, 20 Sup. Ct. 28, 44 L. Ed. 78; *De Guyer v. Banning*, 167 U. S. 723, 740, 17 Sup. Ct. 937, 42 L. Ed. 340; *Chipley v. Farris*, 45 Cal. 527, 538.

Under the facts presented here, pursuant to the authorities cited, the patent issued by the government is determinative and conclusive upon the city and all those claiming under it as to the property actually owned by or vested in the pueblo or its successor, the city of San Diego. It follows, therefore, that the city of San Diego never acquired title to the land it purported to deed to the plaintiff herein, and follows with equal truth therefrom that the plaintiff never acquired from the city, at the time of the conveyance, any title to such property.

[2] Reliance, however, is also made upon the fact that, in consequence of the provisions of section 1106 of the Civil Code of California, a title to the lands in question, alleged to have been conveyed to the city of San Diego subsequent to the execution and delivery of plaintiff's deed, inured to the benefit of the plaintiff and entitles him to a decree as prayed for.

Assuming the applicability of such section, nevertheless it suffices to say that no title was ever acquired by the city of San Diego which could feed the title sought to be conferred upon plaintiff in virtue of the deed of September 12, 1871. By repeated declarations of our Supreme Court, with respect to lands acquired by the United States and out of which sovereign states of the Union were thereafter created and set up, it has been definitely decided that lands lying beneath the navigable waters of the sea or any of its arms became the property of such sovereign state adjacent thereto, subject only to the rights surrendered to the general government through the federal

Constitution. *Pollard v. Hagen*, 3 How. 212, 11 L. Ed. 565; *Weber v. Board Harbor Commissioners*, 18 Wall. 57, 65, 21 L. Ed. 798; *City & County San Francisco v. Le Roy*, 138 U. S. 656, 670, 11 Sup. Ct. 364, 34 L. Ed. 1096. In that wise, the state of California became possessed of lands below ordinary high tide in San Diego Bay. The only claim to the property in question possessed by the city at all is in virtue of the passage of an act of the Legislature of the State of California in 1911 (Stats. 1911, p. 1357). That act purports to confer upon the city of San Diego the right to make certain uses of the lands of San Diego Bay beneath the navigable waters thereof, and including the lands in suit herein. Such act, however, expressly prohibits the city of San Diego from making any "grant, conveyance or transfer of any character" of the lands described therein and referred to herein. No right or title acquired by the city from the state, the proprietor of the lands in question, authorized the city to make any sort of conveyance to this plaintiff, and the conveyance actually made served to confer no title upon him. In this wise, the conveyance being void at law, its invalidity and complete inability to confer any rights upon the plaintiff may be determined and decreed herein, irrespective of any rights that may or may not attach to said lands on the part of the city, defendant herein. *Knight v. United Land Ass'n*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Klauber v. Higgins*, 117 Cal. 451, 49 Pac. 466; *Williams v. City of San Pedro*, 153 Cal. 44, 94 Pac. 234.

The usual decree of dismissal will be entered.

UNITED STATES v. YOHN.

(District Court, S. D. New York. May 27, 1921.)

Commerce ⇨33—**Larceny** ⇨1—**Goods shipped between points in same state, but passing through another state, are moving in "interstate commerce."**

Act Feb. 13, 1913, § 1 (Comp. St. § 8603), making it an offense against the United States to steal "goods or chattels moving as * * * an interstate or foreign shipment of freight or express," is complementary to the general regulation of railroads, and covers such commerce as the Interstate Commerce Act itself covers, which includes a shipment between points in the same state, but by a line passing through another state.

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

Criminal prosecution by the United States against William Yohn. On motion in arrest of judgment. Denied.

Garrett W. Cotter, of Flushing, N. Y., for the United States.

Edwin M. Stanton, of New York City, for defendant.

LEARNED HAND, District Judge. The defendant has been convicted of stealing goods from an interstate railroad car. The question at issue arises upon the face of the indictment and is therefore open

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

upon motion in arrest of judgment. It is this: The shipment was consigned from a point in the state of New York over the West Shore Railroad to the city of New York. This railroad for the larger part of its courses passes through the state of New York, but its eastern terminus is at Weehawken in the state of New Jersey, whose border it enters some 30 miles before it reaches Weehawken. At Weehawken the goods in question were to be transshipped by water across the Hudson river again into the state of New York, their final terminus. The question raised, therefore, is whether such a shipment is interstate within the act of February 13, 1913 (Comp. St. §§ 8603, 8604).

This question has been expressly ruled against the defendant by the Circuit Court of Appeals for the Third Circuit in *United States v. Moynihan*, 258 Fed. 529, 531, 532, 169 C. C. A. 469. It is true that the ruling was not necessary to a decision, but it was a distinct holding, and probably was intended for guidance upon the new trial. The same ruling was made by Judge Holt in *United States v. Delaware* (C. C.) 152 Fed. 269, 271, a case arising, not under the act of February 13, 1913, but under the Elkins Law (Act of February 19, 1903 [Comp. St. §§ 8597-8599]). In *Hanley v. Kansas City & Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, goods were shipped from one station in Arkansas through Arkansas and Indian Territory to another station in Arkansas, and the Arkansas Railway Commission attempted to regulate the rates as between the two Arkansas stations. It was held that the commerce so regulated was interstate, and that the Commission had no jurisdiction, though nearly one-half the transit took place in Arkansas. The ground of the decision was that, whatever might be the rule in taxation, for purposes of regulation such commerce was to be deemed interstate.

Such commerce is, however, not exempt from taxation as distinct from regulation. It was expressly held in *Lehigh Valley R. R. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, that a state might levy a tax upon that portion of a railroad's income which was derived from so much of the transit as was within the state, where both termini were in the same state, and on page 201 of the opinion (12 Sup. Ct. 806, 36 L. Ed. 672) there is language suggesting generally that the test of interstate commerce is the two termini. Yet this language is treated in *Hanley v. Kansas City & Southern Ry. Co.*, supra, 187 U. S. 621, 23 Sup. Ct. 214, 47 L. Ed. 333, as carefully confined to tax purposes. In *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, 35 Sup. Ct. 162, 59 L. Ed. 355, a similar tax statute was sustained, when limited to so much of the transportation as took place within the borders of the taxing state. In *Ewing v. City of Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. Ed. 303, a state license tax upon the business of soliciting traffic for an express company was sustained. All the traffic solicited was for a transit beginning and ending in the state of Kansas, but passing for a portion of its route through Missouri. The same distinction was taken (226 U. S. 469, 33 Sup. Ct. 157, 57 L. Ed. 303), as in *Hanley v. Kansas City Southern Railway Co.*, supra, i. e. that for regulation the rule might be different from that for taxation. In *U. S. v. Lehigh Valley R. R. Co.* (D. C.)

115 Fed. 373, Judge Hazel in a case involving the regulation of rates held that a shipment such as that at bar was not interstate commerce, relying on *Lehigh Valley R. R. Co. v. Pennsylvania*, but at that time, 1902, *Hanley v. Kansas City-Southern Ry. Co.*, supra, had not yet been decided, and with all deference I think the case should be treated as overruled.

In *Wilmington Transportation Co. v. Cal. R. R. Commission*, 236 U. S. 151, 35 Sup. Ct. 276, 59 L. Ed. 508, the court had before it the regulation of commerce by sea from a point on the mainland of California to the island of Santa Catalina, also a part of the state, the carriage being for 20 miles upon the high seas. It was argued that so much as was on the high seas was interstate commerce, and that the rates could not therefore be regulated by the state commission, but the court said that as the Interstate Commerce Act (24 Stat. 379) did not attempt to prescribe rates for water transportation, and as Congress had not therefore exercised its power, the state might still regulate the rates for the whole transit. Although the opinion did not decide, it strongly intimated that, in case Congress should choose to regulate such commerce, it would be within its powers to do so in spite of the fact that both termini were in the same state, and it was so ruled in *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224.

Whatever may be said of a state's powers of taxation, it seems to me that these decisions settle it that if Congress chooses to act upon commerce of the kind at bar, it has the power; its action affects interstate commerce as the Constitution means it. Such commerce may be of a kind which is not immune from state regulation before Congress acts, but it is nevertheless within the powers of Congress, should that body choose to assert them. The goods in fact cross from one state into another and then back again. For example, there can be no question that should the state into whose borders the goods come for the time being attempt to regulate their passage, Congress would have the power to deal with that regulation.

If so, the question turns upon the meaning of the act of February 13, 1913; does it include such commerce as this? The relevant language is this: "Goods or chattels moving as * * * an interstate or foreign shipment of freight or express." The phrase, "interstate shipment," does not alone throw much light, and the question must be answered by looking at the general purposes of the statute. It should, I think, be treated as complementary to the general regulation of railroads, and to cover such commerce as the Interstate Commerce Act itself covers. *Hanley v. Kansas City Southern Railway Co.*, supra, hardly depends upon the existence of the Interstate Commerce Act, but there can be no doubt that that act covers such commerce as that at bar. It would be a factitious distinction to include the same commerce within the meaning of one statute and exclude it from another so closely akin. Rather, I should suppose, the protection of "interstate shipments" ought to be coextensive with the general assumption of control by the government over the railway systems as a whole. Doubtless, there is no inherent necessity that thefts from interstate commerce should be justiciable in a federal court, and, besides, I ought not

to forget that I am dealing with a criminal statute. Yet these considerations are not enough to impose a limitation upon the scope of this act which should introduce an arbitrary and meaningless exception in a public policy clearly expressed elsewhere. The point is, however, open to doubt, and the defendant should be admitted to bail, pending its review, which can be procured with very little trouble and expense.

Motion to arrest denied. Judgment will go on the verdict. I will entertain a motion to admit the defendant to bail pending a writ of error.

RUSSELL v. TILGHMAN.

(District Court, E. D. Virginia. July, 1921.)

Patents ⇨211(1)—Purchaser of article acquires privilege of using it in all parts of country.

Where patentee of a mold for use in manufacture of burial vaults grants exclusive rights in specified parts of the United States, the purchaser of a mold from one of the assignees in one part of the country acquires the privilege of using it or selling it again in all parts of the United States, under Rev. St. § 4884 (Comp. St. § 9428).

In Equity. Bill by Charles F. Russell against W. M. E. Tilghman. Bill dismissed.

Titian W. Johnson, of Washington, D. C., for plaintiff.
James Elliott Heath, of Norfolk, Va., for defendant.

GRONER, District Judge. This is a suit for a patent infringement brought by Charles F. Russell, a citizen of the United States and a resident of the county of Accomac, in the state of Virginia, against W. M. E. Tilghman, a resident of Northampton county in the same state. The suit depends upon the patent laws of the United States and the jurisdiction of this court is conceded.

E. D. Milhouse, of Indiana, on the 9th of May, 1916, was granted a patent for a mold for use in the manufacture of burial vaults. All right, title, and interest in the patent for the counties of Northampton and Accomac, in Virginia, was acquired by the plaintiff, Russell, prior to the institution of this suit. On the 11th of March, 1919, the defendant, Tilghman, purchased from William T. Hearn, of Maryland, one of the molds covered by the patent, brought the same into Northampton county, Va., and has since used it in the manufacture of burial vaults in that county. Plaintiff claims that this use of the patented article by the defendant within the territory exclusively acquired by him is a violation of his rights under the patent laws and should be restrained by injunction.

The purchase of the mold by the defendant from Hearn is admitted to have been a valid transaction, Hearn being the assignee of the patentee in the territory in which the sale took place, but it is insisted on behalf of the plaintiff that, although in the purchase of the mold the

defendant acquired possession of and title to the same legally, he has no right to bring the same into the plaintiff's exclusive territory and use it there for the purposes for which it is designed.

The single question therefore presented for decision is whether the use by the defendant of the patented mold in the county of Northampton in the making of burial vaults in any way infringes upon the rights of the plaintiff as the owner by assignment of the patent covering same. I think not.

By section 4884 of the Revised Statutes (Comp. St. § 9428) the patentee of an article obtains a grant to make, use, and vend the discovery throughout the United States, and he has the right by law to assign his rights in the patent to the whole or any specified part of the United States. He may make and sell the patented article himself or he may divide the country into specified parts, and his assignee, as to the specified part granted, acquired thereby the exclusive rights of the patentee therein. If the patentee manufactures the patented article himself and sells it, the article so sold passes outside the monopoly granted by the act of Congress and is no longer protected by the patent laws. The same condition, precisely, obtains under similar circumstances where he has divided the territory of the United States and granted exclusive rights in specified parts. *Keeler v. Bed Co.*, 157 U. S. 659-661, 15 Sup. Ct. 738, 39 L. Ed. 848. And the purchaser of the patented article, having acquired it in either case legally, acquires also with the purchase the privilege of using it or selling it again in all parts of the United States. In *Adams v. Burke*, 17 Wall. 453-456 (21 L. Ed. 700), Mr. Justice Miller, delivering the opinion of the court, said:

"But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly; that is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration of which he claims for the use of his invention in that particular machine or instrument, it is open to use of the purchaser without further restriction on account of the monopoly of the patentees."

This case was followed by *Keeler v. Standard Bed Co.*, 157 U. S. 659-666, 15 Sup. Ct. 738, 741 (39 L. Ed. 848), in which the Supreme Court, speaking through Mr. Justice Shiras, after quoting all the previous decisions, said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place."

And in *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, the Supreme Court, again reviewing the cases, announced the doctrine of the *Adams* and *Keeler* Cases as established law.

The argument that in the enforcement of this doctrine the inventor in a case like this may lose the exclusive benefit conferred upon him under the patent laws is answered by the fact that he may protect him-

self and his assignee by special contract limiting the use of the patented article to those to whom he sells or grants territorial rights. In this way he may, with certain limitations, retain his monopoly. But nothing of this sort was attempted here. On the contrary, those who succeeded to his rights under the patent have sold the article and received satisfactory compensation therefor, and cannot now complain that the right to its use has passed beyond the protection of the law, or that the purchaser thereof obtained by the unrestricted purchase and sale an absolute property in the article and an unrestricted right in time or place of its use.

The injunction should therefore be, and is, denied, and the bill of complaint dismissed.

TIDEWATER PORTLAND CEMENT CO. v. POTTASH BROS.

(District Court, E. D. Pennsylvania. August 25, 1921.)

No. 7364.

Pleading ⇐48—**Statement of claim held sufficient.**

A statement of claim *held* sufficient in law and to state a cause of action.

At Law. Action by the Tidewater Portland Cement Company against Pottash Bros. On questions of law raised by affidavit of defense. Statement of claim held sufficient.

Levi & Mandel, of Philadelphia, Pa., for plaintiff.

Max Aron and B. D. Oliensis, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. If the statement of claim in the instant case had been cast in the common-law form, it would have contained at least two counts setting forth distinct, although related, causes of action. One would have declared upon a contract in writing to deliver and its breach; the other would have declared upon another like, although oral, contract made as a modification of or substitution, for the first and its like breach. A claim for damages would have followed. The statement of claim as filed is in legal intendment the equivalent of such a declaration. The affidavit of defense seeks to raise several questions of law: (1) The reform of written contracts by oral testimony; (2) the right of plaintiff to have alternative or cumulative causes of action; (3) whether a good cause of action is disclosed by the statement of claim; and (4) whether the plaintiff has applied the proper measure of damages. Each of these questions is one of law, and one which may be raised, and one which, if it arises, may be of importance.

The present point, however, is whether the questions now arise, or whether they can now be raised. When a cause of action exists, it may be stated. The converse, however, does not hold good. When no cause

of action is set forth, judgment may be pronounced at once. When, however, the question is whether the cause of action averred can be proven, its determination must be deferred until trial. We have, in consequence, this analysis of the questions of law which are in a cause—questions which arise out of the pleadings and questions which may arise at the trial. The Practice Act of 1915 (P. L. 483¹) recognizes this distinction and gives authority to the courts to pronounce judgment in advance of trial when the question of law raised goes to the whole case, or a part of it. This means to some of the causes of action set forth.

Following this analysis, it is clear that questions (1) and (4) do not go to the cause of action, but are trial questions. Question (2) is also properly a trial question, because at the most a plaintiff who had not the right to pursue two causes of action would be driven to his election, and should not be compelled to elect before trial. We will, however, dispose of it now. Changes in the mere form of procedure work no change in the substance, nor do any changes in form often work a change in substance. The substitution of a narrative statement of the claim made in a cause and on what facts it is based for the more formal declarations previously in use was intended to work no change in substance. The substantial requirement was and still is that a cause of action good in law must be set forth. Declarations might be made up of separate counts, each setting forth a different cause of action. The practical value of this right was to meet the practical difficulty of forecasting exactly what the proofs would show.

The instant case on its indicated facts affords a good illustration of the difficulty and the need of some pleading expedient to meet it. The facts as developed may prove to be that the parties had a contract; that when what the plaintiff claims to have been a breach occurred the plaintiff offered and the defendant accepted a further opportunity for performance, followed by what the plaintiff claims to have been a second default. The question may then be anticipated to arise of whether the proofs show the first contract and its breach, or a substituted contract and its breach. When confronted with the possibility of such a fact situation presenting itself, a careful pleader would have prepared for it by declaring upon each of these contracts in separate counts. Declarations in the common counts were in use for this purpose. There is nothing in the Practice Act of 1915 to deny to plaintiffs the substance of this right.

The question of law raised to challenge this right is decided against the defendant. The third question, which raises the question of whether the plaintiff's statement of claim discloses a good cause of action, is also decided against the defendant without discussion. The remaining questions, as already stated, are trial questions.

The defendant may file an affidavit of defense to the averments of fact in the statement of claim within 15 days.

¹ Pa. St. 1920, §§ 17181-17204.

SEABOARD AIR LINE RY. CO. v. FOWLER, Sheriff, et al.

(District Court, W. D. North Carolina. March 2, 1921.)

Courts ⇨ 282 (3), 508 (3)—Railroads ⇨ 5½, New, vol. 6A Key-No. Series—
Federal court may enjoin enforcement of void state judgment.

Under Act Cong. March 1, 1920, § 206, subsec. (g), providing that "no execution or process * * * shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control or operation of any railroad or any system of transportation by the President under federal control," a judgment of a state court against a railroad company on such a cause of action is a nullity, and its enforcement by execution may be enjoined by a federal court of equity on the ground that such enforcement would be a taking of property, without due process of law, regardless of the amount involved.

In Equity. Suit by the Seaboard Air Line Railway Company against C. Fowler, Sheriff, and others. Decree for complainant.

Vann & Milliken, of Monroe, N. C., for complainant.
Stack & Parker, of Monroe, N. C., for defendants.

BOYD, District Judge. The Seaboard Air Line Railway Company files its bill to enjoin the plaintiffs in two judgments, taken in the superior court of Union county, against the company and the Director General of Railroads. The causes of action on which these judgments are based arose whilst the said railway was in control of and being operated by the President of the United States, through the Director General of Railroads. Since the judgments were rendered, the plaintiffs have caused executions to be issued, commanding that the amount of the judgments be collected by levy upon and sale of the property of the railroad company.

The railroad company seeks by its bill to enjoin the plaintiffs in the executions and the sheriff of Union county, who has the same in hand, from proceeding to subject the property of the railway company to payments, on the ground, as has been stated, that the causes of action arose whilst the railway was under federal control, and that the suits were brought after the said railway had been returned to its owners. The defendant's prayer for injunction against the plaintiffs and the sheriff is founded on subsection (g), § 206, of the Act of Congress of March 1, 1920 (41 Stat. 462), which is as follows:

"No execution or process other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or any system of transportation by the President under federal control."

This statute was intended by Congress to serve a specific purpose, which is definitely disclosed by the wording of the section which is quoted. That purpose, it is plain to be seen, was to exempt the property of a carrier from levy and sale to satisfy judgments obtained upon causes of action arising from the operation of such carrier's railroad

whilst under federal control. The fact that the law makes ample provision for the payment of such judgments in another way sustains this view.

The mere entry of a judgment on the docket of a court, when the law forbids its enforcement, is simply an idle form. Such judgment is a nullity, and therefore has no legal force. It is to all intents and purposes a judgment void in law. The question, then, for consideration, is whether the federal court can by injunction stop proceedings under an execution in the hands of the sheriff of a county, commanding him to levy upon and sell the property of a railroad company to satisfy a judgment such as referred to above. Although there is a federal statute forbidding generally the courts of the United States to enjoin proceedings in the courts of the several states, yet it is the law of the land as declared by the Supreme Court that the equity jurisdiction of the courts of the United States can be invoked to restrain the enforcement of a judgment obtained by fraud or one which is void in law. These courts also have jurisdiction to restrain the enforcement of judgments and decrees which undertake to deprive a person of his property without due process of law. An execution issued from a state court upon a void judgment, commanding the sale of property of the defendant in the same to satisfy the judgment recited in the execution, is not due process of law, and is therefore violative of one of the provisions of article 14 of the Constitution of the United States, which says:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law."

It is suggested by the plaintiffs in the execution that the amount involved is not sufficient to give jurisdiction to the United States District Court. The statute does not forbid the issuing of an execution or process for the collection of any particular sum, so the conclusion is that the amount is not material; the effect of the act of Congress being to prevent the enforcement, as against the property of a carrier, of a judgment for any amount based upon a cause of action accruing in the course of the operation of the carrier's railroad by the United States.

I conclude, therefore, that the restraining order issued in this case should be made permanent, and a decree to that end may be drawn.

KINLOCH TELEPHONE CO. et al. v. LOCAL UNION NO. 2 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS et al.

(Circuit Court of Appeals, Eighth Circuit. June 27, 1921. Rehearing Denied October 29, 1921.)

No. 5721.

Injunction ⇐136(2)—Employer held entitled to preliminary injunction to restrain threatened interference with contracts of employees.

Complainant, a company which operates an extensive system of telephone and telegraph lines in both intrastate and interstate commerce, and which has accepted the provisions of the Post Roads Act July 24, 1866 (Rev. St. § 5263 et seq. [Comp. St. § 10072 et seq.]), and constructed its lines on streets and other post roads, having both union and nonunion employees, entered into a contract for a stated term with its employees, who were members of certain unions, which recognized the open shop policy of complainant, and by which it was agreed that any grievances should be taken up by complainant and a committee of the employees, to be selected by their union, and on failure of adjustment should be submitted to arbitration. During the term defendant union and the individual defendants, none of whom were employees of complainant, undertook to compel it to unionize its business, which they openly threatened to do. In pursuance of such plan they ordered a strike of their members, in violation of their contract, and attempted by persuasion, inducements, and threats, and even by assaults, to compel other employees to violate their contracts, and threatened to cause strikes by members of all other unions. *Held*, that on such facts, clearly shown, complainant was entitled to a preliminary injunction, and that the granting of such injunction was not prohibited by Clayton Act Oct. 15, 1914, § 20 (Comp. St. § 1243d).

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit in equity by the Kinloch Telephone Company and another against local Union No. 2 of the International Brotherhood of Electrical Workers and others. From an order denying their motion for a preliminary injunction, complainants appeal. Reversed.

For opinion below, see 265 Fed. 312.

Appellants filed a complaint in the court below for the purpose of enjoining appellees from inducing the employees of appellants from breaking their contract with appellants. A motion for a temporary injunction was made by appellants, and the same was heard on the complaint and other evidence submitted by both parties. The motion was denied, and appellants appeal. The facts which are largely undisputed are substantially as follows: Appellants are corporations of the state of Missouri, and have their principal offices in the city of St. Louis. Appellee Local Union No. 2 of the International Brotherhood of Electrical Workers is an unincorporated society located at St. Louis, having as its members certain employees of appellants, as well as certain employees of other firms, corporations, and individuals at the same place. It is a branch or local of the International Brotherhood of Electrical Workers, which is a labor organization, national in character, having various subordinate locals in various cities, towns, and villages of the United States. Appellee McSpadden is secretary of the Conference Board of said International Brotherhood of Electrical Workers, appellee Givens is business agent of said Local No. 2, appellee Thompson is vice president of said local, appellee Knoll is financial secretary of said local, and other appellees are members of the executive board of said local. All of appellees reside in the state of Missouri, and have their offices in St. Louis. Locals Nos. 309 and 649 of the

International Brotherhood of Electrical Workers are referred to in the evidence, but are not parties to this action. In addition to the above locals the International Brotherhood of Electrical Workers maintains a department known as Telephone Operators' Department of the International Brotherhood of Electrical Workers, and in St. Louis there are six local unions of this department. None of the appellees who are referred to by name are or ever have been employees of appellants, or either of them. Appellant Kinloch Telephone Company, hereinafter for convenience herein referred to as the Kinloch Company, operates telephone exchanges and a telephone system in the states of Missouri and Illinois, and also operates local telephone exchanges at St. Louis, Mo., and in other places in the vicinity of St. Louis and East St. Louis and other places in the state of Illinois. In St. Louis and vicinity the Kinloch Company has in its local exchange more than 40,000 stations, and in St. Clair county, Ill., has more than 5,000 stations. Its subscribers at such stations are business and manufacturing institutions, banks, offices, residences and other places where telephones are usually installed and maintained, and a large majority of its subscribers at said stations have no other means of telephone communication, except through the telephones of the Kinloch Company. The Kinloch Company also supplies private telephone exchange service to the Post Office, Jefferson Barracks, and other governmental agencies at St. Louis. More than 30 per cent. of the business of the Kinloch Company is interstate in character, and consists of the transmission of telephone messages from one state of the United States to other states thereof.

Appellant Kinloch Long Distance Telephone Company of Missouri, hereinafter for convenience herein called the Long Distance Company, operates long distance and toll lines in the states of Indiana, Illinois, Missouri, Kansas, and other states, and also owns and operates local telephone exchanges in the states of Missouri and Illinois. The telephone lines of the Kinloch Company and of the Long Distance Company are connected, and each of said companies also connects with other telephone systems, and by virtue of said connections a vast system of telephone lines are connected together, whereby persons in many states of the United States can communicate by telephone in interstate traffic with persons in other states of the United States. A large proportion of the business of the Long Distance Company is interstate in character. In addition to the telephone lines owned and operated as above, the appellants also own and operate telegraph lines and particularly furnish private telegraph lines to various persons. With the exception of the telegraph line of appellants from St. Louis, Mo., to Kansas City, Mo., all of the telegraph lines of appellants are interstate in character and are used almost exclusively for the transmission of interstate telegraph messages.

Appellant Long Distance Company is the owner of all of the capital stock of the Kinloch Company, and while the telephone plants of the appellants are independently owned, yet as a practical proposition they are operated as one unified system, and employees of one of appellant companies are accustomed to and do perform work and labor for the other of said companies, and vice versa. This is particularly so in the exchange and lines of the appellants at St. Louis and vicinity. The distribution of the expense of labor, etc., is a matter of bookkeeping and accounting between the two companies. At St. Louis, Mo., the employees of appellants are employed by the Kinloch Company, although as above stated they are accustomed to and do perform work and labor for the Long Distance Company. In order to keep their telephone lines, instruments, and other facilities in proper working order and repair, in order to keep their appliances in proper condition for practical telephone service, and in order to install new facilities, it is necessary for appellants to keep in their employ a large number of linemen, cable splicers, testers, troublemen, and helpers. At St. Louis, Mo., in the proper conduct of its business, at the time of the controversy herein set forth, it was necessary for appellants to keep approximately 150 of such employees, in order to properly keep their telephone appliances and facilities in proper repair, and in order to install new facilities and appliances, and to do other work in connection with the telephone system in order that the appellants might properly carry out and perform their duties as common carriers in both intrastate and interstate

commerce. At the times mentioned, in order to fully perform such duties, appellants, necessarily required 150 employees in these departments and also required a large number of telephone operators to handle the transmission of both intrastate and interstate messages. At the time in question, of such 150 employees, some were members of the International Brotherhood of Electrical Workers and some were not, and at said times some of appellants' operators were members of the Telephone Operators' Department of said union and some were not. This was in accordance with the open shop policy of appellants which had been maintained by them for many years and which, as hereinafter shown, was maintained by agreement with the International Brotherhood. Each of appellants at all of the times in question was subject to the provisions of the Interstate Commerce Act of the United States, each was engaged to a great extent in Interstate Commerce, and each had, long prior to the times in question, accepted and were subject to the provisions of the act of July 24, 1866, and known as the Post Roads Act, and each had, long prior to the times in question, filed with the Postmaster General of the United States of America, their written acceptance of the restrictions and obligations required by law, and thereby became entitled to exercise the powers and privileges conferred by said Post Roads Act, and became subject to the liabilities and duties imposed upon them by virtue thereof. Under and by virtue of the laws of the United States, among other things, all letter carrier routes established in any city or town for the collection and delivery of mail matter are declared to be post roads, as well as all public roads and highways while kept and maintained as such. More than 75 per cent. of the telephone and telegraph lines of each of appellants are located on streets in towns and cities, which streets are letter carrier routes, or are located upon public roads and highways which are kept and maintained as such. Under and by virtue of said Post Roads Act appellants have the right to construct, maintain, and operate their line through and over any portion of the public domain of the United States, and over and along any military or post roads of the United States, and over, under, or across the navigable streams or waters of the United States. It is also provided by said Post Roads Act that any company which has filed its written acceptances of the provisions thereof with the Postmaster General, which shall by its agents or employees refuse or neglect to transmit messages, as provided by said act, shall be subject to a penalty. The Post Roads Act (Comp. St. § 10072 et seq.) also provides that any company that has accepted the provisions thereof shall so operate its lines as to provide equal facilities to all without discrimination in favor of or against any person, company, or corporation whatever. Heavy penalties, both of a criminal and a civil nature, are imposed by the Post Roads Act against any company which has accepted the act and which violates the provisions thereof.

On or about July 1, 1919, a dispute existed between the Kinloch Company acting for itself and for the Long Distance Company, and certain of its employees who were members of said Local No. 2, as well as certain of its employees who were members of Locals Nos. 309 and 649. After various conferences a written agreement was entered into between the appellant Kinloch Company, representing itself and the Long Distance Company, and the employees of said companies who were members of said locals. At the same time a similar agreement was entered into between appellants and its employees who were members of the Telephone Operators' Department of the International Brotherhood. In each case the agreements were witnessed by James J. Barrett, a conciliator of the Department of Labor of the United States. Said agreements were substantially the same, except as to working conditions. They provided that no discrimination or coercion should be exercised by appellants against any appellees because of their membership in the brotherhood, and that the rights of employees to peacefully solicit employees to become members of said locals, and to exercise fully freedom of speech in the union's behalf, was conceded by appellants, except during working hours. The agreements conceded the question of the open shop policy of appellants. In said agreement all of the working conditions for the period of the contracts were agreed upon, and the question of wages was to be submitted to a

board of arbitration, as provided by said agreements, and, when said board of arbitration had determined upon the wages, that the wages fixed by them should become a part of the agreements for the periods thereof. Such a board was afterwards agreed upon, and made an award as to wages, which was accepted by all of the parties and became a part of the agreements, and wages were paid as provided by said arbitration. The written agreement with the men who were members of the International Brotherhood provided that in case of grievances the company, meaning the appellants, agreed to meet a committee of employees selected by their locals, and that in case of the company and the committee of employees failing to agree in the adjustment of any grievances, then a board of arbitration should be appointed, one arbitrator to be appointed by the company and one by the committee, and in case of disagreement said two arbitrators should mutually agree upon a third, and, failing to agree upon a third within 15 days, then the appellants and the committee should each select new arbitrators, and the same procedure should be followed. An important part of the agreement was that, pending decision of the board of arbitrators, there was to be no stoppage of work on the part of the employees or lockout on the part of the company. It was further provided that the findings of the board of arbitrators should be conclusive on the questions affecting said agreements. Appellants' employees, who were members of said local union, and who were represented in the signing, of said agreement, had full knowledge of the terms, conditions, and covenants, resumed work under and by virtue of the provisions thereof, and thereby became parties to and bound by the terms of said written agreement entered into by their representatives as aforesaid. The agreement was to be in full force and effect for a period of one year from August 1, 1919, and thereafter until terminated by either party upon 30 days' written notice in advance. Work was resumed under such agreements and for a long period of time, or until January or February, 1920, appellants and the said local unions worked together under said agreement in peace, harmony, and satisfaction. On January 30, 1920, a meeting of said Local Union No. 2 was held, at which a vote was taken and carried to the effect that the business agent, to wit, appellee Givens, should have the power to take men off the job of the Kinloch Company whenever he saw fit. On January 26th, one Jennings, who was not and never had been an employee of appellants, and who was not a member of any committee of employees, called upon Mr. Reber, president and general manager of appellants, and asked for a conference between himself, appellee Givens, appellee McSpadden, and Mr. Reber. Mr. Reber told them that he was busy at that time, but would meet them upon Friday. Jennings requested an earlier date, whereupon Mr. Reber agreed upon 11 o'clock on Wednesday, which was two days after this meeting. Mr. McSpadden and Mr. Givens called at the time mentioned; Jennings did not come with them. They stated that they had called to take up some matters with Mr. Reber in connection with the men. Mr. Reber asked them what they were, and they told him, and he stated to them that he would investigate the matter and let them know what he found out, and made an engagement for them to return Friday at 11 o'clock. They returned Friday, and Mr. Reber told them the result of his investigation of the question, stated to them that this method and manner of taking up the controversies was entirely contrary to the agreement; that it was improper, and if the men in the employ of appellants had any grievances whatever they should take them up in the regular manner provided for in the agreement; that is, by a committee of appellant's employees selected by the locals, and not by a committee of nonemployees. It appeared that the general complaint was as to whether appellants, or Reber as its general managing officer, would insist upon foremen paying their dues in the union. And as to whether one Moss, an employee of appellants, had induced an employee to quit the union. Mr. Reber explained to them that that would be contrary to the contract, and that he had no more right to force them to pay dues than he had to force them not to pay dues. Neither McSpadden, Jennings, nor Givens have at any time, ever been employees of these companies.

R. Morton Moss was general superintendent of appellants, and as such had charge of these men. After the first visit of the labor officials to Mr. Reber's office, Mr. Reber informed Moss of the statement that had been made to him, whereupon Moss called upon Jennings at his office in the Pontiac Building in St. Louis. It appears that Jennings told Moss that the complaint of the union was that appellants would not insist upon union members paying their dues, and insisted, not only that Moss should compel the payment of dues and back dues by members or former members of the union, but that he should force them to come back into the organization. Appellee Givens was also present a part of the time, and then stated that he had taken the job as business agent only temporarily; that he would probably have it for about six months, but that he was going to clean the job up, and was either going to put the men on the map or the Kinloch on the bum. Moss told Givens of the open shop agreement and stated to him that if he wanted to get the men into the organization that that was what he was being paid for; that that was not Moss' business, and he did not propose to interfere one way or the other; that he did not propose to force the men to join the union or keep out of the union. Givens also complained of some foremen's meetings held by Moss, which it appeared were meetings of the different foremen for purposes of considering the method of handling work, material, the welfare of the men, and the carrying on of the work. Givens asked that he might be present at these foremen's meetings, so that he could take up with the foremen the question of joining the organization, but Moss replied that that would have to be done outside of working hours, and that he was not interfering with them either one way or the other. Givens also stated to Moss that he was going to see that appellants had a closed shop, and boasted to others that he was going to have Moss fired. After some conversation Givens stated to Moss that he would pull the job if they did not have a closed shop. This conversation occurred on January 28th. Starting with January 30th, a correspondence between officials of appellants and the International Secretary of the International Brotherhood of Electrical Workers began. The International Secretary was located at Springfield, Ill. The correspondence ended by a letter from the International Brotherhood of Electrical Workers dated February 28, 1920, closing as follows:

"Our conclusions concerning the situation are that there are sufficient reasons why members of the brotherhood should be removed from the company's properties. This decision, you will note, has not been hastily reached, and is only arrived at after a very thorough impartial investigation of the merits of the grievances which the employees have.

"You are advised that the International Brotherhood of Electrical Workers is willing to meet representatives of the company for the purpose of adjusting the difficulty, and we trust that the trouble may be brought to an early and satisfactory termination without the necessity of extending the trouble to the operating department of the company. We will refrain from doing so until a reasonable opportunity has been accorded the representatives of the company to advise us of their future position concerning the matter."

On February 9th, appellee Givens called a strike of the employees who were members of the International Brotherhood and who were employed by appellants. Whereupon a large number of the employees who were members of Local No. 2 at St. Louis and Local No. 309 at East St. Louis quit work, while those who were members of Local No. 649 at Alton, Ill., declined to go out on a strike. In the meantime, the appellants continued to endeavor to arrange matters, and the correspondence continued with the international officers at Springfield, Ill., culminating in a visit at the request of the international officers of Mr. Moss to Springfield, at which time Mr. Ford, the International Secretary, admitted that there was no grievance, and if there was it should be taken up in the right way, and that the men had positively violated their agreement. Ford stated further that, while he had instructed the men to take a strike vote, yet he had given positive instructions not to pull off men until the international office had an opportunity of investigating the matter. However, after this conversation, which occurred after the strike

and before the filing of the complaint herein, came the letter from Ford, above referred to, in which he threatened to extend the strike to the telephone operators. In the meantime, at the request of the international officers, Mr. Moss stated that in his opinion all of the members, who desired and expected benefits accruing from their membership in the locals should pay their dues regularly and promptly as all other indebtedness. From the time that the strike was called there commenced on the part of appellees and other members of Local Union No. 2 a policy of threats, intimidation, persuasion, and violence, which disrupted the mechanical organization of appellants, caused it to lose a large majority of its mechanical employees, prevented them from keeping their lines in repair for interstate commerce, prevented them from installing new instruments, and new lines when required, and resulted in the loss of an immense amount of money to them and in a threatened loss of hundreds of thousands of dollars if the matter continued as it was at that time.

Appellee Givens called up Poole, a member of the Union at Alton, and told them to quit work. Poole replied that they were not going off; that this was not their trouble. Givens replied that they had better come off; that they were going to make appellants a closed shop, and if they did not come off, what were they going to do when the shop was burned out? Givens further started to abuse Superintendent Moss, calling him vile and profane names.

Wallace Kirkendall on February 9, 1920, was working in St. Louis for appellants, when he was approached by appellees Knoll and Arnold and one Schwartz, who was a member of the union. He was about to do some work when Knoll told him that he had better not go up there. Again, on February 25th, Roy Roberts, a member of the Union, told Kirkendall that he ought to get off of the job; that they were going to "get those" who were working if they did not. Roberts stated that some of the radical fellows were wanting to come out and get those who were working, but that he and a few of the others were trying to hold them down. Kirkendall, on March 1st, called up Roberts, and asked him when he was going back to work, and Roberts replied that he would not run the risk of getting his head broke. Kirkendall was further told that it was not only No. 2, but all of the union; that the grand officers had sanctioned the strike, and that it was only a matter of time until all of the men would be out on a strike.

Appellee Knoll went to the house of Alex. Moore and spoke to him in his woodshed, and said they were out for a closed shop; that he should go to the meeting and tell them where the company told him to report for work. Currie also telephoned appellee Knoll there was a bunch out in the Styx, with not a policeman within a mile or two—to get a car and four men and come out. Jack Gilbert, an employee of appellants, was slugged immediately after he left some of the strikers in a saloon.

Currie told Walter Duepner that he would be out of a job when they won the strike, and also tried to bribe him by offering him 10 per cent. strike benefits to quit. Other men were offered as high as 80 per cent. of their wages to strike.

Three strikers walked back and forth for an entire afternoon in the presence of William Lyons while he was working for appellants.

Charles H. Winnefeld, an employee of appellants, was told by Roy Roberts that the bunch were framing an attack on the foremen of appellants; that he had stopped it for a while, but later they were going to get them. Winnefeld also saw a group of strikers surround Foreman Bellar, and force him to quit. Appellees Knoll and Givens, in the presence of Parker, a foreman of appellants, ordered his men to "come down off that pole, take your tools off and report to the hall at once." Appellee McSpadden called Munden a scab, and chased him out of his house. H. Kirkendall and McLemore visited the house of Roy Chase, and tried to talk strike to him against his will. Owen Schulte called one Taubold a liar, and threatened to slap his face.

Givens and three others visited Frank Bellar, and said that as long as he continued to work three or four men would be constantly around, and would let the union people who lived in the neighborhood know about him, and it would then not be safe for him.

Jack Gilbert was waiting for a car on February 14th, when members of the union hit him, knocked him down, and kicked him, without giving him a word of warning. Those who had control of the strike and were directing the use of threats, intimidation, and assaults against appellants' employees had full knowledge of the contract between appellants and its employees, and knew that the course they were pursuing would cause the breach of that contract. Witnesses, who testified for the appellees, stated that personally they had no cause for complaint; that they went on a strike simply because they were ordered to by appellees, who were not employees of appellants, and that they had no personal grievances of any kind whatever. It further appeared conclusively by the evidence that there never was at any time during this controversy any dispute between appellants and any of their employees concerning terms, or conditions of employment. Finally, the situation became so bad, in view of the threats, intimidations, and violence that had been used, as above stated, in view of the fact that appellants were no longer able to fulfill their duties as common carriers of interstate commerce, in view of the fact that they were no longer able to enforce their contract with many of their employees, in view of the fact further that appellees were endeavoring to cause other mechanical employees to break their contract and were threatening to call out the telephone operators and thus completely stop telephone service, and in view of the conditions as above set forth, on March 2, 1920, appellants filed their complaint, asking for a preliminary restraining order, for a temporary injunction, and for a permanent injunction upon final hearing. It was stipulated upon the trial that all of the appellees were either insolvent or men of small means.

Bruce A. Campbell, of E. St. Louis, Ill. (William R. Orthwein, of St. Louis, Mo., and Edward C. Kramer and Rudolph J. Kramer, both of E. St. Louis, Ill., on the brief), for appellants.

John P. Leahy, of St. Louis, Mo. (Lena Frank, of St. Louis, Mo., on the brief), for appellees.

Walter H. Saunders, of St. Louis, Mo., filed a brief as *amicus curiæ*.

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

CARLAND, Circuit Judge (after stating the facts as above). We agree with the trial court that the contract between the appellants and their employees required arbitration of any dispute which the evidence may show existed between the appellants and their employees, and that the committee referred to in the contract was intended to be a committee on the part of the employees composed of employees of appellants, and not a committee of the local union to which said union employees of appellants might belong, or a committee composed of the members of the Conference Board of Local Unions, and that neither a proper construction of the contract nor in common fairness or reason is there any obligation on the part of appellants to pay the union dues of their employees, or to see that such dues are paid, or to discharge men who do not pay such dues, although it is clear that this is one of the chief ostensible reasons for calling the strike. We also agree with the trial court in finding that the strike was called in a studied and concerted effort on the part of appellees to unionize the business of appellants, or, in other words, to compel them to convert their business from an open shop into a closed shop. We further agree with the trial court that appellees, as members, officers and agents of the International Brotherhood of Electrical Workers and as individuals, are causing,

maintaining, and supporting the strike in question upon wholly feigned and insufficient grievances, with the aim and intent to compel appellants to unionize their business; that the result of such action upon the part of appellees has been to cause the contract existing between appellants and its employees to be breached by such employees without sufficient reason or excuse in law or in fact, and, further, that appellees threaten to cause other of appellants' employees to break their contract with them; and that appellees are seeking to attain the results above stated by advice, persuasion, and inducements, bottomed upon labor unionization and union obligations. The trial court was of the opinion upon the facts as stated that, laying aside section 20 of the Clayton Act (38 Stat. 738 [Comp. St. § 1243d]), 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, clearly entitled the appellants to a temporary injunction, but it was of the opinion that the Clayton Act did not pass under judgment in the *Hitchman Case*, as that case, although decided three years after the Clayton Act took effect, was commenced seven years before that time. The form of relief asked for in the *Hitchman Case*, however, operates only in futuro, and the right to it must be determined as of the time of the hearing. *Duplex Printing Press Co. v. Deering et al.*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. —, decided by the Supreme Court January 3, 1921, and since the decision of the court below in the present case. Therefore the Supreme Court in the *Hitchman Case* must have considered the effect of the Clayton Act on that case. Light is thrown upon the *Hitchman Case* by the language used by Justice Brandeis in his dissenting opinion in the *Duplex Case*. He said:

"Unlike *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, there is here no charge that defendants are inducing employees to break their contracts, nor is it now urged that defendants threaten acts of violence."

The only inference to be drawn from this language is that the *Hitchman Case* established the law on the facts appearing therein, notwithstanding section 20 of the Clayton Act. We are therefore of the opinion, in view of the decision of the Supreme Court in the *Duplex Case*, that the trial court erred in holding that section 20 of the Clayton Act forbids the issuance of an injunction in the present case. In the *Duplex Case* it was decided that section 20 is limited to the employees affected regarding their own employment, and does not confer privileges upon all members of a labor organization to which they might belong. It was also decided in the same case, if we interpret the decision correctly, that while any one may quit their employment even though a contract exists, yet they may not peacefully persuade others to break their contracts in order to gain their ends, and the Clayton Act does not legalize such interference. The appellees, who were not employees of appellants, persuaded some of the employees under contract to break the same, were attempting to persuade others to do likewise, and threatened to have the telephone operators break their contract. The employees testified in this case that they had no dispute with their employers, and especially is this true in regard to the

women, who had a separate contract which appellees threatened that they would cause to be broken. The object and purpose of a temporary injunction is to maintain the status quo. The issuance of such an injunction generally rests in the sound discretion of the trial court, and that discretion will not be interfered with by an appellate court as to the facts, unless there has been a serious error committed in the consideration of the same.

The law, however, as at present established when applied to the facts herein stated, fully warrants the issuance of a temporary injunction. It is therefore ordered that the order appealed from be reversed, and the case remanded to the court below, with instructions to issue a temporary injunction in accordance with the views herein expressed.

ADVANCE RUMLEY CO. v. JOHN LAUSON MFG. Co.

(Circuit Court of Appeals, Seventh Circuit. March 15, 1921. Rehearing Denied August 19, 1921.)

No. 2815.

1. Patents 828—812,371, for special regulator for explosive engines, held not infringed, and claim 17 invalid.

Secor patent, No. 812,371, claims 1, 3, 5, 13, covering a "special regulator for explosive engines," held not infringed, and claim 17 invalid.

2. Patents 157 (1)—Patentee has right to be own lexicographer.

A patentee has the right to be his own lexicographer, and the court will unhesitatingly accept a definition of the patentee if ascertainable from the patent, if by doing so it can give better or more accurate effect to the claims.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Bill by the Advance Rumley Company against the John Lauson Manufacturing Company. From an adverse decree, plaintiff appeals. Affirmed.

Francis W. Parker and Robert H. Parkinson, both of Chicago, Ill., for appellant.

Edwin B. Hunt, of Milwaukee, Wis., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The present appeal deals with a patent, No. 812,371, to J. A. Secor, and covers a "special regulator for explosive engines." In disposing of the suit, Judge Geiger gave reasons for his conclusions that so satisfactorily present the issues involved that we set them forth in full.¹

¹ The plaintiff, as owner of the patent to Secor, No. 812,371, issued February 13, 1906, brings this suit against defendant charging infringement. The usual defenses, invalidity and noninfringement, are interposed:

The patentee asserts his invention to relate:

"Generally to internal combustion or explosion engines, and particularly to that class of such engines as employ a nonvolatile liquid fuel—such, for example, as commercial kerosene oil—one object of this invention being to correlate under a common unitary control the several recurrent cyclic operations

[1] We agree with the findings and conclusions reached, and adopt the opinion.

While this might well dispose of the appeal, we will, in view of counsel's argument most earnestly urged in support of certain attacks upon the opinion, briefly refer to two contentions.

The decision, so far as it relates to claims 1, 3, and 5, turns upon the presence of the three "throttling-valves" as elements in the combination. Appellant's counsel frankly state in their brief:

"The defense against the charge of infringement rests mainly on the argument that the claims (especially 1 and 3) should be limited to the direct connection of each throttle valve with the governor, and that the valves which throttle the water and oil are not so connected in defendant's carbure-

which affect speed, power, and fuel consumption. In order to obtain this result, an air throttling-valve, and an electric ignition-timing mechanism are unitedly actuated by means of a common control or governor, so that the separate movements of each of these several mechanisms are co-operatively regulated in unison, the control or governor thereby simultaneously determining the relative proportions of the constituents of the fuel mixture, the volume, and thereby the compression of each charge, the internal temperature of the combustion chamber, and the time of ignition.

"My invention therefor comprises means for obtaining a triple-unit control over, first, the internal heat; second, the transformation of heat into power, and, third, power production, thus the temperature of the combustion-chamber, being regulated by the admixture of finely-atomized water as a constituent element of the fuel charge, and the quantity of water thus supplied for the absorption of excess heat being varied in consonance with the variation in engine speed or power output. As concerns the transformation of heat into power, the proportion of the several ingredients in the fuel mixture are varied with micrometric precision in thermo-dynamic correlation with the degree of compression, and as to power production, the mean effective pressure of the working stroke which determines speed and power, being controlled by varying in correlation the proportions, quantity, and compression of the fuel charge, the time of ignition, and temperature of combustion, secures the improved results."

It is believed unnecessary to give in detail a description of the mechanism by reference to the drawings and numerals, for the case must turn upon the interpretation and effectiveness of the claims sued upon, in view of certain concessions that must be made upon examination of the specifications and the drawing. The principal controversy arises out of the first claim allowed to the patentee:

"1. In an internal-combustion engine the combination of an air throttling-valve, a fuel throttling-valve and a water throttling-valve, with a governor adapted to vary the quantity of the combustible charge, and the relative proportions of air, fuel and water, in co-ordination with the variations in quantity of said charge."

It may be said, preliminarily, in view of the specifications, and certainly of the prior art called to the attention of the court, that the patent in suit can in no aspect be regarded as of a pioneer or dominant character. The patentee professed to enter not only a well-known art, but a well-known branch thereof, namely the class of internal combustion or explosion engines, employing nonvolatile liquid fuel, such as kerosene oil, and his object, although stated in ponderous terms, in truth was limited to dealing with the problem of correlation and common control, over operations "which effect speed, power and fuel consumption," and he announces his solution to reside in these means:

"An air throttling-valve, a fuel throttling-valve, a water throttling-valve, and an electric ignition-timing mechanism are unitedly actuated by means of a common control or governor, so that the separate movements of each of these mechanisms," may be "co-operatively regulated in unison, the control

tor. There is no dispute about the fact that defendant's throttling-valves are not directly connected with or directly operated by, the governor."

The query arises: what are "throttling-valves"?

[2] This court has frequently and consistently recognized the patentee's right to be his own lexicographer, and in the present suit, regardless of the ordinary or the technical meaning of the words "throttling-valve," we will unhesitatingly accept another definition if ascertainable from the patent, if by doing so we can give better or more accurate effect to this or other claims. However, such definition must be as-

or governor thereby simultaneously determining the relative proportions of the constituents," etc.

In other words, he characterizes his invention as a "means for obtaining a triple-unit control."

Claim 1, when read in connection with the description last above noted, which, after all, discloses the patentee's construction and his theory of operation, presents the fundamental question involved in the case, namely, the definition to be accorded to any one or all of the so-called "throttling-valves" introduced into the construction under the claims and their relationship, structurally, and functionally and operatively; and the plaintiff throughout apparently realized the necessity in order to make out a case of infringement, to give to the terms of the claims, in so far as they call for definition of "throttling-valves," a "governor adapted to vary" and "in co-ordination with," a definition repugnant to the obvious ones, which, in view of the specifications, the patentee intended. In the consideration of this it will be demonstrated, I believe, that the patentee himself not only appreciated but purposed to recognize the distinctive character of a "throttling-valve" and did not intend by the industrious use of that term to comprehend everything which might function as a valve—in the sense of an "opening" through which there was a flow of gas or liquid. He recognized the distinctive character of a throttling-valve just as clearly as defendant's counsel states it in its differentiation from an ordinary "adjusting" or "regulating" valve, viz.: "A throttling-valve is one adapted to be actuated to control and vary a flow of fluid during the operation from no load to full load of the device or machine with which it is used. An adjusting or regulating valve is one initially manipulated or set to determine the size of an opening through which fluid may flow and after predetermined setting has no further function of varying the opening."

If, now, we turn to the specifications and drawings of the patent, and particularly Figures 7 and 8 of the latter, and, without following the detailed description of the construction, the patentee sums up in the following language:

"As will be understood from this description, my invention comprises direct and positive control in due relation with each other of the air supply by means of the valve *g*, of the fuel supply by means of the valve *m*, of the water supply by means of the valve *j*, and of the time of firing by means of the forked arm *30* and its connecting mechanism, all of the said mechanisms being actuated and controlled by the governor automatically—that is to say, without the intervention of any external or independent agency applied from the moment the engine is initially started."

Now, compare with this the language of the patentee when referring to what are now claimed by the plaintiff to be throttling-valves within the meaning of claim 1 of the patent. Particular reference is made to the construction designated by the numeral 78 in Figure 1 of the drawings.

"After the engine has been started into operation and its interior parts have reached normal working temperature, the valve 72 is opened and the reservoir 74 is filled. The valve 72 is opened sufficiently to insure a constant overflow of water through the overflow pipe 75, thereby maintaining a constant level of water in the reservoir 74, even as a constant level of oil is

certained from the use of the words in the specification and claims, and must be in harmony with the asserted advance which the invention represents over the prior art. Examining the specifications as well as the claims, we can find no support for any definition that would ignore the word "throttling." The use of this word is consistent with its ordinary meaning and no other, and its function in the combination is expressive of the asserted advance over existing structures.

Claim 13 reads:

"In an internal-combustion engine adapted to inhale water for internal cooling, the combination of a piston adapted by its suction movement to in-

maintained in the oil reservoir 1, as the nozzle 77, connecting pipe 76, the reservoir 78 and the adjusting screw 78 are alike and bear the same relation to the passageway *H* as the nozzle 80, passageway 79, reservoir 81 and adjusting screw 82. The action of the in-rushing air through the passageway *H* inhales, atomizes and mixes water with the air charge in the manner hereinbefore described in reference to the action of the starting liquid. The passage of each accurately measured governor-controlled air charge past the nozzle 77 draws in a properly proportioned and accurately measured quantity of water sufficient for absorbing the amount of excess heat produced by compression and the heat-radiating action of the walls of the combustion chamber."

The present attempt, being to bring what the patentee specifically terms "nozzle" or adjusting screws within the definition of a throttling-valve constructed as specifically indicated in the patent, and thereby to endow the element of the air throttling-valve with either the dual function of such a valve and a fuel throttling-valve, or the triple function of such a valve and a fuel throttling and a water throttling-valve, is alone sufficient to defeat the plaintiff's contention. This is true because it leads to a combination of the elements of the claim and a bestowal upon one element the functions of either single, dual or triple construction. It is all the more true because, when once the construction noted by the numerals 77, 78, 80, and 82, which are in fact mere nozzles and adjusting screws, is given either the functions or structural characteristics of a true throttling-valve, the patentee recurs to old art—at least art shown in any number of patents dealing with gasoline carburetors and engines—and plaintiff in this case will not claim that in such engines the use of an air throttling-valve, co-operating with fuel and water valves of the identical construction disclosed by the numerals last above mentioned, was not old and common-place before the date of Secor's patent.

The entire argument of the plaintiff is directed to substantiating the proposition that, because a construction such as that found in Figure 1, where the numerals 77, 78, 80, and 82, as plaintiff says, disclose so-called "controlling-valves"—that because such a structure may work out and utilize water and fuel, because of the presence of the charge of air, which latter is controlled by throttle-valve and governor, therefore the construction responds to claim 1. This, however, impresses me as the basic infirmity in its case. Nowhere in the art—in the ordinary gasoline structures—is a set screw, or an adjusting screw, which permanently (until reset manually) limits the flow of gasoline or water, treated as a "throttling-valve." And if it is true, as the patentee claims, with respect to the construction shown in Figure 1, that upon the influence of the air-throttling valve the water and fuel are removed from the openings defined by the set screws—or the nozzles, in so-called "accurately measured quantities," then the same thing was true of the prior art structures. But it is also true that such result was not attributable to the construction of an adjusting screw nozzle, and therefore in no event could it respond to the terms of the claim respecting the adaption of a governor to vary the quantity of the combustible charge and the relative proportions of air, fuel, and water in co-ordination with the variation in quantity of said charge. It would seem odd to construe the claims as covering a true air-throttling valve in conjunction with what, after all, are not valves of any

bale *each ingredient of a combustible* mixture at the same time, the same temperature, under the same pressure, and through the same admission valve and also to atomize and commingle the liquid ingredients with the air supply; a governor adapted to vary the volume of the fuel mixtures, as well as the relative proportions of the constituent ingredients in said mixtures; a combustion chamber in which the air charge absorbs and incorporates the vapors evolved from the atomized liquids commingled with, and held in suspension by said air charge; substantially as, and for the purpose specified."

character for the admission of water and fuel, and then profess to have obtained a structure in which the governor has any control whatever over the latter valves or in which there is in a just sense a "triple unit control"—that is, in a sense showing an advance in the art.

Stating it in another way: To claim a governor, in detailed structural operative relation with three throttling-valves (see Figures 7 and 8) and then claim that one or two of such valves may be eliminated and port holes of determined size substituted therefor (neither of which is in any structural relation to or with the governor), and still claim three valves in combination with a governor adapted to vary relative quantities co-ordinately, seems on its face not only repugnant to the patentee's purpose and ponderous language, but as avoiding his object by recurring to the practice upon which he professed to make an advance. If that thing happens, it is not because of the structure defined in claim 1, but because of the single air throttling-valve in its relation to the governor. In other words, plaintiff's whole contention necessitates an actual elimination or merging of one or more of the elements of his claim in order to comprehend defendant's structure. It aims to either reduce the claim or to stretch the definition of its elements, the result of either being to comprehend old practice and constructions.

It is my judgment that the foregoing considerations dispose of claims 1, 3, and 5, urged on behalf of the plaintiff, and the general conclusion is that no one of them can be interpreted except in accordance with the expressly stated objects and clearly described means found in the language of the patent; that the elements respecting the governor, the three valves, and their operative and functional relationship were given a definition by the patentee indispensable to show his advance over the prior art and upon such definition the defendant structures cannot be included as infringing.

With respect to claim 13, its language seems plainly to indicate that the air, fuel, and water are severally brought to the same temperature or degree of heat before being sucked into the combustion chamber; and that does not mean, on the contrary it negatives, the notion that these several ingredients are to enter the combustion chamber at their respective normal temperatures. The latter thought was urged on behalf of the plaintiff, though the testimony does not support it. Upon this claim the testimony offered on behalf of the defendant is sufficient to support the view that the structure does not and cannot operate in the manner indicated in the claim, and, in any event, that if the result respecting identity of temperatures and pressures and the atomizing and commingling of ingredients is accomplished, it is likewise accomplished, not by the particular element, the piston, of novel construction, but rather upon the considerations and constructions commonly found in internal combustion engines of this general type.

With respect to claim No. 17, it may be said that conceding its object to have particular reference to the starting of an engine, its provision of a fuel reservoir containing a supply of liquid fuel of a more volatile character than the fuel used in ordinary operations is old in the art, as shown by numerous patents. This being so, it is impossible to escape the objection made by defendant against the claim that it is drawn to aggregate unrelated elements and features. This view has not been met by the plaintiff when specifically directed to the element above noted in conjunction with the governor actuated air throttling-valve. The claim is invalid.

These considerations entitle the defendant to a decree dismissing the bill; and it may be accordingly entered."

The opinion is attacked because of the meaning or construction given to the phrase "each ingredient of a combustible mixture." Confessedly this language is uncertain in and of itself. But although doubtful standing alone, it becomes perfectly clear and certain when we examine the entire sentence.

Again, it is hardly necessary to add to the reasons assigned in the opinion. We allude to but one. If we ignored the specifications and the other claims and the generally recognized meaning of a "combustible mixture" in a carburetor, still we could not escape the language of the claim itself, embraced as it is in a single sentence. When patentee as part of the same element spoke of "commingling the liquid ingredients," he referred to the "liquid ingredients" and to the "air." "Liquid ingredients" involves two liquids, water and kerosene. Patentee's use of the plural at this and other places in the claim is significant. We can entertain no doubt that the court was correct in construing "each ingredient of a combustible mixture" to include air, kerosene, and water.

We also agree that the testimony fails to show appellee infringes this claim because its structure is not adapted to inhale such ingredients into the combustion chamber at the same temperature.

Further discussion we consider unnecessary.

The decree is affirmed.

GANS S. S. LINE v. WILHELMOSEN et al.*

THE THEMIS.

(Circuit Court of Appeals, Second Circuit. July 29, 1921.)

No. 177.

1. Appeal and error ⇐173 (2)—Point not considered below not considered on appeal.

In libel against owner of vessel for nondelivery under charter party entitling libellant to vessel during winter season, in which owner impleaded charterer entitled to possession during summer season, alleging such charterer's failure to deliver to owner to be responsible for owner's nondelivery to libellant, the objection that the charter with libellant had been entered into by an individual who had organized the corporation owning the vessel, whereas, the charter with such other charterer was executed in the name of such corporation, *held* not open to consideration on appeal, where the point was not noted below and was not referred to in the pleadings, and where both the individual and the corporation appeared and answered as owners, and where Admiralty Rules, Nos. 6-9 (267 Fed. viii, ix) were not complied with.

2. Shipping ⇐40—Delivery of vessel by one charterer to owner held not a condition precedent to owner's delivery to other charterer.

Where owner of vessel, charterer during winter season, and charterer during summer season agreed as to dates between which vessel was to be delivered by summer charterer to owner and by owner to winter charterer, the owner was required to deliver at such time, notwithstanding provision of charter requiring vessel to be "placed at the disposal of the charterer * * * upon redelivery by" summer charterer, since such provision as to redelivery by summer charterer was merely a description

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 97, 65 L. Ed. —.

of the relation existing between owner and its seasonal charterers, and did not make such redelivery a condition precedent to winter charterer's right to delivery.

3. Shipping ⇨40—Overlap doctrine held inapplicable.

Where owner of vessel, charterer for summer season, and charterer for winter season agreed as to the dates between which the vessel was to be delivered by the one charterer to owner and by owner to the other charterer, a charterer was not entitled to additional time for delivery under the "overlap" doctrine, the parties themselves having allowed a margin for contingencies by division of seasons by period, rather than named days.

4. Shipping ⇨52—Closing of Panama Canal by Culebra slide not an "act of God."

Charterer's inability to pass through the Panama Canal on closing of canal because of the Culebra slide on canal's bank, did not excuse failure to deliver vessel to owner at required time under provision of charter excepting charterer from liability where such failure was caused by an "act of God," since the closing of the canal in such case was the result, which could have been expected, of a deliberate widening of the canal, which in its entirety was a bold and daring experiment of human activity.

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

5. Shipping ⇨52—"Act of God" due to natural causes, without human intervention.

An act of God is due to natural causes, without human intervention.

6. Shipping ⇨39—Exceptions in charter parties protect both owner and charterers.

Provisions of charter parties making certain dangers "always excepted" protect both owner and charterers, whether the word "mutually" is inserted or not, unless the context clearly shows an intention to protect owner only, or possibly charterers only.

7. Shipping ⇨62—Contract, evidenced by bills of lading issued by master of chartered ship, obligates owner as well as charterer.

When the master of a ship, chartered but not demised, issues bills of lading, the contract evidenced thereby is not only the ship's contract and that of the charterer who caused their issue, but in addition is the contract of the owner whose master issued them.

8. Shipping ⇨56—Subcharterer required under indemnification clauses of charter parties to save charterer and owner from liability growing out of bills of lading issued on behalf of master.

Owner, charterer, and subcharterer were all three personally liable for the fulfillment of the bills of lading, issued by subcharterer on behalf of master, with authority to sign for master, but subcharterer, where charter parties contained indemnification clauses, was bound to save the charterer and owner from such liability.

9. Contracts ⇨143—Construed as a whole.

Every phrase of every commercial contract, including the exceptions, is to be construed in the light of the whole document, to the end that there shall be no more overlapping of phrases than is necessary, and in the light of matters known of all men, and capable of judicial cognizance.

10. Shipping ⇨52—Closing of Panama Canal because of Culebra slide held an "accident of canals."

The closing of the Panama canal because of the Culebra slide held an "accident of canals" within charter party, making a charterer not liable for "accident of canals."

11. Shipping ⇨52—Closing of canal held not to excuse subcharterer from delivery of chartered vessel at specified time.

Where subcharterer accepted goods for shipment from New York to Australia in their "Australian line" without committing itself to trans-

port such goods by the particular vessel which was in its possession under a subcharter, the mere fact that the Panama Canal, through which it had been intended to make the trip, was closed when ship reached it by reason of slides on the banks of the canal, so that it was necessary, if the ship was to proceed with the cargo, for it to sail around the Cape, did not excuse subcharterer's failure to deliver vessel to charterer at the time specified in the subcharter, though subcharter provided that subcharterer should not be responsible for accidents of canals, since such accident did not prevent subcharterer from performing its obligation to deliver shipment and also deliver vessel at specified time, in the absence of evidence that the cargo could not have been delivered in another vessel, notwithstanding that it would have been difficult, dangerous, and enormously expensive to so do.

12. **Shipping** ⚡58(2)—**Burden of proving impossibility on party pleading it.**
Subcharterer, claiming to be excused from nondelivery of vessel to charterer at required time by reason of commercial impossibility, had the burden of proving such impossibility.

13. **Shipping** ⚡58(3)—**Measure of damages for nondelivery of vessel to charterer stated.**

In charterer's action for nondelivery of steamer during the abnormal conditions of the great war, at a time when it was impossible for the charterer to secure another vessel similar to that chartered, the measure of damages was what the charterer could have obtained for the steamer in the market had it been delivered to charterer in time.

Ward, Circuit Judge, dissenting in part.

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

Libel by the Gans Steamship Line against Wilhelm Wilhelmsen and another, as owners of the steamship Themis, and the Nova Scotia Steel & Coal Company, Limited, and Barber & Co., Inc., impleaded. Decree for libellant (*The Themis*, 244 Fed. 545), and respondents appeal. Affirmed as modified.

Suit is by Gans Line for breach of a charter party made to it, for Steamship Themis, and by Wilhelmsen as owner. It is now admitted that title to Themis was and is in the respondent corporation (Aktieselskabet), which Wilhelmsen had formed. Apparently for this reason both Wilhelmsen and his company were made respondents as owners. The other respondents were impleaded under the equity of the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi) for reasons apparent from the facts now to be stated.

In March, 1910, while Themis was still unfinished, and not yet named, she was chartered in such manner as to arrange her employments for the next 10 years. The first charter was to Nova Scotia Company, and the second, made only three days later, to Gans Line. It is agreed that each charterer knew, and knew before Themis entered any employment, all about the rights of the other; and we find that the chartered arrangements of the steamship as made in March, 1910, were equivalent to a tripartite agreement, between owner and the two time charterers, by which Nova Scotia Company was to have the steamer for the summer season, and Gans Line for the winter. The seasons were not defined in terms, but the result intended and agreed upon was reached by fixing the times when, or the periods within which Nova Scotia Company should deliver to owners, who would then deliver to Gans Line, which in turn promised redelivery to owners, which would then recommence the cycle by again handing the ship over to Nova Scotia Company.

Accordingly owners agreed to deliver Themis to Nova Scotia Company each year at Wabana (Canada) between April 1 and May 15; and Nova Scotia's counter agreement was to redeliver annually at Philadelphia or Baltimore between the following December 15 and January 5.

Similarly Gans Line was entitled to delivery from owners at Philadelphia or Baltimore, between the same December 15 and January 5; and it agreed to redeliver between March 10 and April 10, at a U. K. port or on the continent of Europe between Bordeaux and Hamburg, Rouen excepted. This bargain gave owners at least 35 days (April 10–May 15) to get Themis from a European port to Wabana, for annual delivery to Nova Scotia Company.

The exception clauses in the first made charter (Nova Scotia's) read as follows: "That should the steamer meet with any casualty causing her to be withdrawn from Charterers' service temporarily or permanently, all hire paid in advance and not earned, reckoning from the date of such casualty shall be returned to the charterers with interest at 5 per cent. per annum from said date. Owners are also to pay charterers for the value of any of charterers' bunker coals that are consumed while the steamer is off hire, based on the current price of bunker coal trimmed into bunkers at the port steamer is in when off hire, but if steamer is at sea when off hire occurs, then price to be based on current rate at the port steamer is first in after her period off hire. The act of God, the king's enemies, loss or damage from fire on board, in hulk or craft, or on shore, arrest or restraint of princes, rules, and people, collisions, any act, neglect, or default whatsoever of pilot, master or crew in the management or navigation of the ship, and all and every danger and accident of the seas, canals and rivers, and of navigation of whatever nature or kind always excepted. The vessel to have liberty to call at any ports in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property."

The Nova Scotia charter also contained the usual employment and indemnity paragraph, as follows: "That the Captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements. Bills of lading are to be signed at any rate of freight the charterers or their agents may direct, without prejudice to this charter, the captain attending daily at the office of the charterers or their agents; the charterers hereby indemnify the owners from all consequences or liabilities that may arise from the captain so doing."

The substantially contemporaneous Gans charter contained the following stipulation as to the time allotted to Gans: "That the said owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery for nine (9) consecutive winter seasons, commencing with 1911, steamer to be placed at the disposal of the charterers at Philadelphia or Baltimore at owner's option upon redelivery by the Nova Scotia Steel & Coal Co., between December 15th and January 5th each season as called for by charter arranged for this steamer between owners and the Nova Scotia Steel & Co. covering nine (9) consecutive Wabana seasons commencing 1911."

The exceptions of the Gans charter are these, viz: "That should the vessel be lost, freight paid in advance and not earned (reckoning from the date of her last being heard from) shall be returned to the charterers. The act of God, enemies, fire, restraint of princes, rulers, and the people, and all dangers and accidents of the seas, river, machinery, boilers, steam navigation and errors of navigation, throughout this charter party, always mutually excepted."

The employment of Themis, as above outlined, continued (so far as shown) without difficulties or disagreements until the summer season of 1915, when the Nova Scotia Company, being in possession of the steamer, subchartered her (as it had right to do, and at a profit of over £5000 a month) to Barber & Co. for eight months from April 28, 1915. This subcharter therefore expired December 23th, but by a special clause it was agreed that Barber was to redeliver at a port north of Hatteras, "not later than January 1, 1916." It is proved that Barber & Co. contemporaneously knew of the other chartered engagements of Themis; and it is obvious that this firmly fixed redelivery date enabled Nova Scotia Company to ensure the handing over of the steamer to the Gans Line by January 5, 1916.

The Barber subcharter contained the following exceptions: "The act of God, the king's enemies, loss or damage from fire on board, in hulk or craft, or on shore, arrest or restraint of princes, rulers and people, collisions, any

act, neglect, or default whatsoever of pilot, master or crew in the management or navigation of the ship, and all and every danger and accident of the seas, canals, and rivers, and of navigation of whatever nature or kind always mutually excepted."

The employment and indemnity paragraph of the subcharter was identical with that above quoted from owners charter to Nova Scotia Co.

In August, 1915, Barber & Co. advertised Themis as about to sail in their "Australian Line," and took on general cargo for New Zealand and several ports in Australia. To shippers they issued bills of lading signed by them "for the master," which bills reserved to the carrier the fullest possible rights of transshipping by any vessel or line, and to delay, deviate, or overcarry. Freight was to be prepaid, and deemed earned on shipment, "Ship lost or not lost," and among the exceptions was the same form of words as to dangers and accidents of canals, found in Barber's subcharter, and Nova Scotia's charter.

It was intended to make the Australian voyage from New York, by the only route possible if the steamer was to be "north of Hatteras" on January 1, 1916, viz. the Panama Canal.

As soon as Themis was advertised to sail as above, and early in September, Gans Line protested to owners that the voyage could not be accomplished within chartered limits; owners passed the protest on to Nova Scotia Company, who repeated it to Barber ten days before the steamer sailed. The latter promptly replied in writing, "We fully expect to get this steamer back in the time limits of the charter."

Themis sailed with a general cargo on September 12th, arrived at Colon on the 21st, and found the canal closed by slides on the east bank. Then followed the great Culebra slide on the west bank, which produced on October 4th an official notice that the canal would remain closed indefinitely. It was not again opened to commerce until long after January 1, 1916.

On October 5th, pursuant to Barber & Co.'s orders, Themis sailed from Colon for St. Lucia, and arrived October 11th; there coaled and found orders for Durban and Australia. At Durban she coaled again (November 11th), but otherwise proceeded straight for New Zealand; called at seven ports in New Zealand and Australia, started back on February 23, 1916, remained at Buenos Aires and/or Montevideo 13 days, procuring more cargo, and arrived in New York on May 5th,—or after the expiry of Gans Line's chartered period.

The apostiles do not show any renewal of protests on the part of owners or charterers when the vessel was ordered to go around the Cape, nor does it appear how soon after October 5th they or any of them learned of this change of programme. The president of, and chief witness for, Gans Line swore he did not know of it, nor of the closure of the Canal, as late as October 25, 1915. We are of opinion that none other than Barber & Co. of the parties to this suit knew of the voyage around the Cape until after the steamer was in mid-Atlantic.

The Themis is a cargo boat of unusual size, and left New York with at least 11,000 tons of goods aboard. When asked as to the propriety or possibility of transshipping at the Isthmus, the vice president of Barber & Co. testified that it was "not entirely impossible," but it was not "just a question of price," because "our reputation in taking care of other people's goods—the underwriters, the shippers—there were all those things to consider in the trade," wherefore Barber & Co. "did not try," and from the evidence did not even consider, any other course than to keep the ship, and send her on a voyage known to require about the time actually expended.

By November 5th Gans Line certainly knew what had occurred, for they then advised the owners of the facts. Some efforts at a direct accommodation between Gans and Barber were made, but terminated on or before December 9th, when the former (by an attorney's letter) notified owners' agents in New York that it would seek other tonnage to replace Themis, holding owners responsible for loss in so doing.

Shortly after January 5, 1916, this libel was filed, claiming damages for non-delivery of Themis under the charter party to Gans Line above described. The owners brought in Nova Scotia Company, alleging that corporation as responsible for such nondelivery, and obliged to indemnify the owners for any liability to Gans Line.

The Nova Scotia Company similarly petitioned against Barber & Co., whose pleaded defense is that the Themis "was bound to transport [her] cargo in accordance with bills of lading issued therefor," and that this had been done "with the utmost diligence and despatch," and the steamer delivered "as promptly as possible after the closing of the Panama Canal," a misfortune resulting from the slides above referred to which were both acts of God, and a danger and accident of canals.

After prolonged trial the District Court held (The Themis, 244 Fed. 545) the owners liable under their contract to Gans Line, and Barber & Co. not excused by any exception in their charter party for so appropriating the Themis beyond their own chartered period, while Nova Scotia was responsible to owners for the subcharterers' dereliction. The damages therefore (assessed at \$508,727.42) were ordered paid by Barber & Co., any unpaid balance to be discharged by Nova Scotia Company, and any sum not paid by the impleaded respondents to be settled by the owners. This appeal followed.

Burlingham, Veeder, Masten & Fearey, of New York City (R. H. Hupper, Charles C. Burlingham and Homer H. Breland, all of New York City, of counsel), for Wilhelm Wilhelmsen.

Harrington, Bigham & Englar, of New York City, (D. R. Englar, and Herman Goldman, both of New York City, Elkan Turk and Dix W. Noel, of New York City, of counsel), for Barber & Co., Inc.

H. Alan Dawson, of Philadelphia, Pa., for Nova Scotia Steel & Coal Co., Ltd.

Haight, Sandford, Smith & Griffin, of New York City (Charles S. Haight and Wharton Poor, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The singularity of the facts, and wide range of arguments at bar, has seemed to justify the foregoing amplified statement of things proven, which is, however, merely an extension, not a varying, of the fact findings in the careful opinion of Learned Hand, J., in the court below.

[1] For what reason, if any, the owner of Themis is stated as Wilhelmsen in the Gans charter, and as the Aktieselskabet in that of Nova Scotia, does not appear. It is now admitted that the corporation was the owner in point of fact. On this Barber & Co. base the argument that since Gans Line contracted with the individual, and Nova Scotia Company with the company, libelants can have no claim against Nova Scotia, and therefore none against Barber. No such objection is raised by Nova Scotia Company; both Wilhelmsen and his corporation appeared and answered as owners, and the pleadings contain no reference to the point, nor was it mooted below. Even were it substantial, which we do not believe, it cannot be presented to us without compliance with our admiralty rules 6-9 (267 Fed. viii, ix). No such compliance has been attempted, and we decline further consideration of the matter.

The outstanding and admitted fact in this case is that libelant lost its whole 1916 term in Themis, at a time when this neutral (Norwegian) vessel had peculiar value. This is the confessed damnum. Whether injuria also exists depends upon ascertaining (1) what, if any, human action caused the damnum in point of fact, and (2) whether by

contract the actor is protected from the normal consequences of his act.

[2] For libelants' purposes it is, of course, enough to hold the owner, with whom alone it had direct contractual relation. It was an act (i. e., omission) that Wilhelmsen did not hand over Themis to libellant on January 5, 1916. But here, at the very opening of the case, owners seek escape by the plea that the above-quoted section of Gans charter only required the steamer to be "placed at the disposal of the charterer * * * upon redelivery by" Nova Scotia Company, wherefore it is urged that no liability arose until that company did redeliver.

But the whole section in Gans charter must be read, in order to reach the intention of parties, and, so read, it is plain that the phrase "upon redelivery" by Nova Scotia Company is but a description of relation existing between owners and their seasonal charterers; it is not a condition precedent to delivery. This point is well disposed of in the opinion of Learned Hand, J.

But the holding rests on a broader foundation, viz. the interlocking nature of the charters of March, 1910. What was then agreed to was a regular seasonal division of Themis' time; that time division was of the essence, and its primary importance is manifest, because the only way in which the complementary charters could be fulfilled was by holding all parties to strict conformity in respect of times for delivery and redelivery. The practical observance of these times for four years, by the practical men handling the ship, is abundant evidence of their intent, if anything more were needed than knowledge of the circumstances attending the making of the charters. It follows that owners were bound to deliver to Gans not later than January 5, 1916, unless relieved by some applicable exception in the charter.

[3] The foregoing, however, leads to a broader holding—one affecting all the charters under consideration. It is that none of the charterers can invoke the doctrine of what are called the "overlap" cases. That these decisions all rest on an implication of intent in the parties contracting was pointed out in *Schoonmaker Co. v. Lambert Co.* (C. C. A.) 269 Fed. 583. No such implication is here possible, for the intent to make time a primary or dominant factor in the contracts is apparent. Indeed over- and under-lap is but one method of allowing a reasonable "lee way" in performing service with something so subject to peril and delay as a ship. In this instance that "lee way" or margin for contingencies was fully and specifically allowed for by division of seasons by periods rather than named days.

So far then as owners' liability is concerned, it remains but to inquire whether any exception relieves. None is or can be suggested except the "act of God," for the Gans charter contains nothing regarding dangers of canals.

It is worth noting that to render any exception available, it is not enough to prove a fact or set of facts answering the language of exception; it is just as vital to show that such facts prevented (in the legal signification of that word) performance of the substance of en-

gagement. But if the facts do not measure up to the definition, further investigation is idle.

[4] Hence it disposes of owners' defense to the libel to hold, as we do, that the slides causing closure of canal in October, 1915, were not the "act of God," as that phrase has been authoritatively accepted.

[5] Without attempting finality in definition, an act of God is due to natural causes, without human intervention. There are other requirements, but we have gone far enough. The Culebra slide which blocked traffic for months after October 4, 1915, was the result, and the not surprising, nor wholly unexpected result, of a deliberate widening of the Canal, which in its entirety was a bold and daring experiment in human activity. The experimental stage was by no means over when Themis sailed, and that fact was well known to all men skilled in engineering. The cases are collected in 1 Corp. Jur. 1174, and see especially Gleason v. Virginia, etc., Ry., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458. It follows that libellant was properly granted recovery against owners.

To adjust rights as between owners, and the other respondents requires further inquiry as to what act caused libellant's damnum. It begs the question to say that it was either the Culebra slide or the closing of the Canal, for neither physically injured the steamer. It was Barber & Co.'s order to go on via the Cape, an order of which no other party to this suit had knowledge until the Themis was halfway to Africa, at the earliest.

It may be said that the other respondents were present at Colon, in the person of the master, and therefore knew. But that is a legal inference. The fact remains that Barber's orders for Australia, given by wire at St. Lucia, were the proximate cause of libellant's loss, but that fact does not fix nor transfer liability, which depends upon the true construction of all three charters at bar in respect of redelivery obligations, and of the Nova Scotia and Barber charters as to liability of respondent's inter sese.

One other question of fact requires mention. Throughout this cause it has been charged that if Barber & Co. did not know that the Australian voyage could not be completed via Panama in time to save Gans' rights, any reasonable man would have known it. We agree with the court below that this charge is unfounded. Judging by Themis' past performances there was plenty of time to make the trip, provided the subcharterers availed themselves of the privileges reserved in their bills of lading, and transhipped goods for the smaller Australian ports. It was not undertaking the voyage via Panama that caused loss, but continuing it from St. Lucia via the Cape.

Taking up now the interpretation of charters, it is plain that Barber & Co. were just as firmly bound to observe the date of redelivery as was every other party, and for the same reasons—positive covenant and consenting foreknowledge of its importance.

It is next observable that in charter to Nova Scotia Company certain dangers are "always excepted," while in that to Barber & Co. substantially the same dangers are "always mutually excepted"; and on

this difference is grounded the assertion that, while Barber can claim exemption as against Nova Scotia, the owners only can avail themselves of the exceptions in their contracts with the latter company.

Doubtless the exceptions of a charter, varying in details, but for generations familiar in kind, were long generally thought to be inserted for the benefit of owners only. When voyage charters were almost the only kind in use, and charterers expected to lade their own cargo, this was natural. With the growth of time chartering, and the rise of a business of which the *Themis*' engagements is an extreme example, the propriety of equality between contractors became apparent, for such contractors used vessels in the same way, although one was owner and the other charterer; i. e., both hired out the ship or some part of her capacity to third parties. Therefore "mutually" was inserted, although in most contracts mutuality is assumed.

Touteng v. Hubbard, 3 B. & P. 291, decided in 1802, sets forth the early view; and the matter has been discussed rather than decided during the last 25 years in England. *Barry v. Peruvian Corp.*, 2 Com. Cas. 50; *Newman, etc., Co. v. British, etc., Co.*, 8 Com. Cas. 87; *Braemont v. Weir*, 15 Com. Cas. 101; *Embricos v. Reid*, 19 Com. Cas. 263. In none of these cases was the point necessary to decision, but it has been plainly said that exceptions may be available to both parties without the insertion of "mutually," and this view we regard as consistent with the general law of contracts.

In this country the question has never been mooted, so far as we can discover. *Clyde v. West India Co.*, 169 Fed. 275, 94 C. C. A. 551 (the nearest case in this court) did not present it.

[6] With authority lacking, but the English dicta inclining toward what we regard as the reason of the matter, we hold that such exceptions in charter parties as are here presented are intended to protect both owners and charterers, whether the word "mutually" is inserted or not, unless the context clearly shows an intention to protect owners only, or possibly charterers only.

Since, as shown in our fact statement, Barber's defense as pleaded rests fundamentally on an alleged superior obligation to shippers, evidenced by the bills of lading, it is necessary to examine, not only Barber's duty, but the liabilities thrust upon the other respondents, by the employment sections of charter and subcharter, and especially by the direction given the master to sign bills of lading as ordered by charterers.

[7, 8] It is sufficiently shown in Judge Hand's opinion that by acceptance of cargo, the ship became liable in rem for due performance of the contract of affreightment. But when (Barber & Co.'s authority to sign for the master being undisputed) the master of a ship chartered but not demised, which was the condition of *Themis*, issues bills of lading, we hold that the contract evidenced thereby is not only the ship's contract, and that of the time or other charterer who caused their issue, but that of the owner, whose master (i. e., authorized agent) issued the same. Therefore in this instance the shippers had, beyond the obligation of the ship, the right to look to all three respondents, and hold any or all of them personally liable for right fulfillment of

the bills. This point also seems new in American courts, but it is well settled in Great Britain (*Tillmans v. Knutsford*, 13 Com. Cas. 244, 334; *Manchester Trust v. Furness*, 8 Asp. M. C., 57), where it is far more likely to be urged, owing to the weakness of maritime liens in the English admiralty.

But it does not follow from this ruling, that as between themselves, owner, charterer, and subcharterer made but one carrier entity; on the contrary, inter sese the Australian venture from its inception was Barber's alone, and by the indemnification clauses of the charter parties that respondent was and is bound to save the others from any liability growing out of Barber & Co.'s method of performing the contracts of carriage evidenced by the bills of lading issued by Barber for the master.

We have already indicated the nature of that contract of carriage, but now emphasize the point that there was no obligation to fulfill it with *Themis*; there was an agreement to get the goods to Australia, but by multiplied provisions, unnecessary to quote, that agreement would be fulfilled, though there were transshipments "at any place or places." In short the document is a thorough "war bill"; and, as above stated (and pleaded), it contained the exception, running through both the respondents' charters, of danger and accident of canals.

To fully consider not only Barber's pleading, but the relation of respondents to each other, it is now necessary to decide whether the Culebra slide was an accident or danger of canal. Authority is absent, owing to the novelty of such constructions as that at Panama. Cases of freezing of rivers and canals (e. g., *Allen v. Mercantile*, etc., Co., 44 N. Y. 437, 4 Am. Rep. 700) are of no assistance, for freezing plainly responds to the phrase "act of God."

[9, 10] Every phrase of every commercial contract, including the exceptions, is to be construed in the light of the whole document, to the end that there shall be no more overlapping of phrases than is necessary, and in the light of matters known of all men, and capable of judicial cognizance. Canals for deep water vessels had been known since Suez at latest, Panama was building when *Themis* was launched, and "dangers of navigation" would cover stranding on unknown shallows in any navigable waters, including canals. Hence we conclude that "accident of canals" should reasonably cover catastrophic events, short of acts of God, by which the Canal temporarily ceased to exist; and the Culebra slide was such a happening.

[11] Thus is reached the final question: Did this accident of canals, in fact or by law, prevent Barber & Co. from performing either or both of their engagements, viz. their chartered obligation to redeliver, and their contracts of affreightment as stated in bills of lading.

In point of fact, there was no physical prevention. Barber & Co. have not in evidence attempted to prove that it was physically impossible to tranship. To be sure they did not even "try" at the time; but under the exigencies of suit they have given much evidence regarding the difficulties and dangers of unloading and reloading cargo at the Isthmus; there is no evidence regarding conditions at the nearer North American ports, those in the West Indies, at Durban or nearer

in Africa,—nor anywhere else in the world sufficiently near to “north of Hatteras” to enable redelivery to be made.

Indeed, this part of Barber’s defence rests on what in argument is called “commercial impossibility,” which on the evidence is no more than emphasis on the expense of keeping both engagements; and the result of the contention is undisguisedly that it would have cost Barber & Co. so much to keep both promises that therefore they have the right to put the loss on some one else, a contention sufficiently treated in the opinion below.

[12] But assuming that the doctrine of commercial impossibility might be invoked, the evidence does not require us to discuss it, in point of law. If impossibility of performance, commercial or otherwise, or the same thing disguised as “frustration of venture,” be a defense (as it sometimes is), it is one whereof the burden of proof is very heavily on him that advances it, and this record does not show effort anywhere, nor even the probable results thereof at any place, except at the Isthmus. This is not enough.

But taking Barber’s testimony at its fullest value, and holding that it would have been difficult, dangerous, and enormously expensive to deliver Themis cargo otherwise than in Themis, failure to redeliver by January 1st is still not excused. Assume that all the respondents had agreed with shippers to get that cargo to Australia, it remains true that they had agreed with each other than Gans Line should have the steamer by January 5th. Therefore it was their duty, and that of each of them, so to arrange their commitments as to keep all their contracts; and this they did by the form of bill of lading used. That bill left it possible to keep all engagements, under all circumstances that actually occurred, and, as between themselves, the duty of getting the goods to Australia was on Barber & Co.—assuming that the other parties did nothing to hinder or prevent them.

If the bill of lading had not permitted all the varieties of carriage that it did, if it had committed Themis to go to Australia, and the slide had happened as it did, the case would have been wholly different. Again, if the steamer had gone through the Canal in September, and, when entering Balboa on her return trip, had encountered a canal closure in latter December, the exception of accident of canal would have taken on quite a different meaning, or produced a different result.

It is further urged that owners have no recourse to the other respondents because all respondents acquiesced in “continuation of the voyage, after the Panama Canal was closed.” This is the legal inference above referred to, and rests on the truth that by the master the owner was at all times in possession.

The point becomes this: Either the master on his own responsibility should have refused to leave St. Lucia for Durban, or the owners or charterers should have ordered him at Durban to turn back. After Durban it was too late. There is no proof as to radio possibilities, nor evidence that Themis had a wireless apparatus.

As to the first possibility, it was the master’s duty under the employment article to obey all lawful orders of the subcharterer; there was

nothing obviously unlawful in the order. As to the second, the damage was done by that time. It was best to let bad enough alone.

If it were true in fact that all the respondents united in doing something for the pecuniary profit of Nova Scotia Company (which gained £5,000 for every month Barber & Co. detained the *Themis* from Gans), and to save Barber from transshipping expenses, much might still be said, on other grounds, for holding all respondents; but on the record it is enough to sum the matter up thus: The canal accident exception did not relieve Barber & Co. from carriage to Australia, because it did not prevent such carriage; the same exception did not relieve from the duty of timely delivery because there was no physical prevention of delivery, no proven "commercial impossibility" of delivery, and there was, under the bills of lading, a way to keep all lawful engagements, which is the highest duty of all men.

We have assumed throughout this case that all exceptions apply as completely to the primary or dominant duty of redelivery as to all or any other obligations. It is not necessary to discuss the possibilities of its importance.

It follows that the decree appealed from is right as to its findings of liability, and directions as to order of payment.

[13] The measure of damages under the abnormal condition of affairs during the great war is very perplexing. All parties concede that the Gans Line could not secure a steamer like the *Themis*. We do not think that it was its duty to secure two steamers aggregating her dead weight tonnage. To estimate the profits it would have earned had it received and used the steamer involves speculation to a degree, which as the Commissioner and the court below found, makes such a measure entirely unsatisfactory. It seems to us that the fair measure of damages is what the Gans Line could have got for the steamer in the market had she been delivered to it in time.

October 25 Barber & Co. offered the libellant 25 shillings per dead weight ton per month for a steamer of similar description. This Gans Line accepted, but when it named the *Themis*, Barber & Co. refused to take her as not available, she being then on her way to New Zealand. This acceptance was persuasive evidence of what they thought the value of the charter party. December 9 the Gans Line gave up further negotiations with Barber & Co., and charter rates had by that time risen, and were gradually rising. We find that 30 shillings per ton per month would have been a fair market rate for the steamer at and shortly after the last-named date.

Decree modified by reducing damages to 30 shillings per dead weight ton per month, and, as modified, affirmed, with half costs in this court to the appellants.

WARD, Circuit Judge (dissenting in part). I agree with the opinion of the court except as to the allocation of the Gans Line's damages between the owners, the Nova Scotia Company, charterers, and Barber & Co., Inc., subcharterers. My opinion is that the owners only should be held liable.

Imprimis, I lay out of the case two considerations to which great weight is given both by the District Judge and by this court.

The first is the provision contained in the charters and in the sub-charter that, while the master shall sign bills of lading as presented, the charterers will indemnify the owners against "all consequences or liabilities that may arise from the captain so doing." This very familiar clause applies only to claims of shippers under the bills of lading, and no such claim ever arose in this case.

The second consideration is the provision in Barber & Co.'s bills of lading as to transshipment. This was a privilege to the carrier, but both the District Judge and this court hold that it is a privilege which Barber & Co., Inc., were bound to avail of. On the contrary, I think they were not bound to do so if the transshipment would have prejudiced the shipper under the bills of lading, which manifestly was Barber & Co.'s view. The owners and the Nova Scotia Company, charterer, were likewise so bound, because the bills of lading, signed by the master, or by Barber & Co. for the master, were as much theirs as they were Barber & Co.'s.

It seems to me unreasonable to say that Barber & Co. should have discharged the cargo of 11,000 tons of general merchandise accepted by them as common carriers on a concededly proper voyage because the unexpected closure of the Canal made it impossible to redeliver the steamer at the dates fixed in the charters if the voyage were performed, or to say that the failure of Barber & Co. to instruct the master to transship at the island of Santa Lucia in the West Indies or at Durban, South Africa, and not the closing of the Canal, made redelivery on the agreed dates impossible.

It is very significant that this suggestion as to transshipment was made for the first time at the trial. Neither at the time the events happened nor in the pleadings in the cause did these experienced merchants and eminent lawyers make any such claim. No one of the parties interested dreamed of abandoning the Australian voyage, and after it had been performed the libel filed by the Gans Line and the petitions of the owners and of the Nova Scotia Company under the fifty-ninth rule (29 Sup. Ct. xlvii) was not that the voyage around the Cape violated the charter, but that the voyage originally planned, beginning September 12, 1915, via the Canal, violated the charter, because it made redelivery of the steamer at the charter dates impossible. Upon this latter question, however, both the District Judge and this court hold that the original voyage was reasonable and could have been performed in time for redelivery of the steamer to the owners, as agreed.

The question is whether the exception of dangers and accidents in the Canal contained in the charters to Nova Scotia Company and to Barber & Co., Inc., protects them against liability for failure to redeliver the steamer at the agreed dates because of the unexpected closure of the Canal. Of course this exception would not protect either the owners, the Nova Scotia Company, or Barber & Co., Inc., against claims of shippers if the voyage to Australia had not been performed, because manifestly the closure of the Canal would not have prevented per-

formance, but would only have made the time of performance longer. On the other hand, going around the Cape of Good Hope did make it impossible to redeliver the steamer at the agreed date, and, if it was the duty of the owners and of the Nova Scotia Company and of Barber & Co. to perform that voyage, as I think, and they apparently thought it was, then the owners have no claim against Nova Scotia Company or Barber & Co., Inc., for doing so.

McGINLEY v. MARTIN et al.

(Circuit Court of Appeals, Eighth Circuit. July 26, 1921.)

No. 5789.

1. Deeds §94—Previous agreements merged in delivered deed, in absence of ground for reformation.

All previous conversations or executory agreements, as an agreement for sale at a certain amount per acre, are merged in the delivered deed, conveying lands described by government divisions and subdivisions, for a gross sum, unless the evidence justifies a reformation of the deed for mutual mistake.

2. Covenants §125(4)—Damages for failure of title to part of land sold in gross is value of part lost and not proportion of price.

Where sale of lands described by government subdivisions was for a sum in gross, the measure of damages for breach of covenant for title, by failure of title as to some of the tracts, is not a proportional part of the purchase price, but the value of the land as to which title failed, so as to compensate for the actual loss, not exceeding the consideration paid, the lands being of unequal value.

3. Covenants §108(1)—Where sale is by government subdivisions, excess of acreage in one will not avail against failure of title of another.

Where sale is by government subdivisions, without any acreage being set out following the descriptions, excess of acreage in some of the quarter sections does not entitle the vendor to recover for excess, and consequently will not avail as against claim for damages for failure of title as to other subdivisions.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Action by Charles E. Martin and others against William McGinley. From an adverse decree, defendant appeals. Affirmed.

James A. Finch, of New Madrid, Mo. (Matt G. Reynolds, of St. Louis, Mo., and Thomas Gallivan, of New Madrid, Mo., on the brief), for appellant.

R. L. Ward, of Caruthersville, Mo. (Everett Reeves, of Caruthersville, Mo., on the brief), for appellees.

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

TRIEBER, District Judge. The parties will be referred to as they appeared in the court below, the appellees as plaintiffs and appellant as defendant. The action was originally brought on the law side of

the court to recover damages for breach of warranty of title to certain lands in the state of Missouri. The damages claimed were for failure of title to 58 acres, alleged to be of the value of \$100 an acre, 2 acres, of the alleged value of \$150 an acre, and 9 acres, alleged to be of the value of \$100 an acre, of the total value of \$7,000. It was also sought to recover the sum of \$1,800 by reason of a lease incumbering a portion of the land conveyed. As to the latter claim for \$1,800 the court found the issues in favor of the defendant, and, plaintiffs having taken no cross-appeal, this finding is not involved on this appeal.

The deed of the defendant to the plaintiffs contains the usual covenants of warranty, and conveys 5,238 acres for the sum of \$253,000, describing the lands by divisions and subdivisions of the government surveys, and not by acreage. The controversy is only over the 5,000-acre conveyance.

The answer of the defendant, so far as necessary to the determination of this appeal, sets up the following defenses:

(1) That the plaintiffs and defendant, prior to the conveyance mentioned in the petition, entered into a written contract which provided that the defendant would sell to the plaintiffs 5,000 acres of land in Pemiscot county, Mo., to be measured off the west side of an 8,500-acre tract known as the Franklin lands, the consideration to be \$48 an acre, making the total consideration \$240,000.

(2) That by mutual mistake of the parties the surveyor, who prepared the deed, included the lands for which this action is instituted, which did not belong to Franklin and were not intended to be conveyed, and no consideration was paid for them by the plaintiffs, and asks for a reformation of the deed, excluding said lands, in conformity with the terms of the written contract entered into by the parties prior to the execution and delivery of the deed of conveyance.

(3) That some of the governmental subdivisions contained more than the usual 640 acres to a section, and that the plaintiffs obtained the full 5,000 acres contracted for, although the title to the 69 acres failed.

By consent of parties the cause was transferred to the equity side of the court, and upon final hearing a decree entered denying reformation of the deed, and awarding to the plaintiffs the amount claimed by them for the failure of title to the 69 acres, with interest. The cause was heard on oral testimony in open court, and the court made the following findings of fact, which are fully sustained by the evidence and approved by us:

“(a) That lists giving descriptions by separate parcels of the ‘Franklin lands,’ held by defendant for sale, were furnished to plaintiffs; (b) that from these lists plaintiffs selected the various tracts which they proposed to buy; (c) that dealings were had, whereby plaintiffs and defendant finally agreed upon an average price per acre for the land so selected; (d) that in these dealings it was mutually agreed, or conceded, that the lands were not of the same value; and (e) that in the deed of conveyance the lands were described by the usual government subdivisions, no acreage of any parcel being mentioned or warranted. In other words, all these things show, particularly the deed itself—or the deed construed in the light of these facts—shows, that plaintiffs were buying and defendant was selling each of the tracts selected as individual entities, upon the mutual assumption that a section contained 640 acres; that the described half of a given section con-

tained 320 acres; that a given quarter section contained 160 acres, and so on. Stating it another way, plaintiffs bought and defendant sold upon the basis of the contents of the usual government subdivision, just as though there had been appended after each of such description the words 'more or less.' In fact, as already said, no acreages are set forth following the descriptions. * * *

"I find the issues against the defendant upon his affirmative defense and in favor of plaintiffs. This for the reason that the law is that the alleged mutuality of mistake, for which reformation may be had, must be made out by evidence which is so clear, cogent, and convincing as to leave no doubt in the mind of the court. This burden has not been even approximately met by defendant in this case; and the burden was upon defendant, who affirmatively urged this defense, to make it out by the evidence."

[1] One of the contentions by counsel for the defendant, and upon which a reversal is asked, is that the written contract of the parties, entered into before the final consummation of the sale should control, and it establishes the fact that the sale of the lands was not for a sum in gross, but for \$48 an acre, and that for this reason plaintiffs, if entitled to recover at all, can only recover at the rate of \$48 an acre for the 69 acres to which the title wholly failed. But the law is too well settled to require the citation of numerous authorities that, when a deed of conveyance is finally executed and delivered, all previous conversations or executory agreements are merged in the deed, unless the evidence justifies a reformation of it for a mutual mistake. *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, 647, 9 Sup. Ct. 645, 32 L. Ed. 1054; *Wright v. Phipps*, 90 Fed. 556, 571, affirmed 98 Fed. 1007, 38 C. C. A. 702; *Davidson v. Manson*, 146 Mo. 608, 620, 48 S. W. 635; *Dugan v. Kelly*, 75 Ark. 55. 86 S. W. 831; *Abbott v. Parker*, 103 Ark. 425, 147 S. W. 70. As the finding of the learned trial judge, warranted by the evidence, is that there was no mutual mistake authorizing a reformation, this contention cannot be sustained.

[2] It is next claimed that the amount of damages which plaintiffs were entitled to recover is the proportion the number of acres to which the title failed bears to the number of acres conveyed. Ordinarily the measure of damages for a breach of a covenant for title to a part of the land conveyed is limited to the proportionate part of the purchase price for the whole, with interest. But this rule is limited to conveyances when the price for the land sold was by the acre, or if a city lot by the foot, or where the value of the entire tract is uniform; but it does not apply when the land is sold for a gross sum and the value of the different tracts is not uniform, but some part is more valuable than other parts. In such cases the measure of damages is the value of the land, to which the title failed, so as to compensate the covenantee for the actual loss sustained by him by reason of the eviction, not exceeding the consideration paid. As stated in *Griffin v. Reynolds*, 58 U. S. (17 How.) 609, 611, 15 L. Ed. 229:

"The measure of damages is the loss actually sustained by the eviction from the land for which the title has failed, and that damage would not usually be ascertained by taking the average value, though the recovery could not exceed the consideration paid, interest, and expenses of suit."

See also *Semple v. Whorton*, 68 Wis. 626, 32 N. W. 690; *Raines v. Calloway*, 27 Tex. 678.

In the last-cited case, the Supreme Court of Texas said:

"The jury found that there was a failure of title to the 681 acres, and they valued these 681 acres at the average value of the whole amount of land conveyed; whereas, the true measure of damages, if there was in fact a failure of title to any portion of the land, would be the actual value of the particular lots or parcels to which there was a failure of title, to be ascertained by their relative value compared with the balance of the land, assuming the price agreed on by the parties as the value of the whole."

This was reaffirmed in *Hynes v. Packard*, 92 Tex. 44, 45 S. W. 562, the court holding:

"If the land lost was of no value, plaintiff was entitled to nothing; and, if of 'little value,' the amount should have been proved."

The evidence establishes beyond question that the value of these lands is not uniform, and that the land from which the plaintiffs were evicted is of the best conveyed to them. It would certainly not be compensation for the loss to allow only for the value pro tanto of the consideration paid for a large tract, if the purchaser is evicted from the most valuable part of the land conveyed, leaving him only the least valuable part.

A purchase of 640 acres of land for \$32,000 would be, supposedly, at \$50 an acre. It may consist of 320 acres of highly improved land, with valuable buildings on it, while the other 320 acres may be wild lands, with no improvements of any kind, some of it, perhaps, unsuitable for cultivation. The title to the improved 320 acres fails, and the purchaser is evicted therefrom, leaving him only that part of the purchased tract, which is of but little value. Would he be compensated for the damage sustained by the failure of title to the valuable lands, if limited to a recovery of the purchase price pro tanto? Clearly not. In such a purchase the improved part may have been estimated by the parties as of the value of \$80 an acre and the other at \$20 an acre; but the consideration paid for the entire tract was at the average rate of \$50 an acre.

The principal case on which the defendant relies is *Conklin v. Hancock*, 67 Ohio, 455, 66 N. E. 518. But in that case the petition expressly charged that the sale of the land was for \$500 an acre; that by reason of the addition of the 3.24 acres (the tract to which the title failed) the consideration was increased by the sum of \$500 an acre, amounting to \$1,620, for which judgment was asked. The answer admitted these allegations, but denied that the 3.24 acres were worth \$500 an acre, except that, in view of the value of the 260 acres conveyed, and to which there was no failure of title, it was well worth it. Nor was there any evidence to show that the value of the 3.24 acres was not the same as that of the 260 acres. The court in its opinion in that case fully recognized the rule adopted by the court below in the instant case. It held:

"The general rule, as recognized in this state and in most other jurisdictions, is that, if the land is not all of the same quality, the measure of damages is such proportion of the consideration as the value of the land of which the grantor was not seized bears to the value of the whole premises. * * * On the other hand, it must be conceded that, where the land conveyed is all of the same quality, the measure of damages is such proportion of the con-

sideration as the quantity of the land lost bears to the whole quantity conveyed; for it must be obvious that when a deed conveys a stated quantity of land, which is uniform in quality or value, for a consideration expressed in gross amount, the actual loss upon which a breach of the covenant of seisin as to a part would be a part of the consideration determinable by the proportion which the part of the land to which the title failed bears to the whole quantity conveyed."

In *Stewart v. Hadley*, 55 Mo. 245, one of the pleas, as in the case at bar, asked for a reformation of the deed for a mutual mistake. The court found that the recital by the deed giving the consideration in gross was by a mutual mistake and reformed it. Numerous other cases are cited by counsel, which have been carefully examined; but they are based upon facts differing from those in the case at bar, and therefore inapplicable. That evidence to show that the consideration recited in a deed was not the true consideration is admissible is beyond question, but there is no such issue in this case. The consideration set forth in the deed is admitted to be that paid by the plaintiffs.

[3] The contention that as some of the governmental quarter sections conveyed contained more than 160 acres, and that the plaintiffs have received as many acres as they paid for is untenable. As found by the learned trial judge:

"Plaintiffs bought and defendant sold upon the basis of the contents of the usual government subdivision, just as though there had been appended after each of such description the words 'more or less.' In fact, as already said, no acreages are set forth following the descriptions."

In such descriptions there can be no recovery by either party for a greater or less amount of acres in the subdivision. *Wood v. Murphy*, 47 Mo. App. 539; *Jeffords v. Dreisbach*, 168 Mo. App. 580, 584, 153 S. W. 274.

The decree is for the right parties, and is affirmed.

THE STIFINDER.

Petition of ACTIESELSKABET CHRISTIANSAND.

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

No. 168.

1. Collision ⇄77—Steamer to keep lookout.
Every steamer is required to have at least one lookout in the eyes of the ship.
2. Collision ⇄43—Steam vessel to keep out of way of sailing vessel.
When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.
3. Collision ⇄44—Sail vessel should hold her course as to care toward steam vessel.
It is the primary duty of a sailing vessel as to risk of colliding with steam vessel to hold her course and speed, and to do so as long as the steamer can avoid collision.

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

4. Collision ⚡108—Acts of sailing vessel, in agony of collision with steamer, immaterial.

When it becomes apparent to a sailing vessel that a steamer does not intend to conform to the law concerning its duty to keep out of the way of the sailing vessel, what is done or omitted to be done by the sailing vessel in the agony of collision can make no difference, as it is impossible to consider a decision so made as a fault.

5. Collision ⚡48—Burden on vessel to justify departure from rules.

When a sailing vessel departs from the rule as to holding her course and speed when collision with a steamer is imminent, the burden of proof rests upon her to justify the departure, taking upon herself the obligation of showing both that her departure was necessary at the time it took place in order to avoid immediate danger, and that the course adopted was reasonably calculated to avoid that danger.

6. Collision ⚡49—Strong case must be made out against sailing ship colliding with steamer.

In cases of collision between a steamer and a sailing vessel, a strong case must be made out if the sailing vessel is to be held in fault.

7. Collision ⚡49—Steamer colliding with sailing vessel held in fault.

In a proceeding by the owner of a sailing vessel colliding with a steamer for limitation of liability, *held* that the steamer was solely in fault.

8. Collision ⚡11—Rules rigorously enforced.

In controversies arising out of collisions between vessels, the courts should rigorously enforce the collision rules, that the object for which they were framed may be attained.

9. Collision ⚡154—Admiralty rule promulgated after collision not necessarily controlling.

Rule 7 of the Admiralty Rules of Practice (267 F. viii) promulgated by the Supreme Court on December 6, 1920, to become effective on March 7, 1921, providing that if costs shall be awarded by the court to either or any party, then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in the suit shall be taxed as part of the costs of that party, was not necessarily controlling in a collision proceeding wherein the costs were taxed before such rule was promulgated.

10. Admiralty ⚡124—Cost of stipulation included in costs.

In a proceeding to limit liability of a vessel arising out of a collision, where the right to limit was contested, *held* that the cost of stipulation should have been included in the amount of costs taxed, though the costs were taxed prior to the promulgation of rule 7 of the Admiralty Rules of Practice (267 Fed. viii) by the Supreme Court.

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

In the matter of the petition of the Actieselskabet Christiansand, owner of the Norwegian bark *Stifinder*, for limitation of liability in connection with a collision with the steamship *Selje*, owned by the Aktieselskabet Rederiet Odfjell, and carrying a cargo owned by the Cerro de Pasco Corporation. Decree for petitioner, and the owners of the *Selje* and cargo appeal. Modified and affirmed.

The cause came here on appeal from a final decree entered on February 3, 1919.

The case arose out of a collision between the Norwegian bark *Stifinder* and the Norwegian steamship *Selje*, which occurred in the Atlantic Ocean on May 24, 1917, and which resulted in the sinking of the steamship with her cargo, there being a total loss.

The petitioner, Actieselskabet Christiansand, is, and was at all the times mentioned herein, the sole owner of the *Stifinder*. It is a corporation exist-

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

ing under the laws of the kingdom of Norway, and it has its place of business at Christiansand, Norway. It brought this proceeding for the purpose of exonerating the vessel or of limiting liability to the value of the vessel and her pending freight, i. e., \$322,595.46.

Aktieselskabet Rederiet Odfjell is a corporation existing under the laws of the kingdom of Norway and as owner of the steamship Selje filed a claim in the sum of \$1,200,000, the value of the steamship.

Cerro de Pasco Copper Corporation is a corporation organized under the laws of the state of New York, and has its principal place of business in the city of New York. As owner of the cargo of coke which was shipped on the Selje, it filed a claim in the sum of \$111,601.40; that being the value of the cargo.

The court below dismissed the libels on the ground that the collision was due solely to the fault of the Selje.

Harrington, Bigham & Englar, of New York City (Vine H. Smith, of New York City, of counsel), for appellants.

Haight, Sandford, Smith & Griffin, of New York City (John W. Griffin, of New York City, of counsel), for appellee.

Duncan & Mount, of New York City (O. D. Duncan and Warner C. Pyne, both of New York City, and Raymond B. Stefferson, of counsel), for the Selje.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is a proceeding in admiralty to limit liability for the loss of the steamship Selje. As indicated above the proceeding grew out of a collision on the Atlantic Ocean in May, 1917, between the Stifinder, a sailing vessel, and the Selje, a steam vessel. As a result of the collision the steamer, valued at \$1,200,000, was lost along with its cargo which was valued at \$111,601.40. The court below dismissed the proceedings on the ground that the sailing vessel was the privileged vessel and had a right, under the circumstances of the particular case, to keep its course and speed.

The Stifinder was built of steel; had one deck of wood, and three steel masts; was 252½ feet in length and her beam was 39 feet. She sailed from Savannah, Ga., on May 22, 1917, carrying a cargo of 2,764 tons of cotton seed oil cake, and was bound for Denmark, via Halifax.

The steamship Selje was 293 feet long, and her beam was about 43 feet. Her dead weight was 3,750 tons, and her gross tonnage was 2,186. She left Baltimore on May 22, 1917, with a full cargo of coke, consisting of about 2,522 tons, and was bound for Callao, Peru.

The collision occurred some 30 miles to the southward of Diamond Shoal Lightship, in the early morning of May 24, 1917, at about 3:10 a. m. The night was dark, but the atmosphere was clear. There was a steady fresh breeze from the north, and a moderate sea was running. The stem of the Stifinder struck the steamer's starboard side in the way of No. 1 hatch, and the steamer sank within 8 or 10 minutes thereafter, her crew being picked up by the Stifinder. Everything was lost, including the ship's papers and the clothes of the crew other than that which they were wearing.

The Stifinder was on a course of E. N. E., and was sailing on the port tack, six points from the wind, which was as close as she could sail, and was making seven knots. She was carrying all her lights, and they were burning brightly. And the red light on that kind of a night could be seen about 3 miles. The Selje's course was S. $\frac{1}{4}$ W., and she was traveling at eight knots.

It was a good night for seeing lights and those in charge of the sailing vessel (Stifinder) saw the steamer Selje several miles away; and upwards of half an hour before the collision, and thereafter kept her constantly in view. The first mate who was in charge said that he saw through his glasses at 2:30 the two mast head lights of the Selje. The lookout reported the lights and they were about five points on the port bow. The lights seen were the white lights, and afterwards about 10 minutes before the collision the green light was observed. The red light was not seen.

[1] Until a few minutes before the collision the Selje was in charge of the second mate, 22 years of age, who had just obtained his certificate. The captain had turned in about 9 or 10 o'clock, and was not thereafter on the bridge. He was aroused from sleep by hearing the signal given to the engine just before the collision, and went right on deck, and the collision followed within 10 seconds thereafter. The wheel was hard astarboard, and the engines were going at full speed ahead when he reached the deck, and he ordered them immediately stopped. The mate had previously ordered them full speed astern, and before that order could be executed had ordered them full speed ahead. The lookout was not in his place, having left it some 5 or 6 minutes before the collision. It does not appear that any one had taken his place, and the second mate, who was in command and on the bridge, had not been informed that the lookout had left his post. And a lookout is both "the eyes and ears of the ship." The *Sagamore*, 247 Fed. 743, 754, 159 C. C. A. 601. Every steamer is required to have at least one lookout in the eyes of the ship. The *Colorado*, 91 U. S. 692, 23 L. Ed. 379; The *Oregon*, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943; The *Ottawa*, 3 Wall. 268, 18 L. Ed. 165. The mate said that he had not seen the Stifinder until just before he gave the signals which brought the captain to the bridge. The captain testified:

"Q. Did the second mate give you any reason why he hadn't seen the sailing vessel sooner? A. No; he said absolutely he had been on the bridge and had sharp lookout as usual, and absolutely not observed the sailing vessel before she was close to, and then he saw his light."

Nearly an hour after the collision, while it was still dark and while he was in the lifeboat, the captain could see the Stifinder when she was 3 miles away, so he testified. As there is no doubt that the Stifinder's lights were burning brightly prior to the collision, the failure of those on the steamer to see her can only be explained by the fact that the lookout was not at his post, and the mate in command at the time was inattentive to his task. The fault of the Selje was, beyond all question, gross and inexcusable.

The following is an excerpt from the testimony of the officer in charge of the Stifinder:

"Q. How near was the steamer to you when you got back aft? A. About 600 feet.

"Q. She was pretty close then, was she? A. Yes.

"Q. When was it that you first thought there was probably going to be a collision? A. When I went aft. I thought I wasn't sure yet before I came on the poop; I wasn't sure.

"Q. At that time you think the steamer was about 600 feet or so away? A. About 600 feet.

"Q. You were still on your same course? A. On our same course.

"Q. What could you have done, if anything, to have avoided collision? A. I couldn't see. I couldn't do anything then.

"Q. Up to that time what had you thought about what the steamer was going to do, or might do? A. I thought he was going ahead of me, clear of my bow. Most of the steamers try to do the same thing. I thought he was the same kind of man, to try to do the same thing. He was going faster than I was.

"Q. Before this time when he got so close were you able to tell whether he was going to keep on going, or reverse his engines, or what he was going to do? A. No; I couldn't tell about that.

"Q. Why was it you held your course? A. If I had changed my course in any way, if I had fell off the ship, he would hit me amidships; if I had luffed up to the wind, I would have had him amidship.

"Q. So you thought it was best to hold your course and speed? A. Yes.

"Q. And that was what you did? A. That is what I did; it was my duty to do the best I could.

"Q. How long, with the weather conditions as they were that night, would it have taken you to change your course either direction, say five points? A. Take about 5 minutes to change the course, before she would swing any.

"Q. As you look back at the matter now, was there anything, as you see it to-day, that you could have done to help matters? A. No; I can't see anything."

[2, 3] If the mate's estimate is correct that the boats were about 600 feet apart when he made up his mind that a collision was inevitable, the collision actually took place about half a minute thereafter. The District Judge has found, and we think rightly, that until the vessels were some 600 feet apart the steamer could, by proper use of helm and engines, have avoided collision. If that is so, then up to that moment the Stifinder had a right to suppose that the steamer would change her course and the collision would be avoided.

In the Highgate, 6 Asp. M. C. 512, 514, Sir James Hannen said:

"A steamer is able to manœuvre so as to keep out of the way of another vessel even when very close to her. I have had occasion to comment on the practice with reprobation, as experience in this court teaches that steamers very often cut it exceedingly fine. How is a sailing vessel to know that a steamer is not going to cut it fine, or to know in what particular direction she will move at the last moment? The guide of the steamer's action is the presumption that the sailing vessel will keep her course."

The rule is that—

"When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

The primary duty of a sailing vessel is to hold her course and speed, and to do so as long as the steamer can avoid collision. Not to do so is to add to the dangers of the situation. In the present case no duty devolved upon the bark to make any movement to change her course until after it became evident to those in charge of her that the steamer

could not do anything to avoid collision. *Maguire v. Sylvan Glen* (D. C.) 2 Fed. 910.

[4] The Stifinder's duty was to keep her course and speed in the expectation that the *Selje* would obey the law and keep out of the way. When it became apparent that the steamer did not intend to conform to the law, the vessels were then in extremis, and what was done or omitted to be done by the Stifinder in the agony of collision can make no difference, as it is impossible to consider a decision so made as a fault. We agree with the learned counsel who argued this case for the petitioner that to enter upon intricate calculations of what could or could not have been done in 40 seconds, illustrated by elaborate diagrams involving days of labor, and to require that the decision of a seaman, confronted with a sudden emergency and obliged to act on the instant, shall be judged by such calculations and diagrams made weeks afterwards, would be a travesty.

In *The Fannie*, 11 Wall. 238, 240, 20 L. Ed. 114, a schooner meeting a steamer approaching her on a parallel line with the difference of half a point in the courses of the two collided. The steamer alone was held at fault. The court said:

"The steamer was bound to keep out of the way of the schooner, and to allow her a free and unobstructed passage. Whatever was necessary for this, it was her duty to do, and whatever obstructed or endangered the schooner in her course it was the duty of the steamer to avoid. There was but a single obligation resting on the schooner. It was passive rather than active, the duty to keep on her course. If, therefore, the schooner did not change her course, so as to embarrass the steamer and render it impossible, or at least difficult, for her to avoid a collision, there can be no doubt that the steamer alone is answerable for the damages."

And the above was approved and followed in *The Lucille*, 15 Wall. 676, 679, 21 L. Ed. 247.

[5] If the sailing vessel had disregarded the ordinary rule of holding her course and speed, having made up her mind that the steamer was not intending to perform the duty of a burdened vessel and keep out of her way, and at the same moment that she changed her course the steamer had also changed, there would be reason for thinking that she would have been held liable for the collision which ensued. The *Marguerite* (D. C.) 87 Fed. 953, 959. In *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469, a sailing vessel in the straits of Fuca believed that collision with a steam tug was imminent, and, instead of keeping her course, as the privileged vessel, changed it when about one-third of a mile from the place of collision, and put her helm hard astarboard thinking it necessary to do so to escape collision. The collision would not have occurred if the sailing vessel had kept her course and she was held solely at fault. In all such cases it has been said that when a ship departs from the rules the burden of proof rests upon her to justify the departure. She takes upon herself the obligation of showing both that her departure was necessary at the time it took place in order to avoid immediate danger, and that the course adopted was reasonably calculated to avoid that danger. See *Elizabeth Jones*, 112 U. S. 514, 523, 5 Sup. Ct. 468, 28 L. Ed. 812; *Eliza-*

beth Jenkins, L. R. 1 P. C. App. 501; *The Columbian*, 100 Fed. 991.

In *The Lafayette* (C. C. A.) 269 Fed. 917, decided by this court, and which involved a collision between a steamer and a sailing vessel in which the latter vessel kept her course unchanged up to the very moment of collision, the steamer was held solely at fault. We declared that—

“When a vessel is put in great peril without any fault of her own, the question of her negligence in a sudden emergency does not depend upon whether she did everything she might have done or pursued the best possible course. In such cases the rule is that a mistake made in the agony of almost certain collision is regarded as an error for which the vessel that caused the peril should alone be held responsible.”

And see *The Nacoochee*, 137 U. S. 330, 340, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Nichols*, 7 Wall. 656, 666, 19 L. Ed. 157; *The Carroll*, 8 Wall. 302, 19 L. Ed. 392; *The Oregon*, 18 How. 570, 15 L. Ed. 515; *The Shawmut* (D. C.) 261 Fed. 616, 622.

[6, 7] The case under consideration being one of collision between a steamer and a sailing vessel, we may again point out what we also referred to in *The Lafayette*, supra, that in this class of cases a strong case must be made out if the sailing vessel is to be held in fault. We do not think in this case, as we did not think in that case, that the circumstances are such as to justify us in saying that the sailing vessel was in fault for holding her course. The Selje's fault was gross and the blame is hers alone. It would neither be justice, nor in accordance with the established principles of the admiralty law, to compel the Stifinder to bear any part of the loss which resulted from the flagrant misconduct of the other vessel, it not having been made apparent that the Stifinder committed any fault whatever prior to the time when the Selje put her in extremis. We add what we have already indicated, that we do not find that she committed one then.

[8] It is necessary that the courts should rigorously enforce the collision rules that the object for which they were framed may be attained. As the Supreme Court said in *Belden v. Chase*, 150 U. S. 674, 699, 14 Sup. Ct. 264, 272 (37 L. Ed. 1218):

“Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules.”

Undoubtedly there are cases in which sailing vessels and steamships have collided in which the sailing vessels have been held in fault for not changing their course. But all such cases have involved exceptional circumstances. Such a case was the *Sunnyside*, 91 U. S. 208, 23 L. Ed. 302. In that case a collision occurred on Lake Huron 3 miles from shore, between a sailing vessel and a steam tug. The tug, in conformity with a well-known usage in these waters, was waiting for her tow, with her machinery stopped, and was drifting. The sailing vessel kept her course, and the court held that under the special cir-

cumstances the right of the sailing vessel to keep its course applied as to vessels in motion, but not to vessels at anchor, or lying at a wharf, nor to steam tugs lying with their helms lashed waiting for employment. But in the instant case there are no special circumstances to take it out of the general rule.

When the petition for exoneration from or limitation of liability by the owner of the *Stifinder* was filed the court entered an order, as is usual in such cases, appointing a Commissioner to appraise the value of the petitioner in the vessel and her pending freight. On the coming in of the Commissioner's report it was confirmed by the court, and an order was entered, requiring that the petitioner either pay into court the appraised value, with interest, or at its option give a stipulation for the payment for value in the sum of \$327,595.46. And when the final decree was entered the petitioner sought to tax the cost of this stipulation, which amounted to \$1,613, but the clerk declined to include it in the amount of the costs taxed. In this refusal he was sustained by the court below. The petitioner asks for a review of this ruling.

In *The William E. Gladwish*, 215 Fed. 900, 132 C. C. A. 138, this court had a like question before it. A vessel owner, whose petition for limitation of liability was granted and who gave a stipulation for release of the vessel, claimed, on her complete exoneration from blame, that he was entitled to the amount of \$360 paid as premiums on the stipulation. The court below allowed the Gladwish the full costs of the litigation, but refused to allow the \$360 paid by her owner for her release.

This court sustained the court below and said:

"The limitation of liability was allowed in the interest of the *Gladwish*. She alone profited by this proceeding, which was *ex parte*. The owner of the barge and her cargo did not contest the right to limit the liability of the tug. It would have been entirely satisfactory to them to have placed her in the hands of a trustee, but her owners evidently thought that they should have the use of the tug during the litigation, and so, solely for their benefit, she was released and bonds substituted."

The W. A. Sherman, 167 Fed. 976, 93 C. C. A. 228, also involved a limitation of liability. This court in that case stated the rule as follows:

"After a petitioner has surrendered his vessel or given a stipulation for or paid the amount of her appraised value into court, he has no further concern in the proceeding, unless claimants contest his right to limit or he contests his liability. Expenses he has incurred for the purpose of availing himself of the act of Congress he should stand. They are such as cost of filing petition, and stipulations for costs and value, premium, if any, for stipulations, expense of appraisal, or of bill of sale transferring the vessel, commissioner's report on appraisal, expert fees, etc. If any issue is contested in the proceeding between the petitioner and the claimants or any claimant, the costs should fall as usual upon the losing party. They are such as witness fees, mileage, deposition fees, proctor's fee. The cost of bringing in the creditors, such as filing, issuing, and publishing the monition, should be paid out of the fund, on the principle that it should administer itself, and this duty to administer itself applies even when, the petitioner being held not liable, there is no other distribution than to return it to him."

In the case above two issues were involved: First the petitioner's right to limit; and, second, the petitioner's liability. Of these two issues only the last was contested.

The instant case is distinguishable from the two cases above referred to, in that in those cases the petitioner's right to limit liability was uncontested, while in this case it was contested. In *The Wm. E. Gladwish* Judge Coxe expressly stated in his opinion that the right to limit the liability of the tug was uncontested. And in *The W. A. Sherman* Judge Ward's opinion also states that the only contested issue was that of liability.

[9] We observe also that rule 7 of the Admiralty Rules of Practice (267 Fed. viii), promulgated by the Supreme Court of the United States on December 6, 1920, to become effective on March 7, 1921, provides as follows:

"If costs shall be awarded by the court to either or any party, then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."

The above rule was not in force, and had not even been promulgated when the costs were taxed on February 2, 1920, and is not therefore necessarily controlling upon the question now under consideration.

[10] But as this court in denying the right to tax the costs of a stipulation for value in proceedings for a limitation of liability has heretofore carefully confined its ruling to cases where the right to limit has been uncontested, we think that as the right to limit was contested in the present case, and the court below did award costs, that the cost of the stipulation, amounting to \$1,613, should have been included in the amount of costs taxed.

The decree, subject to the modification above indicated, and which is directed to be made, is affirmed.

The LEXINGTON.

(Circuit Court of Appeals, Second Circuit. July 15, 1921.)
No. 239.

1. Collision ⚡37—Tug in fault for collision between tow and crossing steamer.

A tug with barges in tow alongside *held* solely in fault for a collision between her tow and a crossing steamer approaching from starboard for violation of the starboard hand rule, which made her the burdened vessel and required her to keep out of the way and to avoid crossing ahead, instead of which she kept her course and speed on the assumption that the steamer would follow her usual course and turn to port before the vessels met.

2. Collision ⚡90—Narragansett Bay not "narrow channel."

Narragansett Bay, which is customarily navigated in all directions, is not a narrow channel, and the starboard hand rule applies to navigation therein.

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

3. Collision ⚓144—Contributory fault must be clearly shown.

Where the fault of one vessel for a collision is established beyond question, she is not entitled to a division of damages with the other except on clear proof of a fault not made in extremis.

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

Suit in admiralty by Elmer A. Keeler against the steamer Lexington; the Colonial Navigation Company, claimant. Decree for respondent, and libellant appeals. Affirmed.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. [1] This is a suit in admiralty to recover damages for a collision which occurred on January 21, 1919, at about 3:45 a. m. in Narragansett Bay. The suit seeks to recover damages for injuries which were sustained by the barges Kathryn A. Keeler, the Lusitania, and the Penn, while in tow of the tug Elmer A. Keeler. The court below dismissed the libel and held the Keeler solely at fault for the collision.

The Lexington is a single screw steel freight and passenger steamer 246 feet long with 46 feet beam. At the time of the collision she was proceeding on her regular trip from New York to Providence, and was in charge of a licensed pilot. A quartermaster was at the wheel and a lookout was stationed on the bow. All lights were set and burning.

The tug Elmer A. Keeler was in charge of her pilot. She was bound from Providence to Newport, and had in tow the barges Kathryn A. Keeler and the Lusitania on her starboard side, and the Penn and William S. Keeler on her port side. These barges were light coal boats. The tug had her lights burning. The Keeler had passed Rose Island and was headed for Lime Rock Light, intending to go around the southerly end of Goat Island to Newport, and she was on the easterly side of the channel when passing Rose Island. As the Lexington was passing the Dumplings, on a course from Castle Point N. E. by E. $\frac{1}{2}$ E. heading for Newport Light, she observed the green light and towing lights of the tug Keeler bearing three or four points on the port bow. The regular course of the Lexington after reaching the Dumplings on her way to Providence was N. $\frac{1}{2}$ E., and the pilot in charge of the Keeler expected the Lexington, when the Dumplings were abeam, to pursue her regular course up the channel. The navigator of the Lexington, when a short distance below the Dumplings, saw the green light of the Keeler close to Rose Island, and observed by the lights that she had a tow alongside. The distance between the Lexington and the Keeler at this time has been estimated at between

one-half and three-quarters of a mile by the pilot of the *Lexington*, and by the pilot of the *Keeler* a little more than a mile. The *Keeler* kept on her course toward Lime Rock Light, all the while expecting the *Lexington* to starboard her wheel when off the Dumplings and proceed on her regular course to Providence up the channel by Rose Island. The chart shows that from the Dumplings to Providence the channel is buoyed. The *Lexington*, after passing the Dumplings, still exhibited her red light to the *Keeler* instead of her green light. The *Keeler* gave a signal of two whistles, which was immediately answered by the *Lexington* by a similar signal. The distance between the two vessels at the time this signal of two whistles was given was about one-half mile. The green light of the *Lexington* was not observed by those of the *Keeler* except at the time of the collision. The *Lexington* was showing her red light only. The vessels were on crossing courses. The *Keeler* had the *Lexington* on her own starboard hand. The *Lexington* kept her course and speed. The *Keeler* blew no signals, but continued to show her green light only—of her side lights. No other vessels were in the vicinity to interfere with navigation, and there was plenty of room for the *Keeler* to have passed under the *Lexington*'s stern. Suddenly the *Keeler* blew two blasts, indicating that she would attempt to cross the *Lexington*'s bow. The *Lexington* immediately answered with two blasts, put her engines full speed astern, and blew three blasts, indicating that her engines were backing full speed. She succeeded in getting her way nearly off, but her stern struck the starboard side of the *Lusitania*, the *Keeler*'s starboard outside barge, causing serious damage. The *Lexington* sustained no damage.

Article 19 of the rules provides that—

“When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.”

It is conceded that the *Keeler* and the *Lexington* were on crossing courses. It is also conceded that the *Keeler* had the *Lexington* on her own starboard hand. Under article 19 the *Keeler* was bound to keep out of the *Lexington*'s way. Therefore, under article 21, the *Lexington* was entitled to keep her course and speed. And this she did until the *Keeler* made the attempt to cross the *Lexington*'s bow. Then the *Lexington*, as already indicated, put her engines full speed astern and backed.

Until the *Lexington* reversed her engines upon receiving the two-blast signal from the *Keeler*, which was about two minutes before the collision, she was proceeding at her regular speed of 14 or 15 miles an hour and bucking an ebb tide. The *Keeler* was making 4 or 5 miles an hour. The engineer of the *Keeler* testified that his boat was proceeding at full speed. This is an excerpt from his testimony:

“Q. Do you remember when the collision occurred? A. Yes.

“Q. And the vessel did not change her speed at all? She continued at full speed? A. Yes; if I remember correctly, she continued at full speed.”

In this, however, his testimony differed from that of the pilot of the *Keeler*. The pilot's testimony was as follows:

"Q. First let me ask you about how far away do you judge the Lexington was when you first saw her? A. A little more than a mile.

"Q. And about how long do you think it was from the time you first saw her until the collision? A. About three or four minutes.

"Q. About how long was it from the time you saw her until you blew your two? A. A couple of minutes.

"Q. That is, you were approaching her, showing your green, and she was approaching you showing the red, and you were on crossing courses for a couple of minutes before you blew her anything? A. Yes, sir.

"Q. And then you tried to cross her bow, from port to starboard, didn't you? A. Yes, sir.

"Q. What makes you think that you stopped and reversed your engines? A. To lessen the collision.

"Q. What? A. I thought that would be the best thing I could do to lessen the collision.

"Q. I thought you testified that you blew two in order to cross her bow. Why didn't you keep full speed ahead to cross her bow? A. When I saw she was so close that there was to be a collision, I stopped and backed.

"Q. After you blew the two, you decided you could not make it, and then you stopped and backed. Is that right? A. No, sir.

"Q. That is not right? A. No, sir.

"Q. Well, what is right? A. When I saw she was so close that she did not change her course, but come so close that there would be a collision, I stopped and backed.

"Q. She had already blown alarms then, hadn't she? A. Yes, sir.

"Q. And that is why you stopped and backed? A. Yes, sir.

"Q. You did not appreciate that you could not make it until after she blew alarms? A. Just shortly after she blew alarms, when I saw she came so close.

"Q. Those alarms followed pretty quickly after the two blasts, didn't they? A. A short time after; yes, sir."

The pilot stated, what undoubtedly was the fact, that if he had not known that the boat was the Lexington, and had not expected her to pursue a course she was accustomed to take up the channel, and to do so would starboard her wheel, he would not have done what he did do, but would have passed under the Lexington's stern. This is an excerpt from his testimony:

"The Court: Let me ask you: Now, if you had regarded the course of the vessels, your vessel and the Lexington and the lights only, what did you think your duty was? Get out of your mind that you supposed that the Lexington would make the turn and go up straight. Suppose it was not the Lexington, but suppose it was some other vessel. What would you regard it your duty to do?

"Witness: I would have gone under his stern.

"The Court: You would port your helm and go under her stern?

"Witness: Yes, sir.

"The Court: If it was any other vessel—a vessel you didn't know?

"Witness: Yes, your honor.

"The Court: You did not do that on this occasion, did you?

"Witness: No, sir.

"The Court: And I suppose the reason was that you had it in your mind that ordinarily the Lexington went up, turned the Dumplings, or near there, and then went on straight?

"Witness: Yes, your honor."

The District Judge in dismissing the libel stated his opinion of this assumption as follows:

"I got the impression from his testimony that what was bothering him was his conception that the Lexington would take the course which from his

point of view she usually took. He had no right to assume that, because otherwise you would substitute for very necessary orderly rules of the road the guess of the master of one vessel as to what was in the mind of the navigator or the master of the other, and that would be a very unsafe guide. The particularity with which in this circuit the obligations of the starboard hand rule have been stressed, it seems to me, is due to the fact that when a situation becomes at all troublesome, the navigation is much safer if a definite rule is adhered to, except perhaps in the circumstances which must be considered in some cases of some very extraordinary situation where the exercise of prudent judgment might dictate something else. But I am rather convinced that it is an important requirement that the rule be very strictly obeyed."

[2] It is argued on behalf of libelant that the pilot of the Keeler was justified in assuming that the Lexington would pursue her regular and customary course. The argument addressed to us was that after the Lexington left the outside waters and reached the Dumplings she was then in the waters governed by the narrow channel rule, and in that situation exhibition of one side light or the other does not necessarily invoke the application of the rules based on the exhibition of lights. While approaching the Dumplings from Castle Hill the Lexington was exhibiting her red light, and after reaching the Dumplings, in order to proceed to Providence, she would have to starboard her wheel, and if she was upon her regular course she would have exhibited to any vessel in the location of the Keeler her green light. Pursuing the course N. E. by $\frac{1}{2}$ E. past the Dumplings would soon inevitably bring the Lexington upon Goat Island. She must change her course after passing the Dumplings or become a wreck, and the pilot of the Keeler was justified in applying ordinary intelligence as to what the Lexington was expected to do.

And our attention is called to the case of *The Arrow*, 214 Fed. 743, 131 C. C. A. 49, decided by this court, and in which we said:

"We do not think that the navigation of the vessels when encountering each other at Horn's Hook was to be controlled by the starboard hand rule for vessels on crossing courses, although at some time their respective headings were such that their courses if prolonged would cross. The Supreme Court, in *The Victory* and *The Plymothian*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, held that the starboard hand rule is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other; that vessels must be known to follow the courses of the river bank; that, although vessels navigating in a river may sometimes be on crossing courses under the rule, that depends on their presumable courses; that the question always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment. We are not satisfied that it is safe and proper presumption that a vessel bound down the Harlem River which has reached the light above Horn's Hook, keeping along the New York shore on her way down, is going to take the easterly rather than the westerly channel to pass Blackwell's Island. Either course is open to her. A vessel coming up the river in that locality is 'meeting' a vessel coming down, and, if she wishes to navigate on the theory that the vessel she is meeting is going to cross over at that point, she should ascertain if that be the intention by exchange of signals. Until such intention be thus developed the safe course for both vessels is to follow the 'meeting' rule."

The doctrine of the above case contemplates navigation in coming around bends in channels. It was based on *The Victory* and *The*

Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, and this court declared in *The Mohawk*, 242 Fed. 845, 850, 155 C. C. A. 443, it contemplates "a short bend or curve, where for some reason approaching vessels cannot see each other within half a mile." The situation referred to in these cases is not the situation which exists in the case now under consideration. The pilot of the Keeler stated that he saw the *Lexington* "a little more than a mile away," and the vessels were approaching each other in full view for two minutes before the Keeler blew two blasts.

Those in charge of the Keeler knew that under the rules the *Lexington* was the privileged vessel entitled to keep her course and speed. But they chose to speculate upon what they thought the *Lexington* would do, and so the burdened vessel kept right on, and, when she discovered her mistake, undertook to cross the *Lexington's* bow. In doing so she took the risk of the venture.

The narrow channel rule of article 25 has no application. The waters in which these vessels were navigating did not constitute a narrow channel within the meaning of that article. It was pointed out in *The No. 4*, 161 Fed. 850, 88 C. C. A. 668, that "channels within the rule are bodies of water navigated up and down in opposite directions." And, as indicated in *The Hokendauqua*, 270 Fed. 270, which this court affirmed in a decision at the present term (270 Fed. 273), harbor waters where the necessities of commerce require navigation in every conceivable direction "up and down and across" are not to be considered narrow channels.

Article 22 provides that—

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

It was the duty of the Keeler to keep out of the way of the *Lexington*, and there was nothing in the circumstances which prevented her from doing so. But she did not do so and undertook to cross ahead of her. The collision was the result. The fault was that of the Keeler.

The Keeler also violated article 23, which provides that every steam vessel which is bound to keep out of the way of another "shall, on approaching her, if necessary, slacken her speed or stop or reverse." But, as before stated, the pilot of the Keeler testified that his boat continued at full speed.

[3] We are unable to see that the *Lexington* was in fault. Certainly if the *Lexington* was in fault at all, the error was committed in extremis and was superinduced by the prior error of the Keeler. The fault of the Keeler being established beyond any peradventure, she is not entitled to divide damages with the *Lexington* except upon clear proof of a fault not made in extremis. *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; *Lake Erie Transportation Co. v. Gilchrist Transportation Co.*, 142 Fed. 89, 73 C. C. A. 313.

Decree affirmed.

AMERICAN MILLS CO. v. HOFFMAN et al.

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

No. 124.

1. Courts ⇨340—Amendment in federal courts governed by federal statute.

The conformity statute (Rev. St. § 914 [Comp. St. § 1537]), does not apply to amendment of pleadings in a federal court which is governed by Rev. St. § 954 (Comp. St. § 1591), providing that a federal court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe," though the power to permit amendments is incidental to the judicial power.

2. Pleading ⇨249(1)—Amendment on trial changing form or nature of action not allowable.

A plaintiff may not be allowed on the trial to amend his pleading to change the form or nature of the action so as to require different proof or a different measure of damages.

3. Appeal and error ⇨1031(2)—Pleading ⇨249(4)—Permitting amendment changing cause of action held error, and error presumed prejudicial.

Permitting a plaintiff at the close of the evidence to amend his complaint, which was for goods sold and delivered, by changing it to one for breach of contract for refusal to accept the goods after shipment, which under the statute required wholly different proof, and reopening the case to allow plaintiff to introduce new evidence, held error, presumably prejudicial to defendant.

4. Appeal and error ⇨1048(5)—Permitting questions calling for irrelevant testimony held error though negative answer was given.

On an issue as to the right of defendant to cancel an order for goods given to plaintiff, evidence that defendant attempted to cancel orders given to others was irrelevant, and permitting questions on cross-examination of defendant's witnesses calling for such evidence, though the answers were negative, held prejudicial error.

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

Action at law by George F. Hoffman and Peter H. Corr, partners as the Hoffman-Corr Manufacturing Company, against the American Mills Company. Judgment for plaintiffs, and defendant brings error. Reversed.

This cause comes here on writ of error to the United States District Court for the Southern District of New York. The defendant in error, plaintiff below, is hereinafter called plaintiff. The plaintiff in error, defendant below, is hereinafter called defendant.

The plaintiff was and is a copartnership engaged in business in the city of New York. The defendant is a corporation organized under the laws of the state of Georgia, and maintains its offices in Atlanta, in that state. It is engaged in the purchase and sale of twines and cordage. The plaintiff was represented in Atlanta by Francis B. Florence, a merchandise broker, who received from the plaintiff the following letter dated October 9, 1918:

"Dear Sir: Answering your favor of the 5th instant with order inclosed for 25,000 lbs. of Lion Mills Thrush brand paper twine #1200, Mr. Florence, the goods are put upon spools as per the one sent you. Therefore, if you will send us the order for 25,000 lbs. at 30c per lb. f. o. b. New York City 2% 10 days net 30, subject to no freight allowance or carrying charges of any kind, price 30c per lb. for #1200 Thrush brand paper twine put up on spools weighing about 5 lbs. each, to be shipped as fast as we can produce it at our mill,

which would be anywhere from two to eight weeks to complete the order, barring any unforeseen conditions that might arise, we will enter same. Let order come forward at once, please. The goods are usually put up in cases."

Florence then called on defendant and received from them an order for 25,000 pounds of brown paper twine at 30 cents per pound. This order he sent to the plaintiff at New York, and in response received the following reply, dated October 19, 1918:

"[Letter head of Hoffman-Corr Mfg. Co.]

"10/19/18.

"Mr. F. B. Florence, 303 Peters Bldg., Atlanta, Ga.—Dear Sir: We are in receipt of order from the American Mills Co., Atlanta, their order for 25,000 lbs. of brown paper T's as per sample 5 lb. fiber spool, at 30c per lb. We wish to make no mistake on this order and ask if it is #1200 as per sample inclosed herewith, that is to be shipped. Also note that we have not as yet entered said order, for there are some clauses on the customer's order, to which we could not agree. One of them reads, 'This order subject to cancellation for causes beyond buyer's control and reimbursing buyer for loss including profits,' etc. These are conditions which we would not care to agree to. In other words, the sale we will make must be a bona fide one, not subject to any cancellation of any kind. We certainly are not going out after the customer's trade. You may assure him of that, but we are not going to take on any orders, under present strenuous business conditions, subject to cancellation, under any circumstances. Let us hear from you so that we may proceed with the order.
[Signed] Hoffman-Corr Mfg. Co."

The broker took this letter to the defendant, who under date of October 22, 1918, wrote the plaintiff as follows:

"Mr. Florence has shown us your letter addressed to him under date of October 19th, having reference to our order for 25,000 pounds of brown paper twine.

"However, he advised that the sample which you advised was being inclosed was not inclosed.

"In consequence of which we attach hereto a small sample of the twine submitted by your Mr. Florence representing the #1200 Thrush twine, or brown paper twine, and against which we placed our order.

"This, you will notice, is a very small twine made of paper of a width of probably $\frac{9}{16}$ to $\frac{3}{8}$ inch in a basis weight of about 20 to 25 pounds.

"If for any reason your understanding varies from this do not fail to advise us immediately.

"We also note the exceptance you take in several of the terms mentioned in our order, that is, order being subject to cancellation for cause beyond the buyer's control, etc., and would say that it is agreeable to us for you to eliminate these conditions on the order in question.

"Do not fail to advise us relative to the inclosed sample immediately and oblige."

The plaintiff replied on October 25, 1918, as follows:

"We are in receipt of your favor of the 22d instant relative to your order for 25,000 lbs. of brown paper twine. We note that #1200 is what is desired. We shall, therefore, proceed with the order, with the understanding that, as per your agreement in said letter of the 22d, clauses we mentioned in our previous letter shall be eliminated. We are going to ship #1200 Thrush brand twine, eliminating the clauses in question, and thank you for your order."

On October 28, 1918, plaintiff wrote defendant that New York City would be the point of shipment, and asked that shipping instructions be immediately forwarded. On November 1, 1918, the defendant instructed the plaintiff to deliver the twine to the Harris Warehouse in New York City.

On December 14, 1918, plaintiff made a delivery of six cases to the above warehouse, and forwarded to defendant at Atlanta copies of invoices purporting to cover the contents of the same. These invoices having reached defendant, and on January 2, 1919, the defendant wrote to the plaintiff as follows:

"We note your invoice dated December 14th, covering six cases of Thrush twine delivered to the Harris Warehouse.

"We presume that this is against our order for a quantity of these goods, which was to be delivered immediately.

"A reference to our records shows that practically all orders which we had against this have been canceled, due to our failure to deliver, so of course we would have no alternative except to effect cancellation with you.

"It will be satisfactory for us to accept delivery on these six cases, as we do not doubt but what we can get rid of same, but we can accept them only with the understanding, of course, that the balance will be canceled.

"Kindly advise us immediately with regard to same to the end that we may know whether we can take in the six cases or not.

"Awaiting your prompt advice, we are."

At the same time defendant wrote to the Harris Warehouse, instructing the warehouse not to take any of the goods in for defendant's account.

On January 4, 1919, plaintiff wrote defendant saying:

"We have your favor of the 12th (2d) instant with regard to our invoice of Dec. 14, for Thrush brand twine. We note your letter with great surprise. We have already shipped from mill on that 25,000-lb. contract (please refer to your letter of Oct. 11th, contract #F-188), on the 14th ult., 2,677 lbs., and there is in transit from the mill about 5,000 lbs. more, and we cannot, under any circumstances, accept cancellation on the order."

On January 28, 1919, defendant wrote plaintiff as follows:

"We return you herewith invoices for 'Thrush' twine, and desire to state that this order has been canceled.

"If you recall, when we sent you settlement the last shipment, it was sent with the distinct understanding that it would cancel all contracts of every kind and nature, and we hold your receipt to this effect.

"We cannot handle any of these goods, and we will thank you to have them removed, and if they are stored at the Harris Warehouse they are stored there for your account.

"As stated, please investigate this matter, and oblige."

Various letters thereafter passed back and forth between the parties, and in the meantime the plaintiffs continued to ship cases of twine to the warehouse until February 20, 1919, when the final shipment was made. And on March 10, 1919, defendant sent a telegram to plaintiff rejecting all the merchandise. The plaintiff shortly thereafter brought this action, and levied an attachment upon the twine at the warehouse.

The complaint alleged the making of the contract, and that the plaintiffs had duly performed all the conditions thereof on their part. The answer admitted the making of the contract, but denied that it was correctly set forth. It also denied the performance alleged by plaintiff, and denied indebtedness to plaintiff. In addition the defendant set up as an affirmative defense a breach of the agreement in that the goods did not conform with the description contained in the letter of October 22d, heretofore recited. At the close of the entire case and before it was sent to the jury defendant moved to dismiss on the following grounds:

First. That shipments were not made within the time agreed upon.

Second. That the twine was not put up on five pound fibre spools.

Third. That 25,000 pounds of twine had not been delivered or tendered.

Fourth. That there was no proof of what quantity had been delivered or tendered.

Fifth. That deliveries were made in installments which was contrary to section 126 of the Personal Property Law of the state of New York (Consol. Laws, c. 41).

Sixth. That, as required by section 144 of the Personal Property Law of the state of New York, there was no proof that the goods could not, at the times of rejection, have been readily resold for a reasonable price, and no proof that the plaintiffs had sent the notice required by that statute.

After defendant had made these motions, the court requested counsel for the plaintiffs to discuss the various propositions raised thereby. As a result of this discussion the court ruled that the plaintiffs had failed to satisfy the statutes relied on by the defendant in its motions to dismiss, holding that the

plaintiffs had not shown delivery after the first shipment of six cases on December 14, 1918, and had not otherwise proven a compliance with the statute.

Plaintiffs' counsel thereupon moved to amend the complaint, to change the cause of action from goods sold and delivered to breach of contract for failure on defendant's part to accept the goods after the shipment of December 14th, basing his amendment on section 144, subd. 3, of the Personal Property Law of New York. He then asked leave to have the record reopened and for permission to introduce new proof to support the amendment. These motions were granted over the objection and exception of defendant, and defendant was directed to proceed with its defense to the new complaint, over its plea of surprise and its request for leave to withdraw a juror.

Further testimony was taken, and at the close of the case defendant again renewed its motions to dismiss. These were denied, and the case was submitted to the jury, a verdict was returned for 21,718½ pounds at 30 cents per pound, making a total of \$6,515.55, which with judgment was entered on April 3, 1920, for \$6,930.25, together with \$76.12 costs as taxed, making in all the sum of \$7,006.37.

Henry Uttal, of New York City (Ely Neumann, of New York City, of counsel), for plaintiff in error.

John B. Doyle, of New York City, for defendants in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). At the close of the entire case, after both the plaintiffs and defendant had put in their testimony and rested, the defendant renewed motions made at the close of the plaintiffs' case and asked the court to dismiss the complaint on the ground that the plaintiffs had failed to make out their cause of action in that they had not shown that they delivered the quantity of twine called for in the contract. There were other grounds also assigned, as that they had not made delivery within the time required by the contract, or in the manner required by the contract, but by installments. The court denied the motions, and then asked the plaintiffs' counsel whether he desired to amend the complaint. Counsel replied that he certainly did, whereupon the court declared that he would give permission to amend. The court then informed the plaintiffs' counsel that he should move to reopen his case and to amend. This the counsel did. Then the court said:

"And I suppose you wish to ask damages for the value of the goods you may have proved to have been actually delivered, and the difference between the contract price and the market price of any other goods, the delivery of which you tendered?"

Counsel answered that he did. This happened at the close of the Friday afternoon session. Counsel handed to defendant's counsel the amended complaint on Saturday. On Monday morning defendant put in his amended answer, and the trial proceeded. The plaintiffs called three new witnesses whose testimony covers 33 printed pages of the record and recalled one other witness, and the examination of the four occupied the entire morning session of the court. At the afternoon session defendant recalled its three former witnesses who were examined and cross-examined, the judge charged the jury, and the verdict was returned on that day. The defendant claims that it was seriously prejudiced. It was a Georgia corporation with offices in

Atlanta, and had in court at that time its president and the man who had negotiated the contract. They came from Georgia for the purpose of testifying, and brought with them such records as their counsel instructed them to bring to meet the issues presented by the original complaint. They allege they had no witnesses in court on the issues presented by the amended pleadings, and that they were able to make no preparations to meet the issues the new complaint raised.

The permission to amend was granted over defendant's objection. The grounds of objection as stated by its counsel were surprise and the fact that the amendment stated a different cause of action. The defendant asked to be allowed to withdraw a juror, and this was refused.

It is held in New York that after trial pleadings cannot be conformed to the proof. *Northam v. Dutchess County Mutual Insurance Co.*, 177 N. Y. 73, 75, 69 N. E. 222. But in the instant case the amendment, as we have seen, was made after the parties rested and before the case was submitted to the jury, and opportunity was given to introduce new testimony to meet the changed issues.

The cause of action as originally set forth in the complaint was for goods sold and delivered. It is claimed that the effect of the amendment was to change the cause of action from one for goods sold and delivered to one for breach of contract for failure on defendant's part to accept the goods after shipment.

An action for goods sold and delivered can be maintained only when the contract is fully executed on the part of the seller. *Hyde v. Liverse*, 12 Fed. Cas. p. 1112, No. 6972. If he has not fully performed, then his action should be for goods bargained and sold. *Atwood v. Lucus*, 53 Me. 508, 89 Am. Dec. 713; *Allman v. Davis*, 24 N. C. 12. But if the title remains in the seller the action is on the special contract. *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709. The rule is stated in *Saunders on Pl. & Evid.* 536, that, to support an action for goods sold and delivered, the plaintiff must prove, not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods, and enable the defendant to maintain trover for them without paying or offering to pay for them.

The law is well settled that, where the contract has been performed and nothing remains to be done but to pay the amount due under it, a recovery may be had under the common counts. But the plaintiff's evidence made out no such case, and it was thought by court and counsel to be necessary to amend the complaint. It was accordingly amended that damages might be recovered because of defendant's failure to accept the goods. The amendment was based upon and intended to set forth a cause of action under section 144, subd. 3, of the Personal Property Law of the state of New York, which provides as follows:

"3. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section one hundred and forty-five are not applicable, the seller may offer to deliver the goods to the buyer, and if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price." 40 *McKinney's Cons. Laws of New York*, 236.

The proof required to support the amendment was different from that required under the original complaint. Under the amendment it was incumbent upon plaintiffs to prove:

- (1) The sale.
- (2) Performance by plaintiffs.
- (3) The breach by defendant.
- (4) Damages, which, if the goods were readily resalable for a reasonable price, would be the difference between that price and the contract price.
- (5) If the goods were not readily resalable for a reasonable price, that plaintiffs had notified the defendant that they would thereafter hold the goods as bailee for the defendant, and thereupon the measure of damages would be the contract price.

As the original complaint was for goods sold and delivered, the evidence required to support it was:

- (1) Proof of the sale.
- (2) Proof of delivery of the goods.
- (3) Proof of due performance by plaintiffs of all conditions of the sale contract.
- (4) Proof of nonpayment by defendant.

This proof the plaintiffs had failed to produce.

The New York courts in construing this statute have uniformly held that to maintain the action under it the plaintiff must show affirmatively:

- (a) That the goods could not readily be resold for a reasonable price.
- (b) Notifications by the seller to the buyer that the goods were thereafter held by the seller as bailee for the buyer. *Mindlin v. Freyberg et al.*, 171 N. Y. Supp. 250; *Mosler Safe Co. v. Brenner*, 100 Misc. Rep. 107, 165 N. Y. Supp. 336; *Crown Electric Ill. Co. v. Chiariello*, 106 Misc. Rep. 511, 175 N. Y. Supp. 167.

[1] The power of a court to allow the amendment of pleadings is incidental to the exercise of the judicial power. In *Tilton v. Cofield*, 93 U. S. 163, 166, 23 L. Ed. 858, the court declared that—

“Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse, rests in the discretion of the court; and the result in either case is not assignable for error.”

And in *Standard Bitulithic Co. v. Curran*, 256 Fed. 68, 70, 167 C. C. A. 310, 312, we declared that—

“Courts, in the exercise of their common-law jurisdiction, may in their discretion permit pleadings to be amended at any time before verdict, if such amendment does not surprise or prejudice the opposite party.”

An amendment which changes a cause of action would ordinarily surprise and prejudice the opposite party and not meet the test there laid down.

Revised Statutes of the United States, § 954 (Comp. St. § 1591), provide that a federal court “may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.” The words quoted

may be found in the Judiciary Act of 1789, which established the federal courts. Stat. at L. vol. 1, c. 20, § 32, p. 91. The power of a federal court to amend pleadings has existed from the beginning and exists independently of any state statute.

The Revised Statutes provide in section 914 (Comp. St. § 1537) that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, shall conform in the federal courts as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which the federal courts are held. It is to be observed, however, that as respects the amendment of pleadings the federal courts are not controlled by the Conformity Act (Comp. St. §§ 6817, 6818), and are not subject either to the local state law or to the state practice. Where Congress has legislated specifically upon a subject, such as that of the amendment of pleadings, the power of the federal courts in that particular matter is to be exercised under the act of Congress, and not under the local statutes. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248; *Lange v. Union Pacific R. Co.*, 126 Fed. 338, 340, 62 C. C. A. 48, certiorari denied 193 U. S. 671;¹ *De Valle da Costa v. Southern Pacific Company (C. C.)* 167 Fed. 654; *Truckee River General Electric Company v. Benner*, 211 Fed. 79, 127 C. C. A. 503. See, also, *Silvas v. Arizona Copper Co. (C. C.)* 213 Fed. 504, 506.

[2] In what is hereinafter said in reference to the New York cases we are not to be understood as resting our decision upon the authorities of the local state, but are using them as good illustrations of fundamental principles adhered to by courts generally in the exercise of the power to amend with which courts are invested. The principle announced in those cases is simply conformable to the general rule that no amendments can be allowed which change the form or nature of the action. *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155; *Thyssen v. Davenport Ice, etc., Co.*, 134 Iowa, 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572; *Flanders v. Cobb*, 88 Me. 498; *Barnes v. Gibbs*, 31 N. J. Law, 317, 86 Am. Dec. 210; *Allen v. Tuscarora Valley R. Co.*, 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714; *Charmley v. Charmley*, 125 Wis. 297, 103 N. W. 1106, 110 Am. St. Rep. 827; *Connecticut Fire Ins. Co. v. Monroe Circuit Judge*, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398; *Heidel v. Benedict*, 61 Minn. 170, 63 N. W. 490, 31 L. R. A. 422, 52 Am. St. Rep. 592; *Montgomery First National Bank v. Chandler*, 144 Ala. 286, 32 South. 822, 113 Am. St. Rep. 39; *Baldwin v. Western Union Telegraph Co.*, 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

New York Code of Civil Procedure, § 723, provides as follows:

"The court may, upon the trial, * * * amend any process, pleading, or other proceedings * * * where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. * * *"

While there is great power of amendment under the New York Code, the amendment cannot bring in a new cause of action. In *Reeder v.*

¹ 24 Sup. Ct. 853, 48 L. Ed. 841.

Sayre, 70 N. Y. 180, 190, 26 Am. Rep. 567, the court allowed the complaint to be amended by alleging that the plaintiffs sued in their character as surviving partners instead of tenants in common as this did not change the cause of action. "That," said the court, "remained the same, and required no different proof and no additional parties."

In *Wright v. Delafield*, 25 N. Y. 266, 269, Judge Smith, writing for the court; in speaking of the rules allowing affirmative relief upon the pleadings, expressed his opinion that it was—

"quite problematical whether the relaxation of this rule which has been introduced under the Code in modern practice will not involve and produce much greater confusion and mischiefs than it will remedy."

He then went on to say:

"It is true that the courts are more liberal than formerly in making or allowing amendments of pleadings, and when the substantial rights of the parties have been fairly tried, trifling variances are disregarded, and judgment given according to the real right of the case as established. *Corning v. Corning*, 2 Seld. 97; *Hall v. Gould*, 3 Kern. 127; 28 Barb. 441-602; 33 Id. 238.

"But these cases assume, and this right of disregarding variances proceeds upon the ground, that the substantial rights of the parties are set up in the pleadings, and section 169 forbids amendments where the party will be misled or surprised. * * * Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue, and distinctly and fairly litigated."

The courts of that state, as elsewhere, adhere to the fundamental rule that a judgment shall be *secundum allegata et probata*, and they have declared that any departure from that rule is certain to produce surprise, confusion, and injustice. They have said with much force that pleadings and a distinct issue are essential in every system of jurisprudence, and that there can be no orderly administration of justice without them.

"If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." *Brightson v. Claffin Co.*, 180 N. Y. 76, 81, 72 N. E. 920, 921; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420, 428, 429.

In *Walrath v. Hanover Fire Insurance Company*, 216 N. Y. 220, 110 N. E. 426, the complaint alleged that defendant had insured the plaintiff's buildings against fire and then attempted wrongfully to cancel the contract. At the close of the entire evidence the trial court permitted the plaintiff over the defendant's objection to amend the complaint by inserting therein allegations to the effect that defendant agreed to deliver the policy of insurance and had failed and neglected to perform that agreement. This was held reversible error, and a judgment for the plaintiff was reversed. The court held the amendment changed substantially the claim made in the complaint, which was error. And it was held also to be error to allow an amendment to be made at a time which did not allow the defendant an opportunity to meet by proof the allegations made against it. The original complaint alleged an executed contract of insurance. The amended complaint alleged an executory contract. The court said:

"It is fundamental that in civil actions the plaintiff must recover upon the facts stated in his complaint, or not at all. In case a complaint proceeds on a definite, clear, and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith. A party must recover not only according to his proofs, but according to his pleadings."

In New York the courts have no power so to amend a complaint as to change the cause of action. *Walrath v. Hanover Fire Ins. Co.*, 216 N. Y. 220, 110 N. E. 426; *Dexter v. Ivins*, 133 N. Y. 551, 30 N. E. 594; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420, 428; *Balch v. Wurzbarger*, 9 Misc. Rep. 74, 29 N. Y. Supp. 62; *Dows v. Morrison*, 2 Misc. Rep. 54, 20 N. Y. Supp. 860.

In *Moniot v. Jackson*, 40 Misc. Rep. 197, 81 N. Y. Supp. 688, a complaint charged trustees with negligence, and after the proof was in the plaintiff was allowed to amend his complaint to conform with the proof and charge a nuisance. The court held this could not be done for it clearly changed the action from one cause to another.

And a complaint under a contract of employment for salary cannot be changed into an action for damages for breach of the employment contract. *Balch v. Wurzbarger*, *supra*.

In *Zboynski v. Brooklyn City R. R. Co.*, 10 Misc. Rep. 7, 30 N. Y. Supp. 540, the judgment below was reversed because of an amendment made in the complaint at the trial. The court said:

"The court upon the trial is not authorized to allow an amendment which substantially changes the claim or defense * * * and the amendment was not only a substantial change of the claim, but was the substitution of another cause of action for the one pleaded, and that is forbidden by the law at the trial, notwithstanding the broad discretion confided to courts in the matter of liberal amendments."

It has been held that, in determining whether the modification of a complaint is a substitution of a new cause of action, two facts must be ascertained:

- (1) Will the same evidence support both complaints?
- (2) Will the same measure of damages apply to each?

It is said that both questions must be answered in the affirmative to hold the modification a proper one. *Liese v. Meyer*, 143 Mo. 547, 555, 556, 45 S. W. 282; *Ross v. Mineral Land Co.*, 162 Mo. 317, 331, 62 S. W. 984; *Jacobs v. Chicago, Peoria & St. Louis R. Co.* (Mo. App.) 204 S. W. 954 (1918).

[3] From what has been already said it has been made evident that in the instant case the same evidence will not support the original and amended complaints. After the amendment was made in order to support the amended complaint it was necessary to reopen the case and allow the plaintiff to call new witnesses and to introduce entirely new testimony. The original claim had been changed in a "substantial" manner, and in doing so the court exceeded its authority.

It is no answer to say that the defendant was not harmed by what was done. We have no right to speculate upon that question. But it is by no means clear that he was not seriously prejudiced. In *Southwick v. First National Bank of Memphis*, *supra*, the action alleged and the cause of action proved at the trial differed. It was said that the

defendant had probably not been misled. Judge Earl, writing for the New York Court of Appeals, referring to this, declared that it was no answer. He said:

"A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is right to have a complaint, to learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured."

[4] It is proper for us to add that it was prejudicial error to admit testimony that the defendant had placed certain orders with the Worth & Dyke Manufacturing Company, of Richmond, Va., and that after the armistice it had attempted to cancel them. The defendant's witness Miller was asked and reasked again and again after he had said he knew nothing about it and over the objection of counsel whether the defendant had not asked the cancellation of the orders. The same question was put to defendant's witness May. This had no bearing upon the issue, and was clearly irrelevant and immaterial. It was calculated to prejudice the jury against the defendant and to leave an impression on their minds that the defendant was lacking in due regard of its contractual obligation.

The judgment is reversed, and a new trial ordered.

McGRATH et al. v. UNITED STATES.

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

No. 196.

1. **Criminal law** ⇨1090(1)—**Rulings brought into record only by bill of exceptions.**
Rulings of trial court on matters other than pleadings can only be brought into record by bill of exceptions.
2. **Criminal law** ⇨1090(5, 15)—**Bill of exceptions unnecessary to consideration of indictment or judgment.**
Absence of bill of exceptions does not deprive appellate court of right to pass on the sufficiency of the indictment or judgment of conviction.
3. **Criminal law** ⇨1116—**Where no bill of exceptions and record fails to show that demurrer was filed or ruled upon, sole question is whether indictment is sufficient.**
On appeal by defendants without bill of exceptions, and in absence of record showing that a demurrer appearing therein was pleaded or ruled upon, the case must be decided as though there was no demurrer; no motions to quash, for new trial or in arrest of judgment; no exceptions to evidence nor objections to instructions—the sole question being whether the indictment states facts sufficient to constitute the crime charged.
4. **Bribery** ⇨6(4)—**Indictment held to set forth matter before defendants in official capacity; "prosecution."**
Indictment charging that United States income tax inspectors did ask for, accept, and receive money with intent to have their decision and ac-

tion influenced in a matter, which was before them in their official capacity, to wit, a prosecution for having filed income tax not in accordance with the laws, *held* to set forth matter before the defendants in their "official capacity," or in a "place of trust or profit," as those words are used in Criminal Code, § 117 (Comp. St. § 10287) the word "prosecution" comprehending the procedure of the public prosecutor in bringing an accused person to trial, but in common parlance one who is not the public prosecutor, but who takes necessary steps to have proceedings instituted, is said to prosecute the party charged.

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

5. Criminal law ⇨1144(3,13)—Presumed that defect in indictment was cured by instructions, and that evidence was sufficient.

It must be presumed on appeal after conviction that defect in bribery indictment charging the acceptance of money by income tax inspectors in connection with "the prosecution of one I. for having filed his income tax not in accordance with the laws of the United States," instead of "income tax return," was cured by instructions, and that the evidence was sufficient to support the verdict, in the absence of a bill of exceptions, and this is also true as to failure to specify in what particular the return filed was defective.

6. Bribery ⇨1(2)—Person not appointed as provided in constitutional provision not "officer of the United States."

A person not appointed in the manner declared under Const. art. 2, § 2, is not an "officer of the United States," but only an agent or employee of the government.

7. Bribery ⇨1(2)—Income tax inspectors held "officers of the United States."

Income tax inspectors appointed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury were officers of the United States within Criminal Code, § 117 (Comp. St. § 10287), relating to bribery, and Const. art. 2, § 2.

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

8. Bribery ⇨1(1)—One not officer of United States may be liable.

It is not necessary that one should be an "officer" of the United States in order to act "for or on behalf of the United States in any official capacity" within the meaning of Criminal Code, § 117 (Comp. St. § 10287), relating to bribery.

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

John J. McGrath and another were convicted under an indictment charging the asking and acceptance of money with intent to have their decision and action influenced as officers of the United States, and bring error. Affirmed.

The plaintiffs in error, who were defendants below, are hereinafter referred to as defendants.

Griffiths, Sarfaty & Content, of New York City (Charles H. Griffiths, and Raymond H. Sarfaty, both of New York City, of counsel), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (John Fine, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The defendants have been convicted under an indictment which is found in the margin.¹

The defendant McGrath demurred to the indictment. He has made assignments for error as follows:

"(1) The District Court erred in denying the defendant's motion made at the close of the Government's testimony to direct a verdict of not guilty.

"(2) The District Court erred in denying the defendant's motion in arrest of judgment."

The defendant Hirsch has assigned for errors:

"First. In denying the motion made by the defendant to dismiss the indictment on the ground that the indictment did not set forth any crime against the United States.

"Second. In denying the defendant's motion made at the end of the case for arrest of judgment on the ground that the proof did not show the commission of any crime on behalf of the defendant, Martin A. Hirsch."

[1] The record contains no bill of exceptions.

The assignments of error, both those made by McGrath and those made by Hirsch, depend for their validity upon a bill of exceptions. In the absence of such a bill there is nothing in the record to show that such motions were made, or that the court ruled thereon. The rulings of the court below on matters other than the pleadings can only be brought into the record by a bill of exceptions. The necessity of such a bill has been so frequently pointed out by this court that there is no reason for continued citations upon that subject.

While the transcript of record contains what appears to be a demurrer by defendant McGrath it does not disclose that the demurrer was ever filed or argued, or ruled upon in any way. And the transcript contains nothing to suggest that any demurrer was interposed for defendant Hirsch.

[2] The record technically consists of the indictment, the bill of exceptions, and the judgment. The absence from the record of the bill of exceptions therefore simply precludes the court from passing on questions raised at the trial which the bill of exceptions might have brought here if one had been introduced into the record. Its absence does not, however, deprive us of the right to pass on the sufficiency of the indictment or the judgment.

[3] We are obliged to decide this case as though there was no demurrer to the indictment, no motion to quash, no motion for a new trial

¹ "The grand jurors of the United States of America, within and for the district aforesaid, on their oath present that John J. McGrath and Martin Hirsch, late of the city and county of New York, in the district aforesaid, heretofore, to wit, on the 28th day of September in the year of our Lord 1918, did, at New York, N. Y., in the Southern District of New York and within the jurisdiction of this court, being officers of the United States, to wit, income tax inspectors, ask for, accept, and receive money, to wit, \$20, with intent to have their decision and action influenced in a question, matter, cause, and proceeding which was at that time brought before them in their official capacity, to wit, the prosecution of one Irving Bierer, for having filed his income tax not in accordance with the laws of the United States against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. Section 117, U. S. C. C."

or in arrest of judgment, no exceptions to the admission or exclusion of evidence, and no objection to instructions given or withheld. We have no information concerning these matters. The sole question before us, under the circumstances, is whether the indictment fails to state facts sufficient to constitute the crime charged. If it thus fails, then, of course, it is the duty of the court to set aside the judgment. But if the facts alleged are sufficient to sustain the indictment, the judgment must be affirmed. *Sonnenberg v. United States* (C. C. A.) 264 Fed. 327.

In *Serra v. Mortiga*, 204 U. S. 470, 476, 27 Sup. Ct. 343, 346 (51 L. Ed. 571), Chief Justice (then Justice) White, speaking for the court said:

"It being then settled that the conviction on a defective indictment is not void, but presents a mere question of error to be reviewed according to law, the proposition to be decided is this: Did the court below err in holding that it would not consider whether the trial court erred because it had not decided the complaint [indictment] to be bad, when no question concerning its sufficiency was either directly or indirectly made in that court? Thus to understand the proposition is to refute it. For it cannot be that the court below was wrong in refusing to consider whether the trial court erred in a matter which that court was not called upon to consider and did not decide."

The complaint in that case was based on the Penal Code of the Philippine Islands, and the writ of error was issued to the Supreme Court of the Islands, which had entered a judgment of conviction on a complaint which was alleged to be fatally defective. The proposition was that the court should have reversed the conviction because of the contention as to the insufficiency of the complaint, when no such question had been raised before final judgment in the trial court, and when, as a necessary consequence of the facts found by the court, the testimony offered at the trial without objection or question in any form established a very essential ingredient of the crime. It may be the duty of the court to affirm a conviction on a defective indictment.

The indictment in question is based on section 117 of the Criminal Code (Comp. St. § 10287). It provides that:

"Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof; * * * shall ask, accept, or receive any money, or any contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of money or value of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the government of the United States."

The Revised Statutes, § 1025 (Comp. St. § 1691), provide that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which does not tend to the prejudice of the defendant. Under this provision the form of an averment and the manner of stating a fact are treated as matters of form.

The defendants urge three defects in the indictment. The first is that it appears upon the face of the indictment that the defendants did not have any matter before them in their official capacity because the specification is that the matter was a prosecution of a person, and not any investigation by them. The second defect in the indictment is that the supposed prosecution involved a charge of filing an income tax not in accordance with the laws of the United States, which it is claimed is not any matter for which a person could be prosecuted. The third objection is that the defendants are stated to be officers of the United States. They argue that any of these defects, taken alone, is enough to vitiate the indictment herein, but that the three errors taken together clearly demonstrate that the indictment is defective, and that no legal conviction can be had thereunder.

[4] We are thus brought to inquire in the first place whether the matter which the indictment sets forth was one which can properly be said to have been before the defendants in their "official capacity," or in their "place of trust or profit" as those words are used in section 117 of the Criminal Code. We are obliged to answer this question in the affirmative.

That section of the Code was before the court in *United States v. Birdsall*, 233 U. S. 223, 230, 34 Sup. Ct. 512, 514 (58 L. Ed. 930), and it was declared that every action that is within the range of official duty is within its purview. The question is whether the action to be influenced was official action. It was said that to make the action official it is not necessary that it should be prescribed by statute. It is sufficient that it was governed by a lawful requirement of the department under whose authority the officer acted. It was also said not to be necessary that the requirement should be prescribed by a written rule or regulation. It might be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities.

"In numerous instances," said the court, "duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery."

It seems that we must hold that the action of the defendants which was to be influenced was official action within the broad and comprehensive meaning above declared.

The action to be influenced is described in the indictment as a "matter, cause, and proceeding which was at that time brought before them in their official capacity, to wit, the prosecution of one Irving Bierer." The contention of the defendants is that they could have taken no official action in relation to the prosecution of Bierer, as that was a matter with which they officially had nothing to do, it not being the duty of income tax inspectors to prosecute the violators of the Income Tax Law (39 Stat. 756). The power to prosecute all persons charged with crime against the United States is, it is said, in the United States attorneys or in the Attorney General. Revised Statutes, p. 145, § 771 (Comp. St. § 1296), declares that—

"It shall be the duty of every district attorney to prosecute, in his district all delinquents for crimes and offenses cognizable under the authority of the United States. * * *"

So that the objection seems to be that the prosecution of Bierer could not be "a matter, cause and proceeding" before the defendants in their official capacity.

But this is to ignore the fact that the Commissioner of Internal Revenue, his assistants, agents, and inspectors, have duties to perform in respect to the prosecution of offenders under the revenue laws. The duties of their office involve the making of investigations and reports and decisions which are vital to the prosecution of those who violate the Income Tax Law and thereby defraud the government. Without the honest performance of these official duties the offenders would never be brought to trial. These officials have been described as vital cogs in the machinery of prosecution.

The word "prosecution" comprehends the procedure of the public prosecutor in bringing an accused person to trial. In common parlance one who is not the public prosecutor in the technical sense, but who takes necessary steps to have criminal proceedings instituted against an offender, is said to prosecute the party charged. And it seems clear to us that in the performance of their official duties income tax inspectors must take action which in proper cases inevitably leads to criminal prosecutions. The suppression of facts which come to the knowledge of the inspectors in the examination of income tax returns is action upon a matter which is before them in "an official capacity," and is so vitally related to the question of the prosecution of a violator of the law as to bring the matter within the purview of the statute.

[5] We come now to consider the second objection which is that the matter alleged to have been brought before the defendants in their official capacity is not sufficiently described. The language used describes the matter as "the prosecution of one Irving Bierer, for having filed his income tax not in accordance with the laws of the United States." This is said to be a fatal defect, because the so-called prosecution is based upon the alleged filing of something which is not required to be filed by any law of the United States. What the taxpayer is required to file, is not his income tax but his return. Then after he has filed his return the tax is assessed by the Internal Revenue Department after the examination of the return filed by the taxpayer, and on the return so filed. The indictment is also said to be defective in that there is no specification showing in what respect the paper filed was defective. But an indictment may be so defective in form or substance that a court cannot sustain it upon a motion to quash or on a demurrer, yet it may be the duty of the court to disregard the objection if it is not made until after verdict. In illustration of this reference may be made to *Reg. v. Goldsmith*, 12 Cox, C. C. 479. In that case the indictment failed to charge the commission of a crime. It charged the defendant with receiving goods, obtained by false pretenses, but it did not state that the false pretenses had been made with intent to defraud. And the intent to defraud was under the statute essential to the com-

mission of the offense; the false pretenses without the intent to defraud not being sufficient. The court, however, unanimously sustained the conviction under the indictment, although it failed to charge a crime, the defect being cured by the verdict. In the course of his opinion, Bovill, C. J., said that—

“We must assume that the judge has properly directed the jury, and that the jury correctly found their verdict.”

The verdict could not have been arrived at unless the evidence showed that the false pretenses were made to defraud, and the court assumed that the jury was so instructed.

The rule on this subject is correctly stated in Bishop's New Criminal Procedure (Ed. 1913) vol. 2, § 707a, as follows:

“At common law, the verdict cures some things, as to which the rule is the same in criminal causes as in civil. It is that though a matter either of form or of substance is omitted from the allegation or alleged imperfectly, yet if under the pleadings the proof of it was essential to the finding, it must be presumed after verdict to have been proved, and the party cannot now for the first time object to what has wrought him no harm.”

The defect in the indictment in the instant case is evidently a clerical mistake. It cannot possibly have worked prejudice to the defendant, and we must assume that the judge below properly charged the jury, and that the evidence was sufficient to support the verdict, and we therefore hold that the verdict cured the defect.

It may be said in this case as it was said in *Lamar v. United States*, 241 U. S. 103, 116, 36 Sup. Ct. 535, 539 (60 L. Ed. 912):

“It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. Under this situation we think that the case is clearly covered by section 1025, Revised Statutes.”

This brings us in conclusion to the third objection which is that the indictment charges that the defendants are officers of the United States, to wit, income tax inspectors. The Constitution of the United States, article 2, § 2, prescribes how officers of the United States shall be appointed. It reads as follows:

The President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

[6, 7] The argument is that a person not appointed in the manner above declared is not an officer but an agent or employee of the government. That such is the law is certainly beyond controversy. *United States v. Germaine*, 99 U. S. 509, 25 L. Ed. 482; *United States v. Mouat*, 124 U. S. 303, 8 Sup. Ct. 505, 31 L. Ed. 463; *United States v. Smith*, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534; *Auffmordt v. Hedden*, 137 U. S. 311, 326, 11 Sup. Ct. 103, 34 L. Ed. 674. That a

person who is appointed in accordance with the constitutional provision quoted above is an officer of the United States is, of course, clear. In *United States v. Germaine*, supra, Mr. Justice Miller speaking for the court and commenting upon article 2, § 2, of the Constitution declared that it was not to be supposed that Congress, "when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of these modes." In that case a surgeon appointed by the Commissioner of Pensions was held not to be an officer of the United States under section 12 of the act of 1825, which provided that every officer of the United States who is guilty of extortion under color of his office shall be punished in the manner specified in the act. 4 Stat. 118 (Comp. St. § 10253). The Commissioner of Pensions was held not to be "the head of a department" within the meaning of the constitutional provision referred to.

In *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830, a clerk in the office of the Assistant Treasurer of the United States, at Boston, and appointed by that official with the approbation of the Assistant Secretary of the Treasury as the acting head of the department, was held to be appointed by "the head of a department" within the meaning of the constitutional provision, and was accordingly properly described as an "officer" of the United States. And in the *Germaine Case* the court declared that the *Hartwell Case* "is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that *Hartwell's* appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was therefore an officer of the United States."

In the instant case the defendants were appointed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. We are unable, therefore, to see why they are not officers of the United States within the rule laid down in the *Hartwell* and *Germaine Cases*.

[8] It is not, however, necessary that one should be an "officer" of the United States in order to act "for or on behalf of the United States, in any official capacity," within the meaning of the section of the Criminal Code, under which the defendants were indicted. In *United States v. Van Leuven* (D. C.) 62 Fed. 62, it was held that an examining surgeon appointed by the Commissioner of Pensions was not an officer of the United States. It was nevertheless held that in the discharge of his duty as a member of a board of examining surgeons he was a "person acting for or in behalf of the United States" in "an official capacity" under and by virtue of the authority of an office of the government, to wit, the department of pensions. The section of the Criminal Code under which the defendants are indicted applies in express terms, not only to an "officer" of the United States, but to "a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof." That the defendants are plainly within its terms cannot be seriously denied.

Judgments affirmed.

THE JOHN CARROLL.

Appeal of MULLIGAN.

(Circuit Court of Appeals, Second Circuit. July 11, 1921.)

No. 241.

1. Wharves \Leftrightarrow 20 (1)—Wharf manager held negligent in permitting scow to remain at end of pier with knowledge of approaching storm.

Wharf manager, who shifted a scow from a place of safety between piers to the end of the pier, and who permitted it to remain there for hours after due warning of the approach of a storm, *held* negligent, and therefore liable for damages to scow sustained in the storm by pounding against the pier during the storm.

2. Negligence \Leftrightarrow 4—Care must be in proportion to danger.

The care to be exercised must be in proportion to the danger to be avoided.

3. Shipping \Leftrightarrow 54—Charterer secondarily liable for damage to boat by reason of wharf manager's negligence.

A charterer, who was bound to return boat to owner in as good condition as when it took possession, reasonable wear and tear excepted, was secondarily liable for damages from injuries from the negligence of a wharf owner, unless it could overcome presumption of negligence created by return of scow in damaged state by showing that the loss occurred through some cause consistent with due care on its part.

4. Bailment \Leftrightarrow 31 (1)—Bailee presumed to have been negligent on return of property in a damaged condition.

Where chattels are delivered to a bailee in good condition and are returned in a damaged condition, bailee will be presumed to have been negligent, and has the burden of proving that the loss was due to causes consistent with due care on his part.

5. Shipping \Leftrightarrow 58 (2)—Evidence held insufficient to overcome presumption of negligence of charterer.

In action for damages to a scow sustained in a storm after wharf manager had shifted the scow from a place of safety between piers to a place of danger at the end of a pier, and had negligently permitted it to remain at pier end notwithstanding warning of approaching storm, evidence *held* insufficient to overcome presumption, arising by reason of the return of scow in a damaged state, that charterer was also negligent, and therefore secondarily liable.

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

Libel by John G. Mulligan, as executor of the estate of Lawrence Mulligan, deceased, against the steam tug John Carroll, Carroll Towing Line, Inc., claimant, and others. Decree for defendants, and libellant appeals. Reversed, with directions.

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

Harrington, Bigham & Englar, of New York City (Leonard J. Matteson, of New York City, and R. F. Shaw, of Syracuse, N. Y., of counsel), for respondent-appellee New York Central Railroad Company.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. de Grove Potter, of New York City, of counsel), for appellee United Port Service Company.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in admiralty to recover damages to the scow A. A. Donohue, hereinafter called the scow. At the time of the damage alleged the scow was in the possession of the New York Central Railroad Company, a corporation existing under the laws of the state of New York, and a resident of the southern district thereof. The scow was at the times mentioned herein and still is the property of the estate of Lawrence Mulligan, and the libelant sues as the executor of that estate. The railroad company was in possession of the scow under a verbal charter, which is alleged to have been a demise, and under which the railroad company was bound to return the boat in as good condition as when it was received.

On November 18, 1915, the scow was lying alongside of a steamer between piers Nos. 3 and 4, American Docks, Staten Island. At about 10 a. m. on the morning of the day named, the steam tug John Carroll, employed by the United Port Service Company as its agent, came alongside of the scow and announced its intention of moving it to the end of pier No. 3. The libel alleged that the master of the scow protested against being placed at the end of the pier, upon the ground that it was an unsafe thing to do. The master testified that he did so protest, but in this respect he was contradicted by other witnesses. At any rate the shift was made, and the scow was left at the end of the pier during the rest of that day. Shortly after the shift was made a barge was placed outside of the scow, and during the night a second barge was placed outside of her. About 2 a. m. on the morning of November 19th a heavy wind came up, and caused the scow to pound heavily against the pier. Additional lines were gotten out, but the wind increased in violence, and about 9 a. m. the tug John Carroll took the two barges away, but allowed the scow to remain at the end of the pier.

The master testified that at that time two tugs belonging to the railroad company were in the slip between piers No. 2 and No. 3, and that he requested them to render assistance, but that they declined to do so. The master testified that he also requested, without result, assistance from the pier superintendent. At about 11 a. m. a tug belonging to the railroad company took the scow and placed her in the slip between piers No. 2 and No. 3.

But during the time the scow was left at the pier end she received damages because of her pounding against the pier, due to her exposed condition.

The libelant claims that the damage was caused by the negligence of the tug John Carroll in the following respects:

- (1) In negligently moving the scow from a place of safety between the piers to a place of danger at the end of pier No. 3.
- (2) In failing to remove the scow from her position of danger after her dangerous condition, due to the increased wind, became apparent.

The libelant also claims that the damage was caused by the negligence of the railroad company in the following respects:

- (1) In not providing a safe place for the scow to lay.

(2) In instructing its agents to move the scow to the end of pier No. 3.

(3) In failing to remove the scow when her dangerous position became apparent.

The Carroll Towing Line, Inc., claimant, as the owner of the steam tug John Carroll, filed a petition against Messrs. Norton, Lilly & Co., and the United Port Service Company, and alleged that the tug John Carroll was under charter to them at the times in question, and that the scow was placed at the end of pier No. 3 under the instructions of their servants, for which they were liable. Norton, Lilly & Co. did not appear, and were not before the court. The United Port Service Company filed an answer, in which it admitted that pursuant to its instructions the tug John Carroll shifted the scow from alongside of pier 3, where the boat was berthed to the end of the pier. It admitted that the two barges moored alongside of the scow were moved "as soon as possible, and every effort was made to remove the scow, * * * but owing to the heavy sea, the scow * * * could not be moved until about 11 a. m. on the morning of the 19th." It was further alleged "that if any damage occurred to the scow * * * it was caused wholly by and was due solely to an act of God, and was not caused nor contributed to in any manner whatsoever by this respondent, its agents, servants, or any one for whom it may have been responsible."

The court below held that the damage was caused by the negligence of the scow master, and he was the servant of the libellant, and that the libellant, accordingly, was not entitled to any recovery. The libel was dismissed against the United Port Service Company "on the ground that it is not negligent to shift the barge to the pier ends under the circumstances and when they did; and I have also held that there was no affirmative duty on them to shift her on the morning of the 19th, or at least that they were not shown to have neglected the performance of such a duty."

The United Port Service Company called several witnesses. Their testimony shows that pier No. 3 was leased to that company at the time involved herein. That that company for its own convenience instructed the tug John Carroll to shift the scow to the end of the pier, and in pursuance of its instructions the scow was so shifted in the afternoon of November 16th, and was allowed to remain there until Friday forenoon November 19th, when between 9:25 a. m. and 10:30 a. m. she was shifted around to the north side of the pier; that the end of the pier was an unsafe place for the scow during the storm; that the tug which finally shifted the scow from the end of the pier was obliged to "knock off" after it made the shift because of the very heavy sea, which rendered it impossible for her to work any longer. The receiving clerk in charge of the pier admitted that—

Around 9 o'clock the captain of the scow met him, and "we came into the office together, and I called up the New York Central and also his owners. The New York Central said they had a couple of towboats there, and would do what they could to shift the barge from the end of the dock. I know that the New York Central had a couple of towboats around the end of the pier in the morning, and he hailed them, and they wouldn't touch them."

Then later on he testified:

"Q. On the morning of the nineteenth, did you call up the New York Central? A. I wouldn't like to swear to it. I usually do in a case of this kind. * * *

"Q. Did you call to any passing tugs? A. Yes, I was on the end of the pier myself, with the captain, between the hours of 8 and 10, when he was shifted, and we hailed a couple of New York Central tows, but they wouldn't come.

"Q. New York Central tows? A. Tugboats. They were lying around there. * * *

"Q. Now that morning at 9 o'clock or before that the captain came to you? A. Between the hours of 8 and 9.

"Q. What did he say to you? A. The exact words I can't say. The barge was there, but she was in a dangerous position. I said, 'What do you want?' He said, 'Call up the people.' I think we called his people and also the New York Central. The New York Central says, 'We have a couple of tugboats out shifting boats, and we'll take care of it.' I went out with the captain.

"Q. He told you they were New York Central tugs? A. No. The answer I got from the railroad was that they had some towboats down there, and they would take care of them. * * *

"Q. What did you do then? Go down and ask them to assist the Donohue? A. I was on the end, and asked them to come in and take the Donohue out.

"Q. Did they do it? A. No.

"Q. They refused to do that? A. Yes.

"The Court: It was blowing very hard, and when you spoke to them you had to speak into the wind?

"The Witness: Yes, and the water was striking over me at the same time.

"The Court: And they could not hear you?

"Witness: No."

The storm was one of unusual violence. The testimony of the head of the weather bureau in New York shows that the wind began to blow from the east about 5 p. m. on the 18th, and that it steadily increased during the night, and that between 10 and 11 of the next morning it had reached a maximum of 71 miles. That after 7 a. m. of the 18th there were indications of its approach, and that at 4 p. m. on the afternoon of the 18th the Bureau sent out warnings of a northeast storm, and that it would be attended by easterly gales off the Middle Atlantic and Southern New England coasts by early Friday morning. The storm signals were displayed at the top of the Whitehall Building, and at Sandy Hook and Long Branch. The information was given by telephone to the towing and to the railroad companies as the Bureau obtained it.

The District Judge dismissed the United Port Service Company from the case, stating that he did so on the ground that it was not negligent to shift the scow to the end of the pier at the time the shift was made. In this there was no error. But in holding that there was no affirmative duty on that company to shift the scow on the morning of the 19th, "or at least that they were not shown to have neglected the performance of such a duty," he fell into error.

[1, 2] The United Port Service Company as wharf manager owed a duty to the scow. It employed a harbor master who had authority to shift the barges in and around the pier. Under his orders the scow was moored to the south side of the pier on November 14th, and under his orders she was shifted on November 16th to the end of the pier, where she was when the storm broke on November 18th, and where she was

permitted to remain for hours after due warning of the storm had been given. In placing the scow at the end of the pier and in allowing her to remain there the United Port Service Company took the responsibility therefor, and assumed the obligation of her protection. The law imposed upon it, as it had the right to determine at what part of the pier the vessel was to be moored, the duty to exercise reasonable care for her protection. The care to be exercised must be in proportion to the danger to be avoided. And it is a general rule that a person engaging in an act which the circumstances indicate may be dangerous must take such care as prudence suggests to avoid injury. The testimony shows conclusively that the end of the pier was a safe place at which to moor the scow only so long as the weather continued moderate, and the pier end was regarded by all the witnesses who testified upon the subject as an unsafe place when a strong easterly wind was blowing. The officials in control of the wharf knew, or ought to have known, for hours before the scow was shifted that the end of the pier at which they had moored her was an unsafe place for her to remain. The wind had been blowing from the east since 5 o'clock Thursday afternoon, and an east wind was dangerous. The storm warnings had been sent out as early as 4 o'clock of that same afternoon of Thursday, and the information was at the same time given that a storm from the east accompanied by gales was expected early on Friday morning. But notwithstanding this the scow was left at the pier's end until 11 o'clock of Friday forenoon, and the task of moving her was not completed until 11:30. This, we think, was a failure on the part of the United Port Service Company, which had ordered the scow placed at the end of the pier, and which controlled the mooring of vessels at the pier, to exercise reasonable care for the protection of the boat by causing its removal from what had become a place of danger to a place of safety. For its failure to perform that duty it should answer in damages. The primary responsibility rested upon it.

[3] The New York Central Railroad Company was the charterer of the scow, and it seems to be conceded that the boat was in a seaworthy condition when the railroad company took possession of it. It was bound to return the scow to the libellant in as good condition as she was in when it took possession—reasonable wear and tear excepted. It did not do so, and is therefore secondarily liable in accordance with our decision in *Healey v. Moran Towing & Transportation Co.*, 253 Fed. 334, 165 C. C. A. 116.

[4, 5] It is a general rule of the law of bailments that where chattels are delivered to a bailee in good condition and are returned in a damaged state the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. 6 C. J. p. 1158. While the bailee may overcome this presumption by showing that the loss occurred through some cause consistent with due care on his part, that presumption, under the circumstances of this case, was not overcome. The New York Central Railroad Company operates night tugs and day tugs with no cessation. It is true that the master of New York Central Tug No. 25 was instructed to go down to the American Docks to look

after the New York Central boats that were there. He was not informed that this scow was one of such boats, and he did not know that she was, and he did not arrive at the docks until 10:15 on Friday morning. He then shifted the barge Rochester, which he found lying at the end of Pier 1. Then he shifted the Buffalo, which was lying at the end of Pier 2. And at 11 o'clock he began shifting the scow Donohue.

The following explains how he came to shift her:

"Q. Why did you take her? A. I was asked by a man who represented the New York Central Railroad to shift the boat.

"Q. What did the man say to you? A. He asked me would I shove the Donohue off Pier 3.

"Q. Did you know the man? A. I didn't know at the time.

"Q. Did you find out afterwards? A. He told me he represented the New York Central Railroad.

"Q. Did you shift the boat? A. Yes, sir.

"Q. What time did you begin her shifting? A. Eleven o'clock.

"Q. What time did you finish? A. At 11:30."

But as the advance notice of the approaching storm had been sent out on Thursday afternoon, the assistance rendered at 11 o'clock on Friday morning came too late to prevent the resulting injury, and was, in our opinion, so dilatory and negligent as not to relieve it of its secondary liability.

The District Judge thought that if there was negligence it was the negligence of the master of the scow, and that his negligence was attributable to the libelant, as he was the libelant's servant. We do not consider it necessary in this case to decide whether the negligence of the master of the scow is the negligence of its owner, but we do not agree that the facts clearly show negligence on his part. His testimony was that he went to the office of the United Port Service Company as soon as that office was opened Friday morning, and asked to have the boat removed from the end of the pier. In this he is not contradicted.

The decree is reversed, and the court below is directed to reinstate the libel and enter a decree in favor of the libelant against the United Port Service Company, with a right in the libelant to recover from the New York Central Railroad Company should he be unable to collect the amount of the decree from the United Port Service Company.

WILSON et al. v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 251.

1. **Indictment and information** ⇨ 121(2)—Federal court has power to order bill of particulars.

A federal court has power to require a bill of particulars to be furnished where the charges of an indictment are so general that they do not sufficiently advise the accused of the specific acts with which he is charged.

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

*Certiorari denied 256 U. S. —, 42 Sup. Ct. 57, 66 L. Ed. —.

2. Indictment and information ⇨202(5)—Imperfect statement in indictment cured by verdict.

Where an averment in an indictment has been imperfectly stated, the defect is cured by the verdict if it appears to the court that unless the averment were true the verdict could not be sustained.

3. Post office ⇨48(4)—Indictment for using mails to defraud need not set out contents of letters mailed.

In an indictment under Criminal Code, § 215 (Comp. St. § 10385), for using the mails in carrying out a scheme to defraud, it is not necessary to set out the contents of letters alleged to have been mailed.

4. Post office ⇨48(4)—Indictment for using mails to defraud sufficient.

An indictment charging that defendants devised a scheme to defraud by inducing persons to purchase stock of a corporation well knowing that it was not worth the price charged for it, to be carried out by the use of the mails, *held* not insufficient because it did not set out the value of such stock nor the price at which it was sold or intended to be sold by defendants.

5. Conspiracy ⇨27—Indictment held sufficient.

An indictment under Criminal Code, § 37 (Comp. St. § 10201), for conspiracy to devise a scheme to defraud by the use of the mails, *held* not insufficient because the overt acts charged were committed after the scheme had been devised; the conspiracy being a continuing one until the scheme was executed.

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

Criminal prosecution by the United States against Nichols Field Wilson and others. Judgment of conviction, and defendants bring error. Affirmed.

This cause comes here on writ of error to the United States District Court for the Southern District of New York. The plaintiffs in error are herein-after referred to as defendants.

The defendants and 14 others were indicted on June 1, 1917. The indictment contained 13 counts. It charged that the defendants had unlawfully, knowingly, and willfully devised and intended to devise a scheme and artifice to defraud, and that for the purpose of executing the said scheme and artifice so devised they placed and caused to be placed in a post office of the United States in the New York City post office, to be sent and delivered by the post office establishment of the United States certain writings, inclosed in postpaid envelopes, addressed to designated persons, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

The trial began on May 22, 1918. At that time the court severed the indictment as to four of the defendants named therein. On June 26th a verdict of not guilty was directed as to three of the others. The trial was concluded on June 29th, the jury returning a verdict of not guilty as to four others. The defendants Wilson, Matches, and C. R. Berry & Co. were found guilty on all the counts. The defendant Loomis was found guilty on all the counts but the eighth. Other defendants who were found guilty have not joined in the writ of error.

The defendant Wilson was sentenced to a term of imprisonment of five years on each of certain counts, the sentences to run concurrently, and to two years on certain other counts, the term to begin at the termination of the term of five years.

The defendant Loomis was sentenced to a term of one year and one day on each of the counts, the sentences to run concurrently.

The defendant Matches was sentenced to a term of three years on each of the separate counts, except on count 13, on which he was sentenced to two years, the sentences running concurrently.

The defendant C. R. Berry & Co., Inc., was sentenced to pay a fine of \$1,000 on each count, the total fine amounting to \$13,000.

The sentences of imprisonment were to be executed in each case at the United States penitentiary at Atlanta, Ga.

Stanley C. Fowler and Grant Hoerner, both of New York City, for plaintiffs in error Wilson and C. R. Berry & Co.

John M. Coleman, of New York City, for plaintiffs in error Matches and Loomis.

Francis G. Caffey, U. S. Atty., of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The defendants have been convicted of using the United States mails in a scheme to defraud and of conspiring so to do.

There is no bill of exceptions in the record. An application was made to this court on March 9, 1921, for permission to file one. But the application had to be denied. A bill of exceptions must be tendered, signed, and filed within the time prescribed for making, tendering, and filing such bill or within that time the trial court must have extended the time, and the bill must then have been made and filed within the time so extended. Whether a bill might be signed after the time had expired if, prior to the expiration of the allotted time, the parties had consented thereto, was not argued or decided. But it was clearly not within the powers of this court to extend the time for filing a bill of exceptions.

A party alleging error as a ground for reversing a judgment of a lower court must show the errors complained of clearly and affirmatively by the record, and, as the record before us contains only the indictment, the verdict, and the judgment, it is not open to the defendants to raise in this case any questions concerning the improper admission or exclusion of evidence or erroneous instructions to the jury, or refusals to charge as requested, and they have not attempted to do so. The sole question which the case presents is that of the sufficiency of the indictment.

The indictment is an unusual one because of its length. It occupies no less than 85 printed pages of the record, and it contains 13 counts. The first 12 counts charge a violation of section 215 of the United States Criminal Code (Comp. St. § 10385). The material portions of that section are to be found in the margin.¹ The thirteenth count

¹ "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * * shall be fined * * * or imprisoned * * * or both."

charges a violation of section 37 (Comp. St. § 10201), and the material portions of that section are also in the margin.²

The unlawful scheme to defraud which it is charged the defendants devised was that of inducing divers persons to purchase the stock of the Emerson Motors Company, Inc., and to part with their money in the purchase of the shares of the capital stock of the said company, well knowing that such stock was not worth the price which it was their intention and purpose to induce the victims to pay for it. This, it is alleged, they sought to accomplish by means of false and fraudulent pretenses, representations, and promises which are at great length particularly set forth and described. Numerous false representations, and pretenses of the defendants and allegations of their dishonest acts and purposes are set forth in detail. Every act, purpose, intention, representation, and pretense constituting the scheme to defraud is described.

Devising a scheme to defraud and using the mails to execute it brings those engaged in the scheme within the provisions of section 215 of the Criminal Code. *United States v. Young*, 232 U. S. 155, 161, 34 Sup. Ct. 303, 58 L. Ed. 548.

It is undoubtedly a fundamental principle in the law of criminal procedure that one accused of crime must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him. This is necessary not only that he may prepare his defense, but also that he may be able to plead the judgment as a bar to any future prosecution for the same offense. *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819. The indictment should contain such a specification of acts and descriptive circumstances as will on its face determine the identity of the offense. The true test of its sufficiency is not whether it might possibly have been made more certain. It is simply whether the indictment sufficiently informed the defendant of what he must be prepared to meet, and, in case other proceedings should be taken against him for a like offense, whether the record shows with accuracy the extent to which a former acquittal or conviction might be pleaded. *Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105. Tested by that standard, there is no reason for doubting the sufficiency of the indictment.

[1] The indictment is drawn in the form in which such indictments are usually drawn, and it does not appear to be lacking in that degree of reasonable certainty which is required in such cases. But, if the defendants thought that it failed to apprise them of the nature of the accusation against them with that degree of certainty to which they thought themselves entitled, they had a right to ask for a bill of particulars. The right to such a bill may be confined to civil cases, in a few states. See *People v. Alviso*, 55 Cal. 230; *State v. Quinn*, 40 Mo. App. 627; *State v. Williams*, 14 Tex. 98. But it is not so re-

² "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

stricted in the federal courts, and, when the charges of an indictment are so general that they do not sufficiently advise the accused of the specific acts with which he is charged, the trial court has power to order a bill of particulars to be furnished. Kirby v. United States, 174 U. S. 47, 64, 19 Sup. Ct. 574, 43 L. Ed. 809; Rosen v. United States, 161 U. S. 29, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Coffin v. United States, 156 U. S. 432, 452, 15 Sup. Ct. 394, 39 L. Ed. 481; United States v. Brooks (D. C.) 44 Fed. 749; United States v. Bennett, 24 Fed. Cas. p. 1093, No. 14,571, 16 Blatchf. 338. It has been held that, while such a bill cannot supply the omission of an essential averment in the indictment, it may remove an objection upon the ground of uncertainty. United States v. Bayaud, 16 Fed. 376, 21 Blatchf. 287.

[2] In this case the defendants went to trial without making any objection to the indictment. There was no motion to quash, no demurrer, no application for a bill of particulars. As they went to trial without any objection, now that they have been convicted they cannot come into this court to raise objections which must have been met at the trial. If the defects existed, and we do not think they did, they are defects which under the rule were cured by verdict. It is the rule in criminal, as it is in civil cases, that where an averment necessary to support a particular part of an indictment has been imperfectly stated, the defect is cured by the verdict if it appears to the court that unless the averment were true the verdict could not be sustained. Heymann v. Reg., L. R. 8 Q. B. 102, 12 Cox, C. C. 383; Reg. v. Stroulger, 17 Q. B. Div. 327, 16 Cox, C. C. 85; State v. Ryan, 68 Conn. 512, 37 Atl. 377; State v. Freeman, 63 Vt. 496, 22 Atl. 621. The matters said to be indefinitely set forth could not have been proved as alleged unless the government produced all the evidence necessary to support the most careful pleadings.

[3] It is said, however, that the first 12 counts of the indictment are insufficient because they do not describe or set forth the contents of "a certain writing" which in each of said counts is alleged as having been mailed for the purpose of carrying out the alleged fraudulent scheme. The allegation in the first count is in form as follows:

"The said defendants, and each of them, knowingly, willfully, and feloniously, for the purpose of executing said scheme and artifice so devised and intended to be devised by the defendants, and each of them, and attempting so to do, did place and cause to be placed in a post office of the United States to wit, in the New York City post office, to be sent and delivered by the post office establishment of the United States, a certain writing, inclosed in a post-paid envelope, addressed to Mr. T. C. Larsen, Marlon Ave., Harrison, N. Y., against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided."

The allegation in the other counts is the same except that in certain of the counts the writing is alleged to have been placed in the post office in the Pennsylvania Terminal Station, Hudson Terminal Station, Wall Street Station, Station P, all New York City post offices, and in other counts it is said to have been placed in the post office at the city of Kingston. The name of the addressee is given in each of the 12 counts, but the person addressed is not always the same.

The claim that the counts are insufficient because they do not "describe or set forth" the contents of the writing is based upon the following statement in the opinion of the Supreme Court in *Bartell v. United States*, 227 U. S. 427, 431, 33 Sup. Ct. 383, 57 L. Ed. 583:

"While it is true that ordinarily a document or writing essential to the charge of crime must be sufficiently described to make known its contents or the substance thereof, there is a well-recognized exception in the pleading of printed or written matter which is alleged to be too obscene or indecent to be spread upon the records of the court. It is well settled that such matter may be identified by a reference sufficient to advise the accused of the letter or document intended without setting forth its contents."

And reliance is also placed upon *United States v. Noelke*, 1 Fed. 426, 432. In that case the Circuit Court of the Southern District of New York held that a circular alleged to have been mailed in violation of the statute should have been set forth in *hæc verba*, and that the omission to do so was not cured by verdict. The court said:

"This objection appears to have been regarded as one of substance, and not of form merely, and therefore it is not aided by verdict at common law. *Bradlaugh v. The Queen*, L. R. 3 Q. B. D. 618. And for the same reason we think it is not cured by the statute above referred to. Rev. St. § 1025."

As respects the statement made by the court in *Bartell v. United States*, *supra*, and heretofore quoted, it was made in reference to the crime of depositing obscene matter in a post office of the United States, and it involved the construction of section 3893, Rev. Stat. (Comp. St. § 10381). The subject was very elaborately considered in *United States v. Bennett*, Fed. Cas. No. 14,571, 16 Blatchf. 338, in the Circuit Court for the Southern District of New York, and all the English and American cases were examined by Judge Blatchford, and his opinion was concurred in by Judges Benedict and Choate. It was held to be unnecessary under that statute to set forth the writing in *hæc verba* provided the indictment stated that the writing was so indecent that it would be improper to place it on the court's records. The case is the leading case, and the law on the subject does not seem doubtful.

So it has been held important that the written instrument should be set out in full in an indictment where the words of the document are essential ingredients of the offense, as in forgery, passing counterfeit money, sending threatening letters, and libel. See *Wharton's Criminal Procedure* (10th Ed.) vol. 1, par. 213. But it has been held not to be necessary in prosecutions for selling a lottery ticket that the ticket should be set forth verbatim. *People v. Taylor*, 3 Denio, 99; *Freleigh v. The State*, 8 Mo. 613. And a like ruling has been made as to an indictment for the crime of removing a stamp from a cask of distilled liquors. *United States v. Bayaud*, 21 Blatchf. 287.

It does not follow that, because in certain classes of crimes the contents of a writing which are connected with the crime are required to be set out in *hæc verba*, therefore in prosecutions under section 215 of the Criminal Code for using the mails to defraud a similar course must be pursued. In *Wharton's Criminal Procedure* (10th Ed.) vol. 1, p. 643, it is said:

"Using mails to defraud being charged, the exact scheme agreed upon to defraud or obtain money by false representations must be set out, and it must be alleged that a letter or postal card was deposited in the mail in furtherance of and for the purpose of executing such scheme."

The indictment under discussion was within the rule above laid down.

In *Ex parte King* (D. C.) 200 Fed. 622, 628, the District Judge, speaking of section 215, says that—

"It is only necessary that the scheme to defraud should be devised, or intended to be devised, and a letter placed in the post office 'for the purpose of executing such scheme or artifice or attempting so to do.'"

In *United States v. Wupperman* (D. C.) 215 Fed. 135, District Judge Ray, in overruling a demurrer to an indictment which charged the use of the mails to execute a scheme to defraud in violation of section 215 of the Criminal Code, held that the letter—

"should be set out if possible, or sufficiently identified and described; but it is not necessary to go to the extent of alleging just how the letter or package deposited in the mail would or was intended to aid in executing the scheme or artifice."

In *Hume v. United States*, 118 Fed. 689, 695, 55 C. C. A. 407, which was a case of one indicted for using the mails in furtherance of a scheme to defraud, the Circuit Court of Appeals for the Fifth Circuit declared that, while it would have been better pleading to have given the contents of the letters, the omission to do so did not constitute a fatal defect, and judgment of conviction was affirmed.

In *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, the defendant had been convicted under an indictment which charged him with using the mails to defraud. The indictment stated that the names and addresses of those to whom the letters were mailed were to the grand jury unknown, and the contents of the letter were not set forth. It was claimed on writ of error that the indictment should have recited the letters, or at least by direct statements shown their purpose and character, and that the names and addresses of the parties to whom the letters were sent should have been stated. The court held the indictment sufficient and affirmed the conviction. It was said that if defendant had desired further specification and identification he could have secured it by demanding a bill of particulars.

The theory advanced on behalf of the defendants in this case seems to proceed on the assumption that their guilt or innocence depends upon the contents of the letter deposited in the mail under section 215. We do not so read the statute. There is no analogy between a crime of this class and that of forgery, or libel, or the sending of a threatening letter. It is the depositing of a letter in the mails with an intent to defraud that constitutes the offense. It is not necessary that the letter should set forth the fraudulent scheme or contain any false statements. We therefore think it quite unnecessary that its contents should be stated in *hæc verba*. But if we are mistaken in this conclusion the defendants have raised the question too late; the defect being cured by the verdict.

[4] Then it is said that the allegations as to the scheme or plan to defraud are insufficient, vague, and indefinite; that there is no allegation of what the Emerson Motors Company's (Inc.) stock was worth at the time of its disposition to the alleged victims, or as to the price which it was the intention of the defendants to induce the victims to pay for such stock. And reliance is placed upon *United States v. Schwarz* (D. C.) 230 Fed. 537. In that case the indictment failed to allege the real value for the proposed selling price of the real estate to be sold. But the question in that case arose upon a demurrer, and there was an absence of any averments showing a real purpose to defraud purchasers out of their money.

[5] It is said, too, that count 13 does not charge the crime of conspiracy within the meaning of section 37 of the Criminal Code. It is said that all the overt acts pleaded in charge of the conspiracy except one hereafter referred to are ineffectual and must be disregarded because the date of each of them is subsequent to the date of the alleged scheme to defraud by the unlawful use of the mails. And it is argued that the alleged conspiracy and the alleged overt acts must antedate the date of the scheme to defraud; that it is a contradiction of terms to speak of an act done to effect the purpose of a conspiracy after the conspiracy has been accomplished.

At common law no overt act was necessary to constitute the crime of conspiracy. But under the federal statutes an overt act in pursuance of the conspiracy is a necessary element of any offense against the United States. *United States v. Rabinowich*, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211. The conspiracy, however, is still the gist of the offense. *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. The overt act must be a subsequent independent act following the conspiracy and must be one committed to effect the object of the conspiracy. *United States v. Richards* (D. C.) 149 Fed. 443.

We concede that an overt act cannot succeed the completion of the crime contemplated. *United States v. Ehr Gott* (C. C.) 182 Fed. 267; *Ex parte Black*, 147 Fed. 832, 840, affirmed *United States v. Black*, 160 Fed. 431, 87 C. C. A. 383. In the instant case, however, the conspiracy was a continuous one, and the overt acts under count 13, though committed after the conspiracy was formed, were not committed after it was completed. An overt act done after the conspiracy was formed and before it was terminated is sufficient. The count alleges a conspiracy to commit "offenses" against the United States. The execution of the scheme by the mailing of one letter would not terminate the conspiracy. The first letter alleged to have been placed in the mails was deposited on September 15, 1916, and the others are alleged to have been mailed on succeeding dates, the last being deposited on March 22, 1917. It is therefore unnecessary for us to consider whether the one overt act which counsel for defendants admits antedated the commission of the offense was sufficiently described.

Judgment affirmed.

METALLIC RUBBER TIRE CO. v. HARTFORD RUBBER WORKS CO.*

(Circuit Court of Appeals, Second Circuit. June 23, 1921.)

No. 165.

1. Patents ⇨312(1)—Plaintiff in infringement suit must show profits made on sale of infringing article.

Though a former decision of the Circuit Court of Appeals establishing the validity of a patent, and defendant's infringement thereof estops defendant from denying the utility of the device and that it was of value, the burden is on plaintiff, suing for profits from the sale thereof, to show that profits had been made.

2. Patents ⇨318(4)—Only if entire market value of infringing article is attributable to patent device may patentee recover entire profits from sale thereof.

In a suit for infringement of a patent on a nonskid wire tread for tires, if the entire value of the whole infringing tire as a marketable article is properly attributable to the patent device, complainant is entitled to the entire profits on all the tires manufactured and sold by defendant embodying such invention; but, if the whole value of such tire is not solely attributable to such device, complainant must separate and apportion by reliable and tangible proof the part of defendant's profits derivable from the use thereof, to establish a claim for more than nominal damages.

3. Patents ⇨318(4)—Owner of patent on wire tread cannot recover whole profit made by infringer on sale of tires, entire value of which is not attributable to such treads.

A tire being a composite structure, each element of which must be credited with its share of the total profit from the sale thereof, the court erred, in a suit for infringement of a patent on a nonskid wire tread for tires, in awarding to plaintiff the whole profit made by defendant on the sale of tires on which such treads were used, there being no evidence that the entire value of such tires was properly attributable to the presence of the wires in the treads.

4. Patents ⇨318(6)—Royalty payments by infringer for use of other features used in infringing article should be deducted from profits from sale thereof awarded to owner of patent.

In a suit for infringement of a patent on a nonskid wire tread for tires, the court, in awarding to plaintiff defendant's profits from the sale of tires containing such treads, erred in refusing to allow defendant credit for royalties paid by it for the use of other features used in connection with such tires, such royalty payments being part of the cost of production, and the fact that one of such payees failed to receive a patent on his device cannot deprive defendant of its right to deduct the amount paid him for work done in the development of a practical method for imbedding a wire, so as to produce an anti-skid function.

5. Patents ⇨318(6)—Profits from sale of tires without patented wire tread should be deducted from profits awarded to patent owner.

In awarding to the owner of a patent on a nonskid wire tread for tires the profits made by an infringer from the sale of tires with such treads, the court erred in not allowing the deduction of profits on tires without the imbedded wire of such patent; any profit gained by an infringer from the use of what was old prior to the date of the patent not constituting any part of the compensation to be awarded to the patentee.

6. Patents ⇨318(6)—Advertising expenses should be deducted from profits from sale of infringing article awarded to patentee.

The advertising of a business being a necessary expense and one of the means by which the profits arise, the amount expended in advertising an article containing an infringed patent device should be deducted from the profits realized on the sale of such article, in ascertaining the amount payable to the owner of the patent on such device.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 256 U. S. —, 42 Sup. Ct. 57, 66 L. Ed. —.

7. Patents ⇨318(1)—Complainant not entitled to royalties from sale of infringing article, where no profits realized.

Where infringer realized no profits from sales of the infringing article, complainant held not entitled, under circumstances of case, to reasonable royalties from sale of such article.

8. Patents ⇨319(1)—Patentee's assignee cannot recover for lost sales because of infringement, where it sold no articles containing patented device.

Where neither the assignee of a patentee of a nonskid wire tread for tires nor any concern paying it royalties manufactured or sold tires containing such device, it cannot recover damages for lost sales because of sales of such tires by an infringer.

9. Patents ⇨318(5)—Interest on profits from sale of infringing article allowable only from date of referee's report as to amount thereof.

Where the District Court held a patent not infringed, and the infringer ceased its infringement months before a decision of the Circuit Court of Appeals establishing the validity of such patent, so that it could not be regarded as a deliberate and wanton infringer, the court below, on remand, erred in allowing the patentee's assignee interest on the infringer's profits from the sale of the infringing article from the date of the decision of the higher court, where the determination of the amount of such profits was in the hands of a referee during part of such time; interest on an infringer's profits being allowed only from the date of the referee's report ascertaining the amount thereof, or from the date of their first judicial ascertainment, where ascertained by the court, unless such infringement was deliberate and wanton.

10. Patents ⇨319(3)—What constitutes wanton or deliberate infringement.

Where an infringer ceased its infringement months before the validity of a patent was established by the Circuit Court of Appeals, on appeal from decision holding noninfringement, the infringer could not be regarded as a wanton or deliberate infringer.

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

Suit by the Metallic Rubber Tire Company against the Hartford Rubber Works Company. Decree for plaintiff (266 Fed. 543), and defendant appeals. Reversed, with instructions.

Livingston Gifford, Ernest Hopkinson, and Charles S. Jones, all of New York City, for appellant.

Henry F. Parmelee and George D. Watrous, both of New Haven, Conn., for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The Metallic Rubber Tire Company filed a bill in equity against the defendant, in which it alleged the infringement of letters patent No. 609,320, issued to Calvin T. Adams on August 16, 1898, for an improvement in vehicle tires. The bill asked for an injunction and an accounting; the plaintiff claiming as assignee of the patent. The lower court dismissed the bill on the ground of noninfringement. 189 Fed. 402. On appeal to this court in 1912 the patent was held valid and infringed, the decree below was reversed, and the cause remanded, with instruction to enter a decree for the complainant for an injunction, an accounting, and costs. 200 Fed. 743, 119 C. C. A. 187. Accordingly the District Court, on January 30, 1913, entered a decree adjudging the patent valid and infringed, and that the complainant recover from the defendant profits and damages. A perpetual injunction was issued, and the matter of stating the account of profits

and of assessing the damages was referred to a master. On the coming in of the master's report in 1917, exceptions were taken, which the District Judge sustained, and the case was again remanded to the master, who was directed to state an account in accordance with the views expressed in the opinion. 245 Fed. 860. In 1920 exceptions were taken to the master's second report, whereupon the report was modified and confirmed. 266 Fed. 543.

A final decree, filed June 16, 1920, has awarded to the plaintiff the sum of \$244,970.25. The court awarded to the plaintiff the profit made on the whole tire during the period of infringement, amounting to the sum of \$183,383.53, together with interest at 6 per cent. from November 11, 1912, except for a period of two years; said interest amounting to \$61,586.72. Interest was computed from the date of the decision of this court (November 11, 1912), decreeing the validity of the Adams patent and establishing the fact of the defendant's infringement. The period of two years during which interest was withheld covers the time when the matter was in the hands of the master on the reference after the evidence before him was closed. The defendant has brought the case to this court, and claims that the award of the entire profits realized from the sale of the infringing tire was error, and that it was likewise error to award interest from the date of the filing of the opinion in this court establishing the validity of the patent and the fact of infringement.

The specification of the Adams patent states that it relates—

“to means for preventing the yielding tires of bicycles and other wheeled vehicles from slipping on the roadway, as they are particularly apt to do when the roadway is smooth and wet.”

And the invention claimed is:

“The combination, with a cushioned vehicle tire, of a tread applied to the entire periphery of the tire, and having metallic wire interwoven with itself, parts of said interwoven wire lying substantially flush with the outer surface of the tread, and forming cushioned anti-slip bearings covering the sides, and bottom of the tread.”

Adams did not invent a tire, but a particular type of an anti-skid feature imbedded in the periphery of a plain tread tire. The structure which was held by this court to infringe the Adams patent was a pneumatic automobile tire having hard, rigid, coiled wires imbedded in its tread, and was known as the Midgley tread tire.

It appears that the number of tires containing the infringing tread manufactured by defendant was 29,537. Certified accountants were employed by the plaintiff, and other certified accountants by the defendant, and they spent months in an examination of the books of the defendant company. There was a figure upon which all the accountants agreed. That figure, \$121,281.06, was an amount which, taking the same matters into consideration, represented the gross profit for the sale of the infringing tire. It appears that in submitting their report the plaintiff's accountants gave a detailed explanation of the method pursued by them in arriving at the defendant's factory costs and the selling and administration expenses, which resulted in a final showing in their main report of profits of \$121,281.06. As the difference be-

tween defendant's and plaintiff's accountants in the matter of factory costs amounted to only \$7,952.09 out of a total cost for the infringing tires of over \$900,000, and of only \$1,375.14 in selling and administration expenses out of a total of over \$177,000, the defendant's accountants accepted the plaintiff's statement that the total unapportioned profits upon their agreed items of cost and expense should stand as \$121,281.06.

The defendant did not question any of the items by which the accountants agreed upon the factory costs and selling and administration expenses. What the defendant did was to urge that the profits as found should be apportioned between the patented and unpatented features, and that the balance should be offset by certain royalty deductions. The plaintiff, on the other hand, starting with the agreed profits, urged that its own accountants had erred in allowing to the defendant certain costs and expenses totaling over \$70,000.

The master, in his report of September 20, 1915, did not consider it necessary to pass upon the legality of all disputed items. He proceeded upon the theory that the complainant was entitled to recover only the profit due to the use of the improvement or addition made by Adams, and that there was no such profit; that, instead of the sales being a result of the inherent merit of the tire, they were the result of the strenuous forcing sales campaign of the defendant company. In the course of his opinion he said:

"It has not been shown that the patentee or the purchaser of the patent ever established a market value for the anti-skid feature of the patent in suit, and it is evident from the proofs in this accounting that the defendant was unable to establish a market value. No testimony has been given to me to satisfy me that the sole salability of the tires in question arose from their possessing the interwoven wire feature embodying the Adams patent. *Garetson v. Clark*, 15 Blatchf. 70, Fed. Cas. No. 5,248. I find no evidence that the patentee or the purchaser of the patent, would, as a matter of fact, have made any profit whatever if the defendant had not interfered with their rights. "The development of the wire tread at the Hartford works necessitated a vast amount of experimental work throughout the entire period of the manufacture and sale of this type of tires. Changes and improvements were made as these tires were passing through the only efficient practicable test, that of actual use under varying conditions by the average automobile owner. This required time. Nothing of the kind had ever been made before.

"This action was not brought and prosecuted and financed by an individual or manufacturer, who had invented a thing of great merit; not by one who had spent time and labor and money to perfect a thing of great value; not by one who had made and sold anything, and whose business was being ruined or encroached upon by an unscrupulous, deliberate infringer. The principal value of the Adams patent seems to be based upon the possibility of recovering profits from the honest efforts of this defendant to create a successful metallic non-skid feature in connection with its tires. It is not a case where the purchasers would have a tire with this particular feature or go without a tire."

In arriving at the conclusion that defendant had made no profits, the master deducted the royalties which defendant had paid under the Dunlop and Clincher patents for other features which it used in connection with the infringing tires which it sold. These royalties amounted to \$16,800.03. He deducted \$77,064.30 for profits on plain tread tires without the infringing device. He also deducted \$20,957.15

paid by defendant to Midgley under an agreement made by it with him after the allowance by the Patent Office of his application for a patent. The result of the various deductions allowed by the master showed that a loss, and not a profit, resulted to the defendant from the manufacture and sale of the infringing tires, and that the plaintiff was entitled to nominal damages only. Exceptions were taken to this report, and the District Judge filed an opinion on February 19, 1917, in which he sustained the exceptions and said:

"It therefore seems imperative to hold that the patented improvement has given the entire value to the combination, in which case plaintiff is entitled to recover all the profits, unless the defendant can show—and the burden is on it—that a portion of them is the result of some noninfringing and valuable improvement made by him."

On June 29, 1917, the District Judge filed an opinion in modification of the prior opinion of February 19, 1917, and in this subsequent opinion he said that it was imperative to hold that the patented improvement had given the entire value to the combination, and that the plaintiff accordingly was entitled to recover all the profits. He declared:

"It was my intention to hold that the plaintiff is entitled to recover of the defendant all the profits which have been shown to have been received by the defendant on the manufacture and sale of all tires made by the defendant with the patent in suit incorporated into or built into them, because those tires containing the Adams device, which was for a 'new and specific purpose,' were useless without the improvement for the particular purpose for which they were manufactured, to wit, nonskidding, and that while a plain tread tire without the wire was salable for its purpose, yet it could not be fairly said to this plaintiff that it could not recover all the profits received by the defendant on all tires made by the patented improvement which is a permanently incorporated improvement and impossible of removal or detachment."

He added that, whether right or wrong in his conclusion:

"I feel bound to hold, and do hold, that the case falls within the rule that where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits." "This," he declared, "is the rule to apply here." 245 Fed. 860.

The case having been recommitted to the master, additional evidence was introduced, and in his report filed on January 31, 1920, he declared:

"I am of the opinion that, if the complainant is entitled to any recovery in the peculiar circumstances of this case, it should be on the basis of a reasonable royalty, because the method of allowing and disallowing certain items of cost destroys the foundation for arriving at the various figures of cost, and would result in a finding of net profits, as hereinafter shown, out of all proportion to the real equities in the case. I therefore recommend that, in accordance with the evidence taken before me, a fair and reasonable royalty basis for recovery by the plaintiff would be 1½ per cent. of the total net selling price of the infringing tires sold by the defendant. This latter course seems to me reasonable, owing to the fact that tires of the patent in suit with interwoven wires are not at the present time and never have been a commercial success. The only tires of the character ever manufactured or sold were those which the defendant herein made and placed upon the market in an effort to test their value, and, as previously found by me, that effort by the defendant conclusively demonstrated that the patent in suit, even though valid and infringed by the defendant's tires, had no commercial value."

But, reporting his findings so as to conform with the opinion of the court, he found a revised net profit of \$183,383.53. The plaintiff and defendant each filed exceptions to the master's second report, and the court, in an opinion in which it confirmed the master's finding as to the net profits, directed that a decree be entered for the plaintiff in the sum of \$183,383.53, and said:

"Manifestly the plaintiff has been entitled to all profits realized from the infringement by the defendant, and the defendant should be held to pay those profits over, and its own conduct estops it, in my judgment, from any consideration, but the strict application of the established rules; so that, in view of the facts abundantly disclosed, under the application of rule, reason, or justice, it cannot expect to have applied the lesser punishment of assessing 1½ per cent. royalty as the measure of what this plaintiff is fairly entitled to recover, rather than the exact amount of the profits disclosed by the master's report." 266 Fed. 543, 544.

We must therefore determine whether error was committed in entering a decree awarding to the plaintiff all the profits realized in the sale of these tires by the defendant. We quite agree with the court below that, if the Adams device gave to the infringing tires the entire value realized, then the plaintiff was properly awarded all the profits obtained from their sale during the infringing period. In the consideration of this question we think it important, however, to repeat what this court said in *Westinghouse v. New York Air Brake Co.*, 140 Fed. 545, 550, 72 C. C. A. 61, 66, speaking through Judge Wallace, as follows:

"As has been already suggested, the cases are exceedingly rare in which the whole marketable value of a machine, or of a collection of devices, can in reason be attributable to a patented feature which embraces merely an improvement in one of its parts. Marketable value is ordinarily the result of various conditions independent of the normal value of the machine itself, and the contribution which the patented part gives to marketable value is necessarily dependent more or less upon these conditions. Enterprise, exploitation, and business methods in introducing and marketing the thing are generally as important a factor as its intrinsic value. The effect of the control of the market, whether by lawful or illegal endeavors, in fixing the marketable value of many products, is shown by what has been accomplished by some of the so-called 'trusts' of the day. Where that part of the thing is of such paramount importance that it really creates the value of the whole, the doctrine that the value of the monopoly of the part is measured by the marketable value of the whole may reasonably be applied, notwithstanding the marketable value of the whole may from extraneous causes be out of all proportion to its normal value. But, where that part of the thing is relatively an unimportant factor in the normal value of the whole, the application of the doctrine is likely to lead to inequitable results."

[1] It is true that the former decision of this court establishing the fact of the validity of the Adams patent and of defendant's infringement estops the latter from denying the utility of the Adams device and that it was of value. But, as was said in *Westinghouse Electric & Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 225 U. S. 604, 616, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, no matter how great the presumptive or actual value of that patent might be, it would not follow that the defendant had made a profit by the sale of the infringing tire. The plaintiff, having sued for profits,

was under the burden of showing that profits had been made. This it has failed to do to the satisfaction of the master, who has found that an actual loss resulted from their sale.

[2] If the entire value of the whole infringing tire as a marketable article is properly and legally attributable to the device of the Adams patent, the complainant is entitled to the entire profits on all the tires manufactured and sold by the defendant which embodied the Adams' invention. But, if the whole value of complainant's infringing tire as a marketable article is not solely attributable to the device of the Adams patent, the complainant must separate and apportion by reliable and tangible proof the part of the defendant's profits which are derivable from the use of it in order to establish a claim for more than nominal damages. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Westinghouse Co. v. Wagner Co.*, supra; *Hurlburt v. Schillinger*, 130 U. S. 456, 472, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; *Wales v. Waterbury*, 101 Fed. 126, 41 C. C. A. 250. In *Wales v. Waterbury*, supra, which was decided by this court, we said, in speaking of the defendant:

"The profits for which he is to account are not the total profits, but those only which are attributable to the * * * patented invention. This has always been the rule, and it is a manifestly just one upon principle."

And more recently in *Underwood Typewriter Co. v. Stearns*, 227 Fed. 74, 78, 141 C. C. A. 622, 626, this court declared that—

"In determining the profits and damages recoverable for infringement of a patent for a device which constitutes only one feature of the machine or structure sold by defendant, it is the settled rule that the burden of proof rests on the complainant to separate or apportion defendant's profits between the patented and unpatented features and by evidence which is reliable and tangible."

[3] We certainly are far from finding in this record any evidence whatever that the entire value of the infringing tires was properly and legally attributable to the presence of the wires in the treads. We are quite unable to say that without that device there would have been no market for the tires, and that the defendant's structure would have been noncommercial. The value of a tire depends upon the following parts among others:

- (1) The part which secures the tire to the wheel, such as the clinchers or wires.
- (2) The carcass.
- (3) The tread of the tire.
- (4) The inner tube and the provisions in the form of construction of the shoe or cover to protect the inner tube from abrasion, or puncture, or creeping, and to permit it to be inflated with facility and to enable it to assist the clincher or other holding device to hold the shoe or cover to the rim.

The nonskid feature of the tread does not constitute the sole value of the tire. There are various other features which are equally as intimately attached to and which become as much a part of the completed tire as the nonskid feature of the tread. The defendant applied the infringing tread tire to three existing types of tires, the "Clincher,"

"Dunlop," and "QD." These types were made either under patents for which the defendant paid royalties or which it had purchased outright, and which had undoubted value. A tire is a composite structure, and built up element by element and part by part; each of its parts having a distinct and separate function to perform. Each element must be credited with its share of the profit going to make up the profit from the total structure; and we are satisfied that the instant case is not the "exceedingly rare" case, alluded to in our decision in the Westinghouse Case already quoted, in which the whole marketable value of the article can in reason be attributed to the patented feature made use of in one of its parts. It was error, therefore, to award to the plaintiff the whole profit made by defendant on the sale of the infringing tire.

[4] The District Judge was in error in refusing to allow the defendant credit for the royalties paid by it to Dunlop, Clincher, and Midgley for the use of their devices. Such royalty payments, when the inquiry concerns profits actually received by a defendant, are properly regarded as part of the cost of production. *Elizabeth v. Pavement Company*, supra; *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 609, 132 C. C. A. 608. What was paid Midgely is not to be regarded as a gratuity, but as an actual expenditure for work done in the development of a practical method for imbedding a wire in such way as to produce an anti-skid function. It is to be regarded as a legitimate item of cost, as much so as the outlay for the necessary machinery to make the infringing tire. The fact that Midgley ultimately failed to receive a patent cannot, under the circumstances, deprive the defendant of its right to deduct the expenditure along with the other items of cost.

[5] The District Judge was in error in refusing to allow the deduction of \$77,064.30 for profits on tires identical with the infringing structures, but which did not have the interwoven or embedded wire of the patent in suit. In his first opinion (245 Fed. 860, 866) he did allow it, and stated that he did so for the reason that the plain tread tire was and is satisfactorily used without the wire of the patent in suit, and such tires would not have infringed. Thereafter, however, as we have seen, he changed his opinion in this respect, and filed a memorandum in modification thereof.

The difficulty is that the court failed to distinguish between the cases in which, but for the patented improvement, the device would have had no sale at all, and for the wrongful use of which the infringer is made to give up all of his profits, and the cases in which the patented device could be taken away without affecting the sale of the article for the purpose for which it had been previously used, and for the wrongful use of which device the defendant can be called upon to give up only the profits resulting from the use of the addition.

The authorities hold that any profit gained by a defendant from the use of what was old prior to the date of the patent infringed cannot constitute any part of the compensation to be awarded to the patentee. In the instant case the market value of the addition made by defendant to the old tire is easy of ascertainment. Both kinds of tires were man-

ufactured and sold by defendant side by side. The concurrent operations thus furnish a basis of ascertainment. They show that the profit on the sales of an equal number of plain tread tires, arrived at by including exactly the same items of cost used in determining the profits received from the infringing tire, would have been \$77,064.30.

[6] In ascertaining the amount of aggregate profits, there was originally deducted the sum of \$27,278.56 expended by defendant in advertising. It was subsequently admitted by plaintiff's accountants that, instead of \$27,278.56, the sum of \$37,735.79 had been spent in advertising the infringing tire, and an allowance of that sum was made by the master in his second report, and this was approved by the District Judge. The defendant is certainly entitled to a credit for its advertising expenses. This court, in *Gordon v. Turco-Halvah Co.*, 247 Fed. 487, 159 C. C. A. 541, said:

"The advertising of a business is a necessary expense, and, unless something to the contrary appears, must be reasonably regarded as one of the means by which the profits arise. There is no reason to distinguish between it and any other expense by which the sales are made, such as salesmen's commissions, or salaries, or the like."

It appears that during the accounting period the defendant expended for advertising account \$572,481.53. This advertising necessarily inured to the benefit of the Midgley or infringing tire, and the business in those tires should be charged with a proportionate amount of that expense which should be ascertained by prorating the total advertising account in the ratio that the Midgley sales bore to the total sales. It does not appear whether the sum of \$572,481.53 included the amount expended in the sole advertising of the Midgley tires. If so, it would be necessary that such sum should be deducted from any amount which might be found due because of the amount expended for general advertising purposes. The defendant could not be credited twice for the same expenditures, but we do not understand that has been done.

[7] As respects the recommendation of the master in his report of January 31, 1920, for the payment of 1½ per cent. royalty, to which reference has already been made, it is evident that the master was led to that recommendation because of the rejection of the recommendation contained in his earlier report that there were no profits to which the plaintiff was entitled. The circumstances of this case do not seem to us to make it a fit case in which to apply the principle of reasonable royalties laid down in *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398. We cannot but think that the payment of a royalty under all the circumstances of even 1½ per cent. would be in the nature of a gratuity.

[8] There is no evidence in the record of any lost sales. The number of infringing tires was shown, but it does not appear that the plaintiff, as a consequence of the defendant's sales, lost the sale of a single tire containing the device of the patent. Indeed, it appears that at no time during the life of the patent has he ever manufactured a tire containing the Adams device. Neither has any concern paying royalties to the plaintiff manufactured such tires and placed them on the market. The plaintiff, therefore, has lost no sales because of

defendant's sales, and has no claim for damages as distinguished from profits.

Assuming that the gross profit was \$121,281.06, as agreed upon by the accountants on both sides, there would then be the following deductions:

Profits on plain tread tires.....	\$77,064.33
Royalties to Dunlop, Clincher, and Midgley.....	\$37,757.18
Corrected amount allowed for advertising.....	\$10,457.23

[9] The conclusions reached upon the questions already considered probably make it unnecessary to determine the matter of interest. But it may not be improper, in view of all the circumstances and the argument of the question in this court, that we should point out the error of the court below in allowing interest from the date of the decision of this court holding the patent infringed and which was rendered on November 11, 1912. The defendant is thus required to pay interest during the time the matter was in the hands of the master on the reference. In making his ruling on the subject of interest, the District Judge stated that he was well aware that his ruling was based on no rule that could be found in the books, and that precedent did not sustain it, except by implication. He thought justification of his conclusion might be found, however, "when a full review of the whole case is had and the facts surrounding it are carefully considered." The interest as fixed by the decree, and as heretofore stated, amounted to \$61,586.72. The rule as to interest on profits is stated in Walker on Patents (5th Ed.) p. 828, as follows:

"Interest on infringer's profits is allowed from the date of the master's report, which ascertains the amount of those profits, or from the date of their first judicial ascertainment, in cases where they are first ascertained by the court. Interest is in the discretion of the court."

In *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860, where the court was satisfied that the infringement was not wanton, it was held that the defendant should not be charged with interest before the final decree. The court said:

"Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance."

In *Illinois Central Railroad Co. v. Turrill*, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154, the original decrees were rendered in 1874, and were affirmed in the Supreme Court in 1876 (94 U. S. 695, 24 L. Ed. 238), but were sent back to ascertain how much should be deducted for errors in the accounts as then stated. They came again before the Supreme Court in 1884, when they were affirmed. The court allowed interest from the date of the master's report in 1879. Chief Justice Waite, speaking for the court, said:

"If the decrees had been entered originally for the present amounts, the patentee would have been entitled to interest from 1874. That was settled in *Railroad Company v. Turrill*, 101 U. S. 836, which was one of the cases affirmed in whole at the former hearing in this court. Under these circumstances, it seems to us not at all inequitable to allow interest on the corrected amounts from the date of the master's report in 1879."

In *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, interest was allowed from the day when the master's report was submitted to the court, and it was said that the profits allowed—

“have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained. * * * Nothing is shown to take this case out of the general rule.”

The delay between the filing of the bill in June, 1874, and the ultimate decision of the case, was thus very considerable, although not as great by several years as it is in the present case. It was argued in the Supreme Court in November, 1886, and decided in March, 1888. The delay was not explained; neither was it commented upon in the opinion.

In *Crosby Steam Gage & Valve Co. v. Consolidated Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809, it was held that interest from the date of the master's report was properly allowed on the amount of profits reported by the master and decreed by the court. The court said that—

“Delay caused by the court, or not attributable to the plaintiff, in coming to a conclusion on the master's report, where the amount found by that report is confirmed, ought not to deprive the plaintiff of interest on the amount found by the master. Under such circumstances, the account ought to be considered as liquidated on the day when the master's report is filed.”

In *National Folding Box & Paper Company v. Dayton Paper Novelty Company* (D. C.) 97 Fed. 331, a case in the Circuit Court for the Southern District of Ohio, the master had filed a first report on May 13, 1898, and on June 23, 1898, he filed a substituted report. Both reports had been set aside, and the court considered the question of profits de novo. The result reached was in effect a substantial confirmation of the first report of the master. Judge Taft allowed interest from the filing of the first report, saying:

“I think it within the power of the court to treat the filing of that report as a judicial ascertainment of the damages, and to allow interest at 6 per cent. on the sum of \$12,275.51, from May 13, 1898. It would be unjust to charge to the complainant the loss sustained by the delay from that time to the filing of the opinion.”

A previous opinion in the case had been rendered by Judge Taft (95 Fed. 991, 996), in which he had allowed interest on “the amount found due from January 1, 1893,” because “the defendant had full notice of complainant's rights, and chose deliberately to run the chances of the validity of the patent.” But on a petition for reargument Judge Taft modified this in the manner stated above, feeling “constrained” to do so, as he expressed it, by the weight of the authority of the cases in the Supreme Court.

These cases show that as a general rule interest is to be allowed from the date of the master's report, but that circumstances may justify interest from an earlier date. In *Oehring v. Fox Typewriter Co.*, 251 Fed. 584, 588, 163 C. C. A. 578, this court said that perhaps it might be inferred from the decisions of the Supreme Court that interest might be allowed from a date earlier than the master's report, if

infringement was proved to be wanton and deliberate. In that case, however, we did not think the infringement was wanton, and interest was allowed only from the date of the master's report.

[10] This leads to the inquiry whether in the instant case the defendant was a wanton and deliberate infringer. The master in the report filed on September 20, 1915, found that the defendant was an innocent infringer. The District Judge however, thought the defendant a deliberate infringer. "Here we have," he says, "'deliberate infringement,' and defendant ought not to complain if it has to pay for it." Upon a review of the facts we do not think it can be said that defendant deliberately and wantonly infringed what it knew to be a valid patent. Inasmuch as the District Court, when the question originally came before it, held the Adams patent not infringed, it must be admitted that the validity of that patent was open to honest doubt, at least until this court, on the appeal from that decision, established the validity of the patent; and as the defendant had ceased its infringement months before the fact of validity was established, the defendant cannot under the circumstances be regarded as a 'deliberate and wanton' infringer.

In *Oehring v. Fox Typewriter Co.* the patent involved was originally held invalid. 180 Fed. 476. This court reversed that holding in 202 Fed. 753, 121 C. C. A. 119. In view of the original decision of the lower court holding the patent invalid, we held in 251 Fed. 584, 589, 163 C. C. A. 578, that we could not say that the infringement was wanton, notwithstanding that there "were some features indicating a deliberate purpose to infringe." In the instant case we are unable to discover any indication of a deliberate purpose wantonly to infringe. There is no reason, therefore, for taking the case out of the general rule. We are constrained to the conclusion that the court below fell into error in the particulars which we have pointed out, and that the decree below was accordingly erroneous.

The decree is therefore reversed, and the court below is instructed to modify the decree to make it conform with this opinion.

HEISE v. DAVIS, Agent of Railroads, et al. (two cases).

(Circuit Court of Appeals, Fourth Circuit. July 7, 1921.)

Nos. 1889, 1890.

Carriers Ⓒ306 (1)—Neither railroad company nor Director General responsible for dangerous condition of track laid in a camp by the military authorities.

Neither a railroad company, which built a branch from its line into a military camp, nor the Director General, who afterward took over the operation of its road, held liable for the death of soldiers, caused by the derailment of a car within the camp, due to the defective and dangerous condition of the track, where the military authorities had previously taken charge of and were in exclusive control of such track and had changed it at the place of the accident and substituted lighter rails, insecurely fastened.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action at law by T. Alex Heise, administrator of Marion O. Hawkins, deceased, and also as administrator of William Edgar Lowery, deceased, against James C. Davis, Agent of Railroads, and the Atlantic Coast Line Railroad Company. Judgments for defendants, and plaintiff brings error. Affirmed.

D. W. Robinson, of Columbia, S. C., for plaintiff in error.

Douglas McKay, of Columbia, S. C., and P. A. Willcox, of Florence, S. C. (A. L. Hardee, of Florence, S. C., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. These cases involve the same facts; they were tried together and may be disposed of in one opinion.

In June, 1917, the Atlantic Coast Line Railroad Company built a branch from its main line at Simms, S. C., into the military reservation known as Camp Jackson. This branch, after crossing a trestle at the south boundary of the camp, ran nearly straight in a northerly direction for about 100 feet, and then curved sharply to the east for a distance of some 700 or 800 feet. It was called track No. 1. Not far from the trestle a switch was put in, which also curved to the east, parallel with, but much shorter than, No. 1. It does not appear that this switch, called track No. 2, had anything to do with the accident presently to be described. These tracks, aggregating about 1,000 feet, were all laid with 70-pound rails, and were the only tracks laid in the camp by the railroad company. On the 28th of June they were turned over to the military authorities, who thereupon assumed and thereafter exercised complete and exclusive control of the same and of all operations thereon.

On the 10th of May, 1918, a troop train was moving out from track No. 1 towards the trestle. At the curve of that track a car filled with soldiers was derailed and dragged along to the trestle, where it fell, bottom up, into the ravine below. Several of the soldiers were killed, among them Hawkins and Lowery, plaintiff's intestates.

The plaintiff seeks to recover in these suits on the theory that the original construction of the track, at the point where the derailment occurred, was so faulty and dangerous as to charge the railroad company with continuing liability for any injury resulting therefrom, the theory sustained by this court in Bryson, Adm'r, v. Hines (C. C. A.) 268 Fed. 290, 11 A. L. R. 1438, a case arising out of the same accident. In that case we said:

"It follows that, if the negligent construction described in the testimony was a proximate cause of the accident, the plaintiffs had a vested right of action against the railroad when it occurred on May 10, 1918."

But the evidence in this case, while permitting the inference of negligent construction in the first instance, shows that the original track,

at and on both sides of the place where the derailment happened, was reconstructed by the military authorities shortly after they took possession; and this evidence is so definite and circumstantial as to put the fact beyond reasonable doubt. Mahone, the chief engineer of the construction company employed to do the work, and under whose personal supervision it was performed, says that early in July, 1917, the track leading in from the trestle was extended in a straight line "on up through the camp," but with 56-pound rails; that track No. 1 was connected at the curve with "a frog and switch points of 56-pound rail"; that the Coast Line had put in 70-pound rails, and that "to make the 56-pound rail and the 70-pound rail fit, I changed the lead from the switch points to behind the frog point"; that he took out the 70-pound rail south of the frog and "put in 56-pound for about 66 or 70 feet, so as to make it run 56-pound rail to the switch point"; that he shifted the track at the frog, "from nothing in some places to about a foot or a foot and a half in the middle," on account of the old frog that was used, "which did not fit the curve and the angle that was necessary there, and made a kink in the track"; that the kink was "placed in my straight track, instead of in the Coast Line No. 1 track," but the latter was "thrown a little bit to the north or northwest, to ease that curve off as much as possible"; that he did not have sufficient angle bars or bolts, and so used strap iron in place of angle bars; that none of the material was furnished by the Coast Line, and that his construction "was distinct and different from Coast Line construction." And referring to the blueprint in evidence, and the point designated thereon as the point where the accident happened, he said that it "was in the lead which I changed from 70 to 56 pound rail; it was the second joint north of the switch, or the second joint south of the frog in the west rail of track No. 1."

This is fully confirmed by Col. Corkran, the military officer in charge of transportation within the camp, who personally directed the making up of the train in question, was present when it pulled out, gave the signal for it to start, and saw the derailment. He says it "happened at the second joint from the switch point; also the second joint from the frog. The rail at this point is 56 pound."

We find no contradiction of this testimony, and no proof which would warrant the jury in finding the facts to be otherwise. Col. Frank, the plaintiff's principal witness, did not go to the camp until the 3d of September, and the condition of the tracks at that time, at and near the place where the accident happened, must have been brought about in the main by the changes which Mahone had made some weeks before. For he attributes that condition "to the light class of rail that was put in there and accepted by the quartermaster whom I relieved"; and speaks of repeatedly "asking for 75-pound rails, tie plates, braces, etc., to make a safe track in there." But surely he would not have wished to substitute 75-pound rails for the 70-pound which the Coast Line had unquestionably laid; the difference in weight is altogether too slight to justify a change on that account. The "light class of rail," therefore, could have been no other than the 56-pound rail which Mahone had put in along where the derailment occurred.

Col. Frank also says that about six weeks before the accident he had removed practically all of the ties at that place, one at a time, and put them back in with five or six spikes in each tie, "trying to hold it down until I could get heavier equipment, trying to prevent an accident, which I felt sure would happen some day."

Furthermore, it is not shown that the original construction by the Coast Line had the specific defects to which the witnesses on both sides impute the accident. Davis, the only witness for plaintiff who saw the tracks before they were taken over by the War Department, says it was "poor construction," laid on the ground, "small irons," no ballast, "looked as if it was just laid temporarily to shove cars in for unloading purposes." But this does not dispute the testimony of Pleasants, the Coast Line engineer in charge of the work, that the rails used were all 70-pound rails, the standard rail of the Coast Line, and that they were properly bolted together with 70-pound angle bars; nor the testimony of De Berry, track foreman under Pleasants, that "we put down 70-pound rail, and the usual cross-ties and angle bars and spikes, just a few tie plates, not enough to put on all, so one on every other tie." But when the military authorities extended the straight track and switched No. 1 into it; as above described, using 56-pound rails, Mahone testifies that he did not have enough bolts and angle bars to replace the construction of the Coast Line, that in some instances he put in but one bolt in each rail—that is, two bolts in a four-bolt angle bar—and that instead of angle bars he had to use strap iron. And Capt. Felder, conductor of the train, a witness for plaintiff, says:

"After the derailment I examined and found that a wheel of a coach mounted the rail at the joint. The angle bar and bolts at this joint was loose, and there was only one bolt in the angle bar when there should have been four."

This and other testimony of similar import convinces us that the defendants are in no wise responsible for the accident under review. The domination of the military authorities throughout the camp was absolute to the last detail, and neither the Atlantic Coast Line nor the Director General was permitted the slightest interference. For any negligence of the War Department, therefore, in respect of the construction and maintenance of the tracks, the speed of the train, or the position in the train of the wooden coach in which the soldiers were riding, there can be no recovery. Bryson, Adm'r, v. Hines, *supra*. And we think it clear, in view of the evidence above recited, that no causal relation was shown between the original construction by the Coast Line, however defective or unsafe it may have been, and the derailment which occurred nearly a year afterwards. When account is taken of the extension of straight track and necessary switch connection with track No. 1, the removal of the 70-pound rail laid by the railroad company and substitution of much lighter rail, the change in the curve of No. 1, the different type of construction, the obviously dangerous condition of the newly laid tracks from lack of bolts, angle bars, tie plates, and spikes, and the constant use of those tracks in that condition for eight months or more, it seems impossible to say in reason that anything done or not done by the Coast Line in June, 1917,

was the proximate cause or a proximate cause of the accident that happened in the following May.

The facts developed in these cases are entirely different from those presented in the Bryson Case, and we are of opinion that they entitled the defendants to a directed verdict.

Affirmed.

STAR BREWING CO. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 8, 1921.)

No. 2845.

Master and servant ⚡398—**Illinois Injuries Act limitation held inapplicable to "subrogated" employer's claim under Compensation Act against wrongdoer for workman's death.**

Under Workmen's Compensation Law Ill. § 29, as amended (Hurd's Rev. St. 1917, c. 48, § 152), providing that, "Where an injury or death for which compensation is payable by the employer under this act, was not proximately caused by the negligence of the employer or his employes, and was caused under circumstances creating a legal liability for damages in some person other than the employer, * * * such other person having also elected to be bound by this act, * * * then the right of the employe or personal representative to recover against such other person shall be subrogated to his employer, and such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employe," such an action by the employer *held* founded on a new and independent right given by the act itself, to which the five-year statute of limitation is applicable, and not upon an assignment of a cause of action given by the state Injuries Act in favor of the employe which is subject to a special limitation of one year.

Alschuler, Circuit Judge, dissenting.

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

Action at law by the Star Brewing Company against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

P. K. Johnson and Louis E. Wangelin, both of Belleville, Ill., for plaintiff in error.

D. E. Keefe and S. W. Baxter, both of East St. Louis, Ill., for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

BAKER, Circuit Judge. In its declaration Star Brewing Company alleged that one of its employes, while duly engaged in his employment, was killed by reason of the railway company's negligent operation of a locomotive; that plaintiff and its said employe and also defendant were all subject to the provisions of the Workmen's Compensation Act of Illinois (Laws 1913, p 335); that under the operation of said Compensation Act plaintiff became liable to pay to the deceased's widow the

sum of \$3,500; and that under the provisions of said Compensation Act defendant became liable to plaintiff for the same amount.

Defendant's plea in bar alleged that the employé's death occurred on December 19, 1916, and that the action by plaintiff was not begun until August 30, 1918, more than one year after the death. On the overruling of plaintiff's demurrer to this plea, plaintiff declined to plead over; and this writ of error challenges the consequent judgment.

Thus is raised the sole question: Is plaintiff's action founded upon a new right given by the Workmen's Compensation Act, or is it founded upon an assignment of a cause of action given by the Illinois Injuries Act (Hurd's Rev. St. 1919, c. 70) for wrongfully causing death?

We are of the opinion that the declaration is based upon a new and independent right of action created by the Workmen's Compensation Act, and therefore that five years is the only limitation of time that is applicable.

"An act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment within this state" is the title of the act, which alone is sufficient to indicate the general legislative intent to do away with the uncertainties and hardships commonly observed in personal injury suits, with their questions of contributory negligence, assumption of risk, and fellow servant, and their difficulties in the measurement of damages, and to substitute for the uncertainties and expense of such lawsuits, which had been borne by the employés in the state, a definite and easily ascertained and cheaply and promptly obtained compensation which should primarily be borne by the industry or industries in which the injury was inflicted and ultimately be borne by the public at large in sustaining the industries. But the act did not change the existing law as to any parties except employés and employers in the included industries.

This purpose, in our judgment, is completely and adequately accomplished by the detailed provisions and machinery of the act. But, as bearing directly on the sufficiency of defendant's plea, it is not necessary to set forth herein more than is embodied in the following sections:

"Sec. 6. No common-law or statutory right to recover damages for injury or death sustained by any employé while engaged in the line of his duty as such employé other than the compensation herein provided shall be available to any employé who is covered by the provisions of this act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury."

Section 7, which prescribes the amounts payable for injuries resulting in death, makes the compensation payable to dependents in such shares as correspond to their respective degrees of dependency.

"Sec. 11. The compensation herein provided, together with the provisions of this act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in section three (3) of this act, or of any employer who is not engaged in any such enterprises or businesses, but who has elected to provide and pay compensation for accidental injuries sustained by any employé arising out of and in the course of the employment according to the provisions of this act, and whose election to continue under this act, has not been nullified by any action of his employees as provided for

in this act." As amended by act approved June 25, 1917, in force July 1, 1917. Laws 1917, p. 505.

"Sec. 29. Where an injury or death for which compensation is payable by the employer under this act, was not proximately caused by the negligence of the employer or his employé, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, or being bound thereby under section three (3) of this act, then the right of the employé or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employé. Where the injury or death for which compensation is payable under this act, was not proximately caused by the negligence of the employer or his employés and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this act, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this act, but in such case if the action against such other person is brought by the injured employé or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employé or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employé or his personal representative: Provided, that if the injured employé or his personal representative shall agree to receive compensation from the employer or to institute proceedings to recover the same or accept from the employer any payment on account of such compensation, such employer shall be subrogated to all the rights of such employé or personal representative and may maintain, or in case an action has already been instituted, may continue an action either in the name of the employé or personal representative or in his own name against such other person for the recovery of damages to which but for this section the said employé or personal representative would be entitled, but such employer shall nevertheless pay over to the injured employé or personal representative, all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this act, and all costs, attorneys' fees and reasonable expenses incurred by such employer in making such collection and enforcing such liability." As amended by act approved June 25, 1917, in force July 1, 1917. Laws 1917, p. 505.

Defendant's plea is based on the contention that the words "under circumstances creating a legal liability for damages in some person other than the employer to pay damages," and the word "subrogated," and the words "the damages sustained," indicate that the legal proceedings provided for in the first part of section 29, through which the employer may recover a judgment against the negligent third party, are legal proceedings based upon an assignment of the cause of action created by the Illinois Injuries Act for wrongful death, and that "the damages sustained" are the damages which the Illinois Injuries Act awards to the personal representative of the deceased. But this contention, in our judgment, is incompatible with the scheme of the act as a whole, and particularly with the above-quoted sections. By section 6 the right of any employé under the act, or his representative, to maintain a common-law or statutory action to recover damages against any employer under the act for injury or death sustained in the line of duty is explicitly abolished. Unless in some other portion of the act such right of action is revived, it must remain forever dead;

and it is contrary to rational thought to say that a suit can be maintained upon the assignment of a nonexistent thing. Section 7 conflicts with the idea that plaintiff's declaration is founded upon an assignment of a cause of action under the Illinois Injuries Act for wrongful death, because that section provides for an entirely different method of distributing the compensation among the dependents of the decedent. Section 11 is likewise inimical to defendant's contention because it limits the responsibility of every employer who is under the act to the amount of compensation determined under the schedules of the act by the Industrial Board.

Respecting the insistence that "the damages sustained," mentioned in the first part of section 29, are the damages admeasured in personal injury suits, it suffices to say that the Illinois decisions furnish an unequivocal denial. *Keeran v. Traction Co.*, 277 Ill. 413, 115 N. E. 636; *Friebel v. Chicago City Ry. Co.*, 280 Ill. 76, 117 N. E. 467; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95. "The damages sustained" are the damages sustained by the employer in compensating his employé, on account of which he is entitled to sue the negligent third party for reimbursement.

As to the urge that the words "under circumstances creating a legal liability for damages in some person other than the employer to pay damages" and the words "the right of the employee or personal representative to recover against such other person shall be subrogated to his employer" mean that plaintiff's declaration is based on an assigned death claim, we are unable to find an answer in the Illinois decisions.

Looking to the historical evil that was intended to be remedied, to the declared purpose of the Legislature as set forth in the title of the act, to the act as a whole embodying a detailed scheme to effectuate the declared purpose, and to the familiar canons of statutory interpretation, we have no difficulty in solving the ambiguity which is created by defendant's emphasis upon the literalism of the quoted words and in finding the legislative intent to be as follows: If an injury to an employé while in the line of his employment is caused by a third party, and the employer, employé, and third party are all under the Workmen's Compensation Act, then, under section 29 of that act, the third party is liable to pay to the employer the amount of compensation awarded against him and in favor of the employé, provided the third party was guilty of negligence or a violation of some statute giving rise, prior to the adoption of the Workmen's Compensation Act, to an action for damages by the employé. This interpretation is adopted by us from the fourth paragraph of the syllabus in the *Friebel Case*, supra. If the text of that decision at all points unequivocally sustained the syllabus, there could be no debate concerning the Illinois construction of the Illinois legislation. But on page 86 of 280 Ill., on page 471 of 117 N. E., the following language appears:

"The word 'subrogated,' as used in that section, is more nearly equivalent to the word 'transferred' than perhaps any other word that might be used in its place. The meaning of that sentence is that the right of action of the employé against the third party causing the injury is transferred to his employer by operation of section 29."

But in thus furnishing a basis for defendant's insistence that there can be a transfer or assignment of a nonexistent thing, the court did not have before it or in mind the precise question that defendant is now presenting. And against this expression there are other parts of the opinion that should be balanced. For example, on page 85 of 280 Ill., on page 470 of 117 N. E.:

"If, on the other hand, the injury to the employé is caused by the negligence of a third party, or is caused under circumstances that would make the third party liable to the employé at common law for the injury, under section 29 the third party causing the injury must pay the compensation allowed to the employé under the statute if all three of them, the employé, the employer, and the party causing the injury, are bound by the provisions of the Compensation Act. * * * He is only bound, however, to pay the same sum of money as would be awarded to the injured employé against his employer under the Compensation Act."

And from page 87 of 280 Ill., and page 471 of 117 N. E.:

"We think it clear that the employer may at once, after the compensation is fixed under the Compensation Act in a proceeding by the employé against him, proceed in a suit against the third party who caused the injury and recover from such third party the amount payable under the Compensation Act by such employer to such employé without first having paid the employé the compensation awarded. The statute further intends by section 29 that the sum so recovered by the employer from the third party shall be for the sole use of such injured employé, although it may at the same time be reimbursement to the employer of the amount paid out by the employer by way of compensation for such injury."

We therefore entertain the view that the opinion in the Friebel Case, taken as a whole, supplies a just foundation for the fourth paragraph of the syllabus, whether prepared by the court itself or by the official reporter.

Confirmation of this construction of the first part of section 29 is afforded by comparing it with the last portion of the section which deals with the situation where the negligent third party is not under the Compensation Act. In such cases the negligent third party can, of course, only be sued on his pre-existent common-law or statutory liability, and this last portion of section 29 effectuates under certain circumstances a transfer or assignment to the employer of that cause of action—an assignment which otherwise would be against the common law of champerty. This last portion of section 29 therefore emphasizes the fact that the situation covered by the first portion, wherein employer, employé, and negligent third party are all under the act, is governed by the commands given without qualification in sections 6 and 11.

If Illinois had never adopted a "Lord Campbell's Act," and if Illinois had never had any common law of negligence, the Legislature could not have defined the "circumstances," under which the third party who is under the act is liable to reimburse the immediate employer of the injured employé, who are both also under the act, by reference to such pre-existent common-law and statutory liabilities. Under such assumptions, contrary to the facts, of course it would have been necessary for the Legislature, in order to carry out the purpose declared in the title to provide "compensation for accidental injuries or death suffered in the course of employment within this state," to give an inde-

pendent definition of the "circumstances." But, inasmuch as there already existed full definitions of the "circumstances" under which common-law and statutory liability would arise when the bill was introduced and when it was enacted into law, the means were at hand through which to define the "circumstances" by reference. Rights under contracts, conveyances, or statutes are not affected by the question whether all the terms, conditions, descriptions, and definitions are written out in full or are brought in by reference to previous contracts, conveyances, or statutes.

We are not unmindful of the rule that considerations of hardship cannot properly lead a court to broaden a statute beyond its legitimate limits so as to cover cases which the court may think are within the spirit of the act and have been inadvertently overlooked by the Legislature. But in the present case plainly there is no *casus omissus*, for the very case of employer, employé, and negligent third party who are all under the act has received the explicit attention of the lawmakers. Therefore the problem is solved by applying to the inept expressions in the first portion of section 29 the relevant canons of construction. Legislative intent is the polestar. Discovery of that intent is the object of all rules of interpretation. Here we think the applicable method is to study the act as a whole against the historical background of the evil to be cured, and to weigh the title and all of the provisions of the act with a view of harmonizing what might seem to be ambiguities or inconsistencies, if looked at only separately, into a rational whole that will accomplish the obvious and declared intention. To that end a court should not stick in the bark of literalism, but should penetrate to the sap of the spirit of the legislation. And we know of no better exposition of this attitude than is found in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.'"

The judgment is reversed, with the direction to sustain the demurrer to the plea.

ALSCHULER, Circuit Judge (dissenting). I am unable to concur in the conclusion reached. The controlling question is clearly stated in the opinion to be whether the suit is upon a new cause of action created by the Compensation Law, or upon a cause of action arising under the Illinois Injuries Act, transferred to the initial employer by the operation of section 29 of the Compensation Act. If the latter, then concededly the condition in the Injuries Act that the action must be

begun within one year after the death would defeat this suit, since the Illinois cases strictly hold the one-year provision to be a condition upon which any right of action is given, and notwithstanding the cause of delay of a year in bringing suit, or the resultant hardship, there is no right of action if suit is not begun within the year. *Bishop v. Chicago Rys. Co.*, 290 Ill. 194, 124 N. E. 837; *Hartray v. Chicago Rys. Co.*, 290 Ill. 85, 124 N. E. 849; *Carlin v. Peerless Gaslight Co.*, 283 Ill. 142, 119 N. E. 66. The federal courts follow this construction. *Atlantic Coast Line v. Burnette*, 239 U. S. 201, 36 Sup. Ct. 75, 60 L. Ed. 226; *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692, 48 L. Ed. 1067; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358.

The first part of section 29 which gives authority for the action is:

"Where an injury or death for which compensation is payable by the employer under this act, was not proximately caused by the negligence of the employer or his employes, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, * * * then the right of the employe or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employe. * * *"
Chapter 48, § 152b, Rev. Stat. Ill. (Hurd's 1917).

This provision, untouched by the wand of judicial construction, seems in itself so elementally plain that rearrangement or restatement could not further clarify it. There is a suggestion of impropriety, or at least of unusuality, in the employment of the word "subrogated"; but its intended meaning in the context wherein it appears is too obvious to import through its presence uncertainty or ambiguity into the section. But, if there were occasion for judicial interpretation of this word, it is afforded by the Illinois Supreme Court in *Friebel v. Ry. Co.*, 280 Ill. 86, 117 N. E. 467, and *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95, which declare the quite self-evident proposition that "subrogated" in this connection means "transferred."

The majority opinion evidently proceeds upon the assumption that, unless section 29 be construed as creating a new cause of action in favor of the employer, for the recovery in any event against the guilty third party of the employer's full liability under the Compensation Law, the structure of the law as a "rational whole" will be seriously marred, and the legislation will fall far short of remedying the evil at which it was directed. This seems to me to involve a serious misconception of the object of the Compensation Law. This was not intended to invade and to change the entire domain of personal injury law, but its purpose was to lay upon industry the reasonable burdens arising from injuries sustained by employes during the course of the employment, regardless of whether under common or statutory law there arose a right of action for the injury; and to that end each and every employe (or his survivors in case of resultant death) sustaining injury in the course of his employment was entitled from his employer to speedy fixed and certain compensation proportionate to the extent of

injury, and right to all other relief against his employer was withdrawn.

To my mind, had section 29 not been included, the other sections would have been construed to have reference only to actions between employers and their employes, since logically the third party, whether employer or not, and whether coming within or without the act, occupies toward the employe of another employer a relation not different from his relation toward the public in general, and the measure of liability in case he injures such an employe logically should not be different than if injuring any other person not in his own employ. Of course, the latter part of section 29, providing for cases where the third party is not under the act, would very properly have been applicable to all cases, to the extent of enabling the liable employer under the Compensation Law to recoup himself against the wrongdoer out of any damages his employe may recover or be entitled to recover. But along comes the quoted part of section 29, which does not impose any additional burden or liability upon the guilty third party, or confer any benefit or advantage upon this stranger in interest whom he injures, but limits his otherwise full liability to such injured person to a maximum of the amount of the employer's liability under the Compensation Law, at the same time leaving with the alleged guilty third party every defense to the action which he theretofore had. This gratuitous limitation of the liability of the guilty third party in no respect furthers or aids the general policy and beneficent purpose of the legislation, but rather detracts from it by injecting this quite unrelated inequity; and, to my mind, the "historical background" of this legislation affords not the slightest aid in determining which of the two constructions was within the legislative intent, and gives no warrant for the contention that to follow strictly the wording of the clause would render it "incompatible with the scheme of the act as a whole."

I agree, of course, that all parts of a law must be construed together, and so far as possible be given force; but I do not follow the reasoning of the opinion to the end that the construction implied by the strict wording of the clause would conflict with sections 6, 7, and 11.

The opinion states that "since section 6 abolishes the employe's common-law and statutory rights of action for the injuries, such rights, unless revived elsewhere in the act, must remain dead." It cannot well be said that the Injuries Act, as applied to employes, met death at the hands of section 6 of the Compensation Act, and that through section 29 came partial resurrection of the dead. Under the well-stated canons of construction set out in the majority opinion, the two sections must be read together, with the result that common-law and statutory rights of action in the employe are withdrawn except to the extent that through the operation of section 29 they remain. But to the extent that they are excepted or saved by section 29 they are the same common-law or statutory rights as they were before the Compensation Law was enacted, which in the case at bar is none other than right of action under the Injuries Act.

The suggestion that section 7 is inimical to the theory of the survival and assignment of a cause of action given under the Injuries Act, be-

cause it limits the responsibility and provides for a new manner of distribution, finds answer in the fact that this is but a further limitation, or, by necessary implication, an amendment of the Injuries Act, in fixing the amount which may be recovered at a far less than the maximum of \$10,000 as in the Injuries Act provided.

I cannot understand the contention that the Illinois Supreme Court has indicated the true construction of section 29 to be that a new right of action is given by the section. To my mind the reference in the Friebel Case to the right of the employer to recovery against the third party of "the amount payable under the Compensation Act" has little or no bearing upon the question, because there was not in the Friebel or the other Illinois cases any question as to the recoverable amount, i. e., whether it is in any event the amount of liability under the Compensation Act, or the amount which would be recoverable at law, not exceeding the employer's liability for the compensation; and there was no occasion for the court to investigate that question in determining issues before it.

The very fact that the section saw fit to employ the words "not exceeding the aggregate amount of compensation payable under this act by reason of the injury or death of the employé" would strongly indicate that, if there were cases where in the action at law a less amount would be recoverable against the third party by the one injured, the recovery by the employer would be likewise less than the extent of his liability under the Compensation Act.

To my mind, however, the Illinois cases, while not deciding the precise point in issue, are strongly indicative of the view of that court that section 29 means just what the words in my judgment naturally import. The Friebel Case, referring to the word "subrogated" as used in that section, says:

"The meaning of that sentence is that the right of action of the employé against the third party causing the injury is transferred to his employer by operation of section 29."

In the Gones-Fisher Case it was said, referring to the action there:

"The pleas were based on sections 6 and 29 of the Workmen's Compensation Act, the first of which provides that no common-law or statutory right to recover damages for injury or death sustained by an employé while engaged in the line of his duty as such employé, other than the compensation provided in the act shall be available to any employé who is covered by the provisions of the act. That section is qualified by section 29."

And, commenting upon the Friebel Case in its reference to instances where all parties were under the act, the Gones-Fisher opinion states:

"It was further held that the common-law right of the employé to sue for his injury against the party negligently causing his injury was in such a case transferred to his employer, and that the employer could maintain a suit against the party causing the injury by proving such common-law right against such negligent party, but that the amount of such recovery could not exceed the amount that the employer was required to pay his employé under the Compensation Act."

There is further significant inference to be drawn from the following sentence in that opinion.

"By the express provisions of section 29 above quoted, where the person by whose neglect the injury is caused has elected not to be bound by the act, * * * the common-law right of action is preserved against him in full."

These words carry the implication that in the cases where all parties come under the act the court considered the common-law right of action "preserved against him" (the third party), not "in full," but in part, viz. to the extent that the Compensation Act preserved it, and "subrogated," transferred, or assigned it to the employer, who might bring suit thereon; but, whatever the extent or quality of the action remaining, it is that or part of that which theretofore the common or statute law had authorized. Surely, if in these cases the precise questions had been as here, this language of the Illinois Supreme Court would have been decisive.

The contention that this part of section 29 is the creation of a new, and not the transference of an existing, cause of action may well be tested by the query: Suppose Illinois never had passed a "Lord Campbell's Act"; could it be contended that section 29 or any other part of the Compensation Law first created in the liable employer any cause of action for death of his employé occasioned wholly by the wrongful act of a third person also within the act? Manifestly not, unless indeed by some process of legerdemain under the guise of statutory construction we reach the fantastic extremity that section 29 is in itself a new Lord Campbell's Act for the first time giving right of action against one who wrongfully causes the death of another.

I call attention further to the words of the section which declare that "such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act." If the amount he was to recover was in any event to be the compensation for which he was liable, why make any use of the term "the damages sustained"? Clearly the words "the damages sustained" do not mean the same thing as "compensation." "The damages sustained" evidently refers to the previous words of the section, "creating a legal liability for damages in some person other than the employer to pay damages," meaning damages which would otherwise be payable to the person injured or his representative. In the employment of the terms "the damages sustained" and "compensation payable under the act" it will not be presumed they mean the same thing. Each must be given its meaning and force, and it would seem clear there could be no other purpose in the employment of these expressions, and they can have no other meaning, than that "the damages sustained" are the damages which but for the Compensation Act would have been recoverable by the employé or his representative.

To my mind the fundamental trouble here is with the probably harsh operation here of the Injuries Act, through its narrowly conditioned grant of right of action for causing wrongful death, which at times works injustice and hardship. But this involves legislation, not judicial action.

It was within the undoubted power of the Legislature to withdraw wholly all right of recovery in any and all persons against those wrong-

fully causing death. *Keeran v. P. B. & C. Co.*, 277 Ill. 413, 115 N. E. 636. And sections 6 and 29 of the Compensation Law effected this in part.

It was clearly within the legislative power to have declared that, where a third party also under the Compensation Act wrongfully causes an injury or death, the liable employer shall in all cases have the right to recover against the third party the full amount of the compensation for which the employer became liable; and the extreme simplicity with which this could have been stated strongly militates against the conclusion that such legislative intent must be evolved out of a provision which upon its face is strikingly otherwise.

It was also within the full legislative power to provide in its Compensation Law that, where all concerned are subject to it, and a third party wrongfully causes the death of another employé, there shall, by the operation of the act, be transferred to the liable employer whatever lawful right of action the employer or his personal representative would, but for the Compensation Law, have had, and whereon the liable employer may sue and recover the damages sustained through the injury or death to an amount not exceeding the employer's liability under the Compensation Law. This last they have enacted in terms in and of themselves plain and unmistakable, and I find nothing in the historical evil to be cured, or in the general scheme of the law itself, or in any of the other parts of the law, which, by any rules of statutory construction, would require or even suggest an interpretation different from that plain import of the language of section 29.

Whatever may be my view upon the unfortunate situation in which the plaintiff finds himself by reason of its delay, necessary or unnecessary, in the beginning of its suit, I believe that under the Illinois Injuries Act, which is the foundation of its right of action, this suit must fail because not brought within one year after the death.

The conclusion is to me unescapable that the judgment of the District Court was right, and should be affirmed.

SCOTT v. W. R. GRACE & CO.

(Circuit Court of Appeals, Second Circuit. June 15, 1921.)

No. 258.

1. Shipping ⇨ 132 (3) — **Vessel must make delivery of goods admitted by bill of lading to have been received.**

The master of a ship, when he issues a bill of lading for goods, must make delivery of all the goods admitted by the bill of lading to have been received, and, when a shipowner signs a bill acknowledging the receipt of a specific quantity of goods, he is bound to deliver the full amount specified, unless he can show that the whole or some part of it was in fact not shipped; the burden of establishing a short shipment being on the vessel.

2. Shipping ⚡132(3)—**Burden on shipowner to show falsification of bill of lading.**

If a shipowner seeks to avoid responsibility for goods, admitted by the bill of lading to have been received, by showing falsification of the bill, which he duly signed, he bears the onus.

3. Evidence ⚡158(28)—**Shipping** ⚡106—**Tally and receipts held best evidence; liability of vessel did not commence until receipt of goods on board.**

Where bags of nitrate were loaded on a vessel by lighterage company employed by shipper, the ship's responsibility for the shipment did not commence until the goods were laden on board, and a tally into the ship and receipts given for each lighter was the best evidence of what was actually loaded.

4. Shipping ⚡132(5)—**Shipowner held to sufficiently prove that goods admitted by bill of lading were not received.**

In a proceeding by vessel to recover freight, evidence introduced by libelant held sufficient to sustain a finding that all of the goods admitted by the bill of lading to have been received were not received by the vessel.

5. Appeal and error ⚡173(1)—**Defenses not pleaded below not considered.**

A defense not pleaded in the answer, and not relied on below, will not be considered on appeal by defendant.

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

Libel proceedings by Jewett M. Scott against W. R. Grace & Co. Decree for libelant, and respondent appeals. Affirmed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter and Theodore M. Hequembourg, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Oscar R. Houston, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The appellee contracted to carry a full cargo of nitrate on the barkentine Amazon from Antofagasta, Chile, to Mobile, Ala., U. S. A. The freight was paid by the appellant, except a balance of \$10,242.80, payment of which was refused because of alleged short delivery of 1,096 bags of nitrate worth \$10,242.80. It was agreed to carry the full cargo at \$25 per gross ton delivered weight. After loading, a bill of lading was given calling for 16,819 bags of nitrate of soda, weighting "Qtls. 35,488.13. Weight and contents unknown. All on board to be delivered." When delivery was made, it was found that there were 15,723 bags of nitrate. The defense is attempted to be supported upon this difference in the number of bags, to wit, 1,096.

The rule is well settled, both in this country and in England, that the master of a ship, when he issues a bill of lading for goods, must make delivery of all the goods admitted by the bill of lading to have been received. When he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can show that the whole or some part of it was

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

in fact not shipped. The burden of establishing a short shipment is upon the vessel, and it is only relieved from this obligation by satisfactory proof. *The Titania*, 131 Fed. 229, 65 C. C. A. 215; *Bolton Steam Shipping Co. v. Crossman* (D. C.) 206 Fed. 183; *Dowgate S. S. Co. v. Arbuckle* (D. C.) 158 Fed. 179; *Henry Smith & Co. v. Bedouin Steam Navi. Co.*, [1896] Appeal Cases H. L. 70; *Abrath v. North Eastern Ry. Co.*, 11 Q. B. D. 440.

[2] If the shipowner seeks to avoid responsibility, by showing falsification of the bill of lading which he duly signed, he bears the onus. *Bradley v. Dunipace*, 31 L. J. Ex. 210; *The Titania*, 131 Fed. 229, 65 C. C. A. 215.

[3, 4] It being conceded that there is a difference in the number of bags delivered from that which the bill of lading was issued for, the question presented is: Does the evidence warrant the conclusion below that such burden has been sustained by the shipowner? The proof offered on behalf of the vessel shows that only 15,427 bags were put on board. The first officer took a tally of the bags as they were received on the schooner. Contemporaneous detailed entries were made in the log, and duplicate original receipts were signed by the first officer, and his personal memorandum was made. Both the log and this memorandum were received in evidence. It appears that the hatches were not opened until the vessel began to discharge at Mobile. The testimony of the custom officers and the appellee's officers was that the hatches were sealed with the custom seals, and were kept sealed, except during the time of actual discharge. The discharge was made by the stevedores of the appellant. The cargo was for it. The testimony is that all the cargo on the vessel was removed.

The custom officers did not keep a tally of the out-turn of the cargo because it was not dutiable, but a representative of the railway company and a representative of the stevedores kept a tally. Both agreed that 15,723 bags were discharged. While this is in excess of what appears to be the first officer's tally of the number of bags taken aboard, it is explained by the fact that some of the bags broke during the discharge, and there was loose nitrate in the hold, which was gathered up by the stevedores and rebagged. There is nothing in the log which would indicate that any false entries were made. The bags of nitrate were placed in lighters, and towed to the schooner alongside, in an open roadstead where the Amazon was anchored, $1\frac{1}{2}$ or 2 miles off shore. The practice was for the tug to take from one to ten lighters in tow and bring them out to the waiting vessels, leaving two or three lighters for each vessel. The lighters were left tied alongside the ocean vessels, and discharged from the lighter with the vessel's tackle, and the tug then returned to pick up empty lighters and take them back to the beach. The appellant relied upon the tally books produced by it, showing the tally taken when the bags were loaded on the lighters on shore.

The work of lightering the bags to the Amazon was performed by a lighterage company employed by the appellant. Receipts in triplicate showing the number of bags loaded on the lighter when she left shore were given to each lighterman, and then, as each lighter was dis-

charged, the practice was for the first officer to sign one of these receipts and give it to the lighterman, and sign the second and give it to the shipper upon his application, and keep the third for the ship's records. These receipts were in the possession of the appellant, but were not produced. No explanation was made for their nonproduction, nor is evidence offered that they were lost or destroyed. It is possible that some of the bags were lost while on the voyage from the shore to the vessel. The ship's responsibility did not commence until the goods were laden on board, and the tally into the ship and receipts given for each lighter was the best evidence of what was actually loaded. We are satisfied with the conclusion of the District Court below. The evidence fully warrants the claim of the shipowner that he has sustained the burden which he assumed of establishing that he delivered the quantity of nitrate which he received on board in the open roadstead from the lighters.

[5] It is further contended that the appellee cannot maintain this suit, because the charter, by its terms, frees the charterer from all liability immediately upon completion of the loading of the cargo. Clause 15 provides:

"The charterer's liability to cease on completion of cargo. Owners to have a full lien on the cargo for all freight, dead freight, and demurrage under this charter party."

In this way it is sought to escape liability because of the cesser clause in the charter party; but this defense is not pleaded in the answer, and was not relied upon below, and, because it was not pleaded, we will not consider it here.

Decree affirmed.

W. R. GRACE & CO. v. NAGLE.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 249.

1. Sales \S 32—In case of contract by correspondence, written contract need not be evidenced by single paper.

Where, if there was a contract made, it was to be spelled out of correspondence between the parties, it could not be said that there was not an express contract in writing, complete in its essentials, merely because there was no one document which could be labeled the contract between the parties.

2. Contracts \S 29—Whether several papers constituted written contract question of fact.

Whether a number of paper writings evidenced a contract complete in all its essentials was a question of fact, and when both parties moved for a direction of verdict, the resolution of such fact inquiry was for the court.

3. Frauds, statute of \S 90(4), 95(1)—Statute held satisfied as to sales contract by a delivery and acceptance thereunder as a part payment and acceptance of goods.

Where an owner of slabs and a manufacturer of steel plates made an arrangement whereby slabs were to be taken by the manufacturer of the

steel plates at a certain price, and steel plates were to be delivered to the seller of the slabs at a certain price, the statute (Personal Property Law, N. Y. § 85) was satisfied on delivery of the slabs to the manufacturer of the steel plates and acceptance by the seller of the slabs of part of the steel plates, that constituting part payment and acceptance of part of the goods or choses in action so contracted to be sold.

4. Sales ⇐384 (2)—Measure of damages for breach of contract to receive difference between contract and market prices.

Under Personal Property Law N. Y. § 145, where owner of steel slabs sold them to a manufacturer of steel plates at a certain price, and agreed to purchase the steel plates to be manufactured, of such sizes as should be directed, at a certain price, and the contemplated sizes were articles widely dealt in in the open market, and quoted from day to day in trade publications of authority, the measure of damages for failure of the seller of the slabs to receive the steel plates was the difference between the contract price of the steel plates and the market price thereof.

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

Action by Louis F. Nagle, doing business as the Nagle Steel Company, against W. R. Grace & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Harold J. Roig, of New York City, for plaintiff in error.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. This action is to recover a balance due upon an agreement between the litigants correctly described by the trial judge as one partly of barter and partly of sale.

Nagle is a manufacturer of steel plates—that is, he “rolls steel plates from steel slabs”—and he specializes in that branch of industry. Grace & Co., in the summer of 1917, had many tons of “slabs” which they wished to have turned into “plates,” apparently for export. Thereupon an admitted arrangement was made between the parties, by which Grace shipped to Nagle slabs at one price, it being agreed that Nagle would convert them as ordered into plates, and bill the plates to Grace at another price. Under this admitted agreement some 600 tons of slabs were turned into plates, and there remained in Nagle’s possession some extra slabs.

Then followed a lengthened correspondence between the parties as to whether and at what price about 400 more tons of slabs would be taken by Nagle, and at what price Nagle would sell the material back to Grace after he had turned it into plates of the shape and size required from time to time by Grace.

In result Grace shipped to Nagle all the 400 tons of slabs, but never gave directions for the making therefrom of more than about 76 tons of plates, and ultimately refused to give any such directions. This action was brought by Nagle alleging that a contract had been made by which said 400 tons of slabs were to become plates, and that Grace had broken the contract, in that he “neglected and refused to furnish speci-

fications" for the manufacture of all the material except 76 tons, although Nagle was "ready and willing to manufacture the same."

If any contract between these parties was ever made, it is to be spelled out of a lengthened correspondence; there was substantially no other evidence before the court.

At the close of the testimony both parties moved for a verdict, which was awarded to the plaintiff below.

The points here argued are: (1) That the parties "never entered into an express contract in writing, complete in its essential elements"; (2) the contract as spelled out from the correspondence of the parties is insufficient under the statute of frauds; (3) plaintiff's damages were incorrectly assessed.

[1, 2] That there cannot be selected from among the letters and telegrams in evidence any one document that can be labeled the contract between the parties is true enough. But this is immaterial. Whether the paper writings introduced evidence a contract complete in its essentials was a question of fact, in the sense of inference from admitted or uncontradicted events; and that (when both parties moved for a direction) the resolution of this fact inquiry was for the court is a matter too well settled to require citation. We are of opinion that the court below drew the correct inference, but certainly no error of law was committed in declaring that these writings constituted a contract.

[3] Assuming now that there was a written contract complete in all essentials, there is no merit in the contention that the statute of frauds was not complied with. The applicable statute was that of New York (Personal Property Law [Consol. Laws, c. 41] § 85), and that statute is either satisfied or avoided (it makes no difference which word is used) if the buyer "accepts part of the goods or choses in action so contracted to be sold," or if he "gives something in earnest to bind the contract, or in part payment." There is no sort of doubt that Grace made a part payment for the plates by delivering 400 tons of slabs, and it is equally certain that Grace accepted from Nagle 76 tons of plates made out of some of those slabs. This was enough.

The objection to the method of assessing damages is that the court below allowed to plaintiff the difference between the contract price and market price of plates, whereas it is contended that the award should have been of the difference (if any) between the cost of production and the contract price.

[4] The argument rests on such cases as *Hinckley v. Pittsburgh, etc. Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967, and *Kingman v. Western, etc., Co.*, 92 Fed. 486, 34 C. C. A. 489. In all such cases the contract was for the making by the vendor of a peculiar or especial kind of goods for which it could not be said that there was any market value except such as was produced by the efforts of the vendor alone. Under such circumstances it is plainly dangerous, and usually unjust, to let the vendor establish his own market; hence the ruling.

In this case the slabs were to be made into plates of such sizes as should be directed, but the evidence is clear and uncontradicted that all the contemplated sizes were articles widely dealt in in the open market and quoted from day to day in trade publications of authority.

Under such circumstances the rule adopted by the court below was correct, and is indeed expressed in Personal Property Law of New York, § 145, which declares that "in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market price" is the normal measure of damage.

There were no special circumstances here, the contract was for a standard article, and the judgment below is affirmed, with costs.

WILSON et al. v. HABER BROS., Inc.

(Circuit Court of Appeals, Second Circuit. May 25, 1921.)

No. 244.

1. Judgment ⇨651—Consent decree interpreted as an agreement.

A consent decree is an agreement of parties, and is to be interpreted as an agreement, and consequently a suit for infringement of design patent and copyright, resulting in a consent decree by which defendant specifically agreed that the court should declare a design and copyright "good and valid in law," estops defendant from asserting the patent and copyright to be invalid.

2. Copyrights ⇨53—What infringement consists in.

Infringement of a copyright consists in the copying of some substantial and material part thereof.

3. Copyrights ⇨83—Kewpie doll held infringed.

A copyright on a doll known as a "kewpie" held infringed.

4. Patents ⇨314—Question of infringement of design patent one of fact.

The question of determining whether or not there has been infringement of a design patent is, like every other question of infringement, an inquiry of fact.

5. Patents ⇨328—43,680 design, for doll, held infringed.

Design patent, No. 43,680, of a grotesque figure commonly known as a "kewpie," held infringed by dolls sold by defendant and called "best baby."

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

Bill in equity by Rose O'Neill Wilson and another against Haber Bros., Inc. From a decree awarding an injunction and accounting, defendant appeals. Affirmed.

Williams & Pritchard, of New York City (William S. Pritchard, of New York City, and Hylan R. Johns, of Rochester, N. Y., on the brief), for appellant.

D. Anthony Usina, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Decree appealed from is based upon a supplemental bill alleging infringement of design patent 43680, issued to the plaintiff, Wilson, and also infringement of said plaintiff's copyright obtained by registration April 5, 1918, for a "work of plastic art," etc.

The subject both of design patent and copyright is a grotesque figure now commonly sold in toy shops and elsewhere, known as a "kewpie." In the specification of the design patent this object is called a "doll," and in the copyright certificate a "figure or statuette," but the thing is the same.

The present bill is supplementary to one in which the same rights were asserted as growing out of the same patent and copyright, and that bill resulted in a consent decree, by which this defendant specifically agreed that the court should declare (as it did) that said design and copyright were "good and valid in law." That consent decree also directed that a permanent injunction issue, forbidding defendant "from infringing the rights of the plaintiffs." Subsequent to this decree defendant obtained by importation certain other dolls or figures apparently differing in detail from those originally found to infringe, and offered such imported articles for sale; hence this supplementary bill.

[1] The nature of a consent decree is sufficiently indicated in *Hodgson v. Vroom* (C. C. A.) 266 Fed. 267. Such decree is an agreement of parties, and is to be interpreted as an agreement; consequently defendant has agreed that both patent and copyright are valid, and it must be held to its agreement.

We express no opinion as to the propriety of copyrighting this doll, but defendant was at liberty to estop itself from contesting validity, and it has done so. Therefore both as to the copyright and the design there is no question before us but that of infringement.

[2, 3] Infringement of a copyright consists in the copying of some substantial and material part thereof. *Eggers v. Sun., etc., Corp.* (C. C. A.) 263 Fed. 373. It would serve no useful purpose to compare in detail the so-called statuette which plaintiff copyrighted and the doll that defendant sold; it is sufficient to say that the doll at the very least is a plain copy of a "substantial and material" part thereof. Consequently it is an infringement.

[4, 5] The proper method of investigating and declaring asserted infringement of a design patent has been much discussed at bar and in the court below; it being suggested that differing and divergent, if not incompatible, rules are to be found in our previous decisions of *Ashley v. Tatum*, 186 Fed. 339, certiorari denied 225 U. S. 707, 32 Sup. Ct. 839, 56 L. Ed. 1266, and *Borgfeldt v. Weiss* (C. C. A.) 265 Fed. 268. We discover no contradiction between these decisions, though they do afford illustrations of different methods of approaching solution of the same ultimate problem, which is, like every question of infringement, always an inquiry of fact.

Whether the problem be of validity, scope, or infringement, the prime difference between patents for other inventions and those for designs is that in the first class the inquiry is, "What will it do?" whereas in respect of design one always asks, "How does it look?" *Rowe v. Blodgett & Clapp Co.*, 112 Fed. 61, 50 C. C. A. 120. How anything looks depends very largely on the eye of the observer; yet that observer, if a court in equity or a jurymen at law, must decide by the effect upon his eye whether there has or has not been that appropria-

tion of essentials, or substantial appropriation, which constitutes infringement of any patent. For such a process it is inaccurate to speak of a rule in the sense that that word is properly used in relation to legal rights. No more can be done than to indicate the processes by which experienced observers arrive at conclusions. The matter has lately been well put in the Ninth Circuit by saying:

"The differences in designs, which under the patent law will avoid infringement, are differences which will attract the attention of the ordinary observer, giving such attention as the purchaser usually gives in buying articles of the kind in question, and for the purposes for which they are intended." *Zidell v. Dexter* (C. C. A.) 262 Fed. 145, 147.

Almost the same words were used in *Ashley v. Weeks-Numan Co.*, 220 Fed. 899, 136 C. C. A. 465. In *Ashley v. Tatum*, *supra*, the "absence of any applied ornamentation" from the alleged infringement was held to create a difference between the articles of plaintiff and defendant "readily apparent to any one—expert or nonexpert—[so that there was] no likelihood that, whether looked at together or apart, the one could not be mistaken for the other." In other words, to the eyes of the ordinary observers one did not look like the other. As was said by A. N. Hand, J., in a subsequent action on the same patent when reissued, the changes made by the defendant Tatum were thought to have "proceeded so far that it [could not] fairly be said that Ashley's design was a substantial and easily discernible feature of the completed structure." *Ashley v. Samuel C. Tatum Co.* (D. C.) 240 Fed. 979, 982.

The discussion has only illustrated how differently admitted phenomena affect different minds when all are endeavoring to apply the admittedly proper measure in respect of design patents, viz. optical effect. In respect of this particular defendant's doll it is sufficient to say that there is an even stronger external resemblance between plaintiff's "kewpie" and defendant's so-called "best baby" than is exhibited by the drawings inserted in the opinion in *Borgfeldt v. Weiss*, *supra*.
Decree affirmed, with costs.

THE MUSKEGON.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 254.

Maritime liens ⇨25—"Other necessities" in statute does not include services of stevedore.

"Other necessities" for which a lien is given by Act June 23, 1910, § 1 (Comp. St. § 7783), held not to include the services of a master stevedore in loading a vessel in her home port.

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

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

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

In Admiralty. Suit by Nicholas Montanino and Matteo Delfino, partners as Montanino & Delfino, against the steamship Muskegon. Decree for claimant, and libelants appeal. Affirmed.

For opinion below, see 275 Fed. 117.

Crowell & Rouse, of New York City (E. Curtis Rouse, of New York City, advocate), for appellants.

Barry, Wainwright, Thacher & Symmers, of New York City (Earle Farwell and James K. Symmers, both of New York City, advocates), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The events giving rise to this action occurred before the enactment of the Merchant Marine Act of 1920 and the cause is unaffected by the changes thereby made in the Lien Act of June 23, 1910 (36 Stat. 504 [Comp. St. §§ 7783-7787]). Libelants are a firm of master stevedores. The Muskegon is an American vessel, whose home port is New York. She was under charter, and the charterers in her home port were loading cargo. These charterers themselves made a contract with libelants to do the stevedoring necessary to load the Muskegon; libelants performed the labor by and through their workmen, whom they paid; but charterers did not pay libelants' bill, who thereupon filed this libel in rem, which was dismissed by the lower court.

The whole case for appellants rests on the assertion that under the act of 1910 this master stevedore's bill constitutes a lien against the vessel, because the statute provides (section 1) that "any person furnishing repairs, supplies, or other necessities, including the use of dry dock, or marine railway, to a vessel," shall have a maritime lien therefor, and stevedoring should be included under the head of "other necessities." Comp. St. § 7783.

It is no longer doubted that the service of loading and stowing a ship's cargo is maritime. *Atlantic, etc., Co. v. Imbrovek*, 234 U. S. 52, 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. Clearly, therefore, out of the labor of a stevedore rendered to a ship elsewhere than in her home port, a maritime lien arises.

Whether there be any legal difference between the claim of a working stevedore for the reward of his own labor and that of a master stevedor or contractor for what is really the worker's wage, plus profit, is a matter we need not consider, and on which we express no opinion. *The Seguranca* (D. C.) 58 Fed. 908.

It may be assumed, but not held, that these libelants rendered a maritime service for which in a port other than the home of the vessel they would have a lien by general maritime law, yet it remains clear that they have no lien in the home port unless it be conferred by the statute, and the only phrase in that statute on which they can rely is "other necessities."

We adhere to the views concerning the purpose and general scope of the Federal Lien Act expressed in *The Oceana*, 244 Fed. 80, 156 C. C. A. 508, certiorari refused *Morse Dry Dock & Repair Co. v. Conron Bros. Co.*, 245 U. S. 656, 38 Sup. Ct. 13, 62 L. Ed. 533, and also to

the ruling made in *The Hatteras*, 255 Fed. 518, 166 C. C. A. 586, in respect of the words "other necessities" as sought to be applied to towage.

The reasoning of *The J. Doherty* (D. C.) 207 Fed. 997, 1000, as to the meaning of "necessaries," is as fatal to appellant's contention regarding stevedoring as it was in respect of towage before by the act of 1920 the word "towage" was specifically inserted. "Other necessities" mean matters ejusdem generis with repairs and supplies, and that the charge of a master stevedore does not belong to that class is we think entirely plain.

To the full enjoyment and profitable occupation of a ship there are many services which are convenient, useful, and at times necessary; stevedoring is one of them, but it cannot be promoted into that class of claims, long described as "repairs and supplies" by force of the statute, unless the statute be deemed as intended to create a maritime lien in the home port for everything that gives a maritime lien abroad. No such intention can be discovered in the language of the act nor from the history thereof.

The case is most strongly put for appellant if it be supposed that the owner himself had in the home port employed these libelants to do what they did. That act and the consequent service would have been a maritime contract and a maritime service, but it would have given no maritime lien by general law, and none is created by the statute.

The decree appealed from is affirmed, with costs.

We have examined *The Rupert City* (D. C.) 213 Fed. 263, and observe that the stevedoring claim there considered (page 267) was for services rendered to a British vessel in the harbor of San Francisco, and do not think that the learned court intended to declare that stevedoring in the home port was within the act of 1910, or to differ with the construction of that statute announced in *The Doherty*, supra.

DEMPSEY v. EASTERN TRANSP. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1921.)

No. 1894.

Admiralty ⇨ 118—**Finding of fact on conflicting evidence not reversible, unless clearly erroneous.**

A finding of fact by a court of admiralty on the conflicting testimony of witnesses examined in open court will not be reversed on appeal, unless clearly erroneous.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by John J. Dempsey, trading as Dempsey & Sons against the Eastern Transportation Company, owner of the barge Frank R. Diggs, and S. G. Seligman and others, partners as Seligman, Williams & Ball, owners of the tug Juniper. Decree for respondents, and libellant appeals. Affirmed.

George W. P. Whip, of Baltimore, Md. (Harrington, Bigham & Englar, of New York City, and Lord & Whip, of Baltimore, Md., on the brief), for appellant.

Samuel K. Dennis, of Baltimore, Md. (Gerald W. Hill, of Baltimore, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

WATKINS, District Judge. On February 28, 1920, the tug L. A. Dempsey, with three barges, Experiment, McNaughton, and Donaldson, in tow, en route from Elizabeth City, N. C., to Baltimore, Md., was proceeding north through Lake Drummond Canal and at about 6 o'clock in the afternoon met the tug Juniper with the barge Frank R. Diggs in tow. The Diggs was light, and the other barges were loaded to capacity with lumber, with deck loads piled 7 feet high. The Dempsey was about 15 feet beam by 70 feet in length, and drew 8 feet of water. The Juniper was slightly smaller. The Diggs was 23 feet beam by 180 feet length. The other barges were slightly smaller. The canal had an average width of approximately 100 feet, and at the point of meeting the evidence indicates that the channel was about 60 feet wide, with a guaranteed depth of 9 feet. The wind was somewhat strong from the north or northwest, approximately 10 miles an hour, following the Juniper and facing the Dempsey. The preponderance of the evidence indicates clear weather. The usual signals were exchanged by the tugs before meeting. The Dempsey was proceeding very slowly, its speed being about 1 mile per hour. The speed of the Juniper was between 2 and 5 miles per hour. There was some conflict of testimony as to the length of the hawsers used by the tugs and their tow, but this appears to have been of no consequence in determining the questions at issue. The tugs passed each other in safety, port to port, each holding a straight course, with a clearance of about 20 feet. The Experiment, in passing, rubbed and drove the Juniper against the bank. When the Experiment and Diggs met, the former was rammed by the sharp bow of the latter, causing the injuries for which the libel was filed.

The contention of appellant is that the collision was due to the negligent navigation of the tug Juniper and of the barge Diggs, while that of the appellee is that it was due to the negligent navigation of the Dempsey and of the barge Experiment. The learned judge before whom the case was tried filed no formal opinion, but made the following statement as to his conclusions:

"Upon all the evidence I cannot find that the Juniper contributed in any way to the sheer of the Experiment. Therefore I dismiss the libel, because the principal facts seem to me to point to that conclusion as the only one we can arrive at."

While there was a sharp conflict of testimony, the preponderance of the evidence indicates that the accident was caused by the Experiment being so navigated as to drag the bottom of the channel, thereby causing her to sheer, and collide first with the Juniper, and then with the Diggs. The captain of the Experiment testified, *inter alia*:

"The Experiment was over as far to her starboard as she could get. Her starboard side was dragging on the bottom. When the Experiment hit the bottom, I could see her raise up. She did not slide off the bottom until after the collision with the Diggs. I could not tell how long it was after the collision until she did slide off."

It is admitted that, after the collision, which was severe enough to break 9 planks of the Experiment, all the stringers inside, and 3 or 4 beams, the Experiment continued on her way without loss of a moment's time. Had this barge been following the tug in line close to the bank, as was contended, it would seem that so heavy a blow would at least temporarily have driven it far enough ashore to have impeded its progress. The preponderance of the evidence indicates that the collision was due rather to the negligent navigation of the Experiment than that of the Juniper or the Diggs, and the trial judge so found.

Of the 11 witnesses in the case, all but 3 were examined in open court. A finding of fact by a court of admiralty on the conflicting testimony of witnesses examined in open court will not be reversed on appeal, unless clearly erroneous. *Coastwise Transportation Co. v. Baltimore Steam Packet Co.*, 148 Fed. 837, 78 C. C. A. 527; *Norfolk Southern Railway Co. v. Foreman*, 244 Fed. 353, 156 C. C. A. 639; *The Baron Napier*, 249 Fed. 126, 161 C. C. A. 178; *Lake Drummond Canal & Water Co. v. John L. Roper Lumber Co.*, 252 Fed. 796, 164 C. C. A. 636.

Affirmed.

PIERRE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1921.)

No. 5776.

1. **Criminal Law** ⚡1092 (9)—After term and expiration of time as previously extended, no power to extend time to present bill of exceptions.
The court has no power to extend time to present a bill of exceptions after the time therefor as previously extended and the term of court have expired.

2. **Criminal law** ⚡1094—Writ not dismissed for absence of bill of exceptions, where overruling demurrer to indictment is assigned as error.

Though bill of exceptions was not seasonably signed and settled, the writ of error will not be dismissed, where the overruling of demurrer to the indictment is assigned as error; it being the court's duty to pass on it.

3. **Homicide** ⚡140—Indictment for threats to take life of President must state to whom or in whose presence threats were made.

An indictment charging that on or about a certain day, in a certain county, defendant made threats to take the life of the President, is insufficient; it not showing to whom or in the presence of whom the threats were made, as is necessary, that an acquittal or conviction thereunder could be pleaded against any subsequent indictment for the same offense.

Stone, Circuit Judge, dissenting.

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

Criminal prosecution by the United States against Pietro Pierre for threats to take the life of the President. Demurrer to indictment was

overruled, a verdict of guilty returned, and defendant brings error. Reversed.

H. C. Doyle, of Kansas City, Mo. (Redmond S. Brennan and Thurman L. McCormick, both of Kansas City, Mo., on the brief), for plaintiff in error.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant, plaintiff in error, was indicted for violation of the Act of Congress of February 14, 1917, c. 64, 39 Stat. 919 (section 10200a, U. S. Comp. St. 1918). The indictment is as follows:

"The grand jurors of the United States within and for the district and division aforesaid, duly impaneled, sworn, and charged, at the term aforesaid of the court aforesaid, on their oaths find, charge, and present that one Pietro Pierre, on or about the 1st day of October, A. D. 1918, in the county of Leavenworth, in said district, did unlawfully, willfully, knowingly, and feloniously make a threat to take the life of the President of the United States by then and there declaring in substance as follows, to wit: 'The President ought to be killed, and I am going to do it as soon as I get a chance.' And thus he, the said Pietro Pierre, did, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A demurrer thereto was by the court overruled, and upon a trial to a jury a verdict of guilty returned. A motion to dismiss the writ of error was made upon the ground that the bill of exceptions was not signed and settled by the judge within the time provided by law and the rules of the court.

[1, 2] The facts as they appear from the record are, that the trial and conviction were had on October 18, 1919, at the October term, 1919, which term expired on January 12, 1920. The writ of error was allowed on October 22, 1919, and the citation signed on October 25, 1919. On that day the defendant was granted 60 days to present for settling the bill of exceptions. On December 19, 1919, before the expiration of the 60 days, 60 days' additional time was granted for the presentation and signing of the bill of exceptions, which would expire, allowing full 120 days, on February 22, 1920. On February 25, 1920, 3 days after the expiration of the 120 days, and after the lapse of the October term, an additional 60 days was granted. This last order of extension was too late, and therefore coram non judge. *O'Connell v. United States*, 253 U. S. 142, 147, 40 Sup. Ct. 444, 64 L. Ed. 827; *Anderson v. United States* (C. C. A.) 269 Fed. 65, 79. Therefore we cannot consider the bill of exceptions.

But there was a demurrer to the indictment, which was overruled by the court and assigned as error in the assignment of errors. It is our duty to pass on it. The motion to dismiss is therefore denied.

[3] An indictment to which a defendant is required to plead must set forth facts so distinctly as to enable the defendant to prepare his defense, and so particularly as to enable him to plead a former conviction or acquittal, if again indicted for the same offense, and upon such a plea that fact must appear from the face of the indictment: *United States v. Hess*, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; *Miller v. United States*, 133 Fed. 337, 347, 66 C. C. A. 399; *Fontana v. United States (C. C. A.)* 262 Fed. 283, 286. This indictment is defective in that respect. It fails to charge that the alleged threats were made to or in the presence of any person. If the defendant should again be indicted, and the indictment charge to whom, or in the presence of what person or persons, the alleged threats were made by the defendant, a plea of former acquittal or conviction under this indictment could not be sustained. There is nothing in it showing that fact.

The court erred in overruling the demurrer to the indictment, and the cause is for this reason reversed.

STONE, Circuit Judge, dissents.

CORNICK v. UNITED STATES.

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

No. 2842.

Criminal law ⚡1159(6)—Conviction, based largely on circumstantial evidence, not disturbed.

A conviction will not be disturbed on appeal, where there was evidence to support every material allegation against the defendant, although most of the evidence was circumstantial.

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

Max Cornick was convicted of having felonious possession of property stolen from an interstate shipment, and brings error. Affirmed.

June C. Smith and F. F. Noleman, both of Centralia, Ill., for plaintiff in error.

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

Before BAKER, EVANS, and PAGE, Circuit Judges.

PER CURIAM. Cornick was convicted of having felonious possession of property stolen from an interstate shipment.

A study of the transcript of the evidence satisfies us that every material allegation was supported by evidence. Most of the evidence was circumstantial. Concerning the jury's right to act on circumstantial evidence, and the respective functions of the jury, of the trial judge, and of the reviewing judges, we have stated our views in *Applebaum v. United States (C. C. A.)* 274 Fed. 43, herewith decided.

The judgment is affirmed.

SUSQUEHANNA S. S. CO. v. A. O. ANDERSON & CO., Inc.

(District Court, S. D. New York. June 30, 1921.)

No 805.

Injunction ⇨26(3)—Equity will not restrain prosecution of action solely because of existence of cross-claims which cannot be pleaded therein.

Equity will not intervene to restrain prosecution of suit at law or in admiralty merely because of the existence of cross-claims which cannot be pleaded in such suit, nor unless there are other circumstances, such as insolvency of the plaintiff, which may invoke its jurisdiction.

In Equity. Suit by the Susquehanna Steamship Company against A. O. Anderson & Co., Inc. On motion to dismiss bill. Granted.

Cass & Apfel, of New York City, for plaintiff.

Duncan & Mount, of New York City (John A. McManus, of New York City, of counsel), for defendant.

LEARNED HAND, District Judge. Equitable jurisdiction over set-offs antedates any statute of set-off, and remains after their enactment. *Sowles v. First Nat. Bank* (C. C.) 100 Fed. 552. I shall assume without deciding that in a case where this court would entertain an ancillary bill to restrain or control an action at law here pending, it may do the same to restrain or control a libel in the admiralty. In so doing, I shall also assume that the counterclaims here in question are maritime, or, if not, that they may still be the subject of a bill for an equitable set-off or counterclaim. I need hardly add that both these assumptions are extremely doubtful; as to the second, see *United, etc., Co. v. New York, etc., Line*, 185 Fed. 386, 107 C. C. A. 442. I shall, therefore, for argument's sake strip the case of any peculiarities due to its arising out of a libel in the admiralty, and therefore in the federal courts.

The plaintiff seems to assume, because it has counterclaims which under the existing procedure in the main suit cannot be pleaded by cross-libel or otherwise, that a court of equity will restrain or control that suit in the interests of a supposed equity always inherent in that situation. Nothing is further from the truth. Equity, while looking with favor upon the interposition of cross-claims, never ventured to adopt the rule of the civil law, and always required some other circumstances than the mere existence of cross-claims before it would undertake to apply the doctrine of equitable set-off. *Dade v. Irwin*, 2 How. 383, 390, 391, 11 L. Ed. 308; *Norwood Paper Co. v. Columbia Paper Bag Co.*, 185 Fed. 454, 456, 457 (C. C. A. 4th) 107 C. C. A. 524; *Greene v. Darling*, Fed. Cas. No. 5,765; *Howe v. Sheppard*, Fed. Cas. No. 6,773; *Gordon v. Lewis*, Fed. Cas. No. 5,614.

Among the circumstances held sufficient were nonresidence or insolvency of the plaintiff in the action at law *North Chicago Rolling Mill v. Ore & Steel Co.*, 152 U. S. 596, 616, 14 Sup. Ct. 710, 38 L. Ed. 565; *Brown v. Pegram* (C. C.) 149 Fed. 515, 521, or that the claims

were incurred upon a mutual credit, *Greene v. Darling*, supra. Perhaps there may be other grounds, though I do not at present think of any. It is enough to dispose of the case at bar that there must be some such, and the bill, failing any such, must be dismissed for want of equity.

The libellant is a New York corporation and therefore not a non-resident; the sixteenth article of the bill does not allege that it is insolvent, but only that it is "of small financial responsibility," which is irrelevant. Nor is there any other ground suggested, except that the plaintiff acted as agent of the Lydia Steamship Company after November 28, 1919, when Exhibit C was executed.

The agreement is inartificial and hard to construe, but I think it doubtful whether it creates an agency. It is specifically provided that "the terms of the charter party except as modified by this letter, are to control between us," and that the defendant shall pay about \$60,000 monthly in advance. The only possible color for supposing that an agency was intended rests in the provision that the defendant shall "give an accounting of all moneys received and expended." It seems to me unlikely that in view of the payment of the hire it could have been the purpose of the parties that the defendant should pay the balance of the earnings, if there were any. An accounting did not necessarily imply a payment of the balance due, and may have been meant only to put the Lydia Steamship Company in possession of all the facts when the "amicable" settlement should be reached. If the liability of the defendant was limited to the hire, there is no ground for equitable set-off, though the claim be liquidated.

On the other hand, if the agreement is to be treated as an agency, and if it bound the defendant not only to pay the hire, but any possible earnings as well, still I think the bill must fail. The agency, even though there was one, is alleged in article 17 to have been terminated by the Lydia Steamship Company and the parties hereto. Whether this was after or before the assignment, it left nothing but the obligation to account, necessarily unliquidated. That obligation was not to keep separate the money received from the operation of the ship and to turn it over. There is no warrant in the agreement for such an obligation, and no allegation in the bill could be controlling when the contract is incorporated into it. It was no more than to render an account and to pay the balance shown or found due. But such an obligation is no different from any other unliquidated demand, and presents no reason for equitable set-off. There is exactly as little and as much reason why it should be tried at the same time as the libel, as though it had arisen from any other claim which the plaintiff might have.

Nor, indeed, does it appear to me that even though any sum recovered under the libel was to be kept separate with the other funds earned by the ship and turned over to the Lydia Steamship Company that this would present a case for equitable set-off, after assignment to the plaintiff. There is, of course, always an advantage in setting off cross-claims, an advantage which possibly ought to overbalance the confusion or clumsiness of trying two independent suits together.

Yet for good or ill our law has not so looked at it, and the equity which will avail a defendant sued in the first cause must go further. It must either consist of some peril that he cannot recover at all, as for example in case of insolvency, or of some impediment, such as nonresidence or the like, which will force him to a disadvantage in the prosecution of his claim. Otherwise, he must be content to await the ordinary course of law.

There is finally the allegation in article 16 that —

“Had the defendant obtained possession of said sums of money and refused to make payment thereof, the Lydia Steamship Company would have been unable to have collected from it.”

This allegation presupposes that the defendant, if successful, would have transmitted the proceeds to its Danish parent, and must rest upon that assumption. The allegation is not the equivalent of saying that the defendant will so transmit the funds, or will not have with its other resources sufficient financial ability to meet any judgment which may be found due. Should such an allegation be made, the question might arise whether the supposed cross-claim was maritime, and whether, if not, it could be interposed by bill in equity, though it could not be if it were pleaded in a cross-libel.

Bill dismissed, with leave to plead over within 20 days.

**MASON AU & MAGENHEIMER CONFECTIONERY MFG. CO. v. CHUMAS
et al.**

SAME v. ALPS CANDIES, Inc.

(District Court, E. D. New York. July 21, 1921.)

Trade-marks and trade-names and unfair competition Ⓒ—18, 58, 70(2)—**Trade-mark for candy held valid and infringed.**

The word “Peaks” in the form of a design with the letters K and S connected, printed on the tinfoil wrappers of bars of chocolate candy made in the form of a bar or ridge with peaks, *held* valid as a trade-mark, and infringed by defendants by the use on competing candy, similarly formed and wrapped, of the word “Alps,” with the letters A and S connected, and such imitation also *held* to constitute unfair competition; complainant having extensively advertised its product.

In Equity. Suits by the Mason Au & Magenheimer Confectionery Manufacturing Company against Theodore Chumas and John Chumas, partners as Chumas Bros., and against the Alps Candies, Inc. Decrees for complainant.

Dyer & Taylor, of New York City (John Robert Taylor and Gustav Drews, both of New York City, of counsel), for plaintiff.

Ingraham, Sheehan & Moran, of New York City (George L. Ingraham and Carl A. Rood, both of New York City, of counsel), for defendants.

CHATFIELD, District Judge. The plaintiff has brought two actions (against individual defendants in the one case, and against their successor corporation in the other), asking for an injunction against alleged violation of trade-mark and unfair competition by the sale of an uneven roll or bar of candy, made of cocoanut, covered with chocolate, wrapped in foil, and more or less similar, in shape and in the lettering upon the foil, to a candy put upon the market by the plaintiff and known as "Mason's Peaks." The candy sold by the defendants is labeled and known as "Alps."

The record shows extensive advertising on the part of the plaintiff, all to the end of fixing in the minds of the public the idea of heaps, summits, or mountains, as suggesting or suggestive of the so-called peaks of chocolate candy.

The word "Peaks" as printed upon the foil label is given the form of a design by connecting the K and S, in order to show originality and to avoid the possible charge of mere description in the word. The A and S of the word "Alps" are likewise connected.

In the first place it must be held that the word "Peaks," when applied in such connection, is capable of registration as a trade-mark. Nothing has been presented in the case which would indicate that the word "Peaks," in such a use, is so descriptive as to render its use as a trade-mark invalid. In the next place, the word "Alps" is in the same general class, and suggestive of a similar idea.

The many cases that have been decided under the doctrine of unfair competition and infringement of trade-mark depend upon the existence of similarity, rather than identity, in the imitation. This similarity may be entirely in the suggestion, rather than in the word itself, such as "Uneeda," infringed by "Iwanta," National Biscuit Co. v. Baker (C. C.) 95 Fed. 139; "Holeproof," infringed by "Nohole," Holeproof Hosiery Co. v. Fitts (C. C.) 167 Fed. 378; "Keepclean," infringed by "Sta-Kleen," Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 73, 101 C. C. A. 565.

In this regard, it is evident that a similar candy, of similar materials, generally similar in size and appearance, wrapped in a similar style of foil and marked with a similar name, is too near in its imitation to be allowable as a competing commercial article, even though the persons selling the two articles have followed similar paths independently of each other, in the conclusion that the design is of commercial value.

Cocoanut candy in various forms of shredded material is of course old. Chocolate covered candy is old. The use of foil wrapping the candy is old. The formation of the confection in the shape of a cone or ball or stick or bar is old. The use of blue or red letters in order to show upon the foil is old. The wrapping of individual masses in the form of a bar or stick is old, whether produced by hand or by machinery.

Use of each one of these elements may have occurred to the defendants without realization of any actual imitation of the plaintiff's candy, inasmuch as the use of each one of these elements was merely the taking of an old feature as an obvious means of working out an idea. But so long as the plaintiff was the first upon the market, in the use

of candy embodying all these ideas, the defendants are guilty of unfair competition in placing upon the market and selling a candy so closely resembling the plaintiff's in every particular as to make it necessary to carefully examine the label, or to carefully differentiate in the taste of the contents, in order to tell which is which. One would be readily salable for the other, and, according to the testimony, the defendants' product has at times, if not continuously, been sold at slightly lower price than the plaintiff's and the defendants therefore profited by the competition.

The word "Alps" is said to have been taken from a restaurant where the candy was to be sold, rather than from similarity of "Alps" to "Peaks" in commercial suggestion. But the significance of its meaning could not be disregarded, because an intermediate application of the name was made by other parties. Such an excuse would be of no avail with wrong intent. The defendants beg the question when they seek to show lack of intent by citing use to prove the purpose.

When we come to the trade-mark side of the case, the plaintiff should prevail. The designs are similar, confusing, and deceiving, when considered with their use on the same class of goods, for sale to the same public, and with the same suggestion of idea to the public.

The plaintiff uses boxes and wrappings which of themselves furnish advertising of its candies. The defendants do not place the advertising of their article upon their containers. From this the plaintiff argues that the defendants are attempting to evade the charge of competition, and are seeking to make it easier for individual dealers to deceive the public by substituting the single bars of candy, and thus secure for themselves a larger profit. The defendants, on the other hand, argue that the difference in the container shows a lack of intention to imitate.

Neither argument is conclusive, but the methods by which the defendants' candy is placed upon the market lend themselves so easily to unfair competition, that greater reason exists for restraining the descriptive label upon the candies themselves.

Some attempt was made by the defendants to show that in small quantities their package was the original, but the evidence does not prove that the defendants placed their article upon the market in the form in which it is now sold to the public, or that the advertising of their package was formulated until there was some public demand for these articles, even if the defendants were not at the time definitely seeking to profit by the plaintiff's advertising and market, or aware of the plaintiff's rights.

The plaintiff may have a decree.

THE PROGRESSIVE.**THE ABBOTT.**

(District Court, E. D. New York. July 21, 1921.)

Salvage Ⓒ34—Award for assisting disabled destroyer.

A tug *held* entitled to a salvage award of \$1,500, for towing to a place of safety a naval destroyer, costing \$1,500,000, which had struck against the rocks in Hell Gate and broken a propeller, and in such condition was in a position of danger, although, as it chanced, she would have drifted clear with the tide.

In Admiralty. Suit by the Newtown Creek Towing Company, owner of the tug *Progressive*, against the United States, as owner of the destroyer *Abbott*. Decree for libelant.

Alexander & Ash, of New York City (Edward Ash, of New York City, of counsel), for libelant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (L. P. Scott, Asst. U. S. Atty., of counsel), for the United States.

CHATFIELD, District Judge. The libelant seeks a salvage award for services rendered under unusual circumstances to the United States Destroyer *Abbott*, on the morning of the 6th of July, 1920.

The *Abbott* (a large, modern vessel, costing upwards of a million and a half dollars) was at the time the last of four destroyers passing in single line up through Hell Gate, intending to go through Long Island Sound. A dredge and scow operating to the south of Negro Point interfered with the passage of the boats, but the first three destroyers proceeded successfully through the Gate.

The *Abbott*, evidently in preserving her distance and in avoiding a tow passing to port behind the other destroyers, lost steerageway, or was compelled to turn too sharply at the point known as Scaly Rocks, and actually touched, near the stern, against the rocks upon the side of the channel opposite Cram's Bank, a neighborhood where many vessels have been injured, lives lost, and frequent difficulties encountered. The starboard propeller was broken, and associate injuries received.

It is indisputable that a vessel like the *Abbott* could not with impunity, and much less with safety, be allowed to bump along under the influence of a strong flood tide, with her starboard side against the ledge known as Scaly Rocks.

Under the circumstances, the engines were stopped, and although her officers are not in exact agreement as to whether she was then aground, her anchor was let go, and she swung around with the tide. The tug *Progressive*, which had been met further back through the Gate with a tow, landed this tow and went to the *Abbott's* assistance, in response to a whistle. Another tug also appeared upon the scene, and, at the request of the officers of the *Abbott*, the *Progressive* undertook to move the *Abbott* from her dangerous situation.

The captain of the Progressive disagreed with the officers of the Abbott as to how he should pull the Abbott away from the vicinity of danger, but ultimately took a line from the Abbott's bow, as she swung to her anchor chains, with her stern toward Long Island Sound. In this position she was lying considerably further to the east than where she had originally touched the rocks, and apparently was in a position where she would have drifted into safe and navigable water if she had slipped her anchor chain or had not been held at anchor.

The Progressive, on taking the line, actually moved the Abbott ahead or back toward the point where she had struck the rocks, in order that the anchor might be taken up, but it was found that the anchor was fouled in some obstruction upon the bottom, and it was ultimately released at one of the shackles. The Progressive then proceeded to draw the Abbott out in the stream, away from the shore, until she had reached a point where she could be turned again with her head toward the east, and the Progressive then towed her to the open waters of the Sound.

There is some dispute as to whether the commanding officer of the Abbott desired to be towed thus far, but this question is of small moment in comparison with the issue raised as to the necessity for rescuing the Abbott and the value of the services.

If the Abbott had been likely to incur further injury, no contention could be raised that the services were not of great value. They were undoubtedly salvage services, as the Abbott was in distress and apparently in imminent danger. The captain of the Progressive did not know that she was able to proceed. Her officers, not being entirely familiar with the waters, and judging from the general appearance of conditions, were justified in assuming that assistance was required, instead of risking their valuable craft upon the chance that she might escape without further damage. But as a matter of fact, her plates were not severely injured, and her other propeller was sufficient for navigation of the boat. After the Abbott swung away from the shore, she apparently could have rescued herself if she had not been anchored. The services of the Progressive were necessary in getting up the anchor and in handling the Abbott to avoid further danger while raising the anchor. No danger is shown to the Progressive herself, no heroism was exhibited, and, in time of peace as well as in war, loyalty would demand such an act of assistance to one of the government's agents, apart from the question of compensation.

But under the Tucker Act, jurisdiction is vested in the United States District Court to consider a claim against the government for services of this nature. This jurisdiction is limited to \$10,000. The libellant, therefore, claims no more than \$10,000, but argues that its services were actually worth more than that amount. Section 24, subd. 20 (Comp. St. § 991 [24]) and section 145, Judicial Code (section 1136); *U. S. v. Cornell Steamboat Co.*, 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987.

The Progressive performed services of a higher nature than mere towing, but their value cannot be based upon the immense amount of damage which might have been inflicted if the circumstances had been

different. The Progressive undertook, in a commendable way, an enterprise which might prove to be exceedingly important and of great value, or might prove to be casual. As the facts turned out, the actual saving or prevention of loss was slight. The risk was not great, but the responsibility was considerable. In comparison with services of a similar character to valuable merchant craft, it would seem to the court that an award of \$1,500 would be adequate. Under the circumstances, the costs of the trial must be borne by the libelant, and will be included as a part of the award in addition to the \$1,500.

ROBERT FINDLAY MFG. CO. v. HYGRADE LIGHTING FIXTURE CORPORATION.

(District Court, E. D. New York. July 22, 1921.)

1. Patents \Leftrightarrow 328—54,714, for design for frame for shades for electric lights, held valid and infringed.
The Cohn design patent No. 54,714, for a design for frame for shades for electric lights, held valid and infringed.
2. Patents \Leftrightarrow 252—Slight alteration in design held not to avoid infringement.
The addition to an otherwise exact copy of a patented design of a small detail, which changes its appearance so little that it still not only resembles, but would be taken for the design of the patent, does not avoid infringement.
3. Patents \Leftrightarrow 129—Employer of patentee estopped to deny invention.
A corporation which employs a patentee, who has assigned his patent, in making an infringing structure cannot, through him, attack the validity of the patent for lack of invention.

In Equity. Suit by the Robert Findlay Manufacturing Company against the Hygrade Lighting Fixture Corporation for infringement of Cohn design patent, No. 54,714, dated March 16, 1920. Decree for complainant.

Dodson & Roe, of New York City, for plaintiff.

Munn, Anderson & Munn, of New York City, for defendant.

CHATFIELD, District Judge. [1] This action charges infringement of design patent for an electric light shade frame, which is almost exactly copied by the defendant's device. The defendant urges invalidity, seeking to show that different elements in the design were old, and charging public use more than two years before the application for this patent.

The prior art necessarily shows shades or frames for shade coverings in general resembling the design patent in question. The limitations of the art are such that some similarity must necessarily be present, but no design of the prior art is shown sufficiently like the design of the patent in question to render it invalid for lack of novelty in the complete frame. Nor is there any reason to find that the plaintiff's assignor was not the original inventor, that he made any

false oath, or that the design had been in use so long as two years when application was made.

When we come to the question of noninfringement, the designs of the prior art, and also other designs now upon the market which are admittedly not infringements, are offered in order to show the narrow range of resemblances by which liability for infringement is sought to be presented.

[2] The patented design is shown without lighting fixture other than means of suspension. Inasmuch as the charge is for infringement of the shade frame alone, no claim of noninfringement can be based upon the use of a lighting fixture, because the design patent is said to be "a frame for shades for electric lights." The chain suspension in the two designs is exactly similar. A minor difference is shown in the defendant's design, in that they have taken from an older piece of wooden carving, a scroll, or running ribbon pattern with a small flower between each curve of the ribbon, where the patentee shows mere openings or perforations, conveying the impression of a simple ribbon-wound or twisted scroll.

In so far as the defendant is using a different design for this detail, he would be entitled to his own design, and could not be charged with infringement of the particular detail. But he has added this detail to an exact embodiment of the patented design in such a way as to make it evident that it not only resembles the patented design, but would be mistaken therefor, even though the intention of the defendant was to avoid infringement or the commission of any culpable act. *Graff, Washbourne & Dunn v. Webster*, 195 Fed. 522, 115 C. C. A. 432; *Mygatt v. Schaffer*, 218 Fed. 827, 134 C. C. A. 515; *Friedley-Voshardt v. Reliance Metal Spinning Co.* (D. C.) 238 Fed. 800.

[3] The defendant is a corporation formed with the aid of or through the employment of the patentee of this design, who was at the time of application an employee of the plaintiff.

This neither proves infringement nor disproves liability. Under such circumstances, while the defense of invalidity may not be entirely and exactly closed to the defendant, yet the defendant cannot through the patentee attack his own claims of invention while using him as the agent for its own activities. *Mergenthaler Linotype Co. v. International T. Mach. Co.*, 229 Fed. 168; *Johnson Furnace & Engineering Co. v. Western Furnace Co.*, 178 Fed. 819, 102 C. C. A. 267; *Johns-Pratt Co. v. Sachs Co.*, 175 Fed. 70, 99 C. C. A. 92.

If the design complained of were capable of use by the defendant's employee, and honestly conceived by him, it would have the right to manufacture the same, unless circumstances constituting unfair competition were shown. But if either through his former associations and recollections, or even unconsciously, he has made use of a design belonging to the plaintiff, he is responsible therefor, even though his purpose may have been most strictly to observe the plaintiff's rights as he understood them.

The plaintiff may have a decree.

Ex parte LEONG SHEE.

(District Court, N. D. California, First Division. August 16, 1921.)

No. 17291.

Aliens \S 46—Alien wife of native-born citizen if afflicted with dangerous contagious disease not entitled to admission.

Immigration Act, \S 22 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, \S 4289 $\frac{1}{4}$ l), providing that whenever a naturalized alien or one who has taken up his permanent residence in this country shall send for his wife or minor children, and either wife or child shall be affected with any contagious disorder, such person, if thought curable, shall be treated in hospital until cured at the expense of the husband or father, and then admitted, "provided, that if the person sending * * * is naturalized, a wife to whom married, or a minor child born subsequent to such * * * naturalization shall be admitted without detention for treatment in hospital," held not to authorize the admission, as matter of right of the alien wife of a native-born citizen if affected with a dangerous contagious disease.

Habeas Corpus. In the matter of Leong Shee. Demurrer to petition sustained.

George A. McGowan, of San Francisco, Cal., for petitioner.

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

RUDKIN, District Judge. This case involves the construction of section 22 of the Immigration Act of February 5, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, \S 4289 $\frac{1}{4}$ d). Section 3 of that act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, \S 4289 $\frac{1}{4}$ b) excludes from admission into the United States persons afflicted with a loathsome or dangerous contagious disease. Section 22 reads as follows:

"That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until cured and then be admitted, or if it shall be determined that they can be permitted to land without danger to other persons, they may, if otherwise admissible, thereupon be admitted: Provided, that if the person sending for wife or minor children is naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

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

There is no dispute as to the facts. The petitioner is a Chinese person born in China, and is afflicted with a dangerous contagious disease. Her husband, Young Poo, is a native-born citizen of the United States. The question is therefore presented whether the alien wife of a native-born citizen may enter the United States as a matter of right, although afflicted with a dangerous contagious disease. The claim of the petitioner is based on the proviso to section 22, supra. It is contended that under that proviso the wife of a naturalized citizen may enter the United States as a matter of right, provided the marriage took place subsequent to the naturalization of the husband, and that the rights of naturalized citizens are no greater than the rights of a native-born citizen. If the premise is sound the conclusion would no doubt follow. But I am far from satisfied that the alien wife of a naturalized citizen is entitled to admission under the proviso in question, even though the marriage took place subsequent to the naturalization. On the contrary, I am inclined to the opinion that section 22 is a limitation upon the right of citizens of the United States to admission, and that the section and accompanying proviso apply only to the wives of naturalized citizens who become naturalized through the naturalization of their husbands. If I am correct in this conclusion, there is no provision of law authorizing the alien wife of either a native-born or naturalized citizen to enter this country as a matter of right. On the argument my attention was called to the fact that a different construction has been placed upon the section by numerous decisions of the Department of Labor. But if the last construction is correct the prior rulings are of no avail.

The demurrer is sustained.

MUTUAL LIFE INS. CO. OF NEW YORK v. LOTT et al.

(District Court, S. D. California, S. D. August 22, 1921.)

No. E-63.

1. Courts ⇨307(2)—Interpleader statute does not give District Court jurisdiction of a citizen of District of Columbia.

Act Feb. 22, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991a), providing that District Courts shall have cognizance of suits in equity begun by bills of interpleader, when filed by an insurance company, alleging that each of two or more persons, citizens of different states, claims to be the beneficiary under an accrued policy, such suit to be brought in the district of the residence of one of the claimants, does not give a District court jurisdiction of such a suit where one of the claimants is a resident and citizen of the District of Columbia.

2. Courts ⇨307(2)—District of Columbia is not a "state" within section 1 of article 3 of the Constitution.

The District of Columbia is not a state within section 2, article 3, of the Constitution, conferring upon federal courts the jurisdiction of controversies "between citizens of different states."

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

In Equity. Suit of interpleader by the Mutual Life Insurance Company of New York against Alice A. Lott and others. On motions to dismiss bill. Motions granted.

Phelps & Winston and Chas. C. Montgomery, all of Los Angeles, Cal., for plaintiff.

Carnahan & Clark, of Los Angeles, Cal., for defendants.

BLEDSOE, District Judge. Plaintiff above named, by a bill in interpleader framed in keeping with the requirements of the act of Congress quoted in the margin (Act Fed. 22, 1917, § 991a [Comp. St. 1918, Comp. St. Ann. Supp. 1919]),¹ alleges that on the 13th day of February, 1882, it issued an insurance policy on the life of one Eugene W. Wilcox, "payable to his wife, Alice A. Wilcox, if living, and, if not living, to their children"; that the said insured died on the 6th day of January, 1920, leaving him surviving the said wife, now named Alice A. Lott, together with four children, constituting the other defendants impleaded herein. It is also made to appear that a final decree of divorce was granted the said insured on the 3d day of May, 1912; that thereafter certain proceedings were had in the Supreme Court of the state of New York "In the matter of the petition of Eugene W. Wilcox, of the Village of Albion, Orleans county, N. Y., to substitute beneficiaries in life insurance policies," whereby an order was made and entered in the office of the clerk of the county of Orleans directing that the aforesaid four children be "substituted as beneficiaries under the said policy issued by the plaintiff upon the life of Eugene W. Wilcox, as hereinbefore set forth, in place and stead of Alice A. Wilcox, the

¹ The District Courts of the United States shall have original cognizance to entertain suits in equity, begun by bills of interpleader where the same are filed by any insurance company or fraternal beneficiary society, duly verified, and where it is made to appear by such bill that one or more persons, being bona fide claimants against such company or society, reside within the jurisdiction of said court; that such company or society has made or issued some policy of insurance or certificate of membership providing for the payment of a sum of money of at least \$500 as insurance or benefits to a beneficiary or beneficiaries or to the heirs, next of kin, or legal representative of the person insured or member; that two or more adverse claimants, citizens of different states, are claiming or may claim to be entitled to such insurance or benefits and that such company or society deposits the amount of such insurance or benefits with the clerk of said court and abides the judgment of said court. In all such cases the court shall have the power to issue its process for said claimants, returnable at such time as the said court or a judge thereof shall determine, which shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found; to hear said bill of interpleader and decide thereon according to the practice in equity; to discharge said complainant from further liability upon the payment of said insurance or benefit as directed by the court, less complainant's actual court costs; and shall have the power to make such orders and decrees as may be suitable and proper and to issue the necessary writs usual and customary in such cases for the purpose of carrying out such orders and decrees: Provided, that in all cases where a beneficiary or beneficiaries are named in the policy of insurance or certificate of membership or where the same has been assigned and written notice thereof shall have been given to the insurance company or fraternal benefit society, the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside.

beneficiary in said policy named." It is then alleged that the defendant Alice A. Lott, formerly said Alice A. Wilcox, the named beneficiary in said policy, "disputes the legality of the proceedings taken as aforesaid in the Supreme Court of the state of New York in and for the county of Orleans, wherein the last-mentioned order was made and entered purporting to change the beneficiaries in said policy of insurance, and that she alleges that said order had no legal force or effect, and that she further claims that she is still the legal beneficiary in said policy of insurance and entitled to the entire proceeds thereof."

It is then alleged that the four children, the substituted beneficiaries above named, "have filed with the plaintiff proof of the death of the said Eugene W. Wilcox and claim to be entitled to receive in equal shares the entire proceeds of the said policy as the children of the said deceased," and also that "the defendant Alice A. Lott has filed with the plaintiff her claim and claims to be entitled to receive the entire proceeds of said policy as the beneficiary named in the said policy." Plaintiff sets forth the amount due under the terms of the policy, and alleges that it occupies the position of a mere stakeholder in the premises, etc., and, having deposited the amount due upon the policy in court, desires to be relieved of all responsibility upon a determination being had as to the parties entitled thereto, etc.

With respect to the citizenship of the parties involved, it is alleged that the plaintiff is a citizen and resident of the state of New York; that defendant Alice A. Lott, the named beneficiary, is a citizen and resident of the state of California residing at Los Angeles; that the children, Eugene W. Wilcox, Jr., Blanche Beedon, and Mable A. Davis, are citizens and residents of the state of New York; and that "the defendant Hazel E. Loftin is a citizen and resident of the District of Columbia, residing at the city of Washington in said district." Service of process being had upon the defendants named, pursuant to an order of the court directing the issuance of a subpoena, etc., the New York defendants, Eugene W. Wilcox, Jr., Blanche Beedon and Mable A. Davis, move to dismiss the bill of complaint on the ground of want of jurisdiction of the court, and the District of Columbia defendant, Hazel E. Loftin, appearing separately, makes a similar motion. The only matter involved is as to the jurisdiction of this court to entertain the bill under and pursuant to the terms and provisions of the Constitution and of the special interpleader statute quoted. Stated in another form, the legal proposition presented is: May the District Court of the United States take cognizance of a bill in interpleader, filed pursuant to the special statute quoted, in a case in which one of the defendants named therein, and asserted to be a claimant of an aliquot part of the insurance, is a citizen of the District of Columbia?

[1, 2] The jurisdiction of the subordinate federal courts is determined fundamentally of course by the federal Constitution, and secondarily by the provisions of congressional legislation conferring such jurisdiction. They can have no jurisdiction wider than that permitted them by the Constitution; they can assert no jurisdiction other than that expressly granted to them by appropriate congressional enactment,

Sewing Machine Cases, 18 Wall. 553, 577, 21 L. Ed. 914. By section 2 of article 3 of the Constitution, jurisdiction of controversies "between citizens of different states" is conferred upon federal courts. From a very early day in our government it has been held and consistently adhered to that, within the meaning of this provision, the District of Columbia is not a state, and that, where diverse citizenship is relied on as a jurisdictional requisite, a citizen of the District is not one capable of suing or being sued in the United States District Court. *Hepburn & Dundas v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332; *Hooe, Jr., v. Jamieson*, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Wescott v. Fairfield Tp.*, Fed. Cas. No. 17,418; *Seddon v. Virginia T. & C. S. & I. Co.* (C. C.) 36 Fed. 6, 1 L. R. A. 108. If, therefore, this cause exhibited only a controversy between the defendant Loftin and another, it would doubtless be conceded that, under the decisions, jurisdiction was lacking. Plaintiff insists, however, that there is a subsisting and substantial controversy between those who are admittedly capable of suing and of being sued herein, and that in consequence the court should entertain jurisdiction of the whole controversy and all of its incidents, etc.

Possessing an antiquity comparable to that of the holding adverted to above, it has been determined by the Supreme Court of the United States and followed in numberless cases that, with respect to the jurisdiction of the federal courts in controversies "between citizens of different states," where the interest in the subject-matter is joint, and not separable, or even where the parties sue or are sued jointly, if there are several coplaintiffs, each plaintiff must be competent to sue in the federal court, and, if there are several codefendants, each defendant must be liable to be sued therein, or else the jurisdictional requirement is lacking. *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435; *New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44; *Sewing Machine Cases*, 18 Wall. 553, 21 L. Ed. 914; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Merchants' Cotton Press & S. Co., v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *The Removal Cases*, 100 U. S. 457, 468, 25 L. Ed. 593; *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563; *Saginaw Gaslight Co. v. City Saginaw* (C. C.) 28 Fed. 529; *Gage v. Riverside Trust Co.* (C. C.) 156 Fed. 1002, 1007. Giving due countenance to this rule, it cannot be otherwise than that this court is without jurisdiction herein, in that, diverse citizenship being relied on to confer jurisdiction, one of the indispensable parties to the cause, defendant Loftin, is a citizen of the District of Columbia, and not capable of suing or being sued in this court. The defendant Loftin, according to the allegations of the bill, claims a one-fourth part of the insurance. The defendant Lott claims it all. There can be no binding adjudication of the latter's claim without the presence of the former. She is an indispensable party, if justice is to be done. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. In any event, plaintiff evinces no disposition to consider her as a formal or unnecessary party, and no discontinuance as to her has been suggested. *Hooe, Jr.,*

v. Jamieson, *supra*; Hooe, Jr., v. Werner, 166 U. S. 399, 17 Sup. Ct. 994, 41 L. Ed. 1051.

Plaintiff contends, however, that the rulings mentioned are not determinative herein, in that the special statute involved, being highly remedial in its nature, should be construed most liberally to effectuate the end in view, and that, if there be any controversy at all involving "citizens of different states," this court should assume jurisdiction, even though it should happen that there are other parties to that controversy who are not capable of suing or being sued in this court. I have no doubt but that, subject to the controlling provision of the Constitution, Congress may materially widen and enlarge the jurisdiction now or heretofore actually vested in the federal Courts. *U. S. v. U. P. R. R. Co.*, 98 U. S. 569, 604, 25 L. Ed. 143. I have no doubt but that the particular statute here under consideration should be given a liberal construction, in aid of the remedy therein sought to be applied; nevertheless I cannot bring myself to the belief that there was a disposition or intent on the part of Congress, in enacting the statute in question, and using the language which it did, to depart from or impinge upon the rulings theretofore rendered by the federal courts, cited hereinabove, fixing and determining the jurisdiction of those courts in so far as the citizenship of the respective parties was concerned. It will be presumed, of course, that the statute was passed with those rulings in mind. *Blake v. McKim*, *supra*. 103 U. S. 339, 26 L. Ed. 563. It is to be observed that the only basis for the assertion of federal jurisdiction mentioned in the statute is that contained in the fact, which must be made to appear from the allegations of the verified bill, "that two or more adverse claimants, citizens of different states, are claiming or may claim to be entitled to such insurance or benefits." The jurisdictional element herein is obviously based upon asserted diversity of citizenship. The provision in the statute relating to it is exactly in the language of the Constitution, and is not dissimilar, in any substantial attribute, from that contained in other congressional enactments heretofore passed upon, and in which it has been repeatedly held that in suits based on diverse citizenship all of the necessary parties to the controversy on either side must possess the requisite qualifications. *Coal Co. v. Blatchford*, *supra*. In the Removal Cases, *supra*, the construction hereinabove referred to was maintained by the court in the face of spirited and insistent dissent therefrom voiced by Justices Bradley and Swayne. There the statute conferring jurisdiction (18 Stat. 470) purported to do so in regard to "any suit of a civil nature * * * in which there shall be a controversy between citizens of different states," and the dissenting justices in that case expressed at length their conclusions to the effect that the Constitution and the statute, written in similar language, should be construed to the effect that a controversy within the jurisdiction of the federal court exists "when any of the parties on one side thereof are citizens of a different state or states from that of which any of the parties on the other side are citizens; in other words, a controversy may be at the same time both a controversy between citizens of the same state and between

citizens of different states. But the fact that it is both does not take away the federal jurisdiction." In *Blake v. McKim*, supra, decided subsequent to the Removal Cases, supra, and with the contention voiced by the dissent therein in mind, the Supreme Court approved the ruling of the majority as expressed in that case, and also reaffirmed the ruling in the Sewing Machine Cases, supra. Mr. Justice Harlan said (103 U. S. 338, 26 L. Ed. 563):

"The contention upon the part of counsel for the executors is that the suit is removable upon their joint petition, under the first clause of that section. We are unable to concur in that view. There is, undoubtedly, some ground for such a construction, but we are not satisfied that Congress intended to enlarge the jurisdiction of the Circuit Courts to the extent which that construction would imply. The principal reason assigned in its support is that the clause follows the words of the Constitution, when giving jurisdiction to the Circuit Court of a suit in which there shall be 'a controversy between citizens of different States'—language which, it is claimed, does not necessarily require that such controversy must be wholly between citizens of different states. But that consideration was pressed upon our attention in the Case of the Sewing Machine Companies (18 Wall. 553), which arose under Act March 2, 1867, c. 196. 14 Stat. 558. * * * The argument there, by counsel of recognized learning and ability, was that a controversy between citizens of different states is none the less a controversy between citizens of different states because others are also parties to it; that to confine the federal jurisdiction to cases wherein the controversy is between citizens of different states exclusively is to interpolate into the Constitution a word not placed there by those who ordained it, and materially limiting or controlling its express provisions. We declined to adopt that construction. * * *

"It is to be presumed that Congress, in enacting the statute of 1875, had in view as well the previous enactments regulating the removal of causes from the state courts as the decisions of this court upon them. If it was thereby intended to invest the Circuit Courts with jurisdiction of all controversies between citizens of different states, although others might be indispensable parties thereto, such intention would have been expressed in more explicit language. We are not disposed to enlarge that jurisdiction by mere construction. We are of opinion that Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different states, has not distinctly provided for the removal from a state court of a suit in which there is a controversy not wholly between citizens of different states."

Obviously the same principles applicable to the right on removal attach when the jurisdiction of this court is sought in the first instance. In the Sewing Machine Cases, supra, adverted to by Mr. Justice Harlan, the Supreme Court expressed its actual disapproval of the reason and conclusions voiced by the Circuit Court for the District of Massachusetts in the case of *Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co.*, Fed. Cas. No. 4,883, where it had been held that jurisdiction in the federal court will lie if there be any sort of a controversy involved between citizens of different states, even though as an integral part thereof there be a controversy submitted and to be decided between those who are not citizens of different states.

Some point is made that the language of the interpleader statute itself is demonstrative of an intention on the part of Congress to enlarge jurisdiction to the extent contended for, but I fail to gather such intention from a consideration of that language. If the statute had said that a bill of interpleader should lie where it was made to appear that "adverse claimants, two or more of whom are citizens of different

states, are claiming," etc., then, without question, the construction contended for by plaintiff would be much more persuasive. However, the language actually used is different in intent, and moreover is, as above stated, exactly the same in its essential attributes as the language used in other statutes which have been uniformly construed by the highest court in the land adversely to plaintiff's contention. The ruling requiring all the parties on one side of a controversy to be citizens of different states from all of those on the other side has received such support in that court that it was at one time the holding therein that a corporation, being then considered merely an aggregation, might sue or be sued in the federal court only in the event that all of its members or shareholders were citizens of a state different from that of the plaintiff or defendant, as the case might be. *Com. & R. R. Bank of Vicksburg v. Slocomb, Richards & Co.*, 14 Pet. 60, 10 L. Ed. 354.

In *Toland v. Sprague*, 12 Pet. 300, 328, 9 L. Ed. 1093, it was held that Congress might have authorized civil process to issue from any Circuit Court of the United States to run into any state of the Union, but that it has not done so; in consequence, service of process in a suit against a nonresident of the state where the suit was brought would not suffice to give the court jurisdiction. This rule was followed in *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100, where plaintiff filed a bill in interpleader which was dismissed for want of jurisdiction over defendants named therein, they being residents of another state.

This situation, together with the fact that in controversies between contending claimants as to who should receive the fruits of an insurance policy double liability, or at least double litigation, might be imposed upon the insurance company, doubtless served to bring about the enactment of the remedial statute involved herein. The report of the judiciary committee tendering the act in question to the Senate (Senate Report No. 660. Serial 6899, vol. 3, First Session, 64th Congress, 1915-1916) said:

"This bill makes it possible for an insurance company to file its bill in interpleader in the jurisdiction in which one of the claimants resides. The court in which the bill is filed can then issue process to bring in the other claimant. * * * The bill seeks to cure an evil. The evil is the inability of the holder of the fund, which is claimed by diverse claimants, who reside in different states, to obtain proper relief in a tribunal having jurisdiction over all such claimants. Under the present judicial system, there is no such tribunal, and therefore no relief to the holder of such fund."

This report of the committee responsible for the presentation of the bill to the Senate of the United States, which may be looked to in a case involving ambiguity as to the precise intention of Congress, demonstrates clearly to my mind that in the enactment of the legislation here in question Congress had no intention to enlarge the jurisdiction of the federal courts so that those not liable to be sued therein might be sued merely because they were involved in a claim regarding the fruits of an insurance policy. Quite to the contrary, the intention of Congress, as made apparent in the report just quoted, was merely to correct a manifest procedural injustice, sometimes arising in such controversies, and enable a court to assert jurisdiction over all proper

defendants, even though one or more of them might not be a citizen or resident of the state in which the court was held. It is unnecessary to speculate as to what would be the effect of the statute, or the proper conclusion of the court, were the defendant Loftin a citizen of California, of the same state as defendant Lott, to whom she stands opposed in the real controversy embraced in the litigation. It will suffice to suggest that much of plaintiff's argument would be more apposite were it addressed to that particular state of facts.

The point is also made that in any event the court possesses jurisdiction to determine the status of the fund herein, to wit, the money due on the insurance policy, being the money which was deposited with the court by the plaintiff upon the filing of its bill. This fund, however, did not come into the possession of the court through any act other than the voluntary act of the plaintiff itself. None of the defendants requested or consented to such deposit. It would therefore be more than mere novelty to hold that, the court otherwise lacking jurisdiction, the plaintiff could confer jurisdiction on this court to determine plaintiff's true obligation, in the face of antagonistic claims, merely by depositing the amount of its admitted liability with this court. Under that theory plaintiff could confer jurisdiction on any court by depositing the fund in that court, and in such event the statute would be entirely useless and unnecessary. The truth is that, unless this court possesses ample jurisdiction in the premises, there is no "fund" in the sense in which that word is used in applicable decisions. The New York claimants of the moneys due under the policy are not particularly interested in the identical money on deposit in this court. Their claim is against the insurance company, and in the absence of appropriate action, under the statute in question or otherwise, they may sue the insurance company wherever they may find it; and unless they are lawfully brought before this court, in a case of which it has jurisdiction, they are not to be precluded from asserting their claim against the company merely because of its voluntary deposit of a portion of its assets herein. Besides, the language of the statute shows that it was not the intention of Congress that the court where the fund was deposited should have jurisdiction, but that the court where the named beneficiary resided should be the one which should possess jurisdiction to receive the fund and adjudicate the entire controversy. In other words, jurisdiction determines deposit, not deposit jurisdiction.

The controversy here is not between the insurance company and the claimants. If so, the court obviously would be without jurisdiction because some of the claimants are citizens of New York, of the same state of which plaintiff itself is a citizen. Disregarding the formal and looking to the substantial alignment of the parties (*Harter Tp. v. Kernochan*, 103 U. S. 562, 567, 26 L. Ed. 411), the real and seemingly only controversy in the case is between the claimants; between Mrs. Lott, who claims the entire insurance as the named beneficiary, and the four children, who claim the money because of the fact that they have been substituted as beneficiaries by a proceeding which they assert to be lawful and binding upon Mrs. Lott and the insurance company.

In this controversy, diversity of citizenship being necessary to confer jurisdiction, it being clear that one of the indispensable parties is a citizen of the District of Columbia, and therefore having no right to sue and not being capable of being sued in the United States District Court, I must hold in consequence that this court is without jurisdiction of the controversy thus presented.

The several motions to dismiss are granted.

HIRAM WALKER & SONS, Limited, v. LAWSON, Collector of Customs, et al.

(District Court, E. D. Michigan, S. D. August 23, 1921.)

No. 411.

1. Statutes \Leftrightarrow 158—Repeals by implication not favored.

Repeals by implication are not favored, and a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both.

2. Treaties \Leftrightarrow 11—Not abrogated by statute by implication.

A treaty between the United States and a foreign country will not be regarded as abrogated, and rights created thereby taken away, by a subsequent statute by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute.

3. Treaties \Leftrightarrow 11—Foreign shipments in bond through United States lawful.

The provision of the treaty of July 4, 1871 (17 Stat. 863), between Great Britain and the United States, giving the right to transport merchandise in bond through the United States to or from British possessions, remains in force and was not abrogated by the National Prohibition Act as to intoxicating liquors, nor does such act by implication repeal Rev. St. § 3005 (Comp. St. § 5690), authorizing transportation in bond through the United States of merchandise in transit between foreign countries, and the shipment of whisky in bond through the United States from Canada to Mexico is lawful, and within the rights of the shipper under the treaty and statute.

In Equity. Suit by Hiram Walker & Sons, Limited, against Richard I. Lawson, Collector of Customs, and John A. Grogan, Collector of Internal Revenue. Decree for complainant.

Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., for plaintiff.

John E. Kinnance, U. S. Dist. Atty., and Fred L. Eaton, Asst. Dist. Atty., both of Detroit, Mich., for defendants.

TUTTLE, District Judge. This is a bill for an injunction to restrain the defendants, one of whom is the United States collector of customs, and the other the collector of United States internal revenue, for this district, from interfering with shipments, by the plaintiff, of intoxicating liquor from Canada to Mexico and other foreign countries, through the United States. The question involved is whether such shipments are unlawful under the National Prohibition Act. The material facts alleged in the bill of complaint are as follows:

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

Plaintiff is a corporation organized and doing business under the laws of the province of Ontario, Canada, is a resident of Walkerville, in said province, and is a subject of Great Britain. For more than 30 years it has been manufacturing and distilling, in Walkerville, whisky which it has been selling and shipping to various foreign countries. During these years plaintiff has conveyed its whisky from Walkerville to a port of the United States, and in transit therefrom through the United States to other foreign countries, as authorized by a certain treaty between the United States and Great Britain, and pursuant to a certain statute of the United States. The treaty in question was proclaimed July 4, 1871 (17 Stat. 872), and contains the following provision:

"It is agreed that, for the term of years mentioned in article XXXIII of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue, as the government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States."

The statute referred to is section 3005 of the United States Revised Statutes (Comp. St. § 5690), which provides as follows:

"All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the custom house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

After the time of the taking effect of the Eighteenth Amendment and of the National Prohibition Act (41 Stat. 305), plaintiff ceased to import whisky into the United States, but has continued, under the regulations of the United States Treasury Department, to convey whisky in transit, in bond, through the United States, pursuant to said treaty and statutes; such whisky entering the United States from Canada and being destined for foreign countries. If plaintiff were compelled to ship its whisky to Mexico, Central America, and South America otherwise than in bond, through the United States, the increase in freight and transportation charges, cost of handling, and delays caused in making deliveries would be so great as to largely impair, if not entirely destroy, the business of the plaintiff in such foreign countries. Shortly before the filing of its bill of complaint herein, plaintiff presented a shipment of its whisky to the agent of the defendant collector of customs at the port of Detroit in this district, to be conveyed, in transit, in bond, through the United States to the country of Mexico, to be there delivered to plaintiff's customers residing in said country. It duly complied with all applicable laws (except the National Prohibition Act, if that be applicable) and regulations.

Up to this time, neither defendant had interfered with any such shipment. Plaintiff executed its bond in due form, and its said shipment was delivered to a common carrier in Detroit for conveyance in transit, in bond, through the United States to Mexico. Shortly thereafter, the defendant collector, claiming to act pursuant to the provisions of the National Prohibition Act, seized said shipment while it was still in the possession of said common carrier for said through shipment, and refused to allow it to proceed, on the ground that it was being transported contrary to the terms of the Eighteenth Amendment and of the National Prohibition Act. Plaintiff is unable to obtain a permit for said, or any similar, shipment of intoxicating liquors in bond from Canada through the United States to a foreign country and the defendants will interfere with, and prevent, any such shipment unless restrained by injunction.

By appropriate averments, the bill alleges that irreparable injury will be sustained by it, unless the injunction prayed be granted. The bill alleges that the suit arises under the Constitution and laws and treaties of the United States, and that the matter in controversy exceeds the jurisdictional sum of \$3,000, exclusive of interest and costs. The cause is now before the court on the bill, a motion to dismiss, an answer not denying the foregoing facts, and a stipulation that—

“as the issues presented by the bill of complaint and answer filed thereto are questions of law and the facts are before the court as set forth in the bill of complaint, answer, and this stipulation, it is unnecessary to take proofs in said cause, the aforesaid questions of law being controlling and decisive, that the case proceed to a final decree without taking of proofs, and that the taking of proofs herein be dispensed with, and that the whisky in controversy was and is intended for consumption as beverage whisky, but the plaintiff does not admit the materiality of the manner of the use thereof.”

As already indicated, the ultimate question presented for decision is whether the National Prohibition Act, properly construed, forbids the transportation of intoxicating liquor from Canada to a foreign country by transshipment, in bond, through the United States, under regulations pursuant to the treaty and statute already quoted. The solution of this question involves, and depends upon, the proper interpretation of said National Prohibition Act, popularly known as the “Volstead Act.” This statute was, of course, passed for the purpose of enforcing the Eighteenth Amendment, which provides as follows:

“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.”

Section 3 of title 2 of the statute contains the following provision:

“No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.”

Does this section of the statute forbid the making of the transshipment in question? It is clear enough, and is, I understand, conceded by plaintiff, that under a strict construction of the language just quoted from such statute the latter is sufficiently broad in its terms to prohibit the shipments under consideration, since it is undoubtedly necessary, in order to make such shipments, to both "possess" and "transport" intoxicating liquor within the United States. It is likewise probably true, as is apparently also conceded, that this statute, even thus strictly construed, would be a valid exercise of the power, expressly conferred on Congress by the Eighteenth Amendment, to enforce such amendment by "appropriate legislation." It is, however, equally certain that in attempting to interpret the meaning of this statute the words used must be read in the light of the mischief aimed at, and of the purpose sought to be accomplished by its enactment.

The primary factor in determining the proper construction of such statute must be a consideration of the design and intention of Congress in enacting it, and if such intention can be ascertained, that, and not the literal import of the language employed, must control. It must be borne in mind that not only may the same words have different meanings in different connections, but also that—

"A thing may be within the letter of a statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Lau v. United States*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; *Taylor v. United States*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130; *American Security & Trust Co. v. District of Columbia*, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 356; *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 7, 10 A. L. R. 1548.

It will be noted that the language of the Eighteenth Amendment, already quoted, applies and limits the prohibitory terms thereof to intoxicating liquors intended for "beverage purposes," and that Congress, by section 3 of title 2 of the Volstead Act, expressed its intention that such act should be construed "to the end that the use of intoxicating liquor as a beverage may be prevented." In view of these references to the object of this legislation, and of the common knowledge of the territorial limitations upon the scope and effect of Congressional action, it cannot be doubted that the purpose underlying the enactment of this statute was the prevention of the use of intoxicating liquor as a beverage within the United States and the territory subject to the jurisdiction thereof. *Street v. Lincoln Safe Deposit Company*, *supra*. This purpose, then, must be carefully kept in mind in seeking to arrive at a correct interpretation of the language employed.

[1] It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one, unless full effect cannot be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. Ed. 878; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; *Washington v. Miller*, 235 U. S. 422, 35 Sup. Ct. 119, 59 L. Ed. 295.

[2, 3] It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights created thereby taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed, until the contrary is plainly manifest, that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict, and cannot both remain in force, that the former will be considered as impliedly repealed by the latter. *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *U. S. v. Gue Lim*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.

It is necessary to consider a contention presented, but apparently not very earnestly pressed, by the government, that the provision of the treaty here involved, article 29, ceased to be operative prior to the passage of the National Prohibition Act. As already noted in the extract therefrom previously quoted, the said article was, by its terms, to remain in force "for the term of years mentioned in article 33 of this treaty." Article 33 does not mention article 29, but provides that certain other specified articles of the treaty, relating to fisheries—"shall remain in force for the period of ten years from the date at which they may come into operation, and, further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same."

It is argued in this connection that, as these articles specified in article 33 have been long since abrogated, in accordance with the provisions of the treaty, therefore the "term of years mentioned in article 33," during which article 29 was to continue in force, has terminated. With this contention I cannot agree. I am satisfied that the reference in article 29 to article 33 was prompted by a desire to adopt, for article 29, the same period of life as that "mentioned in article 33," without an unnecessary repetition, in article 29, of the somewhat cumbersome provisions of article 33. When the articles thus specified in article 33 were subsequently terminated, no mention was made of article 29. The latter has never been expressly abrogated, has been treated as in force, and acted upon, by the executive officials of Canada and of the United States for more than 50 years, and is, in my opinion, still in effect.

Bearing in mind, then, the canons of construction referred to, and applicable to an inquiry into the meaning and effect of the National Prohibition Act with respect to the matter in controversy, it is to be observed that at the time of the adoption of said act a treaty between this nation and Great Britain was in effect, granting to the subjects of the latter, including the plaintiff herein, the right to convey goods, wares, or merchandise in transit from Canada through the territory of the United States in transit to other countries, subject only to the rules and regulations therein referred to. There was also at that time in force a federal statute, obviously enacted in furtherance of the object of said treaty; such statute providing that—

"All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the custom house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Knowing, as it must, of course, he held to have known, of the existence and terms of this treaty and statute, Congress enacted legislation containing prohibitory provisions couched in broad and general terms, but clearly designed to prevent the use of intoxicating liquor for beverage purposes within the United States and the territory subject thereto. Congress, of course, had no right or power to forbid any use or disposition of intoxicating liquor outside of such territory, and there is no reason for the assumption or room for the inference that it entertained any such intention. *U. S. v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471. What warrant, then, is there for ascribing to Congress a purpose (not expressed by that body, as it would have been easy and, if intended, natural to have done) to prohibit the shipping of liquor not intended for, or capable of, use for beverage or any other purpose in the United States, and transported, not into, but through, the United States (*United States v. Gudger*, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653; *McLean v. Hager* [C. C.] 31 Fed. 602), in accordance with a treaty then in existence and not expressly abrogated or otherwise mentioned in the statute which is claimed to have indicated such a purpose? I am unable to find in the language of the statute, read and considered in the light of all the surrounding circumstances, the clear evidence of such a purpose which should appear in order to justify such a construction. I am of the opinion that the National Prohibition Act does not indicate any intention to forbid the conveyance of intoxicating liquors in transit in bond from Canada through the United States to foreign countries under the provisions of the treaty and statute authorizing such conveyance, and pursuant to proper rules and regulations by the executive officials having charge thereof.

It is urged by the government that the prohibition in the statute against the exportation of intoxicating liquor from the United States negatives an intention to confine its application to the use of such liquor within the United States. This argument overlooks the close relation between manufacture and exportation, and the incentive to engage in the former which is furnished by the right to engage in the latter; and it was doubtless considered, and not without reason, that to forbid the exportation of intoxicating liquor from, would tend to make easier the enforcement of the prohibition against its manufacture and possession in, the United States. It cannot, however, be said that such a relation exists between the transshipments in question and the prevention of the use of intoxicating liquor as a beverage within the United States. To hold otherwise would be in effect to ignore the efficacy and effect of the protection afforded such transshipments by the United States customs officers and other officials under whose supervision they are conveyed in transit through the United States.

It was evidently the belief of Congress in providing for such conveyance, that goods under such supervision could be safely left to

proceed without interruption through this country to their destination beyond its borders, and that they could therefore be legitimately exempted from the payment of the customs charges to which they would otherwise be subject. In view of the presumption in favor of the performance by public officers of the duties imposed upon them, and giving to the operation of the customs rules and regulations the same consideration and weight apparently accorded by Congress, I conclude that conveyances of intoxicating liquor in transit under the rules and regulations applicable and in the control of the proper officials were not regarded by Congress as falling within the scope of the evils sought to be remedied by the National Prohibition Act, or as having such a substantial relation thereto as to call for their inclusion among the acts forbidden by that statute.

Finally, it is argued that, because section 20 of title 3 of the statute, applicable solely to the Canal Zone, expressly provides "that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad," therefore the absence of such an express provision from the portions of the statute not relating to the Canal Zone indicates a purpose to make those portions of the act applicable to liquor in transit. This contention cannot be sustained. Its lack of merit is made apparent, not only by the observation that it is merely from the operation of "this section" that the liquor in transit referred to is exempted, but also by a consideration of the fact that the absence of any applicable treaty furnishes a probable, if not necessary, reason for an express exemption from the operation of section 20 of "in transit" shipments of liquor through the Canal Zone, whereas there was no necessity or occasion for such an express exemption with respect to "in transit" conveyances from Canada through the United States; the latter being protected by treaty provisions not repealed by the National Prohibition Act.

The arguments advanced by the government rest, in the last analysis, upon the ultimate contention that to "transport" or "possess" intoxicating liquor, except as expressly authorized by the Volstead Act, is forbidden by that act. It has, however, already been distinctly held by the Supreme Court that these words are not to be so interpreted but that a transportation, or possession, of intoxicating liquor necessarily connected with, and incidental to, an act not within the prohibitions, because not within the spirit and true meaning of the statute, is not a violation thereof. *Street v. Lincoln Safe Deposit Company*, supra.

For the reasons and from the conclusions thus expressed, it necessarily results that the injunction prayed should be granted, and an order will be entered in conformity with the terms of this opinion.

MILLER v. MINERALS SEPARATION LIMITED et al.

(District Court, N. D. California, Second Division. September 6, 1921.)

No. 16197.

1. Corporations \Leftrightarrow 665 (1)—**Not subject to suit in foreign jurisdiction in which it is not doing business.**

A corporation cannot be sued in a jurisdiction foreign to that of its organization unless it is there doing business at the time the action is commenced.

2. Courts \Leftrightarrow 280—**Jurisdictional allegations in complaint may be controverted by affidavit.**

Where the complaint in an action in a federal court against foreign corporations contains allegations not essential to the statement of the cause of action, but relating solely to the question of the court's jurisdiction over defendants, such allegations may be controverted by affidavits for the purposes of a motion to dismiss or to quash the service on the ground of want of jurisdiction over defendants.

At Law. Action by John H. Miller against the Minerals Separation Limited and others. On motions by certain defendants to quash service of summons and dismiss as to such defendants. Motions granted.

John H. Miller, of San Francisco, Cal., in pro. per.

Garret W. McEnerney, of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. These are motions to quash service of summons and dismiss the action as to certain of the defendants. The action is one to recover damages resulting from the breach of an alleged contract to employ plaintiff as an attorney at law in certain patent infringement litigation involving a process of ore concentration by air froth flotation. It proceeds against four corporations named as defendants, the first three, namely, Minerals Separation Limited, Minerals Separation American Syndicate Limited, Minerals Separation American Syndicate (1913) Limited, being British corporations, and Minerals Separation North American Corporation, a Maryland corporation. They are named in the action in the order of their organization respectively and have been referred to by counsel for convenience of designation as "first corporation," "second corporation," etc., and such method of designation may be adopted for present purposes. The cause of action proceeds upon the basis, as alleged, that the employment of plaintiff was by the three British corporations, and that the liability of fourth corporation, organized since such employment, arises from voluntary assumption of the obligation. Service of summons in the action for all four defendants was had upon one Edward H. Nutter, designated under the laws of the state by fourth corporation as its agent upon whom process against it might be served. The latter defendant in due course appeared generally to the merits, but the three British corporations have each severally appeared specially and moved the court to quash the service as to them and dismiss the action upon the ground as to each that the service upon Nutter was unauthorized, and that at the time of the commencement of the action

and the attempted service of summons it was not doing business in this state.

[1] In response to these motions plaintiff does not controvert the principle now thoroughly settled that a corporation, being a creature of the law of the state or country of its creation, cannot be sued in a jurisdiction foreign to its organization unless it is there doing business at the time the action is commenced (Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Peterson v. C., R. I. & P. R. R., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Philadelphia, etc., Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537), but he seeks to sustain his right to serve the defendants in the manner stated and maintain jurisdiction of them here by certain facts alleged in his complaint, purporting to give a history of the formation and method of doing business of the several defendants, which, in connection with facts set up in an affidavit filed in response to the motions, he contends support the theory upon which he proceeds.

The pertinent facts alleged in his complaint bearing on this theory are in substance these: That on or about August 24, 1910, first corporation "caused" second corporation to be incorporated "and became and ever since has been the owner and holder of a majority" of its capital stock, in consideration of which it granted to second corporation an exclusive license to use in the United States for a period of years the inventions of certain letters patent of the United States owned by first corporation; that on or about June 27, 1913, first corporation and second corporation "caused to be incorporated" third corporation, and thereupon first corporation "became and ever since has been the owner and holder of a majority of the capital stock" of third corporation; that on or about August 1, 1913, third corporation "took over by assignment all the property and assets" of second corporation, and thereupon became the successor of second corporation "and an adjunct to and agent" of first corporation throughout the United States and controlled by the latter; that third corporation "acted in such capacity and carried on and did business throughout the United States and in the state of California, Northern district thereof, until on or about March 16, 1917"; that on or about December 9, 1916, first corporation "caused to be created under the laws of the state of Maryland fourth corporation having its principal place of business at the city of Baltimore, in the state of Maryland, but doing business in the state of California and Northern district thereof, and having a managing and business agent therein," and first corporation then "became and ever since has been the owner and holder of the entire capital stock thereof."

It is upon these allegations and certain facts set up in his supporting affidavit that plaintiff bases the conclusion stated in his affidavit:

"That the fourth corporation was and is the agent in the state of California of the first, second, and third corporations, and that the business being conducted by the fourth corporation in the Northern district of California was and is in contemplation of law being conducted by the first, second, and third corporations through and by such fourth corporation as their agent."

And from these facts plaintiff contends that at the time of service fourth corporation was properly to be regarded as the agent upon whom service could competently be made for its codefendants; that indeed in legal contemplation it was and is the mere alter ego of the other defendants in carrying on business in this state.

It may be here stated that plaintiff, at the argument, without abandonment of his theory as to the manner and purpose of their organization, conceded that as to second corporation and third corporation the showing had disclosed that both had practically or entirely retired from or ceased doing business before the bringing of the action, that the latter was in fact actually defunct and the former moribund, and that as to them the motion should be granted. Accordingly those two defendants may be dismissed from further consideration.

This leaves only the question involving the status of first corporation. As to this defendant it may be said at once that, if the affidavits presented in its behalf are competent and available for the purpose, they entirely refute and overthrow the facts alleged in the complaint touching its relation to its codefendants as well as those stated in plaintiff's affidavit tending to sustain his right to sue it in this jurisdiction. Without indulging in unnecessary detail, those affidavits, all made by persons perfectly cognizant from their own knowledge of the facts which they state, are to the effect that first corporation, while in a sense the parent corporation, in that it was originally the owner of all the patents granted in this and other countries involving the so-called flotation process, did not organize or cause the organization of either or any of the other defendant corporations, but that each of those corporations in turn was organized by other and distinct interests for their own business purposes, and was carried on and conducted as a wholly independent enterprise and organization, controlled and directed by its own independent board of directors, and to no extent responsible to or controlled by first corporation; that, while the latter owns an interest in the capital stock of fourth corporation, such holding at and before the bringing of the action and service of the summons was not to exceed one-twentieth of 1 per cent. of such stock; that it neither controls or directs its business in any way, but that all such business and transactions are conducted entirely independently of first corporation and without requirement to account to the latter in any way; that the two corporations are, in other words, wholly distinct entities in no way in privity with each other.

If the method of showing these facts is competent, it is needless to say that the plaintiff's theory that fourth corporation was controlled by first corporation in the sense claimed must fall to the ground, since, even if the latter owned the entire capital stock of the former, it would not show control in any legal sense. *Pullman Palace Car Co. v. Missouri Pacific Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Peterson v. C., R. I. & P. R. R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed 841.

[2] But plaintiff makes the objection that defendant's affidavits are not competent to meet the allegations of his complaint as to the history

and organization of defendant corporations. Referring to those allegations and the features of defendant's affidavits tending to refute them, he says:

"The foregoing were issues of fact tendered by the complaint. Those issues cannot be met by affidavits on behalf of defendants on a motion to quash service of process, but only by an appropriate pleading provided by the rules of practice."

But, whatever the purpose intended to be subserved by including these allegations in his complaint, it is clear that plaintiff has wholly misapprehended their effect. While plaintiff's objection would doubtless be well taken did it arise upon any allegation of fact essential to his cause of action, these averments are not of that character. They are wholly unessential to the statement of an ordinary cause of action such as this for damages arising from breach of contract. All that it was necessary for plaintiff to allege was the making of the contract and its breach, and, incidentally, the facts which would bring the controversy within the general grant of jurisdiction of this court over the subject-matter. It was wholly immaterial to that cause of action what the particular history or character of the defendant corporations was or for that matter where they were doing business. While it is essential in an action against a foreign corporation, unless the objection is waived, to show, in order to give the court jurisdiction of the person of the defendant, that it was at the time of bringing the action doing business within that jurisdiction (*St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Cady v. Associated Colonies* [C. C.] 119 Fed. 420; *Henning v. Planters' Ins. Co.* [C. C.] 28 Fed. 440; *Hazeltine v. Mississippi Val. Fire Ins. Co.* [C. C.] 55 Fed. 743), this fact constitutes no proper feature of the statement of a plaintiff's cause of action (*Friezen v. Allemania Fire Ins. Co.* [C. C.] 30 Fed. 349; *Multnomah Co. v. Weston Co.*, 54 Or. 22, 99 Pac. 1046, 102 Pac. 1).

Moreover, it is the settled rule of practice in these courts that the objection by a foreign corporation to being sued in a jurisdiction where it is not doing business may properly be interposed by a motion to dismiss. *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Benton v. McIntosh* (C. C.) 96 Fed. 132; *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357, 53 C. C. A. 577; *Union Water Dev. Co. v. Stevenson* (D. C.) 256 Fed. 981; *Vitkus v. Clyde S. S. Co.* (D. C.) 232 Fed. 288; *Higham v. Iowa State Travelers' Ass'n* (C. C.) 183 Fed. 845. This being so, if plaintiff's contention were good, it would entirely subvert this established method of procedure, since, by merely alleging as here in an unverified complaint what purport to be the facts as to the place of the defendant's doing business, a plaintiff could practically deny a defendant all substantial benefit of a motion of this character and coerce it to answer to the merits.

It is obvious, therefore, that the rule of procedure invoked by plaintiff, while salutary and orderly in its place, has no application to the facts before us, and that the plaintiff may not, by merely anticipating in his complaint the facts upon which such a motion as this may be founded, prevent the defendant from meeting those facts in the usual

and ordinary way recognized in raising the question of jurisdiction over its person.

This renders it unnecessary to consider the question of the legal sufficiency of the plaintiff's affidavit, and it results from what has been said that the motions must be granted; and it is so ordered.

HILB et al. v. AMERICAN SMELTING & REFINING CO.

(District Court, S. D. Ohio, W. D. February, 1921.)

1. Bankruptcy ⚡60—Inability to pay debts maturing held "insolvency," and appointment of receiver an act of bankruptcy "because of insolvency."

Where there were suits of creditors pending against a corporation which was actually insolvent in the bankruptcy sense and claims in the hands of attorneys for collection, and it feared judgments and executions thereon, and could not pay its debts as they matured, there was a condition of "insolvency" as the term is commercially used, and within the meaning of laws of Ohio, and appointment of a receiver on application of a stockholder instituting the proceeding as an indorser of past-due notes of the corporation was an act of bankruptcy, the receivership being "because of insolvency" within the meaning of Bankruptcy Law, § 3a, subd. 4 (Comp. St. § 9587), although the application for appointment of the receiver did not say that the corporation was insolvent, but was careful to aver that it was solvent in the sense of the Bankruptcy Law (Comp. St. §§ 9585-9656), and that its assets at a fair valuation were more than sufficient to pay all of the indebtedness.

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

2. Bankruptcy ⚡60—Receivership under state law because of insolvency an act of bankruptcy.

Where, because of insolvency, a receiver has been put in charge of corporate assets under the laws of a state or of a territory or of the United States, an act of bankruptcy is committed; that is, when the laws of the state provide for a receivership on the ground of insolvency, and are applied to a corporation insolvent in the bankruptcy sense, the act of bankruptcy is complete.

In Bankruptcy. Petition by Charles R. Hilb and others to declare the American Smelting and Refining Company, bankrupt. Defendant adjudged a bankrupt.

Kramer & Bettman and Wm. R. Collins, both of Cincinnati, Ohio, for petitioning creditors.

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, for bankrupt.

PECK, District Judge. This case is here upon the creditors' amended petition, which avers that within four months of the filing of the petition on the 15th of January, 1920, the defendant company, while insolvent, committed an act of bankruptcy, in that it did heretofore, to wit, on the 15th day of January, 1921, while insolvent, make application for the appointment of a receiver for its property, in the insolvency court of Hamilton county, Ohio, and because of insolvency

a receiver has been put in charge of its property under the laws of the state of Ohio. Petitioners pray that the defendant may be adjudged a bankrupt. Defendant denies that it has committed the act of bankruptcy set forth in the petition, or that it is insolvent, and avers that it ought not to be declared bankrupt for any cause in the petition alleged.

This cause was referred to an auditor, to report upon the solvency or insolvency of this corporation at the date of the commission of the alleged act of bankruptcy and at the date of the institution of these proceedings, and he reports that at both dates the corporation was insolvent by some \$40,000; that the aggregate of its property at a fair valuation was not sufficient in amount to pay its debts. The conclusions of the auditor are unchallenged. From the evidence adduced I find that the allegations of the creditors' petition, other than those charging the act of bankruptcy, presently to be considered, are true.

Coming now to the act of bankruptcy alleged, it appears from the evidence that the defendant, being, as has been found, an insolvent corporation upon January 15, 1921, was the defendant in an action that day filed against it in the court of insolvency of Hamilton county, Ohio, by Harvey Cantor, a director and one of the two managing officers of the corporation. There were five stockholders, of whom four were members of the same family, Harvey Cantor, his father, his mother, and his brother owning all but one share of stock, which was held by an employee, presumably to qualify him as a director. The corporation was managed by Harvey Cantor and his father. Harvey Cantor was on that day the indorser upon certain promissory notes past due, in the aggregate \$6,236, of which the corporation was the maker. The corporation was in financial difficulty and embarrassment, and he consulted counsel concerning his own obligation as indorser and concerning the affairs of the company, and determined to take proceedings for the purpose of securing the appointment of a receiver. There was no meeting of the board of directors. There is no evidence that the other directors, except his father, were informed of his purpose. He states that his father did not agree with him in the propriety of this step. Nevertheless he proceeded and filed his petition in the court of insolvency, setting up his notes and the fact of his indorsement and that they were past due and unpaid, setting up also that he was indorser upon some other notes not yet due. He further alleged that the defendant was indebted to divers creditors whose claims were past due and that other creditors of the defendant had brought suit against it, which suits were then pending; that other claims were in the hands of attorneys for collection; that judgments and executions were threatened against the property of the defendant; that the property would thereby be offered for sale, and, if sold in that manner, would realize but a small part of its real value, but that, if it could be kept from such sale and its product sold in the usual course of business, the business would be conserved and saved from sacrifice, which would benefit the creditors of the defendant, the plaintiff, and all parties in interest; and that he was entitled to have the property, in which he had an

interest, saved from loss or material injury. He further averred that the assets of the defendant, at a fair valuation, were more than sufficient to pay all its indebtedness; that the company was amply solvent; but that, owing to the then present financial and commercial stringency, the assets of the defendant were in danger of being dissipated and impaired. He further averred that the business of the defendant would be mismanaged, the creditors of the defendant would levy executions and sell the property at forced sales, and that not enough money would be realized to pay the claims of the creditors and indemnify and repay the plaintiff the amount of his indorsements. The prayer of his petition was that a receiver be appointed, authorized, and empowered to continue the business of the defendant until the further order of the court; that the assets might be ordered sold by the receiver to be appointed by the court, at such times and in such manner as will be most conducive to the interests of the persons in interest, so that the receiver will be able to realize the highest and best price for the assets of the defendant, and for such further relief as he might be entitled to have.

The application was presented to the court. Counsel for the company asked further time to investigate, which was not allowed; and an order was made to the effect that the court found that the defendant corporation had had due notice of the hearing and that the plaintiff was an indorser on promissory notes and negotiable paper, a co-maker thereto with the defendant company; that the promissory notes are due; that defendants have neglected to pay or satisfy them, and they are unpaid; and that, unless a receiver is appointed, the assets of the defendant company will be dissipated, to the great and irreparable damage of the petitioning creditors. The order further recites, "The court further finds from the evidence that the plaintiff is solvent, and that his assets are in excess of his liabilities"—probably an error in the drafting of the order, by which, no doubt, it was intended to find that the defendant was solvent and its assets were in excess of its liabilities.

Thereafter the receiver took charge of the business. The defendant acquiesced in the receivership. The plaintiff Harvey Cantor was appointed manager for the receiver at a salary of \$500 a month, and the plaintiff's father was appointed assistant manager at a like salary. No effort on the part of defendant was made to contest the receivership or otherwise dispose of it.

[1] Do these facts show that because of insolvency a receiver has been put in charge of the defendant's property under the laws of the state of Ohio within the meaning of section 3a (4) of the Bankruptcy Law?

The petition shows beyond a peradventure that the defendant was unable to meet its obligations in due course. There were suits of creditors pending against it, claims in the hands of attorneys for collection, and it feared judgments and executions thereon. It obviously could not pay its debts as they matured. This situation shows a condition of "insolvency," as the term is commercially used, and within the meaning of the laws of Ohio and as defined by its highest court. In *Mitchell v. Gazzam*, 12 Ohio, at page 336, it is said that insolvency

in the mercantile sense means inability to pay debts according to the ordinary usages of the trade—

“but in the broad sense used by the statute it means a person whose affairs have become so deranged that he is unable to pay his debts as they fall due; and if, from such a deranged state of his affairs, and * * * inability to meet his moneyed engagements, he should transfer his property to a trustee to pay his debts, we should regard such assignment as made in contemplation of insolvency, and within the meaning of the statute.”

See, also, *American Hosiery Co. v. Baker*, 18 Ohio Cir. Ct. R. 604.

It is impossible to conclude otherwise than that the defendant then was, and by the plaintiff's petition in the insolvency court was alleged to be, “insolvent,” in that sense of the term in which it has been used in the law of Ohio. He did not say that it was insolvent, but he pleaded facts showing its insolvency within such meaning, and those facts were the basis for the appointment of the receiver. He was indeed careful to aver that it was solvent in the sense of the Bankruptcy Law, “that its assets at a fair valuation are more than sufficient to pay all of the indebtedness, and that the company is amply solvent.” So that the situation was that he averred such facts of insolvency as to him seemed necessary to procure the appointment of a receiver under the laws of the state of Ohio, but refrained from averring such further insolvency, although it actually existed, as would bring him within the purview of the Bankruptcy Law (Comp. St. § 9585-9656).

His action was founded on the doctrine of the case of *Barbour v. National Exchange Bank*, 45 Ohio St. 133, 12 N. E. 5, in which it was held that an indorser of the past-due notes of an insolvent corporation might bring an action in equity to apply the funds of the principal debtor to the payment of the obligation, and, as part of his remedy, have a receiver appointed. It will be found by reference to that case that the corporation there was insolvent. In the syllabus (which in Ohio is the law of the case), it will be found that it is stated that “S. was surety of an insolvent manufacturing corporation.” The insolvency referred to there is perhaps that degree of insolvency known as mercantile or commercial insolvency, the inability to pay maturing debts.

That the plaintiff Cantor alleged that the corporate assets were more than sufficient to meet the obligations was mere surplusage and immaterial, and obviously designed to avoid the effects of the Bankruptcy Law. That allegation added nothing to his cause of action. His petition for a receiver and liquidation would have been as strong had he alleged the reverse.

If we assume that the finding in the entry appointing the receiver “that plaintiff is solvent, that his assets were more than sufficient to meet his liabilities,” was intended to be a finding that the *defendant* was solvent in the sense that *its* assets were more than sufficient to meet *its* liabilities, it was not responsive to any direct issue made in the case, because Cantor's right to the redress he sought was not based upon, nor aided by, a showing of “solvency” within the bankruptcy meaning of the term, but upon “insolvency” within the common-law meaning of the term. That expression is to be taken as a limitation

placed by that court upon its finding with regard to the condition and affairs of the corporation, but it is not an adjudication of solvency in bankruptcy sense which will be binding here, both because that issue was not involved and because the creditors, generally, were not parties to that proceeding: *Reynolds v. Stockton*, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. Ed. 464.

The evidence, therefore, shows that the insolvency court acted upon a showing of commercial insolvency. Are we precluded here from determining the real extent of that insolvency, and whether it was in fact such insolvency as is defined by the Bankruptcy Law? The greater includes the less. The court of insolvency acted upon the showing made that the loss was present. But should not this court, upon the petition of creditors, who were not parties to that proceeding, ascertain the true and real extent of that insolvency? Upon this subject there is a conflict of authorities. It has been held by courts of the United States that the record must affirmatively show that the state court acted upon such insolvency as would bring the case within the bankruptcy definition. In *re William Butler Co.* (C. C. A., 1st Cir.) 207 Fed. 705, 30 Am. Bankr. Rep. 502, 125 C. C. A. 223. However, there was strong dissent. And in another aspect that case was not followed by the Circuit Court of Appeals of this circuit in *James, etc., Co. v. Dayton Coal & Iron Co.* (C. C. A., 6th Cir.) 223 Fed. 991, 34 Am. Bankr. Rep. 649, 139 C. C. A. 367. In *Maplecroft Mills v. Childs* (C. C. A., 4th Cir.) 35 Am. Bankr. Rep. 311, 226 Fed. 415, 141 C. C. A. 245, and in *Valentine Bohl Co.* (C. C. A., 2d Cir.) 34 Am. Bankr. Rep. 855, 224 Fed. 685, 140 C. C. A. 225, the same rule was stated, but the defendant in each case appeared to the court to be not insolvent in the bankruptcy sense. On the other hand, it was said in the case of *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.* (C. C. A. 9th Cir.) 24 Am. Bankr. Rep. 216, 177 Fed. 825, 101 C. C. A. 39:

"With respect to the application for a receiver it may be conceded that, if it appears from the record and is established by proof that the application is made under * * * statutory authority or general equity jurisdiction having no relation to insolvency, then the act of applying for a receiver is not an act of bankruptcy. But when it appears that the application for a receiver has relation to insolvency, and that the purpose of the proceeding is to have the corporation managed with a view of its dissolution and the distribution of its assets among the creditors of the insolvent, then the application for a receiver is clearly an act of bankruptcy."

In *Stewart Petroleum Co. v. Boardman et al.* (C. C. A., 8th Cir.) 45 Am. Bankr. Rep. 573, 264 Fed. 826, a receiver was appointed in a state court on the ground that the defendants' property was so mortgaged and pledged that it was insolvent and could not meet its obligations, and that its officers had abandoned its business. It was held that the receivership was "because of insolvency" within the meaning of section 3a (4) of the Bankruptcy Act (Comp. St. § 9587). It will be noted the allegation in the state court proceeding was of a common-law insolvency and did not fulfill the definition of section 1a (1-15) of the Bankruptcy Act (Comp. St. § 9585). The facts with regard to the appointment of the receiver, including the grounds for the same, seem

to have been practically the same as those shown in *Re Wm. Butler & Co.*, supra. The evidence in the bankruptcy court showed, however, that the defendant was insolvent within that definition.

Now, what have we here? An insolvent corporation in bankruptcy sense; a receivership upon a ground having the most real relation to such insolvency; a proceeding for the winding up of the corporation, sale of its assets, and distribution of the proceeds among its creditors. A like case is thoroughly considered by Judge Van Valkenburgh in *Re Sedalia Farmers' Co-operative Packing & Produce Co.* (D. C. Mo.) 45 Am. Bankr. Rep. 287, 268 Fed. 898, and the conclusion that he reaches is that, when the appointment of a receiver because of insolvency is the act of bankruptcy relied on, the bankrupt must be actually insolvent within the meaning of the Bankruptcy Act at the time of the appointment and at the time of the filing of the involuntary petition, but that, where the required degree of insolvency exists and is the proximate cause of the receivership, the appointment is because of insolvency within the meaning of the Bankruptcy Law, although the petition for a receivership alleges only a common-law insolvency. And it seems to me that such is the conclusion which should be reached in the present case; otherwise one may allege a degree of insolvency just sufficient to bring the case within the state law and procure the appointment of a receiver and the distribution of the assets of a corporation actually insolvent within the meaning of the Bankruptcy Law, and thus defeat what the amendment of 1903 to the Bankruptcy Law (32 Stat. 797) was obviously intended to accomplish—the administration of the estate of an insolvent corporation under the Bankruptcy Law instead of a state receivership invoked for that purpose.

Indorsements by corporate officials of the obligations of embarrassed corporations are far from unusual. If, in every such instance, the official who has so indorsed may, by setting up his indorsement in the state court, procure the administration of the insolvent's estate by a receiver there, there would certainly be a great limitation to what was intended to be an exclusive jurisdiction of bankruptcy courts in such instances.

[2] Furthermore, it is to be noted that it is when because of insolvency a receiver has been put in charge "under the laws of a state, or of a territory, or of the United States," that an act of bankruptcy is committed. This means that, when the laws of a state provide for receivership on the ground of insolvency, and are applied, the act of bankruptcy is complete. In such case the insolvency meant would seem to be the insolvency known to the laws of the state. Obviously the receivership application in the state court would be made to conform to the laws of the state, and good pleading would require the applicant to go no further. In other words, it would seem that the words "under the laws of a state" may be fairly deemed to apply to the entire preceding phrase, including the words "because of insolvency." To read it otherwise is to leave it optional with the applicant for a receiver of a corporation that is actually insolvent under the bankruptcy definition whether, by disclosing the entire fact, to subject

the corporation to the Bankruptcy Law, or, by disclosing only so much as is necessary to comply with the state law definition, to avoid bankruptcy and accomplish a winding up and distribution in the state court, and perhaps leave in force preferences or judgments secured within four months which an adjudication of bankruptcy would destroy. Such construction seems hardly consistent with the title of "An act to establish a uniform system of bankruptcy throughout the United States." It would permit any one interested in the corporation, avoiding direct corporate action, to obtain for the corporation that which it could not obtain by means of a general assignment or an application on its own behalf for a receiver. Such, indeed, was the attempt in the present case.

It is therefore concluded that the receiver was appointed on the ground of common-law insolvency, that such common-law insolvency was but a lesser phase of an actually existing bankruptcy insolvency, and that such an appointment was because of insolvency under the laws of a state within the meaning of section 3a (4) of the Bankruptcy Act, and that an act of bankruptcy was thereby committed. And the defendant, being now insolvent, must be, and is, adjudged a bankrupt.

In re C. W. BARTLESON CO.

(District Court, S. D. Florida. December, 1920.)

1. Bankruptcy \Leftrightarrow 57—Conveyance not made to hinder or delay creditors not "act of bankruptcy."

A conveyance of real estate by a corporation within four months before the filing of an involuntary petition in bankruptcy against it does not constitute an act of bankruptcy within the Bankruptcy Act, though it hinders and delays creditors in the collection of their claims, where the evidence shows no fraudulent design to do so, but that the conveyance was made to secure past indebtedness and to obtain future advances.

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

2. Bankruptcy \Leftrightarrow 57—Prior conveyance by bankrupt solvent at date of filing petition not "act of bankruptcy."

Where a bankrupt at the date of filing an involuntary petition against it was solvent, a conveyance by it within four months before the filing of such petition did not constitute an act of bankruptcy within the Bankruptcy Act.

3. Corporations \Leftrightarrow 198—A creditors' agreement reciting a prior voting trust agreement held effective, whether actually signed and executed by a committee of creditors and the corporation or not.

Where a committee of creditors of a corporation, who were elected directors thereof and conducted the business in the name of the corporation, and to whom was assigned the majority of the stock for purposes set out in a voting trust agreement, sent to other creditors of the corporation for their signature a creditors' agreement reciting the voting trust agreement and purporting to be signed by them and executed by the corporation, such agreement became effective so far as the corporation, committee, and such creditors as signed it were concerned, whether it had been actually signed and executed or not; such acts being an adoption of such purported signatures.

4. Bankruptcy ⇨60—Creditors' agreement held not general "assignment for benefit of creditors" within Bankruptcy Act.

Though a majority of the stock of a corporation was transferred to a committee of creditors for purposes set out in a voting trust agreement under which such committee was put in virtual charge of the corporation, a creditor's agreement prepared by it and sent to other creditors for their signature, though effective as between themselves, the corporation, and all other creditors signing it, did not constitute a general assignment for the benefit of creditors so as to constitute an act of bankruptcy within the Bankruptcy Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment for Benefit of Creditors.]

In Bankruptcy. Involuntary petition against the C. W. Bartleson Company. Dismissed.

See, also, 243 Fed. 1001 ; 253 Fed. 296.

Haley & Heintz, Cooper, Cooper & Osborne, McNeill & Strum, and George C. Bedell, all of Jacksonville, Fla., for creditors.

Fleming & Fleming and George M. Powell, all of Jacksonville, Fla., for respondents.

CALL, District Judge. March 3, 1916, an involuntary petition in bankruptcy was filed against the C. W. Bartleson Company. April 13th an amended petition was filed, alleging some ten acts of bankruptcy. After the taking of testimony began an amendment was made, amending certain acts of bankruptcy alleged in the amended petition and adding another act. Other creditors intervened in the proceeding. Such action was had in the proceeding that answers to the amended petition and intervening petitions were filed April 11, 1917. Answer to the amendment to the amended petition was filed September 7, 1918. These answers put in issue each of the acts of bankruptcy alleged. Proofs were taken and the case brought on for final hearing. At such final hearing all of the acts of bankruptcy alleged were abandoned except the following: (7a) That the bankrupt within 4 months before the filing of the original petition, on the 17th day of February, 1916, transferred and concealed certain real estate of the value of \$9,000 to the Atlantic Company, not a creditor of the bankrupt, without consideration, and with intent to hinder, delay, and defraud the creditors of the bankrupt.

In the proofs there is no contention but that the real estate was conveyed to the Atlantic Company, nor is it contended that the Atlantic Company was a creditor of the bankrupt, nor is there any contention that the Atlantic Company paid a consideration for said property conveyed. The conveyance purported to convey a fee-simple title. At the time of such conveyance the bankrupt was undoubtedly embarrassed for funds to properly conduct its business. The bankrupt at the hearing produced a declaration of trust executed by the Atlantic Company, and concurred in by the bankrupt in favor of three Jacksonville banks to secure indebtedness from the bankrupt to the banks and future advances. This declaration of trust was not recorded along with the deed.

[1] Under this state of facts is the act of bankruptcy alleged proven? I think not. There were no facts in evidence showing a fraudulent design on the part of the bankrupt to hinder or delay its creditors in the collection of their claims, but the evidence does show that the conveyance was made for the purpose of securing past indebtedness and with the view of obtaining future advances. While the effect of this may and probably does hinder and delay creditors in the collection of their claims as incidental to the security given, yet it does not constitute the act of bankruptcy denounced by the Bankruptcy Act (Comp. St. §§ 9585-9656).

[2] In addition to this, the testimony shows the solvency of the bankrupt at the date of filing the involuntary petition, which would be a sufficient answer to this act of bankruptcy.

[3] The next acts of bankruptcy relied upon are those set forth in the eighth and ninth acts in the amended petition. These are that the bankrupt on the 29th of February, 1916, made a general assignment for the benefit of its creditors and delivered all its assets to five persons, as a creditors' committee, to be administered for the benefit of its creditors. These are the acts most strenuously insisted upon for the petitioners.

A synopsis of the material facts appearing from the testimony may be stated as follows: In February, 1916, the bankrupt, finding itself embarrassed for funds to meet its current bills as they matured, called a meeting of its creditors at its place of business, at which a statement of its assets and liabilities was exhibited and a plan was developed to continue the business, a committee of five being selected for that purpose. Eleven hundred and twenty shares of the capital stock of the corporation out of a total of 1,250 shares were transferred to the five persons, and these five persons were, at a stockholders' meeting, elected directors of the corporation and conducted the business in the name of the corporation, buying and selling goods, etc., in the usual course of business. A voting trust agreement was entered into between the original holders of said stock and the five persons named at the creditors' meeting, dated February 29th, to continue for five years unless sooner terminated by one of four ways set out in the trust agreement. Spaces were provided for the signatures of the five persons selected as a creditors' committee, but do not appear to have been signed. A so-called creditors' agreement was sent out to the creditors of the company reciting the voting trust agreement, and purporting to be between C. W. Bartleson Company, of the first part, the five persons named as a creditor's committee of the second part, and such persons holding claims against the company as may make themselves parties of the third part. This paper sent to the creditors purports to be signed by the five persons chosen by the creditors' meeting as such creditors' committee, and C. W. Bartleson Co., by C. W. Bartleson, its president, and attested by C. W. Smith, secretary, with "corporate seal" in brackets above the name, then a space for the signature of the creditor. The paper provided that the agreement should become binding and effec-

tive when, in the discretion of the committee, a sufficient number of creditors in amount or number should execute the agreement.

It is contended for the bankrupt:

First, that this agreement never became effective because never executed by the corporation.

As to this contention it seems to me only necessary to point out that the committee, who constituted the board of directors and who had had assigned to them 1,120 shares out of 1,250 shares of the capital stock of the corporation, and were then, through the vice president, actively in charge of the affairs of the corporation, sent to various creditors in order that the creditor might make himself a party, this paper purporting to be signed by themselves and executed by the corporation.

Such acts were an adoption of such signatures, and it becomes of little moment whether the papers prepared for signature and execution had been actually signed and executed. I find that the creditors' agreement did become effective so far as the corporation, committee, and such creditors as signed same were concerned. The action of the committee under the agreement, it seems to me, was an exercise of the discretion vested in them by the second clause of the agreement.

[4] Second, that if said agreement became effective, still it did not constitute a general assignment for the benefit of the creditors.

There can be no question under the testimony in this case but that it was contemplated by all the parties concerned that the corporate entity should be maintained throughout; that the business of the corporation should be and was carried out in the usual and ordinary way under the corporate name by corporate officers, selected, it is true, by the committee appointed at the creditors' meeting. There was no transfer of the corporate assets to the committee. It is true that the stock of the corporation was transferred to them for the purposes set out in the voting trust agreement, and, if this can be said to be a transfer of the assets of the corporation, then, and only then, could it be said that a general assignment for the benefit of the creditors had been made. As was said in one case, this action of transferring the stock and thus putting their committee in virtual charge of the corporation might be tantamount to transferring the assets, but would not constitute a general assignment for the benefit of creditors as provided in the Bankruptcy Act.

I am constrained, therefore, to find against the petitioning creditors on this act of bankruptcy.

What I have said disposes also of the ninth act of bankruptcy alleged in the amended petition.

A decree will be prepared dismissing the involuntary petition in bankruptcy, the amendments thereto, and the intervening petitions at the cost of the petitioners.

UNITED STATES v. NEWTON TEA & SPICE CO.
(District Court, S. D. Ohio, W. D. January 21, 1920.)

No. 1736.

1. Food ⚡15—False statements in circulars in package not violation of Food and Drugs Act.

False representations in circulars inclosed within package cannot be considered as violations of Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717-8728), relating to misbranding.

2. Food ⚡20 (1)—Information as to false representation in label held sufficient.

An information, alleging that statements of label were false and misleading, in that they represented to the purchaser that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth, said article was not then and there a substitute for eggs, and could not be used in place of eggs for baking and cooking, was sufficient, under Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717-8728), as against an objection that it did not set forth why or in what manner the article could not be used as a substitute for eggs.

3. Food ⚡15—Proviso in Food and Drugs Act held not to furnish refuge for false representation as to nature of contents of package.

The proviso of the fourth subsection of section 3 of the Food and Drugs Act of June 30, 1906 (Comp. St. § 8724), providing that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in certain cases, goes only to the branding or name of the article, and does not furnish a refuge for one who has on the label otherwise falsely stated the nature of the contents of the package.

4. Food ⚡15—Statement on label that article was substitute for eggs not one of opinion.

Statement on label of package, "Substitute for eggs in baking and cooking," was not one of opinion only, but one of fact, and, where false, constituted a violation of Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717-8728); it being otherwise expressed upon the label that the article could be otherwise used in place of eggs "in baking and cooking."

5. Food ⚡15—Representations as to result to be obtained held to constitute misbranding of food.

False representation as to results which may be obtained by the use of an article may constitute misbranding under Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717-8728).

6. Indictment and information ⚡52 (1)—Information need not be upon oath where defendant voluntarily appears.

An information not upon oath is not violative of the Fourth Amendment to the Constitution, where defendant has voluntarily appeared and filed motion to quash, it being only required that information shall be supported by oath before warrant may be issued thereon.

Prosecution against the Newton Tea & Spice Company under the Food and Drugs Act of June 30, 1906. On motion to quash information. Motion overruled.

James R. Clark, U. S. Atty., and Allen C. Roudebush, Asst. U. S. Atty., both of Cincinnati, Ohio.

McCauley & Simmonds, of Cincinnati, Ohio, for defendant.

PECK, District Judge. On motion to quash the information. The defendant, upon the filing of the information, voluntarily appeared

thereto, and moved to quash the same, upon the grounds: First, that the information is indefinite and does not apprise the defendant of the facts constituting the alleged crime with such certainty and particularity as to enable the defendant to know what it has to meet; second, the information attempts to charge the defendant with the commission of a crime by way of argument and conclusion; and, third, the court has no jurisdiction.

[1, 2] First. The information is brought under the Food and Drugs Act of Congress, June 30, 1906 (34 Stat. at Large, 768 [Comp. St. §§ 8717-8728]), and charges the defendant with shipping in interstate commerce 50 cases of an article designed for food, known as "Newton's Eggno," which the information alleges was labeled to read:

"An excellent substitute for eggs * * * to be used for baking and cooking purposes * * * an article of real merit and far superior to the usual egg substitutes on the market, * * * composed of pure materials * * * one even teaspoonful to be used in place of each egg called for in recipes requiring eggs"

—with directions for using and place of manufacture. A poster and circular are alleged to have been inclosed within the package, making like representations; but the contents of these, even if false, cannot be considered as violations of the act. *United States v. American Druggists Syndicate* (C. C.) 186 Fed. 387. The information further alleges that the aforesaid statements of the label were false and misleading, in that they represented to the purchasers that the article was a substitute for eggs, and could be used in place of eggs for cooking and baking, whereas, in truth, said article was not then and there a substitute for eggs, nor could the same be used in place of eggs for baking and cooking. The defendant contends that the information is deficient, in that it does not set forth why, or in what manner, the article cannot be used as a substitute for eggs in baking and cooking. The statements of the label above set forth were evidently designed to lead the ordinary housewife to believe that the contents of the package could be used in substitution for eggs in the ordinary preparation of food. The information expressly negatives the usefulness of the article for that purpose. It would seem, therefore, to be entirely sufficient to draw the issue upon that question, and, therefore, the motion in this respect is not well taken. This disposes of the first and second grounds assigned.

[3] Third. Defendant contends that the court has no jurisdiction over the subject-matter, for the reason that the information does not state an offense within the terms of the act. In support of this contention it is argued that the article comes within the proviso of the fourth subsection of section 8 of the act, by which it is provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in case, first, of mixtures or compounds which may now, or from time to time hereafter, be known as articles of food under their own distinctive names, and not in imitation of, or offered for sale under, the distinctive name of another article if the name be accompanied on the label or

brand with a statement of the place where said article has been manufactured or produced; and, second, in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends. Even though we assume it to be the duty of the pleader under this act to negative the terms of the proviso, or assume that the article in question is shown by the label to be a mixture or compound known as an article of food under its own distinctive name, not alleged to be in imitation of another, nevertheless the protection afforded by this proviso goes only to the branding or name of the article, and does not furnish a refuge for one who has on the label otherwise falsely stated the nature of the contents of the package. It is not against the use of the name of "Eggno" that the information is directed, but against the statement that the contents are useful and fit to be substituted for eggs in ordinary cooking recipes.

In *United States v. 150 Cases of Fruit Puddine* (D. C.) 211 Fed. 360, having the subject under consideration, at page 364 the court says:

"It does not seem to me that the proviso in question was intended to except them absolutely from the provisions of the act, and to leave the manufacturers free to make misrepresentations concerning them. Such a construction is out of harmony with all the rest of the statute, and disregards one of the principal purposes of it. It seems to me that the protection afforded by the proviso is limited to the distinctive name; and, as so limited, I have no doubt that the proviso applies to the first paragraph of section 8, and fully protects distinctive names from being misbranding."

It was there accordingly held that the words "Fruit Puddine," being false and misleading with reference to the product known as "Puddine," constituted misbranding within the statute.

[4] It is further contended that the statement "substitute for eggs in baking and cooking" is not one of fact, but of opinion only, and therefore not, in law, misleading; that the substitution of one thing for another is largely a matter of judgment, and that to call a thing a substitute is not to affirm that it is even similar to the original; that one article of diet may be a substitute for another without any necessary similarity. In this case, however, the defendant chose its own definition for the term "substitute" when it expressed upon the label that the article could be used in place of eggs "in baking and cooking." Nothing else could be inferred but that in ordinary culinary compounds the article in question would produce the same or similar results as the use of eggs. This is a direct affirmation of a fact and a definite description, so far as obtainable results are concerned, of the article sold.

[5] It is further contended that the mere representation as to the results which may be obtained by the use of an article do not constitute misbranding under the act, and reliance is had upon *United States v. Johnson*, 221 U. S. 448, 31 Sup. Ct. 627, 55 L. Ed. 823, where it was held that the curative effect of a medicinal preparation of which the labels stated that the contents were effective in curing cancer, contrary to the fact, was not an offense against the provisions of the act relating to the sale of drugs, as the act then stood. But the terms of the act at that time were very much narrower in scope with regard to drugs than with regard to food. By the amendment of 1912

(Comp. St. §§ 8907a, 8733, 8907b, 8736, 9737) the prohibition relating to the misbranding of drugs was made to expressly cover any statement regarding the curative effect of the article, and under that amendment it has been held that statements of curative effect in reckless and wanton disregard of their truth come within the act. *Simpson v. United States*, 241 Fed. 841, 154 C. C. A. 543. With regard to food, the act makes it an offense if the package containing it, or its label, shall bear any statement, design, or device regarding the ingredients or substances contained therein, which statement, design, or device shall be false and misleading in any particular; and the allegations of the information would seem clearly to bring the statements in question within that category.

[6] The information is not upon oath, and it is contended that the same is therefore violative of the Fourth Amendment, and for that reason the defendant should not be held to answer. But the information is not required to be upon oath; it is only required that the same shall be supported by oath before warrant may be issued thereon. *Weeks v. United States*, 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524. As the defendant has voluntarily appeared and filed the motion now under consideration, no question concerning the validity of a warrant is here.

Motion overruled.

In re ANDERSON.

Ex parte EDWARDS, Internal Revenue Collector.

(District Court, S. D. New York. June 23, 1921.)

No. 804.

Bankruptcy ⇨346—Court has jurisdiction to liquidate taxes claimed by United States.

Under Bankruptcy Act, § 64a (Comp. St. § 9648), providing that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, etc., in advance of payment of dividends, "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," while the United States is not required to file a claim for taxes, in the absence of any action on its part, the court has jurisdiction to proceed in invitum to liquidate any such tax, and notice to the collector of internal revenue for the district is sufficient as a condition precedent to such proceeding.

In Bankruptcy. In the matter of Alma Newton Anderson, bankrupt. On petition of William H. Edwards, Collector of Internal Revenue, to review decision of referee. Affirmed.

The order adjudged that the income tax levied upon the bankrupt for the year 1917 was in fact not properly laid, that the United States had no claim, and that it should be barred from asserting a claim against the estate. The bankrupt's income tax had been levied on a return made by her in 1918. The adjudication (voluntary) was made on October 17, 1918, and the United States never filed any proof of claim. On January 7, 1921, more than two years

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

after adjudication, the trustee served notice upon the local collector of internal revenue of a motion to bar the United States because the tax asserted to be due was not so in fact. The United States attorney appeared specially to object to jurisdiction, but the referee overruled his objection, proceeded to liquidate the claim and after taking evidence held that the bankrupt had been improperly taxed. Thereupon he passed an order so declaring and foreclosing the United States from setting up the claim thereafter.

Russell N. Shaw, of Washington, D. C., and Edward F. Unger, of New York City, for the United States.

Eugene M. Gregory, of New York City, for the trustee.

LEARNED HAND, District Judge (after stating the facts as above). The first question is of jurisdiction. Under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), Judge Wallace held that the United States was not bound to file any proof of debt and might later hold a trustee under Revised Statutes, § 3467 (Comp. St. § 6373), who had distributed the estate with notice of the claim. *United States v. Barnes* (C. C.) 31 Fed. 705. Judge Gresham held the opposite in *United States v. Murphy* (C. C.) 15 Fed. 589. Judge J. B. McPherson in *Re Stoever* (D. C.) 127 Fed. 394, allowed the United States to prove a claim under the act of 1898 more than a year after adjudication, on the theory that section 57n (Comp. St. § 9641) was a statute of limitation and did not bind the sovereign. *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513, decided that under the act of 1867 the United States might sue to recover a debt without proving in bankruptcy and in disregard of the bankruptcy proceedings in toto. None of these cases deal with taxes.

Under the present act it has, however, been several times held that the bankruptcy court had jurisdiction directly to reassess or liquidate a tax, regardless of its conclusiveness under the domestic law or of the procedure established to review it. *New Jersey v. Anderson*, 203 U. S. 483, 493, 27 Sup. Ct. 137, 51 L. Ed. 284; *In re W. P. Williams Oil Corp.* (D. C.) 265 Fed. 401; *In re United Five and Ten Cent Stores* (D. C.) 242 Fed. 1005. In all these cases the point came up upon claim filed by the taxing power, and therefore this question of jurisdiction did not arise; still the power of the bankruptcy court over the subject-matter is settled.

The case turns upon the implications necessarily to be drawn from section 64a of the present act (Comp. St. § 9648). It provides:

"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."

The section shows that taxes are treated as quite different from dividends, as payments to be made before the distribution proper of the estate takes place. *Lewis v. United States*, supra, may still be law, and certainly no claim for taxes need be filed, but that has nothing to do with the question at bar. The section contemplates that the taxes

shall be liquidated and paid at once, a purpose which cannot be accomplished if the estate must wait some action by the taxing power. If the court has no power conclusively to decide the issues, it is obliged to hold up the administration until such time as the United States or a state may choose to proceed. It appears to me to be a necessary implication of the statute that some action may be taken in invitum.

It must be owned that as applied to a state whose assent to be sued cannot be implied from an act of Congress there are greater difficulties than in the case of the United States. I do not mean to say, however, that a state is sued within the meaning of the Eleventh Amendment if notice is given that a claim for taxes is to be liquidated, at least when the state has acquired no lien on the property. That question may be left till it arises. Here I am dealing with the United States, and it is only necessary to find in section 64a an implied consent to such notice, whatever it may be, as proceedings in bankruptcy require. Even assuming that jurisdiction must go as far as though the United States had a specific lien upon the property, still I think it an implication from the section that Congress meant to permit the United States to be drawn into the proceedings so far as necessary. Therefore I agree with the learned referee in believing that he had power to make a ruling which would protect the trustee in distribution, and the only remaining question is of the actual procedure which he adopted.

Notice was probably necessary, and at least a proper condition precedent to any action, and the normal person on whom to serve notice was the official charged with the duty of collecting taxes, he who would file the claim if one was filed. That official is the collector of internal revenue. It is he who serves notice on delinquents and receives all payments (R. S. §§ 3183, 3184 [Comp. St. §§ 5905, 5906]), and it is he who distrains and sells upon the distress (R. S. § 3187 et seq. [Comp. St. § 5909 et seq.]). There is at least no other conceivable official on whom notice could be served if he be not the man, and, if section 64a gives the court power on its own initiative to move at all, the procedure here adopted was the only one open.

I shall not review the actual liquidation of the tax by the referee, because I do not mean to hold the collector to it, if he wishes to contest the issues on the merits. The point of jurisdiction was certainly doubtful. If, therefore, the collector wishes to move before the referee within 10 days after the entry of an order on this opinion to dispute the merits with the trustee, he is free to do so, and the referee will receive his proof. If he does not choose to do so, the order will be affirmed unconditionally.

The order of the referee affirmed, unless within 10 days the collector files notice with the referee that he elects to contest the case upon the merits.

In re THE HUB.

(District Court, S. D. Florida. June, 1921.)

Bankruptcy ⇨108—**Affidavit of creditor's attorney held insufficient for issuance of warrant to seize bankrupt's property.**

Under Bankruptcy Act, § 69 (Comp. St. § 9653), providing for issuance of warrant requiring marshal to seize bankrupt's property and hold it subject to further orders of court, on satisfactory proof that a bankrupt has committed an act of bankruptcy, such warrant would not be issued on the affidavit of one of the attorneys of the petitioning creditors as to statements made to him by certain parties, where answer denied the acts of bankruptcy alleged; the statements, except such as were made by the bankrupts, being hearsay and without probative value.

In Bankruptcy. In the matter of The Hub, bankrupt. On application under Bankruptcy Act, § 69, for a warrant to the marshal to seize property of the bankrupt and hold it subject to further order of the court. Application denied.

Altman & Morrow, of Tampa, Fla., for petitioners.

Macfarlane & Macfarlane, of Tampa, Fla., for defendants.

CALL, District Judge. This application is made under section 69 of the Bankruptcy Act (Comp. St. § 9653), which provides:

"A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, * * * issue a warrant to the marshal to seize and hold it subject to further orders."

In this matter the only affidavit submitted with the application is made by one of the attorneys of the petitioning creditors as to statements made to him by certain parties. These statements, except such as were made by the bankrupts, are hearsay and without probative value. In re Kelly (D. C. Tenn.) 91 Fed. 504, 1 Am. Bankr. Rep. 306. The statute requires at least a prima facie case to be made by the applicants. This has not been done in this case, in the face of the answer denying the acts of bankruptcy alleged in the petition, and therefore the application will be denied.

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

STORY et al. v. STANFIELD.

(Circuit Court of Appeals, Ninth Circuit. September 12, 1921.)

No. 3633.

Sales ⇨32—**Complete contract held evidenced by telegrams and customs.**

A telegram, "Wire lowest price you will sell the 7,000 S. & W. yearling ewes," and an answering telegram, "Lowest price on S. & W. yearling ewes eleven fifty this subject to immediate acceptance," held, together with custom and usage and Rev. Codes Mont. §§ 5032, 5035, 5036, to evidence a complete contract for the sale of the sheep, where defendant's offer was accepted within 24 hours, as against an objection that there was no meeting of the minds of the parties upon the price to be paid for the sheep, in that price could only be determined upon delivery, and that the offer was not accepted immediately.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action at law, brought by T. B. Story and L. P. Work, copartners doing business under the firm name and style of Story & Work, to recover damages from defendant, R. N. Stanfield, for breach of contract to deliver certain sheep as provided in the contract. Demurrer to the amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action, sustained. Plaintiffs bring error. Reversed, with directions.

Frederick H. Drake, of Portland, Or., and C. B. Nolan and Wm. Scallon, both of Helena, Mont., for plaintiffs in error.

Bauer, Greene & McCurtain, of Portland, Or., and Ed. R. Coulter, of Weiser, Idaho, for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The amended complaint alleges in substance that the plaintiffs, Story & Work, were copartners in business, residing at Bozeman, Mont.; that they were engaged in the live stock business, and as such bought and sold ewes; that plaintiffs are residents of the state of Montana; that the defendant, Stanfield, is a resident of the city of Stanfield, state of Oregon; that William Rea, Jr., was a live stock broker engaged in the business of buying and selling live stock on commission, and known to be such to both plaintiffs and defendant, and for many years prior to the 25th day of May, 1917, and in many transactions involving the sale of live stock, including sheep, the said Rea, as such broker, at divers times purchased from and sold to the said Stanfield several thousand head of sheep; that on the 28th day of April, 1917, Stanfield entered into a contract with the plaintiffs, through the said Rea as broker, by the terms and provisions of which Stanfield purchased from the said plaintiffs 7,000 head of yearling ewes at a price agreed upon; that under and by virtue of the terms of said contract the ewes were to be delivered by the plaintiffs to Stanfield, or order, at White Sulphur Springs, Mont., and Three Forks, Mont., on

July 1, 1917; that Stanfield at that time paid to the said Story & Work, as part payment for the purchase price of said ewes, the sum of \$4,000; that after the sale was made to Stanfield of said ewes through the said Rea as broker, and on the 25th day of May, 1917, the plaintiffs desiring to repurchase from the said Stanfield, the defendant, the said ewes, and to purchase all of his rights in the said contract for sale of said ewes, the said Rea, acting as broker in that behalf, sent to the defendant at his home in Oregon, from Billings, Mont., a telegram reading as follows:

"May 25, 1917.

"R. N. Stanfield, Stanfield, Oregon. Wire lowest price you will sell the seven thousand Story & Work yearling ewes.
Wm. Rea, Jr."

It is alleged that the said Rea meant thereby the ewes theretofore purchased by the said Stanfield from the plaintiffs, as before referred to. It is alleged that in reply to said telegram said Stanfield, on the afternoon of the 26th day of May, 1917, sent to the said Rea, at Billings, Mont., a telegram from Portland, Or., reading as follows:

"Wm. Rea, Billings, Montana. Lowest price on Story & Work yearling ewes eleven fifty this subject to immediate acceptance.

"[Signed] R. N. Stanfield."

At the time of the receipt of said telegram at Billings on the afternoon of the 26th day of May, 1917, the said Rea had left the said city of Billings for the city of Butte, state of Montana, and said telegram was forwarded to him by wire to the said city of Butte, where the same was received by him about 8 o'clock on the evening of that date, and immediately upon its receipt by him the said Rea accepted for himself and on behalf of the said Story & Work the offer so made, by then and there delivering for transmission at the Western Union Telegraph Company's office at the city of Butte, prepaying the charge for transmission of same, a telegram directed to the said defendant at his home at Stanfield, Or., said telegram reading as follows:

"Butte, May 26, 1917.

"R. N. Stanneld, Stanfield, Oregon. Sold your Story & Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars to-morrow.
Wm. Rea, Jr."

Plaintiffs allege on information and belief that said telegram was thereupon sent to and received by the said Stanfield on the date named. Plaintiffs further allege that in connection with the said transactions there was a well-known custom in the live stock trade, to wit, the sheep trade, according to which immediate acceptance in the offer referred to meant that the offer should be accepted at least within 24 hours after the same was made, and in that connection plaintiffs allege that in the instant case the acceptance of the offer by the plaintiffs and by the said Rea in their behalf was an immediate acceptance; that there was in the live stock trade, to wit, the sheep trade, a custom and usage that, where delivery of the live stock was to be made in the future, there should be paid to the seller part of the purchase price not exceeding 8 per cent. of the estimated total price, unless otherwise agreed upon, and payable in money or negotiable instruments, and that transactions of

that character could be carried on in the name of the broker without disclosing the principal's name; that pursuant to said custom, and agreeably to the terms of said contract of sale, and on the 27th day of May, 1917, the said Rea, for and on behalf of the plaintiffs, sent by mail, postage prepaid, a letter addressed to the defendant at Stanfield, Or., inclosing a check for \$7,000, and likewise inclosing said written memorandum of the contract of sale and purchase; that said check was good; that said Wm. Rea, Jr., Agent, had a checking account in the bank on which said check was drawn more than sufficient to pay the same; and that it would have been paid on presentation to said bank and was equivalent to cash. Plaintiffs further allege that, although the letter containing the check and memorandum was received by the defendant in due course of mail, the defendant failed and neglected to advise the said Rea in any manner regarding same until the 14th day of June, 1917, when the said Rea received by mail a letter from the defendant Stanfield, returning said check, said letter reading as follows:

"Stanfield, Oregon, June 12, 1917.

"Wm. Rea, Jr., Billings, Mont. Dear Sir: Referring to your letter and telegrams concerning the Story & Work yearling ewes, you will note that I quoted you a price for immediate acceptance, and, as I did not receive a reply, I concluded that you did not want them. The price on yearlings was steadily advancing, and I was unable to hold them for you at the price quoted. I am returning herewith your check for \$7,000, as I am unable to sell these ewes at the price offered in your contract.

"Yours truly,

R. N. Stanfield,
"By Don Pruitt."

Plaintiffs further allege that the customs and usages hereinbefore mentioned were known to plaintiffs and defendant, and to the said Rea, and said dealings, as evidenced by said telegrams and letters and as conducted by the said Rea for and in behalf of the plaintiffs, were carried on agreeably to said usages and customs, and that the same were generally and uniformly observed in the case of sales of live stock, and particularly of sheep; that by the sending of said letter by Stanfield, dated June 12, 1917, and received by the said Rea on the 14th of June, 1917, and by the return of the check referred to, the said Stanfield wrongfully and without cause breached the said contract entered into by him with the plaintiffs, as evidenced by said telegrams and letters; that by reason of said breach of said contract by the said defendant, plaintiffs have been damaged in the sum of \$21,000, for which amount, together with costs of suit, plaintiffs demand judgment against the defendant.

To this complaint a demurrer was interposed by the defendant, on the ground that said complaint did not state facts sufficient to constitute a cause of action. The court below was of the opinion that the minds of the parties never met as to the terms and conditions of the alleged contract of repurchase as evidenced by the telegrams and letters in the record.

Plaintiffs concede that the telegrams alone were not sufficient to establish a contract, but that they must be read in the light of the original contract of sale of April 28, 1917. The title of the defendant to these

ewes rests upon the original contract. The ewes had not been delivered to the defendant, but were to be delivered on July 1, 1917, at designated places. In less than a month after the original contract had been entered into by the parties, and more than a month before the delivery of the sheep was to be made as required by the contract, Rea, acting as a broker, submitted to the defendant by telegram a proposal to repurchase the sheep, and asked for the lowest price. The defendant knew from the original contract what sheep were referred to in the Rea telegram. The defendant replied by telegraph, fixing the price subject to immediate acceptance. Rea telegraphed within 24 hours his acceptance. The complaint alleges that it was a well-known custom in the live stock trade, to wit, the sheep trade, that an acceptance within 24 hours was an immediate acceptance. By the demurrer the defendant admits this allegation to be true. Rea also mailed to the defendant a check for \$7,000, with written memoranda of the contract of sale and purchase. It is alleged that this check was good, and was in an amount sufficient under the custom and usages of the sheep trade to meet the requirements of a purchase for future delivery. It is alleged that it was also the custom that such a transaction could be carried on in the name of the broker. The Revised Codes of Montana of 1907 provide as follows:

Section 5035: "A contract is to be interpreted according to the law and usage of the place where it is to be performed. * * *"

Section 5036: "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Section 5032: "A contract must receive such an interpretation, as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done, without violating the intention of the parties."

What more was required to make this contract complete? In what respect did the minds of the parties fail to meet? The only objection that Stanfield made to the transaction, as set forth in the telegrams of May 25th and 26th, was that the price he quoted was not accepted immediately. But it was accepted immediately, if we are to accept as true the allegations of the complaint that immediate acceptance meant that the offer should be accepted at least within 24 hours after the same was made. The objection is now made that there was no meeting of the minds of the parties upon the price to be paid for the sheep, but the full purchase price could only be determined upon the delivery of the sheep on July 1, 1917. In the meantime all that the custom and usage of the trade required for such a future delivery was the payment to the defendant of a sum not exceeding 8 per cent. of the estimated total price. This payment Rea made for and on behalf of the plaintiffs, and the transaction was thus completed. The minds of the parties had fully met upon all the essential terms of the contract, providing, of course, the allegations of the complaint are true. If they are not true, their denial will present issues of fact for the jury.

The judgment of the court below is reversed, with directions to overrule the demurrer.

LUCAS v. UNITED STATES.*

HICKS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 9, 1921.)

Nos. 5619, 5620.

1. Criminal law \Leftrightarrow 97(1)—District where overt act is committed has jurisdiction in conspiracy prosecution.

A conspiracy to do a certain thing is not ended for all purposes when the plan is completed, but carries on through every act done in the execution of that plan, and a charge of conspiracy to illegally transport liquor from one state into another, and the carriage of the liquor into the latter state, is sufficient to give the court in that district jurisdiction of the offense.

2. Criminal law \Leftrightarrow 619—Consolidation of cases for trial held proper.

The consolidation for trial of separate indictments against the same defendants, growing out of the same transaction, held proper.

3. Criminal law \Leftrightarrow 260(6)—Acquittal on one indictment held not inconsistent with conviction on another, based on the same transaction.

An acquittal under an indictment for conspiracy held not inconsistent with conviction under another, charging the same conspiracy and alleging the same overt acts, but that the conspiracy was formed in a different state.

4. Criminal law \Leftrightarrow 1169(12)—Error in admission of confession cured by subsequent evidence.

Error in admission of a confession without proper foundation being laid by showing that it was voluntary held cured, where such fact was shown by defendant.

5. Criminal law \Leftrightarrow 854(7), 855(1)—Permitting separation of jury and instructing as to duty to agree held not improper.

Permitting a jury to separate during their consideration of a case because accommodations could not be procured for them together, and general instructions given on their reassembling as to their duty to agree, if possible, held proper.

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

Criminal prosecution by the United States against Roy Lucas and Jack Hicks. Judgment of conviction, and defendants bring error. Affirmed.

W. B. King, Norton Montgomery, and William H. Dickson, all of Denver, Colo. (Quaintance, King & Quaintance, of Denver, Colo., on the brief), for plaintiffs in error.

Harry B. Tedrow, U. S. Atty., of Boulder, Colo.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Separate writs of error by Roy Lucas and by Jack Hicks from conviction for conspiracy to violate the Reed Amendment (39 Stat. 1069 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a-10387c]). Lucas and Hicks were jointly indicted in four separate cases, which were consolidated for trial. The conviction was under one of the indictments charging conspiracy at

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

*Rehearing denied December 5, 1921.

Cheyenne, Wyo., to transport intoxicants from that place to Denver, Colo. The points here urged are: Lack of jurisdiction; wrongful consolidation of the four cases for trial; insufficiency of the evidence; erroneous admission of evidence; erroneous instruction and wrongfully permitting the jury to separate after submission of the case.

[1] The indictment was in Colorado, jurisdiction there being based upon an overt act. The overt act charged was that the accused, on a certain date, caused intoxicants to be transported in interstate commerce from Cheyenne into Larimer county, Colo., in an automobile driven by one Ray. The objections urged to this jurisdiction are, that the indictment does not allege what physical act was done in Colorado; that the offense contemplated by the conspiracy was completed before Colorado was reached in the course of transportation; that it was necessary to show that Ray was a conscious party to the conspiracy; that the bare allegation that accused "caused to be transported" is fatally defective as a statement of a mere conclusion, since it does not allege the acts done by the accused to cause such transportation in Colorado. The first criticism is baseless, as the indictment clearly charges the physical act of transportation by automobile in Colorado. The contention that the offense was completed before the Colorado state line was reached is untenable. A conspiracy to do a certain thing is not ended for all purposes when the plan is completed. It carries on through every act done in the execution of that plan. The conspiracy charged here was to transport intoxicants to Denver, and the carriage by an automobile of those intoxicants into Larimer county as a part of the trip was an act in direct execution of the conspiracy, and amply sufficient for the purpose of lodging in the District Court for Colorado jurisdiction of the conspiracy. *Block v. United States*, 267 Fed. 524, 529, recently decided by this court, is directly controlling. The contention that the driver of the automobile in Larimer county must have been a conscious party to the conspiracy in order for his acts there in transporting the liquor to be a basis of jurisdiction, is frivolous. The allegation of the indictment as to causing the intoxicants to be transported would be sufficient as following the statute, but here the method, time, and place of transportation are set out clearly. The attack upon the jurisdiction of the court cannot stand.

[2] The objection to the consolidation of the four cases is not well taken. In each case the defendants were the same. In two of the cases each charged a conspiracy to violate the Reed Amendment, differing only as to the place where the conspiracy was alleged to have been entered into. The other two charged conspiracy to transport liquor not properly labeled, differing only as to the place of the conspiracy. All of the cases related to the same transaction. No prejudice is seen to have resulted from the consolidation of the cases for trial, and the discretion of the trial judge in ordering the consolidation is approved.

[3] The contention that the verdict of acquittal in one of the other cases, tried at the same time, is inconsistent with conviction in this case is unsound. The case in mind was an indictment charging conspiracy in Denver, Colo., to violate the Reed Amendment by transporting in-

toxicants from Cheyenne, Wyo., into Denver, Colo. The overt act was the same in that indictment and in the present case. Obviously, the two indictments were framed to fit the proof as to whether the conspiracy had been entered into in Denver or in Cheyenne. The jury decided that the conspiracy was formed in Cheyenne. The inevitable result of such a view was to convict in the present case, and acquit in the other case.

It is also contended by Lucas that he should have been permitted a separate trial. We find no sufficient basis for error in denial of this request. The evidence was amply sufficient to justify conviction.

[4] The evidence claimed to have been erroneously admitted was a confession of the defendant Hicks. It is claimed that no proper foundation was laid for the admission of this evidence, because it was not shown that the confession was voluntary. At the time the confession was offered this proof was defective, and no proper foundation was laid for the admission. However, in cross-examination of the same witness, defendants clearly developed that the confession was voluntarily given; therefore the error of admitting it was cured. The trial judge clearly and carefully limited the effect of this confession to Hicks, so that Lucas was not prejudiced thereby. *Holmes v. United States*, 267 Fed. 529.

[5] The contentions as to improper instruction and improper separation of the jury may be better understood by first considering the matter of the separation of the jury. After having considered their verdict for six hours until 10 o'clock at night, the jury was permitted to separate until the following morning. The reason for permitting this separation was that the marshal was unable to secure quarters where he could hold the jury together overnight. The separation of the jury under these circumstances and upon the order of the court, was proper, and no prejudice to accused is shown to have arisen therefrom.

While the jury was separated, one of the jurors told several persons that the jury had disagreed. It having been communicated to the judge that a juror had talked about the case and the foreman of the jury having communicated to the court that the jury were in disagreement, the court, on the following morning, gave the instruction following:

"Gentlemen, I have a communication from you, through your foreman, in which he reports that the evidence has been fairly discussed and that there seems to be no prospect of agreement, and indicating how the jury stands in numbers. He does set out what leads me to believe that you were not all evenly divided. There was a very small number of the jurors on one side, and the greater portion of them on the other. It appears to be the position taken by a small part of the jury, and he seems to think there is no hope of agreement. We have frequently had jurors feel that way about a case, and yet reach a verdict. A trial of a lawsuit, of this number of witnesses, is expensive to both sides. It is difficult to tell what to do at times under such circumstances. Of course, we look at it from the point of view that the 12 men now on the jury are about as capable, if not fully so, as any other 12 men we could get to determine the case. You have not had the matter under consideration for a great length of time. We have kept juries for two or three days, and while I always hesitate to do that, I think it ought to be done if

the jury in the end reached a verdict. And yet, on the other hand, I shrink from the idea of imposing hardship on men, keeping them together. So I hope you will appreciate the attitude which the court necessarily finds itself in under conditions of this sort. The testimony in this case is not voluminous. It is not difficult to keep it in mind. Of course, if any juror, under his oath and his conscience, cannot say that he was willing to agree with his fellows, no one can ask him to do so. But when we find a juror in that condition, in that state of mind, the only reasonable and fair thing for him to do is to examine himself, question his own conscience, inasmuch as all of his fellows stand against him, go over it again, and listen to them in patience, and see whether he is not wrong. So that I hardly feel that I can now discharge the jury. As I have said, you have only had about six hours' consideration of this case. The marshal telephoned me after supper last night that he was unable, on account of the great number of visitors now in the city, to find a place where you could be accommodated and have beds, and that if you were kept together you would have to remain up. That is an extreme hardship on any one, and knowing that there were some men on the jury along in years, I felt I would not be justified in subjecting you to that sort of thing, so I permitted you to go to your homes last night, and told the marshal to instruct you to go home and return to your jury room this morning. That is recognized as the proper procedure in criminal cases throughout the country, under such circumstances. Of course it was highly important, and you gentlemen knew that it was important from what had already been said in this case, that you should not talk to anyone about the case. To do so would be a contempt of court, and subject you to punishment as in contempt.

"I do not know that it is true, but I am pretty reliably informed—there may be a mistake about it—that some of the jurors, after they went to their rooms, engaged in telephone conversations with others about this case. That I shall investigate. I call your attention to it now, not for the purpose of taking that up, but to let you understand that if I am compelled to permit you to separate again, this conduct, of the character to which I refer, cannot be indulged in. It may be, if we have to keep you overnight, we can get a room tonight. If we cannot get a room we will then consider whether we can follow the course that was followed last night. This jury is now each an officer under oath, and is bound to consider nothing but the testimony in this case, and he must keep his mind free from outside communications, and decide this case solely on the testimony adduced here. We will do all we can while you are in consultation to help relieve your burdens, and make it just as comfortable for you as the officers of the court can make it. If at any time the jurors are in doubt about any principle of law that has been announced, you are at liberty to come into the court and have the court read-vice you in those respects. You are bound by the evidence and the law in the case, and you are expected to return a verdict accordingly.

"I will ask you to retire to your room again."

No exception was saved to this additional charge, but we have considered the objections urged against it because the liberties of citizens are involved. We think the charge timely, proper, and not prejudicial to accused.

The judgments are affirmed.

In re JOHN B. ROSE CO. In re ROSE BRICK CO. Appeal of TRAVELER'S INS. CO.

(Circuit Court of Appeals, Second Circuit. June 8, 1921.)

Nos. 210, 211.

1. Insurance ⇨182—Policy issued to two corporations held not to create joint and several liability for premiums.

Policies of employer's liability insurance were issued to two employer corporations in the form of "A and/or B." The premiums were based on the pay rolls of the insured during the term of insurance. Neither corporation owned any stock of the other, though the same man was president of both and their business relations were more or less intimate; one, which owned tugs and barges, being sometimes employed to transport the product of the other. *Held*, that the contracts did not impose a joint and several liability for premiums, but that each corporation was liable only for so much of the premiums as was based on its own pay roll; both being jointly liable in respect to employees, if any, who were jointly employed.

2. Contracts ⇨184—Both joint and several obligations may arise from the same contract.

It is possible in the same contract that some promises shall be joint and others by the same promisors shall be several.

3. Evidence ⇨86—"Presumption of law" defined.

A "presumption of law" is a rule of law that a particular inference shall be drawn from a particular circumstance, and, from the fact which is proved, the law raises an artificial presumption of the existence of the other fact which is inferred.

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

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

In the matter of the John B. Rose Company, bankrupt, James G. Graham, trustee, and of the Rose Brick Company, bankrupt, Charles Clayton Bourne, trustee. Appeals by the Travelers' Insurance Company from orders of the District Court. Affirmed.

See, also, 275 Fed. 416.

These causes come here on appeals from orders entered in the United States District Court for the Southern District of New York.

The claims against both bankrupts were tried together in the court below, the trustee of one of the bankrupts having intervened upon the trial of the claim against the other upon consent. Upon review in the District Court of the orders of the referee both matters were argued together, and the court handed down one opinion covering both claims. The body of the orders of the referee as respects both claimants are precisely alike, and the orders appealed from of the court below are likewise alike, differing only in the amounts allowed against the respective bankrupts. While each bankrupt filed separate petitions for review and separate orders were entered in each matter by the referee and by the court, the same testimony and exhibits covered the claims of both. The Travelers' Insurance Company is the claimant-appellant in both causes.

The appeals will be disposed of in this court in one opinion.

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

William J. Moran, of New York City, for appellant.

Hughes, Rounds, Schurman & Dwight, of New York City (Richard E. Dwight and Allen S. Hubbard, both of New York City, of counsel), for appellee Graham.

Graham Witschief, of Newburgh, N. Y., for appellee Bourne.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The claims involved are for premiums alleged to have been earned by the Travelers' Insurance Company upon policies of workmen's compensation and of liability insurance issued and delivered to both bankrupts at their special instance and request.

The claimant filed an identical proof of claim against both companies for a balance of premiums due and owing to it upon six policies of insurance in the sum of \$8,013.73. Upon the hearings before the referee the claimant reduced its claim to \$7,985.67. It is conceded that of this latter amount \$4,972.96 was computed upon the pay roll expenditures of the John B. Rose Company and that \$3,012.71 was computed upon the pay roll expenditures of the Rose Brick Company. The contention between the parties is as to whether or not both the John B. Rose Company and the Rose Brick Company, both bankrupts, are jointly and severally liable to the Travelers' Insurance Company, claimant, for its claim of \$7,985.67. The question resolves itself into one of law and depends upon the interpretation to be given to the contracts entered into on one side by the insurance company, and on the other side by the two assured bankrupt companies.

There is no issue of fact involved, there being no disputed facts and no contradiction in the evidence. The trustees of the bankrupts offered no evidence and rested upon the evidence and testimony presented by the insurance company, the claimant herein.

It appears that six policies were issued to "The Rose Brick Company and/or The J. B. Rose Brick Company." Only one policy is printed in the record, but it is stipulated that this policy is typical of the others. The policies were issued upon "Declarations," of both bankrupts together. Said "Declarations" are "set forth" in each policy and, according to the terms of the policy, are "hereby made a part thereof." The said declarations were made by the "employer," as follows:

"The signature to this proposal is accepted by this employer as his signature.
The Rose Brick Company and/or
"The J. B. Rose Company,
"Per P. E. Farnum."

In said applications the bankrupts declared, among other things, as follows:

"Item 1. Name of employer, the Rose Brick Company and/or the J. B. Rose Company; P. O. Address, Roseton, N. Y. The employer is corporation."

While there were six policies issued and accepted, three of them covered the period July 27, 1916, to July 27, 1917, and the other three for the succeeding period between July 27, 1917, and June 10, 1918, and the three in each group covered different kinds of liability, one covering

"workmen's compensation," another covering liability to any person (the public) and another covering "marine" liability. A separate policy of each of said kinds was not issued to each of the bankrupts, but each kind of policy covered both bankrupts, and only one policy of each kind was issued to the "employer" or to the "assured."

The policies contain the following provision with respect to the payment of the premium:

"* * * The premium is based upon the entire remuneration earned during the term of the policy by all employees of the employer except * * * If the earned premium thus computed is greater than the advance estimated premium paid, the employer shall immediately pay the additional amount to the company; if less, the company shall immediately return the unearned premium to the employer."

It is also provided:

"The company shall be permitted, at all reasonable times, * * * to examine the employer's books and records at any reasonable time during the policy term, or any extension thereof, or within one year after its final expiration, for the purpose of determining the actual premium earned while the policy was in force."

In all of the policies there is a definite obligation to pay premiums, which when originally issued were "estimated." Premiums were originally "estimated" because the premium was computed according to rates fixed by the policies upon pay roll expenditures to be made by the employer or the assured during the policy period—which expenditures were ascertained by the insurer's auditors during and after the close of the policy period. The policies prescribed different rates for different classifications of work involving the pay roll expenditures.

The bookkeeper of the Rose Brick Company testified that the statements rendered by the claimant and received at the Roseton office were not only for the amount due by the Rose Brick Company, but they were also for the total amount due; that he would compute such statements and ascertain the amount owing as between the two companies by the Rose Brick Company, and would charge such amounts on the books of that company. He said the payment of the premiums was generally attended to at the New York office, and that that office would send checks from each company—"usually a thousand dollars on account."

The insurance broker testified that he would receive from the bankrupts payment of the premiums as follows:

"Generally received a check from the New York office, made out to me personally, and from time to time the check, as I remember it, had stamped on the bottom, Rose Brick Co. or J. B. Rose Co., per J. B. Rose, and underneath was generally the signature of John B. Rose."

He also testified that the checks were received on the general bill, and that he never received any instructions from either corporation that the remittances which were made should be applied in any way except on the general account of earnings under all of the policies.

The referee held that the contract between the insurance company and the two assured companies imposed a joint and several obligation upon the latter, and he granted orders overruling the objections filed by the respective trustees in bankruptcy of the John B. Rose Company

and of the Rose Brick Company. Orders were entered against each of the assured companies allowing the claim of the insurance company in the full amount of \$7,985.67. Thereupon the respective trustees of the bankrupt companies petitioned to have the orders revised. The District Judge revised the orders entered and filed a memorandum opinion in which he said:

"In my judgment, the clear meaning of the expression 'and/or' in such a policy is to designate as the employer either or both companies respectively. That is, in one policy three employers are designated, the Rose Brick Company, the J. B. Rose Company, and the two together. The liability resulting therefrom is that of each company for the premium based upon its pay roll and that of both companies jointly for the aggregate of their pay rolls in case they engaged in some activity under which they jointly had employees.

"No such enterprise was undertaken. No proof is offered that the two companies combined in any way whatsoever, or that they had any joint employees.

"Clearly, it could not have been intended that each company should be a guarantor for the other company, as any such intention could and should have been plainly expressed.

"The claim will be allowed against each company on the basis of its pay roll alone.

"The order of the referee will be revised accordingly."

The result is that the insurance company's claim against the John B. Rose Company is restricted to the premiums based upon the pay roll of that company which amount to \$4,972.96. And the claim against the Rose Brick Company is restricted to the premiums based upon its own pay roll which amounts to \$3,012.71.

The claimant insists that the court erred in determining that the words "and/or" in the contracts or policies of insurance did not create a joint and several liability on the part of the bankrupt companies, and in not allowing its claim against both bankrupts in the sum of \$7,985.67.

It is contended by the claimant that the obligation of the J. B. Rose Company and of the Rose Brick Company to pay the premiums prescribed by the policy contracts is joint, and therefore that each bankrupt is severally liable for the entire claim set forth in the proof of debt.

In Chitty on Contracts, vol. 1 (11th Ed.) p. 139, the law on this subject is stated as follows:

"It is said, moreover, to be a principle of law, that if several persons stipulate for the performance of an act, they are impliedly bound jointly, and not severally; and that there must be express words creating a several liability, in order to render them separately responsible. But the latter part of this proposition is not strictly correct; the true rule being, that even in the absence of express words, an agreement prima facie joint may be construed to be several, if the interest of either party, appearing upon the face of the instrument, shall require that construction."

In Parsons on Contracts the rule is stated as follows:

"Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand, there should be words of severance, in order to produce a several responsibility or a several right.

"Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends

(the rule above stated being kept in view) upon the terms of the contract, if they are express; and where they are not express, upon the intention of the parties as gathered from all the circumstances of the case. It may be doubted, however, whether anything less than express words can raise a liability which shall be at once a joint and a several liability."

And in *Williston on Contracts*, vol. 1, § 322, it is said that—

"Following the analogy of the rule of real property that an estate granted to two persons created a joint tenancy in common, it was early held and, except as changed by statute, the law remains that promises by two or more persons create a joint duty unless the contrary is stated."

And see *White v. Tyndall*, 13 A. C., 263; *Noyes v. Barnard*, 63 Fed. 782, 11 C. C. A. 424; *Alpaugh v. Wood*, 53 N. J. Law, 638, 23 Atl. 261; *Pittsley v. King*, 206 Pa. 193, 55 Atl. 920; *Mintz v. Tri-County Natural Gas Co.*, 259 Pa. 477, 103 Atl. 285; *Nabors v. Producers' Oil Co.*, 140 La. 985, 74 South. 527, L. R. A. 1917D, 1115; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639; *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088; *Milner Bank, etc., Co. v. Whipple's Est.*, 61 Colo. 252, 156 Pac. 1098.

[3] A presumption of law is a rule of law that a particular inference shall be drawn from a particular circumstance. From the fact which is proved the law raises an artificial presumption of the existence of the other fact which is inferred.

In arriving at the meaning of this contract we must consider all the circumstances including the relations existing between the two corporations insured and the business to which the contract relates. We must ascertain by reasonable inference what the parties understood and mutually intended by the words which they employed. We must then give effect, if possible, to the meaning so ascertained.

The John B. Rose Company and the Rose Brick Company, the bankrupts, in whose name the policies of insurance were issued, are distinct corporations, and John B. Rose was the president of each. The John B. Rose Company was engaged in taking builders' sand and gravel from its own banks at Roseton near Newburgh, N. Y. It was also the owner of barges and tugboats and was engaged in the transportation on the Hudson river of its own products, sand and gravel, and in addition of brick manufactured by the Rose Brick Company at Marlborough, some 8 or 10 miles distant from the plant of the Rose Brick Company. At times the Rose Brick Company chartered barges, with their crews, of the John B. Rose Company. The business relations between these two companies were of a more or less intimate character. John B. Rose owned a majority of the stock of the John B. Rose Company, and as executor of the estate of his father had control of almost the entire stock of the Rose Brick Company. The referee in the memorandum which he filed in referring to the business operations of the two companies states that it may very well have been in the mind of Rose or of his insurance broker, Farnum, having in mind the risks incurred by the two companies, that an employee of the one company might very well de facto assert an accident claim against the other company. Counsel for the trustee asserts in his brief that no employees

of the Rose Brick Company were at the sand and gravel plant of the John B. Rose Company, and that no employees of the latter company were at the plant of the Rose Brick Company. He then points out that if an employee of the Rose Brick Company was injured only the Rose Brick Company could bring suit upon the policy against the insurance company, and that if an employee of the Rose Brick Company was injured only the Rose Brick Company could recover indemnity from the insurance company for such an injury. He concludes that it is inconceivable that the contracting parties in entering into the contract evidenced by the policies intended that the insurance company should be liable to the Rose Brick Company for an injury sustained by an employee of the John B. Rose Company while engaged in working exclusively for the John B. Rose Company, or that the insurance company should be obligated to indemnify the John B. Rose Company for an injury sustained by an employee of the Rose Brick Company while engaged exclusively in work for the latter company. We think this is undoubtedly so. The contract seems to us to indicate a plain intent to create a several liability upon the part of the insurance company to the two companies assured. It also indicated a like intent to create a several liability with regard to the obligation of the two companies assured for the payment of the premiums. The liability of each company for premiums is commensurate with the benefits received by each company under the policy. But while the contract signifies the intention stated it indicates something more. The words "and/or" cannot be ignored. They have a meaning. It seems to us that in writing the policies it was had in mind that in view of the fact that the John B. Rose Company's barges and their crews were employed to transport the brick manufactured by the Rose Brick Company a situation might arise in which there would be joint employees and that special provision should be made for the protection of the two companies in that class of cases.

The policies were drawn to insure three employers:

1. The Rose Brick Company against injuries to its employees.
2. The John B. Rose Company against injuries to its employees.
3. The two companies together against injuries to their joint employees.

As the resulting liability of each company for the premiums is based upon its pay roll, there is a several liability of the Rose Brick Company for the number of employees carried on its pay roll. A like several liability of the John B. Rose Company exists for the number of employees carried on its pay roll. In addition there would exist a joint liability of the two companies for the aggregate number of employees carried on their pay rolls if the companies engaged in any joint undertaking. The fact, however, is not disclosed by the evidence that the two companies did engage in any joint undertaking or that they had any joint employees.

[2] It is possible in the same contract that some promises shall be joint and others by the same promisors shall be several. Williston on Contracts, vol. 1, § 325. And see *Buster v. Fletcher*, 22 Idaho, 172,

125 Pac. 226; *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935. It is possible that the John B. Rose Company and the Rose Brick Company might make themselves jointly liable for premiums on policies insuring their joint employees if they should have any, while each might assume a several liability for premiums on policies insuring simply its own employees. The question whether this was what the parties did in the contract now under consideration is to be determined by the language used and by intention of the parties as gathered from all the circumstances of the case.

In determining the question herein presented we must assume, unless compelled by the language used to a contrary conclusion, that the intent of the parties was to enter into a valid contract and one which it was in the power of the corporations to make. We are bound if possible so to construe the contract as to make it legal. For it is a cardinal rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former must be adopted. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; *United States v. Central Pacific Railroad Co.*, 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173. The John B. Rose Company, as stated in an opinion filed at this term,¹ owned none of the stock in the Rose Brick Company and had no direct interest therein. It also appeared that the Rose Brick Company owned none of the stock of the John B. Rose Company. For these companies to have entered into a joint agreement whereby they assumed a joint obligation to pay the premiums on insurance policies for the protection of employees not jointly employed by them would seem to be ultra vires their powers and void. The ultra vires promise of one could not make valid the ultra vires promise of the other.

We do not feel compelled to the conclusion that the parties had such intention. In this connection it is significant that the "declarations," upon which the policies were issued, were signed not in the form "Rose Brick Company and John B. Rose Company," but in the form "Rose Brick Company and/or J. B. Rose Company." And in all six policies the assured is so described. If the intention was to enter into a mere joint contract we fail to understand the significance of the words "and/or." We think the meaning of those words was stated correctly by the court below in the construction put upon the agreement, and which has been already set forth in this opinion.

The orders are affirmed.

¹ *Matter of John B. Rose Co., Bankrupt, Metropolitan Bank, Claimant-Appellant, v. James G. Graham, Trustee in Bankruptcy, Appellee.* 275 Fed. 416.

In re JOHN B. ROSE CO.

Appeal of METROPOLITAN BANK.

(Circuit Court of Appeals, Second Circuit. June 1, 1921.)

No. 225.

1. Corporations ⇨484(3)—Generally without power to become guarantor.

A corporation ordinarily is without power to enter into a contract of guaranty, though the existence of such power is sometimes implied when necessary to enable the corporation to accomplish the objects for which it is created or when it is reasonably necessary in the conduct of its business.

2. Corporations ⇨484(3)—Directors cannot authorize guaranty which is ultra vires.

A guaranty executed by a corporation otherwise ultra vires is not validated because authorized by its board of directors.

3. Corporations ⇨484(3)—Guaranty by corporation held void as ultra vires.

A guaranty executed by a corporation to a bank, covering any indebtedness then or thereafter contracted to the bank by its president, pursuant to which the president discounted with the bank notes of third persons or corporations payable to him personally, and the proceeds were paid out on his personal checks, held void as ultra vires, where the evidence did not show that the guarantor had any interest in the notes discounted or received the benefit of their proceeds.

4. Corporations ⇨484(3)—Corporation must control another to make it a subsidiary.

While a corporation may execute a valid guaranty of indebtedness contracted by a subsidiary, constituting a part or branch of its business organization, to make one corporation a subsidiary of another within the rule, it is necessary that the one company should itself control the other, and the fact that the president of one corporation is also president and controls a majority of the stock of a second, which has subsidiaries of which it owns all the stock, does not make the second corporation or its controlled companies subsidiaries of the first, which has no stock, interest in, or control over any of them.

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

In the matter of the John B. Rose Company, bankrupt. On appeal by the Metropolitan Bank from an order of the District Court. Affirmed.

See, also, 275 Fed. 409.

The John B. Rose Company is a corporation organized under the laws of the state of New York, and was adjudicated a bankrupt on June 11, 1918.

The Metropolitan Bank on September 24, 1918, filed proof of claim in the sum of \$25,000.

The proof of claim is based upon an alleged guaranty which may be found in the margin.¹

¹ "In consideration of the sum of one dollar to us, John B. Rose Co. of New York, N. Y., paid by the Metropolitan Bank of New York, the receipt of which is hereby acknowledged, and for other good and valuable considerations, we hereby jointly and severally promise and guarantee to said bank to pay to it (all present and future indebtedness and indebtednesses, liability and liabilities, of John B. Rose, on his bills receivable doing business in New York, N. Y., whether he shall be alone liable, or is or shall be liable jointly with another or others to said Metropolitan Bank, New York, whether such liabil-

The proof of claim invokes the guaranty in respect of 16 promissory notes which aggregate something in excess of \$25,000. The notes were all drawn to the order of John B. Rose and were indorsed by him. They were discounted by the bank which placed the money to the credit of his individual account.

The order adjudicating the John B. Rose Company a bankrupt contained the usual provision referring the matter to a referee in bankruptcy to take such further proceedings as required by the act of Congress.

The trustee of the bankrupt moved to expunge the claim of the bank on the ground that the guaranty on which the claim rested was ultra vires the John B. Rose Company and therefore void.

The referee in bankruptcy allowed the claim. The District Court overruled the order of the referee, and on November 15, 1920, entered an order disallowing the claim and expunging it from the list of claims against the estate of the bankrupt.

The bank seeks to uphold the guaranty upon the theory that while the bank account was in the name of Rose personally, it was for the benefit of the John B. Rose Company and the subsidiary companies to which reference has been made.

Butcher, Tanner & Foster, of New York City, for appellant.

Hughes, Rounds, Schurman & Dwight, of New York City (Richard E. Dwight and Allen S. Hubbard, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] A corporation ordinarily is without power to enter into a contract of guaranty, as such a contract is foreign to the objects of its creation and hazards its funds in a manner unwarranted by the contract which

ity or liabilities be now contracted or incurred, or be hereafter contracted or incurred, at one or several different times, and in one or several different amounts or sums; and we hereby jointly and severally agree with said Metropolitan Bank, New York, that this shall be a continuing liability, promise and guarantee to it by us, to pay to it at maturity all present and future liability and liabilities, and indebtedness and indebtednesses of said John B. Rose of New York, N. Y., either alone or jointly with another or others, to said Metropolitan Bank, New York, at however many times and in whatever sums and amounts incurred or contracted).

"But our liability hereon shall only compel us to pay in the aggregate the amount of twenty-five thousand (\$25,000) dollars, and our liability hereon shall cease for all indebtedness of said John B. Rose to said Metropolitan Bank, New York, contracted or incurred after notice in writing received by said Metropolitan Bank, New York, to the effect that we will not be liable to it for any indebtedness or liability of the said John B. Rose contracted or incurred after such notice in writing.

"Witness our hand and seal this 15th day of January, 1918. In the presence of John B. Rose Co. [Signed] John B. Rose, President.

"[Signed] Oscar A. Freyer.

"At a meeting of the directors of the John B. Rose Company held this day, a quorum being present, it was—

"Resolved, that the president be and hereby is authorized on behalf of the John B. Rose Company to execute and deliver the above guarantee to the Metropolitan Bank, guaranteeing the payment of bills receivable in the aggregate and amount of twenty-five thousand dollars.

"John B. Rose Co.

"[Signed] John B. Rose, President.

"Robt. T. Foyd, Secy.

"[Signed] Oscar A. Freyer."

exists between it and the state, and between it and its stockholders. The existence of such a power is sometimes implied, however, when it is necessary to enable a corporation to accomplish the objects for which it is created, or when it is reasonably necessary in the conduct of its business.

It appears that the bankrupt, the John B. Rose Company, which gave the guaranty, was a corporation engaged in the excavation and sale of sand and gravel for building and construction purposes, and in the sale of brick and other building material. In carrying on its business it had barges engaged in the transportation on the Hudson river of brick, sand, and gravel. It did not itself manufacture brick, but obtained it from the Rose Brick Company and the Alpha Company. The Coney Island Construction Company and the other subsidiary companies sold the brick for the John B. Rose Company instead of the John B. Rose Company selling it direct. The John B. Rose Company had no interest in the sale of the brick except to the extent of its commission as the agent of the Rose Brick Company.

It may be assumed, unless there are special circumstances disclosed in the record which make this case an exception to the general rule, that the John B. Rose Company, being a manufacturing and sales company, had no implied power to loan its credit or to guarantee the individual paper of John B. Rose. While a corporation organized for manufacturing purposes may guarantee paper which it owns, or paper which it negotiates in due course of business and the proceeds of which it receives, it cannot be maintained that the power to guarantee the personal notes of a third person for his accommodation is possessed by it as being "essential to the transaction of its ordinary affairs" nor within "the legitimate objects of its creation." In the case of *In re Prospect Leasing Co.*, 250 Fed. 707, 709, 163 C. C. A. 39, this court recently declared the rule to be fundamental that a corporation had no implied power to make accommodation paper. We did not apply the rule in that particular case because the corporation had received a valuable consideration for its indorsement inasmuch as a cause of action against the corporation was released.

In *Ward v. Joslin*, 186 U. S. 142, 149, 22 Sup. Ct. 807, 46 L. Ed. 1093, the court declared that ordinarily corporations have no implied power to bind themselves by accommodation indorsements, or to guarantee the paper of a third person which they do not own. And in *Louisville, New Albany & Chicago Railway Co. v. Louisville Banking Co.*, 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081, the court declared that a railroad corporation, unless authorized by its act of incorporation or a statute, had no power to guarantee the bonds of another corporation and that such a guaranty was "beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel."

In *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 160, 105 N. E. 210, 212, the New York Court of Appeals declared that—

"A manufacturing corporation has no power to make or indorse notes for the accommodation of others. * * * One who deals with the officers or

agents of a corporation is bound to know their powers and the extent of their authority."

The rule is so familiar and is so well established that citations in support of it are quite unnecessary. The real question involved must be whether there are any circumstances disclosed in the record which make the rule inapplicable to the case under consideration.

The document containing the guaranty is set forth in the statement preliminary to this opinion. On its face it appears to be for the personal benefit of Rose. It guarantees "all present and future indebtedness and indebtednesses, liability and liabilities of John B. Rose," "whether he is or shall be alone liable, or is or shall be liable jointly with another or others." It appears to be an agreement which is ultra vires the corporation. In view of the apparent ultra vires character of the guaranty the burden of proof is on the creditor, in this case the Metropolitan Bank, to prove by a preponderance of evidence that each of the notes which it discounted was discounted for the benefit of the John B. Rose Company and that the moneys so derived were for the use and benefit of that company.

[2] The guaranty given to the claimant bank appears to have been authorized at a meeting of the directors of the John B. Rose Company. But if the guaranty were otherwise ultra vires it could not be made intra vires as against creditors even if it had been authorized by all the directors and the stockholders. In re Prospect Worsted Mills (D. C.) 126 Fed. 1011, 1014; *Murphy v. Arkansas, etc., Improvement Co.* (C. C.) 97 Fed. 723, 727; *Germania Safety Vault & Trust Co. v. Boynton*, 71 Fed. 797, 19 C. C. A. 118; *J. G. Brill Co. v. Norton, etc.*, St. Ry. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 53, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

[3] The testimony of the president of the claimant bank as to the circumstances under which he agreed to accept the guaranty of the John B. Rose Company does not disclose that the money realized from the discounting of the notes was to be used for the benefit of the John B. Rose Company, or that any representations were made to him that the guaranty was for the benefit of the corporation. Asked to give "the full conversation" he had on the subject with John B. Rose, he said that Rose approached him on the subject of discounting some notes:

"I told him we were willing to discount those papers. He told me they were commercial notes, and I said we would discount those notes, provided we had the notes endorsed and guaranteed by a responsible party. He offered the guaranty of the John B. Rose Company. I told him I would give him \$25,000 to start with. He was satisfied. I then had a paper made out, as he told me that he required the money on January 15th.

"He took the guaranty along, and on the 15th of January his cousin or brother, a man by the name of Rose, called on me and brought me several notes, less than \$25,000, and gave me that guaranty; and on the strength of that I gave instructions to discount the paper, and to open an account."

He was asked and answered further as follows:

"Q. What did he say to you? Did he say he wanted to discount paper with you? A. Sure. Q. And what was the character of the paper he said

he wanted to discount with you? A. Commercial paper. Q. Arising how? A. Commercial paper must have some commercial transaction. Q. Was it a transaction in connection with the sale of merchandise? A. I did not ask, or care. Q. Did Mr. Rose say he was in the business of buying and selling merchandise? A. No, sir. Q. What did he say? A. He said he was the president of the John B. Rose Company, manufacturers of brick, I think it was. Q. And he did not say he was in business? A. No, sir. Q. You did not so understand, either, did you? A. No. I did not care as long as there was a satisfactory guaranty."

We have examined the record carefully to see whether any circumstances are disclosed which would justify the guaranty, and we have found none. If the John B. Rose Company received any consideration for its guaranty the fact does not appear. The evidence fails to show that the money realized by the discount of the notes covered by the guaranty was obtained at the request of the John B. Rose Company for its use, or that it was applied to its benefit. On the contrary, we think it appears that the guaranty was given for the accommodation of John B. Rose individually.

Henry Ollesheimer, the president of the appellant bank, was asked as to the notes he discounted and testified as follows:

"Q. And they were not made by the John B. Rose Company? A. No, sir. Q. And did not bear the indorsement of the John B. Rose Company? A. No, sir; it was not necessary.

"By Mr. Dwight: Q. They were not payable to the John B. Rose Company? A. No, sir. Q. Didn't it occur to you that John B. Rose might be exceeding his authority in discounting these notes for his own credit? No, sir; those are matters which occur every day. Q. Didn't you notice that this guaranty is a guaranty of the John B. Rose Company and not of John B. Rose individually? A. If it had been his own company in it, it would not be necessary, as he indorsed them individually."

As ordinarily a corporation has no implied authority to enter into a contract of guaranty and only possesses the power when under the circumstances it is a necessary or proper means of accomplishing a purpose authorized by its charter, a bank acts at its peril in relying upon such a contract without inquiry. And yet the testimony of the president of the claimant bank indicates that he discounted notes made to Rose individually and placed the proceeds of them all to Rose's individual credit and paid them out on his individual check in reliance on the guaranty of the John B. Rose Company without any inquiry whatever into the circumstances to ascertain whether the guaranty was or was not *ultra vires*. It is perfectly apparent that at the time it never occurred to him to make the inquiry and the matter was one of indifference.

The testimony of Rose, however, is that he informed the president of the bank that the proceeds realized from the discounted notes were to be used in the John B. Rose Company's business. The following is an excerpt from his testimony:

"Now, what in this conversation, was said about the purpose of your opening up this account with the Metropolitan Bank and the issuance of this guaranty? A. I stated, to the best of my recollection and belief, that we would offer for discount—that John B. Rose would offer for discount paper which would be guaranteed by the John B. Rose Company, and the proceeds

used in the John B. Rose Company business. Q. What was intended to be done with the money? A. Used in the business of the John B. Rose Company and the subsidiaries, and that was done. Q. Was that what you stated to Mr. Ollesheimer? A. That is my recollection.

"Mr. Dwight: I move to strike out the last part of Col. Rose's answer to the last question where he interpolated the words 'and that was done.'

"Mr. Hanford: Let it be stricken out. We will show what was done.

"The Referee: I think I will strike that out, that the proceeds were to be used for the benefit of the John B. Rose Company."

The testimony shows that the notes upon which the claimant bank seeks to hold the John B. Rose Company liable were all discounted subsequent to April 5, 1918. It also shows that out of the proceeds of such notes deposited in the individual account of John B. Rose he checked out for admittedly personal expenditures various sums aggregating \$1,400. It appears too that the John B. Rose Company received only \$4,000 out of the proceeds realized from the discounted notes aggregating more than \$25,000. It fails to show for what purpose the \$4,000 was paid, whether it was to discharge debts due from Rose to the company or whether it was money advanced to the company. The remaining sums were paid to the so-called "subsidiary" companies, but the purpose for which the money was paid to them is not proved. The unsatisfactory character of the testimony on that subject may be seen in the following excerpt from the testimony of Rose:

"Q. Now, take the first check, N. & W. J. Peck Company, \$4,931.18, did you owe the Peck Company that money? A. I do not know anything about those checks which were drawn.

"Q. Why did you pay the check for \$4,931.18? A. I do not know.

"Q. Do you know why you paid any of the checks, aside from those for your own personal account? Just tell us if there are any which you know why you paid them. A. I do not know whether these were drawn, or why these were drawn. Here is one (indicating), \$4,931.18, charged to the Peck Company.

"Q. Did you owe the Peck Company at that time? A. I do not know anything about it. I presume the John B. Rose Company is running the John B. Rose Company office, and I presume that is money paid for them to the Peck Company. I signed these in blank; I authorized them; I am responsible for them; and I do not know how they happened. I believe these checks were made payable to these companies, and I believe it was done on my authority, and I have indicated the ones which were to me personally. More than that I know nothing.

"Q. Do you know whether the John B. Rose Company received any credit for those sums? A. I do not know anything about it."

Proof that Rose, after the discount of the notes, paid moneys out of his individual account, in which the proceeds of the discounted notes were deposited, to the John B. Rose Company or to the Coney Island Construction Supply Company whose stock it owned, is not in and of itself proof that such note was discounted for either of such companies, or that either had such an interest therein as would change the nature of the guaranty as to the notes from that of an ultra vires to an intra vires transaction, and a fortiori as to moneys paid to the other companies none of whose stock the John B. Rose Company owned, as well

as to that paid to the Alpha Brick & Holding Company in which the John B. Rose Company was a mere minority stockholder.

It is significant:

1. That the discounted notes were all payable to the order of John B. Rose.
2. That the account opened with the claimant bank and in which the proceeds of the discounted notes were deposited was in the name of John B. Rose, and not in the name of the John B. Rose Company, or in that of John B. Rose, president.
3. That John B. Rose drew checks on this account for his personal expenses.
4. That there is no evidence which proves that he regarded the funds in this account as impressed with any trust for the John B. Rose Company or for any of the subsidiary companies.

The following are excerpts for Rose's testimony:

"Q. At the time you opened this account with the Metropolitan Bank, did you have a conversation with the president as to the nature or character of the notes which you expected to discount there? A. I do not think that question came up.

"Q. Mr. Ollesheimer said that you stated that you expected to discount commercial paper negotiated in the ordinary course of business. Do you recall such a conversation? A. I may have; I do not remember it.

"Q. Those notes you discounted were all to your individual order, were they not? A. I do not know. * * *

"Q. Why did you open the account in your own individual name? A. I do not know I did."

As respects the discounted notes it appears from his own testimony that they were for money due to Rose individually. He testified as follows:

"Q. Were you on April 19, 1918, as an individual, as Col. Rose, a creditor of the N. & W. J. Peck Company for the amount of this note, \$1,507.95—did they owe you that? A. I think they owed me three or four times that.

"Q. Individually? A. Yes, sir; for moneys advanced to them.

"By Mr. Dwight: Q. Was this payment made to you for money due you individually? A. They owed me money, and a good deal of it at that time."

And in reply to a statement made by the referee he said:

"I have in mind that these companies owe me money, all of them. These companies all owe me money personally, as it shows, and several hundred thousand dollars."

It appears that the claimant bank discounted 16 notes made payable to the order of John B. Rose, that Rose testified that these companies owed him money, that Rose opened a personal account in the bank in which he deposited funds belonging to himself, and that from time to time he checked out of this account money for his own personal purposes. The account was not opened until January 15, 1918, and the petition in bankruptcy was filed on June 7th of the same year. The entire series of discounted notes range in date from March 26, 1918, to April 24, 1918. Between January 15, 1918, and April 30, 1918, there was deposited in Rose's account with the bank an amount which aggregates \$85,576.47. This sum was not made up entirely of the proceeds of discounted notes. It is admitted that he placed his personal funds

in the account, including the money paid him on his salary account. For example on January 25th he deposited \$1,500 in that account, that being a payment of salary due to him from the John B. Rose Company.

The conclusion to which the testimony brings us is that the discounted notes were made payable to Rose individually because he had personally advanced to the makers, the so-called subsidiary companies, large sums of money, and that the notes were payments on indebtedness due from the companies to him. He was free to use the funds as he desired. They were his funds and were subject solely to his order. So much of them as he did not need for his personal expenses he used in such amounts as he determined in promoting his business enterprises through the agencies of the John B. Rose Company and the so-called subsidiary companies. But the funds so deposited in his name were not the funds of these companies and were not subject to their control.

[4] These being the facts as we derive them from the record, the question remains whether the John B. Rose Company could guarantee the payment of notes given by the subsidiary companies to John B. Rose in payment of indebtedness due to him for moneys advanced to them by him in carrying on the business in which they were engaged.

There are numerous cases in which it has been held that while a manufacturing or trading corporation has no power to give accommodation paper, such paper may nevertheless be enforced against it by a bona fide holder for value. *National Bank, etc., v. Sancho, etc., Co.*, 186 Fed. 257, 110 C. C. A. 112; *Florence, etc., Improvement Co. v. Chase National Bank*, 106 Ala. 364, 17 South. 720; *American, etc., Bank v. Gluck*, 68 Minn. 129, 70 N. W. 1085; *Blake v. Domestic Manufacturing Co.*, 64 N. J. Eq. 480, 38 Atl. 241; *National Bank of the Republic v. Young, Receiver*, 41 N. J. Eq. 531, 7 Atl. 488; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 8 Atl. 472, 1 Am. St. Rep. 123; *Jacobs Pharmacy Co. v. Southern Bkg., etc., Co.*, 97 Ga. 573, 25 S. E. 171; *Mechanics' Banking Association v. New York, etc., Lead Co.*, 35 N. Y. 505; *Monument National Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322. It cannot be claimed, however, that the question presented by the facts in this case involves the principle referred to. The rule is based on the law of negotiable paper.

It is said that a private corporation may even give away its assets if all the stockholders assent provided there are no creditors who are injured. The doctrine of *ultra vires* cannot be invoked against such acts, stockholders having acquiesced, as no one can object except creditors and the state. In *Cook on Corporations* (7th Ed.) vol. 1, § 3, that writer says:

"A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, 50 years ago the courts would summarily have declared it illegal for a business corporation to become an accommodation indorser of commercial paper. But to-day there is no rule of public policy which prohibits a private corporation having a capital stock from

becoming the accommodation indorser of commercial paper, provided such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid."

In the instant case, however, corporate creditors have not been paid and the corporation giving the guaranty has been adjudged bankrupt.

It has been held in numerous cases that a corporation may enter into a contract of guaranty when reasonably incidental to its authorized business. *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543; *Smith v. Norwich City Water Commissioners*, 38 Conn. 208; *Thomas v. Hastings City National Bank*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263. As where a sawmill company guaranteed the payment of interest on the bonds of a railroad company which penetrated the country from which its supply of timber was to be drawn. *Mercantile Trust Co. v. Kiser*, 91 Ga. 636, 18 S. E. 358. It is not necessary, however, to review in this connection these cases in detail.

In *Mapes v. German Bank of Tilden*, 176 Fed. 89, 99 C. C. A. 609, the principle is stated that it is beyond the powers of a corporation to guarantee the obligations of others in which it has no interest and from which it derives no benefit. So in *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 645, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526.

In the case of *In re New York Car Wheel Works (D. C.)* 141 Fed. 430, the District Court for the Western District of New York held that where corporation A. held all the stock of corporation B. at the time of the guaranty the former could validly guarantee the notes of the latter; that in such a case the guaranty was for the benefit of the former and not in a technical sense for the accommodation of the latter. In that case corporation A. had indorsed the notes of corporation B. and it was held not to be an accommodation in a legal sense and therefore void but was a guaranty and valid. If that be sound law, then the *John B. Rose Company* might have guaranteed the notes of the *Coney Island Construction Supply Company*. But that is not what in fact it did, and we do not need to consider whether the principle above laid down is or is not in our opinion correct. It simply is not applicable to the facts of this case.

In *Blake v. Domestic Manufacturing Co.*, supra, the Domestic Manufacturing Company indorsed notes made by persons who were the selling agents of another corporation known as the Domestic Sewing Machine Company and which were made payable to the order of the latter company and which were indorsed by the latter company. These notes having been discounted by the banks the proceeds were deposited in the banks to the credit of the manufacturing company and all the payments out were made on the checks of the manufacturing company. It was claimed that with the exception of about \$10,000 the entire amount raised by the discount of the notes was used in paying the obligations of the sewing machine company and did not go to the use of the manufacturing company. The two companies carried on the business of manufacturing and selling sewing machines as one entire

business. The stock of the manufacturing company, 1,980 shares out of 2,000, was held by the sewing machine company and it paid an agreed dividend to the holders of the balance of the stock, and such was the only accounting had between them. It was held that the discounted notes were not under the circumstances to be regarded as accommodation paper. The facts in that case and those in the one under consideration are so different that comment is hardly necessary.

And in *Lumbermen's Trust Co. v. Insurance & Investment Co.*, 248 Fed. 212, 160 C. C. A. 290, it was held by the Circuit Court of Appeals in the Ninth Circuit that a corporation can guarantee the principal and interest of indebtedness incurred by its subsidiaries. And see *General Investment Co. v. Bethlehem Steel Corporation (D. C.)* 248 Fed. 303.

In *Kendall v. Klapperthal Co.*, 202 Pa. 596, 52 Atl. 92, it was held that where three corporations were organized to act and did act and were treated by all connected therewith, as virtually branches of a single organization having mutual and interdependent interests and co-operating on lines of common interest and policy for the furtherance of the purposes of one of them, the relation between them was sufficient consideration for assumption by the parent corporation of the duty of reimbursing indorsers of the notes of another of the corporations for loss from their indorsements. The court thought that the absence of strict legal identity between the separate organizations was wholly barren of real merit in a court of equity. "A court of equity does not," the court said, "take a skin deep view of a situation like that here presented. It looks to the substance of the transaction, and not to its mere form of color, and sees things as ordinary men do. Of course, a corporation does not lose its legally distinct and separate personality by reason of the ownership of the bulk or the whole of its stock by another, nor by its joining hands with another in a common enterprise. But it is well understood that for purposes of equity, courts will look behind that artificial personality, and if need be, ignore it altogether and deal with the individuals who constitute the corporation." In that case practically the same persons were associated together for one common purpose under three or four different names corresponding to the several branches of the single common enterprise.

It was the opinion of the referee to whom this matter was originally sent that the various companies which are involved herein were all engaged in one joint enterprise or business venture dominated and controlled by Rose, and that what inured to the advantage of one company inured to the advantage of the others. He thought it "plain" from the testimony of Rose that the guaranteed notes did not represent commercial transactions between himself and the companies which made the notes, but that they were part of a plan for raising money to finance the enterprise in which this group of companies were jointly interested. But the District Judge in reviewing the order of the referee in referring to the matter declared that he could find "no evidence in the record to support this conclusion." And this court coincides in the view taken by the District Judge.

The Coney Island Construction Company was engaged in selling building material at retail. It purchased brick and sand and gravel from the John B. Rose Company. All the stock of the Coney Island Construction Company, with the exception of three shares, was owned by the John B. Rose Company. Rose testified that the John B. Rose Company had no other relation to the Coney Island Construction Supply Company except to sell it material from time to time.

The Mahnken Building Material Company was a dealer in masons' and builders' materials, lime, sand, plaster, and brick, and maintained its yard in the borough of Brooklyn. The John B. Rose Company did not hold any stock of the Mahnken Building Material Company, but sold brick and some sand and gravel to the company.

The N. & W. J. Peck Company was a retailer of building materials in the borough of Manhattan in New York City. The John B. Rose Company owned none of the stock of this company, but sold it material and occasionally sand and gravel.

The Alpha Brick & Holding Company was the maker of only one of the sixteen notes involved in this appeal. The check stubs of John B. Rose fail to show that this company received any of the proceeds of the notes. This company sold brick manufactured by the Rose Brick Company and other companies. The John B. Rose Company apparently had no other relation to this company than that it held three-eighths of its capital stock.

The John B. Rose Company had no other direct relation to the four companies makers of the notes, involved in this case, than as above stated. Claimant has attempted to show, however, an indirect relation between these companies through the medium of the Rose Brick Company. But the John B. Rose Company held none of the stock of the Rose Brick Company, that stock being held by John B. Rose personally and by the estate of his father.

It thus appears that the John B. Rose Company owned the stock of the Coney Island Construction Supply Company which may be properly regarded therefore as technically a subsidiary company, that it owned a large block but not a majority of the stock of the Alpha Brick & Holding Company, and that it owned none of the stock in any of the other so-called subsidiary companies. The fact that the Rose Brick Company owned a majority of the stock of the Mahnken Building Material Company and of the N. & W. J. Peck Company, and that John B. Rose was able to control the affairs of the Rose Brick Company as the executor of his father's estate, does not entitle such companies to be regarded as technically subsidiary companies of the John B. Rose Company, for John B. Rose and the John B. Rose Company cannot be regarded as one and the same even though Rose did own a little more than half of the stock of the latter. To make one corporation technically a subsidiary of another, as we understand it, it is necessary that the one company should itself control the other. And the John B. Rose Company as a company did not control any of these corporations with the single exception of the Coney Island Construction Supply Company. We do not see therefore how it can be said that all these companies were strictly and technically speaking engaged in one com-

mon enterprise. As respects these several companies, excepting the Coney Island Construction Supply Company, it does not appear that the stockholders were the same. The officers certainly were not the same. The John B. Rose Company, as before stated, was engaged in the production of sand and gravel. The evidence is that it sold very little of it to the Peck Company and to the Coney Island Company and "some" to the Mahnken Company. While it acted as a selling agent of the brick manufactured by the Rose Brick Company and sold such material to the Coney Island Company, the Peck Company, and the Alpha Company, those companies do not appear to have confined their purchases to the brick manufactured by the Rose Brick Company. Neither does it appear that the brick which the John B. Rose Company sold was alone that which the Rose Brick Company manufactured. Rose, when asked where his company obtained the brick which it sold, replied: "Along the Hudson river, from the manufacturers." And when asked whether the John B. Rose Company, with respect to everything except gravel and sand manufactured by itself, "simply acted as agent to the manufacturers in disposing of their brick products?" simply replied, "Yes, sir." And Rose testified as to the Alpha Company that it "sold brick manufactured by the Rose Brick Company, and I think they sold brick at that time for other manufacturers; but who they were at that particular date I do not recall."

As against corporate creditors even though two corporations are engaged in the same line of business and have the same officers and stockholders and are run practically as one institution and become sureties for each other, it has been held that such suretyship is illegal and cannot be enforced. *Rogers v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E. 1017. In the case at bar the John B. Rose Company and the so-called subsidiary companies did not have the same stockholders and officers and were not run as practically one enterprise.

An act of a corporation which is ultra vires its charter cannot become binding on the ground of estoppel. *Union Pacific Ry. Co. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; *Louisville, etc., Ry. v. Louisville Trust Co.*, 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081; *Bowen v. Needless National Bank*, 94 Fed., 925, 36 C. C. A. 553; *Park Hotel Co. v. Fourth National Bank*, 86 Fed. 742, 30 C. C. A. 409; *Merchants' Bank of Valdosta v. Baird*, supra.

The conclusion of the whole matter may be stated as follows:

A corporation is ordinarily not bound by its guaranty of the paper of a third person as such a guaranty is foreign to the enterprise for which it was created. The burden of overcoming the presumption of the ultra vires character of the guaranty has not been sustained as it is not established by satisfactory proof that the proceeds of the discounted notes were ever paid to the John B. Rose Company the guarantor, or that the so-called subsidiary companies were engaged with the bankrupt in carrying on what can be regarded as a single enterprise, or that the bankrupt derived any benefit from or had any interest in the guaranty.

The order of the District Court is affirmed.

LUMIERE v. PATHÉ EXCHANGE, Inc., et al.

(Circuit Court of Appeals, Second Circuit. June 8, 1921.)

No. 202.

1. Copyrights ⇨20—Photographer taking pictures gratuitously for his own benefit entitled to copyright.

One employing a photographer to take his picture for pay is entitled to the copyright as against the photographer, but a photographer who takes a picture for his own benefit and gratuitously is entitled to the copyright as against the sitter.

2. Copyrights ⇨74—Conditions precedent to suit for infringement.

Under, Copyright Act, § 12 (Comp. St. § 9533), a suit for infringement of a copyright of a photograph, copies of which have been reproduced for sale, cannot be maintained until two copies have been deposited as required by said section and a certificate of registration, giving date of publication, has been obtained under section 55 (Comp. St. § 9576).

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

Suit in Equity by Samuel Lumiere against the Pathé Exchange, Inc., and others. From a decree of dismissal without prejudice, both parties appeal. Affirmed.

Almy, Van Gordon & Evans, of New York City (Don R. Almy and William S. Evans, both of New York City, of counsel), for complainant.

Coudert Bros., of New York City (Howard Thayer Kingsbury and Charles A. Conlon, both of New York City, of counsel), for Pathé Exchange, Inc.

Cornell, Lockwood & Jeffery, of New York City (William P. Jeffery and Alfred Tweedy, both of New York City, of counsel), for Chalmers Pub. Co., Inc.

Augustus T. Gurlitz, of New York City (John D. Myers, of Camden, N. J., and A. T. Gurlitz, of New York City, of counsel), for Victor Talking Mach. Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. August 26, 1919, this bill was filed with a prayer for an injunction and an accounting on the ground of infringement of copyright of three photographs taken by the plaintiff of Dolores Cassinelli, a motion picture actress, and copyrighted by him.

April 17, 1920, Judge Learned Hand dismissed the bill without costs or prejudice and with leave to commence a new action. All the parties have appealed, each contending that the decree should have been on the merits in his or its favor.

[1] Whoever employs a photographer to take his picture for pay is entitled to the copyright as against the photographer, but a photographer who takes a picture for his own benefit and gratuitously is entitled to the copyright as against the sitter. *Press Publishing Co. v. Falk*

(C. C.) 59 Fed. 324. See, also, the opinion of Judge Thomas, sitting in the District Court for Connecticut, in *Altman v. New Haven Union* (D. C.) 254 Fed. 113.

In May, 1918, Miss Cassinelli employed one Letendre as her publicity agent, who told her it would be necessary for her to have artistic photographs taken to be used for publicity purposes. He advised her to go to the plaintiff, who has a high reputation for taking such photographs, which she consented to do. Letendre testified that he arranged with the plaintiff to take the photographs at a reduced rate with the privilege of copyrighting. The plaintiff testified to the same effect and also that he had stated this arrangement made by Letendre to Miss Cassinelli, who expressed herself satisfied. Miss Cassinelli testified that she did not remember such a conversation with the plaintiff, but that she had left the whole matter of business in the hands of Letendre, concerning herself only with the artistic details and values.

In June, 1918, she did order and pay for some 200 photographs at about \$1 each, the plaintiff's regular price being \$60 a dozen. The proofs and pictures given Miss Cassinelli were all marked as copyrighted by the plaintiff. Although it is perfectly evident that she did not know anything about copyright or what it meant, the evidence satisfies us that Letendre acted within his authority as her agent in giving the copyright privilege to the plaintiff.

Early in May, 1919, Miss Cassinelli was engaged by the defendant, Pathé Exchange, Inc., as an actress in a motion picture called "The Unknown Love." The Exchange wanted artistic photographs of her for advertising the motion picture, and she told it that the plaintiff had made some such pictures, whereupon the Exchange authorized her to order 800 upon condition that the plaintiff's copyright notice be removed. This the plaintiff refused to do, but sold a dozen or more of the copyrighted photographs to the Exchange. The Exchange employed an artist named Michelson to make two drawings of Miss Cassinelli differing from the photograph in details of dress, but using it for the face. These drawings were transferred to plates from which colored prints were taken, one of which was inserted as an advertisement in the weekly issue of April 26, 1919, of the *Motion Picture News*, published by the defendant, *Motion Picture News*, the name Michelson being substituted for the plaintiff's notice of copyright, and the other in the same issue of the *Moving Picture World*, published by the defendant Chalmers Publishing Company, Inc., but without any notice of copyright or artist's name. We think these advertisements were clearly infringements within our decision in *Gross v. Seligman*, 212 Fed. 930, 129 C. C. A. 450.

[2] This brings us to the question whether the plaintiff has so complied with the provisions of the Copyright Act of March 4, 1909 (Comp. St. §§ 9517-9524, 9530-9584), as to be entitled to maintain this action. Under section 11 of that act only one copy of photographs not to be reproduced for sale need be deposited, and the date of publication need not be stated in the certificate of registry under section 55, but, if they are to be reproduced for sale, two copies must be filed under

section 12, and the date of publication, i. e., the earliest date on which copies were sold (section 62), must be stated in the certificate of registration under section 55. In either case copying the photographs would infringe the copyright and the right to recover for infringement committed before a certificate of registration for copies to be reproduced for sale had been obtained would continue.

The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not "promptly" followed by deposit of copies as required by the act except by action of the register of copyrights under section 13, which was not taken.

The plaintiff relies in his bill upon his having published the photographs with the notice of copyright in accordance with sections 9 and 18 and upon certificates of registration obtained under section 55 dated August 8, 1919, and a deposit of two copies of each photograph on the same day. The trouble is that the certificates of registration are for photographs not to be reproduced for sale, no date of publication being stated. Section 12 provides that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this act with respect to the deposit of copies and registration of such work shall have been complied with." Deposit of copies and registration is each a condition precedent of the right to maintain an action for infringement. When this bill was filed, two copies of each of the photographs had been deposited, but the registration required by the act had not been obtained. The registration relied on is for photographs not to be reproduced for sale, whereas these photographs had been reproduced for sale more than a year before. Nevertheless the plaintiff may get a certificate of registration under section 55 for photographs to be reproduced for sale as required by section 12, and thereafter may maintain another action, which indeed we are informed has been begun. For this reason the District Judge rightly dismissed the bill without prejudice, and the matter of costs was in his discretion. The parties cannot by agreement, expressed or implied, alter the statute. Other important and difficult questions depending upon the construction of the Copyright Act do not arise and need not be considered.

Decree affirmed, without costs to any party.

HOUGH, Circuit Judge. I agree with the foregoing opinion as far as it goes. There are, however, two points for which this decision will by inference be thought authority and as to which I do not wish to be concluded. They are: (1) Whether under the circumstances shown by the record this plaintiff should not be relegated to his action at law; and (2) whether in any form of action plaintiff can recover damages for infringements committed before he not only registered his claim of copyright, but deposited the requisite number of copies.

BEAVER BOARD COMPANIES v. IMBRIE et al.

In re STATE OF SANTA CATHARINA, REPUBLIC OF BRAZIL.

(District Court, S. D. New York. August 15, 1921.)

No. 296.

Banks and banking Ⓒ80 (10)—**Bonds held purchased outright by banking and bond house, so that state issuing bonds not entitled to accounting by receiver of bond house.**

Contract between a South American state and a firm of New York brokers and bankers *held* a contract of purchase by the firm of the bonds of the state, paid for by the firm's opening a credit on their books in favor of the state, so that the relation of debtor and creditor was created, and the state was not entitled to an accounting from the firm or its receiver, as from an agent or trustee.

In Equity. Suit by the Beaver Board Companies against James Imbrie and others, copartners doing business as Imbrie & Co. Claim of the State of Santa Catharina, Republic of Brazil, expunged.

See, also, 275 Fed. 437.

Zalkin & Cohen, of New York City, for receivers.

Rabenold & Scribner, of New York City, for defendants.

Davies, Auerbach & Cornell, of New York City, for State of Santa Catharina.

MANTON, Circuit Judge. Receivers have been appointed for Imbrie & Co., the defendants in this action, seeking to conserve the assets of this firm. The defendants were brokers, and were also engaged in business as bankers. A claim has been filed by the state of Santa Catharina, republic of Brazil, which seeks an accounting from the defendants as agents and for a return of the bonds referred to herein. A motion is made to expunge this claim.

On November 3, 1920, Imbrie & Co. and the state of Santa Catharina, republic of Brazil, entered into a contract providing as follows:

Santa Catharina Fiscal Agency and Bond Purchase Contract

Liber 66, folio 76.

Deed of purchase and sale and other agreements made by the state of Santa Catharina, as grantor, and Imbrie & Co., as grantee, in the form below:

Let All to Whom These Presents shall Come Know:

That in the year one thousand nine hundred and nineteen, on the third day of the month of November, in this city of Rio de Janeiro, in my office, before me, the notary, appeared as true contracting parties:

On the one hand, as grantor, the state of Santa Catharina, represented by its Governor, His Excellency Doctor Hercilio Pedro da Luz, duly represented by his attorney in fact, Colonel Elyceu Guilherme da Silva, residing in this city, by virtue of the power of attorney which he presented, and which on this date is recorded in the proper book of my office, in the presence of the Secretary of Finance and Public Works of the said State, Dr. Adolpho Konder, resident in the same state and temporarily in this city.

And on the other hand, as grantees, Imbrie & Co., bankers in New York, United States of America, represented by their partner, Frederico Lage, resident in New York, and temporarily in this city; the parties present being

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

known to me, the notary, and to the witnesses below mentioned and subscribing, who are also known to me, to which I certify.

And in the presence of the said witnesses, the grantor, the state of Santa Catharina, through its Governor, declared that:

Whereas, the grantor desires to conclude a trust agreement for the creation and issue of five thousand state bonds, of the par value of one thousand dollars (\$1,000) each, according to the terms and conditions which have been agreed upon in the minute hereinafter mentioned, which is made a part hereof; and

Whereas, the grantor is desirous to sell said bonds and Imbrie & Co. is willing to purchase the same; and

Whereas, the state of Santa Catharina is further desirous of appointing a fiscal agent in New York in connection with the service of said bonds and for the purpose of maintaining its credit in the New York market:

Now, therefore, in consideration of the foregoing and the mutual covenants hereinafter expressed, it has agreed with the grantees, Imbrie & Co., as follows:

Clause I.

(a) At any time before December 1, 1919, the state of Santa Catharina agrees to make with such bank or trust company of the United States of America which Imbrie & Co. may designate the trust agreement above referred to, in accordance with the minute which it now approves and rubricates on all its pages, in order that it may, as aforesaid, become an integral part of the present instrument, and further agrees to issue five thousand state bonds, of the face value of one thousand dollars (\$1,000) each, under the terms, conditions, and with the guaranty mentioned in the said contract.

(b) The state hereby sells and assigns to the said Imbrie & Co., bankers, the five thousand bonds for the sum of four million three hundred and twenty-five thousand dollars United States gold, and agrees to deliver the same on the first day of January, 1920, at the principal office in the city of New York of the trustee named in said trust agreement, or wherever said trustee may designate.

(c) Imbrie & Co. purchase said bonds and upon delivery thereof as aforesaid agree to pay to the state the said sum of four million three hundred and twenty-five thousand dollars, as follows: On January 1, 1920, two million three hundred and twenty-five thousand dollars, and on February 1, 1920, two million dollars.

(d) The aforesaid payments shall be made by depositing the respective sums to the credit of the state with such trust company, bank, or bankers in the United States of America as the Governor of the state may designate.

Clause II.

(a) The state of Santa Catharina hereby appoints Imbrie & Co. its fiscal agent with reference to the issue of bonds, described as 'State of Santa Catharina, Brazil, 6% External Secured Sinking Fund Gold Bonds of 1919,' in said trust agreement.

(b) Imbrie & Co. hereby accept said appointment.

(c) The state of Santa Catharina agrees that, in case it shall determine to purchase any of the bonds of said issue for the sinking fund in accordance with the provisions of the said trust agreement, it will make such purchases through Imbrie & Co., who shall receive for such service a commission of one-half of 1 per cent. on the purchase price, exclusive of interest, or in case the bonds shall have been listed on the New York Stock Exchange then in lieu of said $\frac{1}{2}\%$, the commission fixed by said Exchange: Provided, however, that said commission shall be payable to Imbrie & Co. only in case the purchases shall be effected at a price which, with said commission added, shall be less than the face value of the bonds purchased.

(d) The fiscal agent may, instead of acting personally, employ and appoint agents and attorneys as it may deem desirable.

(e) The fiscal agent shall be answerable to the state only for its own willful misconduct.

(f) The fiscal agent shall have, in addition to other rights, powers, and duties conferred by law and by this agreement, the following:

(1) It shall from time to time receive all sums paid to it by the state, or received by it for account of said state, and shall use and apply them in accordance with this agreement.

(2) In case the state should purchase bonds of said issue through the fiscal agent in accordance with the provisions hereof, the fiscal agent shall at the proper time or times present the said bonds to the said trustee and receive payment of principal and interest from said trustee for account of the state, and hold the sum or sums so received for the benefit of the state and subject to the directions of the Governor of the said state.

(3) The fiscal agent shall cause the definitive bonds of said issue to be engraved, temporary bonds being printed as provided in the trust agreement for account of the state.

(4) In the event that the said state should determine to have the bonds of said issue listed on the Stock Exchange in the city of New York, the fiscal agent shall attend to the details of the listing of said bonds for the said state, and transmit to it for signature or execution any and all papers and documents necessary in connection therewith.

(5) In all cases where it may be necessary or desirable for the state to give or publish any notices in connection with the bonds of said issues, the fiscal agent shall (where the said duty is not imposed upon the trustee) attend to the publishing or giving of said notices on behalf of the state.

(6) The fiscal agent shall from time to time advise the state of any matters coming to its knowledge regarding the facilitating of the sale and delivery of the said bonds, transmit to said state notices, addressed to the state, and also transmit to it any and all information believed by said fiscal agent to be of interest or advantage to said state in connection with the issue of said bonds, or the credit of the state.

(7) It may, subject to the terms of this agreement, act in accordance with the written order of the Governor of the state, and such orders shall be full protection to the fiscal agent for action in accordance therewith.

(8) The fiscal agent shall keep in New York accounts of receipts and disbursements in connection with its agency, and statements of such accounts, with copies of the vouchers covering expenditures, shall be rendered to the state at the expiration of each year and at such other times as the state may request.

(9) Statements of account rendered by the fiscal agent shall be conclusive on the state, save as specific objection in writing by the state to such statements of account shall be received by the fiscal agent within three months after the delivery of such statements of account to the state.

(10) The fiscal agent shall only be answerable for such moneys as may be actually received by it in New York from the state or for its account. It will allow interest at the rate of two per centum (2%) per annum on the average daily credit balances in accounts representing all receipts and disbursements. The fiscal agent shall not be chargeable with interest, except as aforesaid.

(11) The fiscal agent may acquire and hold any of said bonds with the same rights as if it were not fiscal agent hereunder.

(g) The fiscal agent may withdraw and resign by giving notice to the state of such intention, specifying the date when it is desired that such withdrawal shall take effect, which shall be not less than four months, unless a shorter notice shall be accepted by the state.

(h) The fiscal agent in custody of moneys hereunder shall be liable only as banker. It shall be protected in acting upon any notice, request, consent, certificate, bond, or other paper or document believed by it to be genuine and to be signed by the person or persons purporting to sign the same. It may advise the legal counsel and shall incur no liability for any action taken or suffered hereunder by it in accordance with the opinion of such counsel.

(i) At the end of each year during the life of this agreement, on written request of the fiscal agent, made to the Governor of the state, there shall be paid to it all expenses made in good faith, verified by both parties, in the performance of any duty imposed upon it under this contract.

Clause III.

The grantor assures the grantee of the preference of the grantee, under equal conditions, for any other external loan which the grantor may contract while the bonds which are now being sold are not fully redeemed.

The grantees and also the grantor, in the presence of the said witnesses, declare to me that they accepted this instrument and that they agree to comply with all its clauses and conditions, and a receipt of the following tenor was delivered to me:

9695. Collector's Office of the Federal District Stamp Tax. Fiscal Year of 1919. Reís 39:200\$000. In the book of receipts the treasurer is debited with the sum of 39:200\$000 received from the Governor of the state of Santa Catharina as stamp tax on the sum of 39.600:000\$000, equivalent to \$5,000,000 at the rate of exchange of 3\$920, latest official quotation, corresponding to the amount of the loan contracted by the said state with Imbrie & Co., bankers in New York, in accordance with Report No. 5, Collector's Office of the Federal District, November 1, 1919.

P. Capelli, Clerk,

A. Pinto, Treasury Agent.

And as they so declared, executed, and accepted, to which I certify, they requested of me this deed, which I caused to be drafted by my assistant, Deus-dedit Menezes, as it had been assigned to me.

And having been read to the parties and to the witnesses present during the entire act, they approved it and sign with the said witnesses, Drs. Joaquim Thiago da Fonseca, Emilio M. Nina Ribeiro, before me, Damazio Oliveira, acting notary, who signs.

Elyseu Guilherme da Silva.

Adolpho Konder.

Imbrie & Co.

Joaquim Thiago da Fonseca.

Emilio M. Nina Ribeiro.

Copy issued to-day. I, Damazio Oliveira, acting notary, sign in public.

A true copy:

[Signed] Damazio Oliveira.

Under an act of Congress of the state of Santa Catharina, on August 16, 1919, the Governor was authorized to contract an internal and foreign loan up to \$5,000,000 gold, to be applied to a bridge or ferryboat connection between the capital and the continent, to electric tramway construction in and about the capital, to road construction, and to sanitation. In addition to the general guaranty, there was a special guaranty of territorial taxes and of any others in the discretion of the government, which should be given as a pledge for the faithful payment of the interest and sinking fund of the loan. It was pursuant to this authority that the contract was made. Five thousand bonds, of the denomination of \$1,000 each, were issued under a trust agreement of February 25, 1920, between the state of Santa Catharina and the Equitable Trust Company of New York. The indenture contained the following provision:

"That Santa Catharina has at least 5,000,000 inhabitants, has an annual budget of about \$1,400,000, has total debts, foreign, internal, and floating of \$1,906,170; that the state assigns as security for the loan the 'industrial and professional tax,' 'territorial tax,' the 'capital tax,' and 'export tax,' estimated to amount for 1920 to \$826,977, subject in part to prior charges to secure bonds totaling £198,426, with annual charges in favor of such prior issues of £17,649.

"The state represents that all acts done prior to the issue of the bonds above mentioned have been done strictly in accordance with the laws of the state and of the Brazilian federation, and that all acts, conditions, and things required to be done, to happen, or to exist prior to the issuance of the bonds have been done, have happened, and exist, with due and strict compliance with the laws and Constitution of the state of Santa Catharina and of the United States of Brazil.

"The full faith and credit of said state are irrevocably pledged for the prompt payment of the bonds and interest, and the bonds shall always constitute a direct liability of the state, irrespective of any security provided.

"In case of default in principal, interest, sinking fund, or any installment thereof, the state will deliver the revenues of the aforesaid special taxes to the trustee as and when collected, and the trustee may bring direct action before the Brazilian courts against the state for the collection of the amounts in default and make effective the security of said special taxes."

Pursuant to the contract of November 3, 1919, these bonds were delivered to Imbrie & Co., and Imbrie & Co. opened a credit on their books in favor of the state of Santa Catharina, and proceeded to treat the bonds as their own, taking the position that it was a sale and purchase of such bonds. If there was a sale and purchase of the bonds, and the relation created is that of debtor and creditor, the claim in the present form should be expunged; for in such case Imbrie & Co. would owe to the state the difference between moneys which were paid for such bonds and the \$5,000,000 to be paid, less their agreed commissions. The contract—Clause I(c)—provides for the purchase of said bonds, and upon delivery thereof Imbrie & Co. agree to pay to the state \$2,325,000 on January 1, 1920, and \$2,000,000 on February 1, 1920, "by depositing said sums to the credit of such bankers" as, pursuant to clause I (d), the Governor might designate, and the Governor did designate Imbrie & Co. as such depository. A telegram of March 1, 1920, to the Equitable Trust Company reads as follows:

"As Governor of state Santa Catharina, I have designated Imbrie & Co. as depository under Clause I, subdivision (d), of contract of November 3, 1919. Imbrie & Co. have paid the purchase price of the bonds through a credit which they opened on their books in favor of the state. The provisional bond deposited with Banco Hollandez has been duly issued and belongs to Imbrie & Co."

On September 10, 1920, the Governor cabled Imbrie & Co. as follows:

"State has nothing to do with difficulties you have claimed to encounter in offering loans (i. e., marketing the bonds), for your undertaking was that of a purchaser, and not merely an intermediate broker for the placing of the loans. In so far as state is concerned, and for all purposes, total bonds, in number 5,000, have been placed, so much so that state has already made payment first interest coupon in accordance with telegrams sent May 1 and acknowledged May 27. Your status as regards the state is that of a debtor of a definite sum in United States gold held at our unqualified disposal and acknowledged by you in current account rendered over your signature. * * *"

And on September 17 he cabled as follows:

"The undertaking of the state was faithfully discharged, as have been discharged all obligations of the state under the contract. * * * It is your obligation as a debtor to the state to pay to the same the proceeds of the bonds which were sold to you. * * * According to the contract, the loan is secured by state revenues clearly specified. * * *"

This transaction and the contract under which it was carried out, together with the cablegrams, indicates clearly that the relation between the parties was that of debtor and creditor, and that there was a sale and purchase of the bonds in question. The claim filed with

the receivers sets forth the authority of the Governor of the state to make the contract in question. It provides:

"The Governor of the said state of Santa Catharina was, at the time when the said contract was made, duly authorized to represent the said state in the making of the said contract and to make the same."

The state has defaulted in paying the semiannual interest due June 1, 1921, and it now disputes the validity of the bonds. It has received on account of the said bonds \$1,541,010.72. The contention of the state is that the bonds were in the hands of Imbrie & Co. as agents, and paid for, so that the fiscal agents are subject to an equitable suit for an accounting for the bonds, and that the state is entitled to rescind the contract and require Imbrie & Co. to pay "all damages that might fall to the state on account of the inability of Imbrie & Co. to account for the bonds or to return them."

What, in point of fact, was the intention of the parties, must be obtained from the contract and the conduct of the parties prior to the time of the appointment of the receivers of Imbrie & Co. The contract defines the state as the seller, and Imbrie & Co. as the purchaser, of the bonds. It does, in another section, define the state's relation with Imbrie & Co., designating the latter as the fiscal agents of the state. Taking the contract as a whole, I think it indicates a desire on the part of the state to sell to Imbrie & Co., "who are willing to buy this issue." The appointment of a fiscal agent in connection with the transaction was apparently for the purpose of fiscalizing and for the service of maintaining the state credit in the New York markets. Clause I (b) provides that the state "hereby sells and assigns" to Imbrie & Co., for \$4,325,000 United States gold and agrees to deliver the same on January 1, 1920, at the New York office of the trustee. The contract provides how the payment should be made:

"The aforesaid payments shall be made by depositing the respective sums (amounts in question) to the credit of the state with (in) such trust company, bank, or bankers in the United States of America as the Governor of the state may designate."

Clause II appointed Imbrie & Co. fiscal agents with reference to the issue of bonds, and Imbrie & Co. accepted the appointment. Two per cent. on all the moneys received was for services rendered by Imbrie & Co. as such agents. They received all sums paid to them by the state, and they acted for the state in presenting for payment all the bonds purchased by the state, and then agreed to attend to the details of listing of the bonds on the exchange, if that be done, and to publish all notices and advise the state of all matters regarding facilitating the sale and delivery of the bonds, and transmit all information to the advantage of the state, and to keep accounts of receipts and disbursements, and to pay 2 per cent. upon all moneys received by them in New York from the state.

It is clear that Imbrie & Co. purchased the bonds, and the title thereto passed on the delivery of the bonds. The Governor of the state, pursuant to his authority, nominated the bankers, Imbrie & Co., its depository. When a sale was made, a contractual relation, with the

obligations of seller and purchaser, arose. Whenever money was paid into the hands of the bankers, Imbrie & Co., or credits were entered upon their books for the state, the relation of creditor and debtor arose. This is so, even though cash was not paid with one hand and taken in with the other hand—that of the bankers. If the gold was actually put into the vaults of Imbrie & Co., and subsequently appropriated by the bankers, Imbrie & Co., I do not understand that the state would claim a breach, giving rise to an action in equity for an accounting. Money paid into a bank ceases to be the money of the principal, and is then the money of the bank. *Marine Bank v. Fulton County Bank*, 2 Wall. 252, 17 L. Ed. 785. The contract created by the deposit has nothing of the nature of a trust in it; it is purely a legal one. *Bank of Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897. Nor is the result different when, instead of an actual gold or money deposit, a credit is given by a book entry. If the entry and credit was given in the ordinary course of business, as it apparently was, and not in fraud, the bank bears no relation of trust or agency to its depositor, the state, in that it would have to pay the money to the defendants, as bankers.

On March 1 the state cabled:

"Imbrie & Co. have paid the purchase price of the bonds through a credit which they opened on the books in favor of the state."

The state has accepted a substantial sum in payment for the bonds. They should not now question the validity of the bonds. I think no trust relation is involved in the wrong or breach committed by Imbrie & Co. The wrong inflicted gives rise to a common-law breach of contract. Therefore the state is not entitled to an accounting. Its present claim for an accounting will be expunged, and it may, if so advised, within 20 days file a claim for moneys due or alleged to be due through the failure, on the part of Imbrie & Co., to carry out the contract for the purchase of the bonds in question.

BEAVER BOARD COMPANIES v. IMBRIE et al.

In re BROKAW.

(District Court, S. D. New York. August 15, 1921.)

No. 297.

Partnership ⇨210—Suit against individual members of partnership in hands of receiver not permitted.

Since partnership receivers, under the New York Partnership Law, may collect from the individual members, and such funds, when received, constitute part of the receiver's estate, leave to join the individual members in a common-law action against the partnership, being an interference with the receiver's effort to conserve the assets and distribute them equally among the creditors, will not be granted; such refusal not preventing plaintiff from later recovering against them after the receivership has terminated.

In Equity. Suit by the Beaver Board Companies against James Imbrie and others, copartners doing business as Imbrie & Co. Petition by George T. Brokaw for leave to join individual defendants denied.

See, also, 275 Fed. 431.

Zalkin & Cohen, of New York City, for receivers.

Rabenold & Scribner, of New York City, for defendants.

Barber & Gibboney, of New York City, for petitioner.

MANTON, Circuit Judge. This application must be denied. To grant leave to sue the defendants in a common-law action and join with them the individual defendants is contrary to the practice which prevails. Indeed, it might frustrate the object of this action in equity to conserve the assets of the firm of Imbrie & Co. Under the New York Partnership Law (Consol. Laws, c. 39), the receivers have the right to collect from the individual members of Imbrie & Co. and such funds, when received, would constitute part of the estate of the receivers. In pursuing this effort to obtain funds from the individuals, it may be that all the personal property the individuals have (other than the copartnership property) might be required to satisfy the claims of the receivers. If a suit were permitted against individual defendants, this would be an interference with an effort of the receivers to conserve the assets of the firm and distribute them equally among the creditors. Refusing to permit Brokaw to sue now would not prevent him from later recovering against the individuals if he is entitled to. This must take place after the receivership has terminated.

Motion denied.

DONNELLY v. ANDERSON BROWN & CO., Inc., et al.

(District Court, S. D. New York. July 30, 1921.)

1. Courts ⇨351—Federal court may grant discovery in action at law pursuant to state statute.

A federal court has power in an action at law to grant an order for the examination of defendant by plaintiff for the purpose of framing his complaint, pursuant to provisions of the state statutes, where it is shown that plaintiff does not possess sufficient information.

2. Discovery ⇨37—Plaintiff held entitled to an order for examination of defendants for the purpose of framing complaint.

In an action at law by a customer against brokers to recover money and securities deposited to margin stock purchases, where it is shown that in some instances defendants charged plaintiff's account with losses on stocks which they did not purchase, and that they disposed of bonds deposited as collateral, but that plaintiff was without knowledge of the extent of such practices, plaintiff *held* entitled to an order under Code Civ. Proc. N. Y. §§ 870-886, for examination of defendants for the purpose of framing his complaint.

At Law. Action by James Donnelly against Anderson Brown & Co., Inc., James MacFadyean, and William C. Brower. On motion by defendants to vacate order for examination of defendants. Modified.

The plaintiff obtained an order to examine the defendants in an action at law for the purpose of framing his complaint. He relied upon the provisions of article 1, title 3, of chapter 9 of the New York Code of Civil Procedure, which gives such a right. The chief allegations of his affidavit are stated in the opinion below. The defendants moved on the papers to vacate the order.

Max L. Arnstein, of New York City, for the motion.
Gilbert E. Roe, of New York City, opposed.

LEARNED HAND, District Judge. [1] The power of this court to grant such an examination stands directly upon *Anderson v. Mackay* (C. C.) 46 Fed. 105, which has been neither qualified nor reversed since it was decided. Indeed, *Frescole v. Lancaster* (C. C.) 70 Fed. 337, must be taken as founded upon it and in accord with its principle. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, is not contra, either on the facts or on the ratio decidendi. An examination to frame a pleading is quite another thing from a perpetuation of testimony to be used in proof of the issues. Nor does *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842, touch this point. A ruling by a judge of this circuit squarely in point ought to be followed till reversed, except in case of a very clear opinion to the contrary. On the contrary, I believe that the ruling as *res nova* is correct.

[2] I think enough facts are alleged to bring the case within the statute. I agree that the plaintiff must show that he has not now enough information to frame a complaint. *Waitzfelder v. Moses Sons & Co.*, 120 App. Div. 144, 104 N. Y. Supp. 796; *Matter of Gardner*, 124 App. Div. 654, 109 N. Y. Supp. 1130; *Thompson v. Haigh et al.*, 134 App. Div. 614, 119 N. Y. Supp. 331. Has he such information at hand?

The plaintiff says that he means to sue in conversion and on contract; that from time to time he delivered some \$13,000 in cash and \$15,000 in securities, as margin to a speculative account, which he opened with the defendants, who were his brokers; that they accounted with him periodically, and in the accounts professed to have executed his orders; that on April 11, 1921, when he came to change the account upon their demand for further margin, the defendants were very slow in delivering to the new broker some of the securities which should have been in the account; that he later learned that in the case of \$4,000 par value of certain bonds, which they should have kept unsold, the actual bonds delivered to the new broker were not the same as those delivered by him, but that his bonds had been sold and others substituted when the account was changed. In the case of some of the securities alleged in the accounts to have been purchased, a former employee of the defendants swears that to his knowledge the defendants never bought or held the securities for the plaintiff, as they should, but made only book entries.

From these facts he suspects that the defendants never did buy and sell any of the stocks which he ordered, and, if so, they had no right to apply any part of his margin to their own use to meet any losses. I

must assume on these papers that they did charge him with losses, and did not turn over to the new broker all his margin. If so, they must justify by showing actual purchases and sales. Now I quite agree that it would be an intolerable thing to allow a broker's customer to examine the broker and pry into his books on a mere charge that the latter had defrauded him. This is not such a case. The customer has shown that in some instances the brokers failed to execute orders which they told him they had. He has further shown that they have sold bonds which they professed to have on hand, and that they had to buy equivalent bonds to close out the account. These allegations are not denied, and must be taken as true; on their face they show that in some instances, at any rate, the brokers who are fiduciaries have been faithless to their trust. That removes any hardship which there might otherwise be in subjecting them to an examination.

On the other hand, it is impossible for the customer to state his cause of action without that information. He must show that when the brokers sold or credited themselves with any of the margin, they had in fact not executed those orders upon which the losses depended which were their justification. It is entirely impossible for him to allege which of the purchases or sales which they reported to him they had not executed, unless he learns it from them. Yet in conversion or in an action for money had, he must show each several wrongful application of his property on which he means to rely. That is not matter of damages, but of the very cause of action.

Now it may be that the plaintiff has stated enough to justify a bill in equity for an accounting; he has shown the fiduciary relation and several instances of misfeasance. Yet he is not for that precluded from suing at law, and in his action he is entitled to all the usual procedure. I can see no reason to vacate the order, and much reason to allow the examination. However, in deference to *Ex parte Fisk*, supra, I think the order should be modified to prevent the use at the trial of any of the evidence procured.

DUVALL v. DYCHE, Warden.

(District Court, N. D. Georgia. August 27, 1921.)

Internal revenue ⇐2—**Statute requiring registration of stills not repealed by National Prohibition Act.**

Rev. St. § 3258 (Comp. St. § 5994), requiring the registration of stills, *held* not repealed by the National Prohibition Act.

Habeas Corpus. Application by F. H. Duvall against J. E. Dyche, Warden. Writ denied.

J. O. Ewing and Anderson, Rountree & Crenshaw, all of Atlanta, Ga., for petitioner.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for respondent.

SIBLEY, District Judge. Duvall is held in the penitentiary under a sentence of one year and one day, pronounced upon a plea of guilty

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

to an indictment charging him, among other things, with having "unlawfully had in his possession on September 1, 1920, a still and distilling apparatus for the production of spirituous liquors set up, without having the same registered as required by law." This charge is evidently based on R. S. § 3258 (Comp. St. § 5994). Duvall's claim is that this section, together with those on which the other counts of the indictment were framed, were repealed by the National Prohibition Act (Act Oct. 28, 1919, c. 85 [41 Stat. 305]), and that consequently the record shows him guilty of no offense in law.

1. The counts, other than that quoted from above, rest upon sections of the Revised Statutes held by the Supreme Court in *United States v. Yuginovich*, 256 U. S. —, 41 Sup. Ct. 551, 65 L. Ed. —, decided June 1, 1921, to be repealed so far as applicable to beverage liquors. The present record does not disclose that beverage liquors only were involved here. This is not a question of demurrer, but of the utter invalidity of a final judgment. These circumstances may distinguish the present case from that of *Yuginovich*, *supra*. But whether the other counts be valid or not, the sentence is authorized by that quoted if it be valid (See *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966), and we pass to a consideration of that.

2. The words of National Prohibition Act, tit. 2, § 35, "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws," recognize the rule of implied repeals, but manifest a purpose to limit it within the narrowest bounds possible. The inconsistency which will work a repeal under this provision must be equal to that necessary to work an implied repeal generally. The rule has been thus stated by the court:

"In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both if by any reasonable interpretation that can be done; that 'there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy;' and that 'if harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.' [Citing cases.] It is well settled that repeals by implication are not favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both." *United States v. Lee Yen Tai*, 185 U. S. 213, 221, 22 Sup. Ct. 629, 633 (46 L. Ed. 878).

R. S. § 3258, was scrutinized by Congress in enacting the National Prohibition Act, and expressly referred to in title 3, section 8, but for the purpose of making an exception to it rather than repealing it. Industrial alcohol plants were exempted from its operation, together with certain other named sections. Congress evidently considered the section not as repealed, but as applying to these plants in the absence of such an exemption. The Treasury Department had long applied the section to all stills for whatever use intended, whether to make alcohol, turpentine, gasoline, or other substances. *Treas. Decisions*

Nos. 193, 337, 918, 1021, 1344, 1817. Its purpose was to give the collector information of the whereabouts, surroundings and use of all stills set up, that they might be under surveillance, and also that the taxes on their manufacture and sale might be checked up. In the case of industrial alcohol plants, the tax upon the stills and upon the product is remitted by title 3, § 8, and by section 2 the plant itself is to be registered, so that section 3258 really could serve no useful purpose as to these. But the tax remains on other stills and their product, whether lawfully operated or not, and the need of surveillance is not lessened by prohibition of beverage liquors. So far from being inconsistent with the prohibition law, the section seems to be a helpful and consistent requirement, and was so considered by the legislative body.

Nor has the executive department found any repugnancy in the two laws, for during the present year the Treasury Department has twice held R. S. § 3258, to be still of force, and made rules applying it: Treas. Decs. Nos. 2993, 3068. The interpretation by this department of the laws which it is intrusted in part with the enforcement of is not without weight in judicial construction. *United States v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389.

The prohibitions of title 2, sections 18 and 25, which are principally relied on as inconsistent, are of "utensils * * * designed or intended for use in the unlawful manufacture of intoxicating liquor" and "property designed for the manufacture of liquor intended for use in violating this title, or which has been so used." Stills for turpentine, gasoline, commercial alcohol, or for other distilling operations which are lawful are not covered. Yet the same reasons exist for registering them as ever did. The intention with which a still is set up is hardly a practical test of whether it must be registered or not. There is no hardship, and great security, in having all registered on being set up, save those for industrial alcohol, when the plant itself is registered. R. S. § 3258, is still of force, with an exception as to stills in industrial alcohol plants ingrafted on it, which exception of course may be pleaded in a proper case. The record here shows an offense against the law, and a lawful sentence upon it. The writ of habeas corpus must be discharged.

J. ARON & CO. v. UNITED STATES LLOYDS.

(District Court, S. D. New York. June 24, 1921.)

Insurance Ⓒ475—**Marine contract held not valued policy.**

In a contract of marine insurance on a particular cargo for a particular voyage, effected by a binder, incorporating by reference the New York lighterage form, the insertion of the words "valued at sum insured" held not to change the normal character of the policy as a contract of indemnity under which the insured in case of loss is entitled to recover only the actual value of the property lost.

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

In Admiralty. Suit by J. Aron & Co. against the United States Lloyds. Decree for libellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Frank A. Bernero, of New York City, of counsel), for libellant.

Pierre M. Brown, of New York City, for respondent.

LEARNED HAND, District Judge. The sole contract which must be considered is the binder, that being the only paper which was executed before the loss, an event that finally fixed the rights of the parties. That by reference incorporated the New York lighterage form and so the two papers must be read together. Taken alone, the lighterage form is unambiguous enough; it provides clearly for an indemnity agreement and nothing else. The binder was in part in writing, especially the words, "sum insured," and the whole phrase, "valued at sum insured," would, therefore, take precedence over anything inconsistent with it in the New York lighterage form, though its meaning must, of course, be learned before the two can be compared. The libellant must maintain either that of itself the phrase is equivalent to a provision agreeing that the assurer pay the face of the policy as the liquidated value of the goods, or that custom has given it that meaning.

The evidence, which really does not amount to proof of any custom either way, appears to me to be negligible. At most it goes no further than to show that the assured had accepted similar binders before. Since no losses have occurred, the point has never been in dispute, and the prior usage between the parties amounts to nothing. I think I am driven, therefore, to an interpretation of the words merely as they stand, and without any collateral assistance. I do not forget that between the assurer and other parties losses have been settled on the basis of indemnity, but that cannot affect the rights of the assured, for the proof is not enough, as I have said to make it a custom.

It is the practice in foreign hull insurance to take out true valued policies, but no such practice exists in domestic insurance either on hull or cargo. When the parties do take out such insurance, if the valuation be not fraudulent, both sides are bound. The St. Johns (D. C.) 101 Fed. 469. If in the case at bar no effect could be given the phrase except that contended for, I should say that the learned commissioner was right. That is not, however, the case. If the insurance had been in fact for less than the true value, the phrase would secure the whole insurance to the assured; the assurer could not maintain that the assured was a coinsurer for the difference between actual and insured value. That gives an important meaning in the assured's favor, and is not inconsistent with the New York lighterage form incorporated by reference; rather it fulfilled one of the conditions of that policy.

When, however, the libellant seeks to go further and change the policy from its express, and usual, meaning—i. e., as a contract of indemnity, to a contract to pay a fixed sum in the event of loss—it seems to me that the language ought to be clearer. Perhaps less would be required in the absence of so plain a provision as is in the lighterage form, but I ought to reconcile the two papers so far as I can, and not

to nullify one by uncertain language in the other. The case is not one, moreover, in which the policy was over a period of time covering a number of voyages where the amount could not be known in advance, and where a valued policy was nearly a necessity. *N. Y. & Cuba Mail S. S. Co. v. Royal, etc., Co.*, 154 Fed. 315, 83 C. C. A. 235. The binder was upon this cargo only for this particular voyage, though its duration was uncertain.

Finally, although I do not forget that implications are to be taken against the assurer, I ought also to remember that the assured drew up the binder. The New York lighterage form was clear enough; it was the words added by the assured which do not clearly nullify the language of the policy proper. While the question is indeed open to doubt, and *res integra*, so far as I have found, I think that the papers can best be reconciled (and I may add the probable "intent" of the parties best satisfied, had they been faced with the question) by holding that the phrase referred to the coinsurance clause in the policy, and did not change the normal, and expressly agreed, character of the policy as a contract of indemnity.

A decree will be entered for the actual value of the loss, with interest.

VICTOR TALKING MACH. CO. v. CHENEY TALKING MACH. CO. *

(District Court, W. D. Michigan, S. D. August 5, 1920. On Rehearing,
November 24, 1920.)

1. Patents 328—814,786, for improvement in talking machines, held valid and infringed.

The Johnson patent, No. 814,786, for improvement in talking machines, claim 42, relating to the structure and means of attachment of the amplifying horn, *held valid and infringed.*

2. Patents 328—814,848, for amplifying horn for talking machines, held valid, but not infringed.

The Johnson patent, No. 814,848, for an amplifying horn for talking machines, claims 7 and 11, *held valid, but not infringed.*

3. Patents 289—Discontinuance of suit without prejudice held not laches.

Dismissal without prejudice of a suit for infringement of patents in 1917 owing to the abnormal conditions and the pressure of other business in the federal courts *held not such laches as to preclude renewal of the suit at a later time.*

In Equity. Suit by the Victor Talking Machine Company against the Cheney Talking Machine Company. Decree for complainant on one cause of action, and for defendant on the second.

Kenyon & Kenyon, of New York City, and Knappen, Uhl & Bryant, of Grand Rapids, Mich., for plaintiff.

George L. Wilkinson, of Chicago, Ill., and Travis, Merrick, Warner & Johnson, of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. This suit is for infringement of two patents, No. 814,786 and No. 814,848, both issued March 13, 1906, to the plaintiff as the assignee of the inventor, Eldridge R. Johnson, also president of the plaintiff company. The original application was filed

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

*Decree modified 276 Fed. ---.

February 12, 1903, and later was divided, the second application having been filed February 9, 1904. The first patent is for improvements in talking machines and the second for improvements in amplifying horns. Claim 42 of patent No. 814,786 and claims 7 and 11 of patent No. 814,848 are here in issue and are as follows:

"42. A talking machine, comprising a tapering sound conveyer, means for attaching sound-reproducing means to the small end thereof, and horn-coupling and supporting means with which the other end of said conveyer is movably connected."

"7. An amplifying horn, comprising a continuously tapering tube having a joint to allow a movement of one end of said horn in relation to the other, said horn being supported at said joint."

"11. An amplifying horn, comprising a tapering curved tube, said tube being pivoted on a substantially vertical axis to allow a horizontal movement of the smaller end of said tube, the curved portion of said horn connecting sections thereof lying in substantially parallel planes, said axis passing through or adjacent said curved portion."

The defenses relied upon are: (1) That the claims declared upon are invalid for want of invention; (2) noninfringement; and (3) laches.

[1] 1. *Validity*.—The gist and substance of Johnson's invention (described, defined, and embodied in the patents and the claims here in issue) consisted of the production of a talking machine having an amplifying horn tapered or flared outwardly from its connection with the sound box, curved or bent upon itself in the form of the letter U and so joined and supported as to permit movement of the inner and smaller section thereof independently of the outer and larger section and thus to relieve the needle or stylus of the burden, weight, and inertia of the heavier and larger part of the horn. The invention of the patents marked a distinct and substantial advance over the prior art. Before Johnson's discovery, amplifying horns of talking machines which tapered or flared from a point at or near the connection with the sound box were constructed either in a single piece or in parts rigidly connected and were movable only as a whole upon or across the record disc. The earlier machines were cumbersome, unwieldy, and inconvenient, and, by their weight and inertia, cast a heavy burden upon the needle or stylus. Talking machines in which the amplifying horn was located at a distance from the sound box and connected therewith by a sound conveyer of constant diameter were admittedly inferior in both volume and quality of tone reproduced. The utility of the invention, both as a commercial product and an acoustical achievement was at once recognized. Its success has been marvelous. In this connection it is to be noted that, while probably the inventor did not anticipate such result, his invention has made possible the modern inclosed or cabinet talking machine. These patents have been held valid in the courts of this country and England in both contested and pro confesso cases. In this suit nothing new has been presented which tends to destroy or modify the force and reasoning of the earlier decisions.

2. *Infringement*.—Claim 42 reads definitely, specifically, and literally upon defendant's talking machine. The "tone arm" or "sound conveyer" of defendant's machine is tapering, its small end is attached to

and connected with the sound box or reproducer by a mechanical device, and its large end is movably connected with the structure by which it is supported and by which it is coupled to the amplifying horn proper. While defendant's tone arm or sound conveyer is composed of short octagonal sections, each of which has parallel sides and is straight, yet each section is larger than the preceding one, and the assembled sections constitute a tapering structure which is the exact mechanical, if not acoustical, equivalent of a conical sound conveyer. The contention of the defendant that the means for attaching the sound reproducer to the small end of the sound conveyer must be confined and limited to the "gooseneck" connection shown in the drawings and described in the specification of the patent is without merit. There is nothing contained in the drawings, specification, or history of the patent which requires such limitation. This contention is also negated by the fact that the "gooseneck" connection is itself made the basis of other claims of the patents. The fact that the amplifying horn of defendant's structure for a considerable distance from the larger end of the tone arm is not tapered is quite immaterial. Claim 42 does not call for a horn tapered in its entire length. Nor is it material whether the amplifying horn is supported by the top of the cabinet or by the bracket of the preferred form shown in the drawings of the patent. In either case the horn coupling and supporting device is located at the larger end of the tone arm or sound conveyer, which is movably connected therewith, and so meets the requirements of this claim.

[2] Claim 7 calls for "an amplifying horn, comprising a continuously tapering tube," etc. By no stretch of construction can defendant's amplifying horn, viewed as a unitary structure, be regarded as "a continuously tapering tube." The tone arm portion of the horn composed of octagonal straight sections, and that portion composed of the so-called orchestral sections may fairly be said to be tapering within the purview and meaning of this claim, but that portion of the tube lying between the tone arm and the orchestral sections, which is approximately of the same length as the tone arm itself, is of constant and slightly less diameter than the larger end of the tone arm. Such a tube cannot be said to be continuously tapering within any definition of the term. A voluntary limitation of this character is binding upon the patentee and those claiming under him. *D'Arcy Spring Co. v. Marshall Ventilated Mattress Co.* (C. C. A. 6) 259 Fed. 236, 170 C. C. A. 304.

It is also clear that claim 11 is not infringed. This claim calls for "a tapering curved tube, * * * the curved portion of said horn connecting sections thereof lying in substantially parallel planes." The connecting portion of the tube of defendant's machine is not tapered and is not curved. The lower turn or bend of the tube is at the junction of two straight sections and is abrupt and forms a right angle. There is no evidence tending to indicate the adoption of this form of sound conveying tube for the purpose of avoiding infringement. The designer of defendant's machine, who is both a noted and accomplished musician and has had long experience in the construc-

tion of musical instruments, testifies that this form of construction was adopted by him after many experiments which led him to believe that the quality of the tones reproduced was greatly improved thereby. The so-called "mechanical throat" of defendant's amplifying horn is the subject of patent No. 1,170,801, granted to Cheney February 8, 1916.

If the question of infringement of claims 7 and 11 were otherwise doubtful, all doubt is removed by an examination of the specifications of the patents in suit, from which it appears that the curvature and continuous taper of the sound-conveying tube of the amplifying horn are prominent and basic features and elements of the invention. The patentee says:

"By locating the small end of the horn in this manner so that the sound-conducting tube or horn flares outwardly practically from the sound box, I have found that it allows the sound waves to advance with a regular, steady, and natural increase in their wave fronts in a manner somewhat similar to that of the ordinary musical instruments, thus obviating the well-known disadvantages due to long passages of small and practically constant diameter. It is also desirable to avoid abrupt turns in the sound-conducting tube or passage.

"It is therefore the object of my invention to provide a talking machine with an amplifying horn meeting these requirements. * * *

"It is further to be noted that I have avoided to the greatest degree any abrupt turns. * * * I have produced, in effect, a sectional horn tapering from end to end."

"The object of this form of my invention is to provide an amplifying horn * * * of such a character that the same will have all the material advantages of a single horn connected directly to the sound box, but without having the disadvantages due to long passages of small and practically constant diameter, to the weight of the bell portion of the amplifying horn, and to abrupt turns in connecting tubes."

"The fact that all portions of the conducting tube or horn are tapered allows the sound waves to advance with a regular and natural increase in their wave fronts in a manner similar to that of ordinary musical instruments, obviating the disadvantages due to long passages of small and practically constant diameter having abrupt turns."

[3] 3. *Laches*.—Upon this subject little need be said. A former suit by the same plaintiff against the same defendant for infringement of the same patents was begun in November, 1915, in the District Court for the Northern District of Illinois. In March, 1917, after proofs had been taken and the case had been made ready for hearing, upon motion of plaintiff and with the consent of defendant, the suit was dismissed without prejudice and upon condition, imposed for the benefit of both plaintiff and defendant, that the testimony theretofore taken might be used in any subsequent suit between the same parties. In the present suit defendant has taken full advantage of the condition so imposed. The proofs show and courts will take judicial notice of the extraordinary and abnormal conditions which existed in this country and in the world at large from the spring of 1917 to the spring of 1919, and, in a lesser degree, to the present time. Litigation of this character was frowned upon by public officials, was discouraged by the courts, and, as far as possible, was avoided by every one. Under these circumstances, it cannot be said that plaintiff has been guilty of

such laches as to preclude it from asserting its rights and prosecuting suits for trespasses thereon.

A decree will be entered finding claims 7 and 11 of patent No. 814,848 valid, but not infringed, and claim 42 of patent No. 814,786 valid and infringed, granting an injunction; directing an accounting, and referring the case to John S. Lawrence, master in chancery, for such accounting. Neither party will recover costs.

On Rehearing.

Cannevel's invention, as indicated by the title, illustrated by the drawings, described in the specification and defined in the single claim of his French patent, No. 307,593, resided in and related to the "sound box," and not to any part of the amplifying horn of a talking machine. So far as appears, he had no conception of Johnson's two-part, U-shaped, tapering amplifying horn and its resultant advantages. His sole consideration was the avoidance of restriction or choking in the "neck" or short connection between the diaphragm and the straight megaphone horn of the prior art. At most, his device corresponded to the single element of the combination of claim 42 of patent No. 814,786 described as "means for attaching sound reproducing means to the small end" of the tapering tone arm part of the amplifying horn.

The former decree in this case will stand as the decree upon rehearing.

VICTOR TALKING MACHINE CO. v. JOHN WANAMAKER, NEW YORK.

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

1. Patents \Leftrightarrow 328—814,786, claims 2 and 42, and 814,848, claims 7 and 11, for a talking machine horn, held infringed.

The Johnson patents, Nos. 814,786, claims 2 and 42, and 814,848, claims 7 and 11, which cover a talking machine, one element of which was a tapering tone arm, held infringed by tone arms which were continuously tapering, except for a few inches next to the sound box and a few inches further along the tube of the horn.

2. Patents \Leftrightarrow 49—Commercial success held to show utility, notwithstanding contrary expert testimony.

The testimony of complainant's expert, to the effect that the ordinary hearer could not distinguish between the sounds from a tapering tone arm and those from one with parallel sides, is not sufficient to defeat a patent covering the tapering tone arm for want of utility, where the tapered tone arm achieved commercial success as soon as it was put on the market, and the nontapering tone arm was apparently abandoned.

3. Patents \Leftrightarrow 36—Evidence held not to show alleged prior machine was reduced to successful practice.

In a suit for infringement of a patent, evidence held not to show that a machine embodying the invention, constructed before complainant conceived the idea was a successful reduction to practice.

4. Patents \Leftrightarrow 328—814,786, claims 2 and 42, and 814,848, claims 7 and 11, for talking machine improvements, held not anticipated.

The Johnson patents, Nos. 814,786, claims 2 and 42, and 814,848, claims 7 and 11, for talking machines and horns, the novel feature of which was a tapering tone arm, held not anticipated.

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

5. Patents \Leftrightarrow 328—814,786, claim 36, held invalid for want of invention.

The Johnson patent, No. 814,786, claim 36, for improvements in talking machines, which was not limited, as were other claims of the same patent, to machines having a tapering tone arm, held invalid for want of invention.

In Equity. Suit for infringement of patents by the Victor Talking Machine Company against John Wanamaker, New York. Decree rendered for complainant, except as to one claim.

Kenyon & Kenyon, of New York City (William Houston Kenyon, of New York City, John D. Myers, of Camden, N. J., and Theodore S. Kenyon, of New York City, of counsel), for complainant.

Dunn, Goodlett, Massie & Scott, of New York City (C. A. L. Massie and Ralph L. Scott, both of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This is a suit for infringement of letters patent Nos. 814,786 and 814,848. The application for each patent was filed February 12, 1903, and the patents were each issued on March 13, 1906. The claims at issue are 2, 36, and 42, of patent No. 814,786, and 7 and 11 of patent No. 814,848. These claims are as follows:

Of No. 814,786:

"2. In a talking machine, an amplifying horn proper, a record support, a tapering sound tube, movable, independent of the amplifying horn proper and supported to move in a given plane parallel with said record support, a sound box mounted upon and communicating with the small end of said tube and movable independently thereof toward and away from the record support, said horn and tube communicating, and supporting means at the communicating portion of said horn and tube."

"36. In a talking machine, a record support, a hollow sound-conducting arm movable in a given plane parallel with said support, and a sound box mounted upon, communicating with, and movable independently of said arm, toward and away from the record support; said sound box being movable upwardly and to the other side of its point of support, whereby it may be supported in an inoperative position by contact with said arm or a portion thereof."

"42. A talking machine, comprising a tapering sound conveyor, means for attaching sound-reproducing means to the small end thereof, and horn coupling and supporting means with which the other end of said conveyor is movably connected."

Of No. 814,848:

"7. An amplifying horn, comprising a continuously tapering tube having a joint to allow a movement of one end of said horn in relation to the other, said horn being supported at said joint."

"11. An amplifying horn, comprising a tapering curved tube, said tube being pivoted on a substantially vertical axis to allow a horizontal movement of the smaller end of said tube, the curved portion of said horn connecting sections thereof lying in substantially parallel planes, said axis passing through or adjacent said curved portion."

[1] I shall first allude to the question of infringement. It was held by Warrington, J., in the case of Gramophone Company, Ltd., v. Ruhl, heard in the English Chancery Division, that a tone arm which was not substantially tapering did not come within the claims of the

British patent, that seem to have been identical with those under consideration. But it is stated that the tone arm of the defendant in that case, while smaller in the area where it joined the sound box than it was where it joined the upper part of the horn, attained the difference by a sudden enlargement. A diagram of that tone arm is shown in the opinion of the Court of Appeals, which likewise held there was no infringement.

Judge Sessions, in the case of *Victor Talking Machine v. Cheney Talking Machine Co.*, 275 Fed. 444, decided August 5, 1920, held that the tone arm of the defendant in that case was tapering, and did infringe claim 42 of patent No. 814,786, but that the horn as a whole did not infringe claim 7 or 11 of patent No. 814,848, because it was neither continuously tapering nor had it a tapering curved tube. He said:

"That portion of the tube lying between the tone arm and the orchestral sections, which is approximately of the same length as the tone arm itself, is of constant and slightly less diameter than the larger end of the tone arm."

Evidently the variation from a continuous taper was far greater than in the horn and tone arm of the defendant in suit, and the tube of the Cheney machine may be regarded, not as curved, but with rectangular joints.

The British Court of Appeals in passing on this very question in the case of *Gramophone & Typewriter, Ltd., v. Ullmann*, held that unsubstantial variations in continuous tapering would not avoid infringement, and Judge Learned Hand reached the same conclusion in his opinion filed January 14, 1913, in the case of *Victor Talking Machine v. Hoschke*.

None of the cases have held that so small a deviation from a continuous taper as the 4 to 5 inches of tone arm next the sound box, and the $3\frac{1}{4}$ inches farther along the tube of defendant's horn, is a sufficient variance to avoid the claim in suit. I find a clear infringement, and regard the only real question as that of validity.

[2] The records before Judge Learned Hand in the *Lindstrom and Hoschke* Cases, and before Judge Sessions in the recent *Cheney* Case, were practically the same as that now presented except for the *Winne* alleged prior use, the *Miller* patent, and the *Columbia* taper tone arm. There is, however, the significant further addition to the present record, consisting of the testimony of complainant's own expert to the effect that the ordinary hearer could not distinguish between the sounds from a tapered tone arm and those from one with parallel sides. Undoubtedly the complainant's expert, Mr. Hunter, insisted that careful experiments would show a superiority of tone in a machine having a tapering tone arm. The evidence of the practical abandonment of the first *Johnson* machine having a tone arm with parallel walls, and the immediate success in the trade of the later form of instrument with a tapering arm, is a tribute to the utility of the talking machine described in the patents in suit. This argument from commercial success has been enough to satisfy Judge Learned Hand, Judge Sessions, and at least one, and perhaps two, English Courts of Appeal that a tapering tone arm, in combination with the other elements present in the

claims under consideration, was sufficiently novel and useful to be patentable.

I doubt the conclusion of Justice Warrington in the case of Gramophone Co. v. Ruhl, *supra*, to the effect that an improvement in tone which can only be detected by trained experts does not involve an advantage to the public which justifies a patent. In the first place, even if only well-trained musicians could detect the advantage, I can see no reason for saying that it is not useful. Furthermore, I think it possible that even the average man may have a real preference for sounds which he has not the training or concentration consciously to compare with those less pleasing. The unanimous opinion of so many judges, as well as the commercial success of the tapering tone arm as soon as it was put on the market, and the apparent abandonment of the nontapering tone arm, are most persuasive. The point is a close one, but I am of the opinion that the results achieved by the Johnson device in suit should outweigh the evidence of some experts that a tapering tone arm affords no advantage, and even the admission of Mr. Hunter that the superiority of its tone cannot readily be detected. I find no reference in the patents which seem to have been before the courts in former litigations which literally meets the combination described in the patents in suit, and agree with the judges who have heretofore passed on the question that the patent is valid, so far as the art is concerned that they appear to have had before them in the prior litigations.

[3] There remains the consideration of the new prior art. I think the construction of slot machines by Abner Tisdell prior to any date of invention claimed by Johnson is established by a number of witnesses who impressed me as credible. I do not understand it to be disputed that Abner Tisdell came to No. 1013½ Gates avenue, Brooklyn, about March, 1900. There seems to be no doubt that Tisdell constructed a 12-record machine with a tapering tone arm during that year, or the early part of the next; but these events happened about 20 years ago, work was done on the machines covering a period of a number of years, and Winne, for whom they were made by Abner Tisdell, testified that the latter, in 1900, was at 1013½ Gates avenue, "doing work for me building parts of slot machines, experimental work." Record, p. 376. In 1915 Winne testified as follows about the first 12-record machine:

" * * * We saw certain things were faulty. I could not state exactly how long we worked on these improvements, but I would say it was at least two, if not three, years, after this first machine was constructed, that we continued the building of these machines." Record, pp. 414, 415.

Winne then added that it would be pretty hard to tell then what things they found faulty, and that they worked on improvements at least two, if not three, years after the first machine was made. Record, p. 414. At another place Winne said the defects were "just the coin mechanism." Record, p. 380.

Lather, who worked on the machines both at the Gates avenue and Myrtle avenue shops of Abner Tisdell, testified, in 1915, that the first 12-record machine was a sort of experiment, and was not a success for

the purpose of an automatic slot machine (Record, p. 431), and added that it was 4 or 5 years later that the other machines were constructed. He also said that the 12-record machine was a secret before it was completed. Record, p. 433.

I think such evidence as this from a man who was helping Abner Tisdell develop the slot machines shows a failure to comply with the well-established rule that a prior use must be established by clear testimony and beyond a reasonable doubt. I think the witnesses were reputable and truthful, but lack of clear documentary evidence, or physical exhibits showing date of reduction to practice, leaves the question whether the Tisdell conception was reduced to successful practice, or was in public use, before the date of Johnson's application, problematical. As the proof stands the trials can only be regarded as experimental prior to an even later date.

[4] The tapering tone arm, which appears in the Miller reissue patent, cannot be regarded as anticipating that feature of the Johnson patent. The matters in interference did not relate to a tapering tone arm. The affidavits of Miller furnish the only evidence of the date of his conception, and his sketch, dated December 2, 1900, showing a talking machine with a tapering arm, does not establish that date by documentary evidence, for Miller does not state when the date was placed on the sketch. Moreover, the language of his specification nowhere describes or claims such an element as a tapering tone arm, but only shows a diagram of such an arm. There is no reason to suppose that this feature was a part of Miller's conception. I do not regard claim 37 of the Miller reissued patent, No. 12,963, as calling for a tapering tone arm. It is applicable to an amplifier having a tone arm either with parallel sides, as shown in Figure 4, or with tapering sides, as shown in Figure 1, and makes no claim to any special shape.

As for the Columbia defense, the date is too late. I think it clear that Johnson's conception was at least prior to the summer of 1902, and that dies were made and successful devices constructed, embodying his invention, during that summer, of the character of Exhibit 18. The Columbia device appears to have originated in Hinkley's sketch in October. This was rapidly followed by reduction to practice, but of a later date than Johnson, who proceeded steadily from the early summer of 1902 until he put his talking machine on the market in the spring of 1903, and filed the applications for his patents on February 12, 1903.

[5] On the whole case I hold all the claims in issue valid and infringed, except claim 36 of patent No. 814,786. That is not limited to a tapering tone arm. I regard it, therefore, as showing no invention over the Elfering or Johnson and Denison prior patents. The only modification of claim 36 in suit are obvious equivalents. *Victor v. Edison*, 229 Fed. 999, 144 C. C. A. 281; *American Graphophone Co. v. Gimbel*, 240 Fed. 971, 153 C. C. A. 657.

The complainant is entitled to an interlocutory decree, adjudging all the claims in issue, except 36, *supra*, valid and infringed, and providing for an injunction and an accounting. The suit as to claim 36 should be dismissed.

In re LINDY-FRIEDMAN CLOTHING CO., Inc.

(District Court, N. D. Alabama, S. D. August 17, 1921.)

1. Landlord and tenant ⇨47—Intention of grantor governs in construction of lease.

Whether a particular provision of a lease amounts to a condition or not, the rule is that the intention of the grantor governs, and such intention is to be gathered from the whole instrument and the existing facts.

2. Landlord and tenant ⇨76(1)—Restrictions in lease against subletting valid.

In a lease for a term of years, restrictions against assignment or subletting are valid.

3. Landlord and tenant ⇨77—Verbal transfer of lease held not effective against landlord.

Where a lease of a building for a term of years contained a provision against assignment or subletting without consent of the lessors, but recited that lessees intended forming a corporation to conduct business in the premises, and provided that they should have the right to transfer and assign the lease to such corporation on a form attached, to be signed by both assignee and lessors, by which the assignee took subject to all obligations of the original lease. The taking of possession by the corporation from the lessees without the execution of such instrument or the knowledge of any transfer by the lessors held not effective to transfer title to the lease to the corporation.

4. Landlord and tenant ⇨76(3)—Provision in lease requiring formal execution of transfer held not waived.

Provision of a lease, requiring any assignment to be executed on a form attached and signed by assignee and lessors, held not waived by the lessors, in the absence of clear proof that they had actual knowledge of an informal transfer by lessees.

5. Landlord and tenant ⇨101½—Provision in lease for forfeiture in case of bankruptcy of lessees held to apply to corporation assignee.

A provision of a lease, giving lessors the right to re-enter in case of bankruptcy of lessees, held to apply to a corporation which the lease provided might become assignee, and which went into possession and became assignee in fact as between it and the lessees.

6. Bankruptcy ⇨255—Trustee should not assume lease which will delay settlement of estate.

It is not in accordance with the settled policy of requiring prompt settlement of bankrupt estates to authorize a trustee to take over a lease of a large business building held by the bankrupt and having over five years to run.

In Bankruptcy. In the matter of Lindy-Friedman Clothing Company, Inc., bankrupt. On petition to review order of referee. Vacated.

Cabaniss, Johnston, Cocke & Cabaniss, of Birmingham, Ala., and Steiner, Crum & Weil, of Montgomery, Ala., for petitioners.

Tillman, Bradley & Baldwin and Ritter & Winn, all of Birmingham, Ala., for trustee.

CLAYTON, District Judge. This matter is before me on the petition of S. L. Tyson and N. W. Tyson as landlords, for review of the order of the referee in bankruptcy of June 10, 1921, decreeing:

"First. That the trustee in the above-entitled matter is entitled to the possession of the premises and the ownership of the leasehold

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

constituted by that certain lease entered into under date of the 21st day of June, 1919, by and between S. L. and N. W. Tyson through their duly authorized agents, Molton Realty Company, as landlords, and Samuel Friedman and Sol Lindy, as lessees.

"Second. That said S. L. and N. W. Tyson and their agents are hereby enjoined from in any wise interfering with the possession of said leased premises by the trustee in bankruptcy herein or by his tenants, subtenants, assignees or transferees during the full period of the term of said lease, that is to say, to the expiration of said term on the 30th day of September, 1926."

The questions at issue have been fully argued, and I have given them due consideration. I have carefully examined the opinion of the referee. It reflects much learning, and is proof of his ability and industry; but in my opinion he had an incorrect conception of what the lease contract really is—what rights of the landlord were granted away and what were reserved; what rights the lessees became possessed of and what they were compelled to do to enable them to continue to enjoy the contract or to empower any third party to take their place in its enjoyment. I am constrained, therefore, to disagree to the referee's interpretation of the lease contract or to his conclusion, and cannot adopt his reasoning so excellently phrased.

The questions presented arise out of the lease contract entered into by S. L. Tyson and N. W. Tyson on one part and Samuel Friedman and Sol Lindy on the other, on June 21, 1919; and these questions must be determined by the ascertainment of what the parties really intended by the stipulations and agreements contained in the instrument. The leased premises is a five-story brick and concrete building occupied as department store, and the lease term was for seven years, ending September 30, 1926. Among the provisions of the contract important to be considered are the following:

"Should the lessee fail to pay the rents as they fall due as aforesaid, or violate any of the other conditions of this lease, the lessors shall have the right, at their option, to re-enter the said premises and annul this lease. Such re-entry shall not bar the recovery of rent or damages for breach of covenant, nor shall the receipt of rent after condition broken be deemed a waiver or forfeiture."

"The lessee agrees, * * * not to assign this lease, nor underlease or let said premises, or any part or interest therein, without the written consent of the lessor, hereon indorsed. * * * If an execution or other process be levied upon the interest of the lessee in this lease, or if a petition in bankruptcy be filed by or against the lessee in any court of competent jurisdiction, the lessor shall have the right, at his option, to re-enter said premises and annul this lease."

The foregoing excerpts are taken from the printed portion of the lease. In the typewritten portion are the following stipulations:

"It is distinctly understood and agreed that the lessees will do such repairs and improvements upon said building as may be necessary to keep the same in a neat and tenantable condition during the entire term of this lease."

Then follows a statement as to the nature of certain repairs that the lessees may make to suit their convenience.

"The lessees shall have the right to sublet any part of said building that they may wish to sublet, but such subletting shall be in all respects subject

to this lease, and subject to printed form hereto attached marked 'Exhibit A.' These forms to be executed also by subtenant."

"It is contemplated by the lessees herein to organize a corporation with not less than \$20,000.00 paid-up capital, and it is agreed that when said corporation is organized the lessees shall have the right to transfer, assign this lease and sublet the property described to such corporation. The form to be used in the transfer and subletting shall be the same as the form hereto attached marked 'Exhibit A.'"

Attached to the lease as "Exhibit A" is what is called "Transfer of Lease Contract," as follows:

"For value received the lease contract hereto attached, by and between _____ as lessor, and _____, as lessee, is hereby transferred, assigned and conveyed by _____ to _____ and the property described in said lease contract is hereby sublet by _____ to _____; and in consideration thereof the said _____ hereby agrees to pay the rent due or to become due under the terms of said contract to _____, and further assumes all other obligations of the original lessee to the original lessor.

"The undersigned _____ hereby consents to the above transfer, assignment and subletting, but in giving his consent does not in any wise change or modify said contract or release the original lessee from any obligation to the original lessor."

It is very evident that by this instrument the parties contemplated the creation of written contractual obligations between them, which should be observed even in the case of another party desiring to become sublessee. The signatures of both parties thereto were required; and when the contract was executed they of course became bound by the terms and stipulations thereof. The instrument does not appear to have been skillfully drawn, or with any particular reference to a technical meaning or application of its terms.

Throughout the lease the landlords are called "lessors," while the tenants are called "lessees." Friedman and Lindy occupied the premises for a brief period, and then, as contemplated by the provision quoted from the lease, organized the corporation, which entered and occupied the premises for the period from about September, 1919, to June, 1920, and then became bankrupt, and its estate is now being administered by this court. John S. Coxe was appointed receiver, and subsequently, in the latter part of June, 1920, made trustee of the estate.

In February, 1920, a part of the leased premises was sublet by Lindy-Friedman Clothing Company, Inc., to Augusta Friedman, and a certain other part in April of that year was sublet by the corporation to the Gulf States Supply Company. On June 30, and July 5, 1920, the lessors, S. L. Tyson and N. W. Tyson, gave notice in writing to the original lessees, the subtenants, the bankrupt and the trustee, that they elected to exercise their option to re-enter the said premises, and made demand for the surrender thereof, assigning no particular reason. On May 18, 1921, the trustee in bankruptcy filed his petition, setting out substantially the foregoing facts, and praying for an order to the effect that the trustee is entitled to possession and ownership of the leased premises, and to have the lease performed by the lessors in favor of the trustee for its unexpired term. Upon the hearing of this petition, the facts were substantially without dispute.

[1] It is useless to expand this opinion with a discussion of the

technical distinction between a "covenant" and a "condition" with respect to the lease in question; for, after all, whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs, and such intention is to be gathered from the whole instrument and the existing facts. *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963. No precise or technical words are required in a deed to create a condition precedent or subsequent. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy. *Elyton Land Co. v. S. & N. A. R. Co.*, 100 Ala. 396, 14 South. 207.

Undoubtedly, the landlords had fundamental rights, which if not granted away by them, cannot now be taken from them by a court; and it is clear to my mind that the intention was to preserve and not to surrender certain of these rights. It is specially stipulated in the printed portion of the lease that the property should not be sublet without the consent of the landlord, but subsequently provided that the lessees should have the right to sublet any part of the premises; however, this modification of the restrictions as to subletting took care to say that "such subletting shall be in all respects subject to this lease and subject to printed form hereto attached marked 'Exhibit A.' These forms to be executed also by any subtenant." The exhibit part of the contract and the prescribed form are hereinbefore set out. Neither Augusta Friedman nor the Gulf States Supply Company, who were claimed in the argument in behalf of the trustee to be sublessees, executed contracts according to the terms of the lease and in the forms provided, or any other written form to which the lessors were a party; and according to the testimony in behalf of the lessors, which I believe to be true, they, the Tysons, had no notice of such subletting until subsequent to the bankruptcy of the Lindy-Friedman Clothing Co., Inc.

The lessors gave timely notice of their election to terminate the original lease, and they now insist that these subleases were made in disregard of their rights expressly reserved to them in their contract or lease, made by them as the owners of the building. Certainly, the landlords had the right to know who their tenants were; and it was well within their lawful authority to require as a condition or term of their contract that sublessees, desiring to occupy the premises or any part thereof, should become bound by written contract obligations such as was stipulated in the instrument of lease—a condition which cannot be subtracted at the pleasure of the original lessees. Therefore, when such lessees undertook to sublease parts of the property, thereby letting strangers to the original contract into possession without complying with the stipulations of their lease contract, the terms of the same were violated, and the other party thereto, the Tysons, became entitled at their option to put an end to the lease and to take possession of their property.

[2] It is a sound proposition and applicable to this lease that, it being for a term of years, restrictions against assignments without the consent of the lessor are valid, for various reasons, among them that

a lessor has the right to exercise his judgment with respect to the persons to whom he trusts the management or custody of his premises. Naturally he does not want undesirable tenants, those who may use his property for unlawful purposes, or those whom he may consider financially irresponsible. This doctrine, I think, is upheld by the cases cited in 16 R. C. L. §§ 326-645.

[3] The lease was not formally assigned to the corporation, now the bankrupt here, nor was there any written evidence of the assignment. The trustee insists, however, that there was a verbal assignment, and that the original lessees let the corporation into possession of the premises, and that thereafter the corporation paid the rent. It is a familiar rule that in construing an instrument if a seemingly conflicting provision can be reconciled with the others so as to afford a field of operations for all, then all the provisions must be allowed to stand. It appears to me that the stipulation for the acquirement of the lease by the corporation is not in such hostility to the other or general provisions of the contract relating to subleasing as to destroy the necessity for a formal contract by any subtenant, even the corporation. I am therefore of opinion that the bankrupt did not, prior to the bankruptcy, acquire title to the lease as against the landlords, because the lease was never assigned to the bankrupt, nor was a formal contract of lease entered into by the bankrupt and the landlords.

However, it is insisted that there was a waiver on the part of the lessors of the provision of the lease requiring formal contract from a sublessee. It is significant that the lessees and the bankrupt corporation apparently studiously refrained from taking any definite steps to vest in the corporation the legal title to the lease. This appears to me to have been a deliberate and intentional failure on the part of Lindy and Friedman and the bankrupt to comply with the terms of the original lease, so that either of them would be in a position to claim ownership of the lease as possible exigencies might seem to demand. It is true that a number of checks of the bankrupt were accepted in payment of rent. But it is also true that the lessors through their agents did not receipt the bankrupt for this rent, but receipted the original lessees in each case of payment, and that the account was kept all the time by the lessors' agent in the name of the original lessees. There was never any act of any kind by the lessors or their agent which could be construed as a recognition of the assignment of the lease. On the contrary, the conduct of the lessors and their agent is convincing that the lessors at all times considered the original lessees as the parties who were under the contractual relations of lessees and obligated to pay the rent.

[4] If it be argued that the acceptance of checks of the corporation was evidence of knowledge on the part of the lessors of the alleged assignment of the lease and of their acquiescence therein, I think the answer is that it is not enough that the lessors might upon inquiry have discovered the fact of assignment. There must be actual knowledge of the fact, and unless the evidence is so cogent and sufficient as to warrant the inference that there was such knowledge, there is no

consent or waiver. *German-American Savings Bank v. Gollmer*, 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.) 1066. In this case the evidence failed to carry to the lessors or their agents knowledge or notice of the assignment; and, on the other hand, the evidence convinces me that the landlord had no such knowledge or notice. *Emery v. Hill*, 67 N. H. 330, 39 Atl. 266; *Walker v. Wadley*, 124 Ga. 275, 52 S. E. 909.

[5] The lessors urge that the lease contract has been terminated according to its express provisions by the bankruptcy of the Lindy-Friedman Clothing Company, Inc. On the other hand, the trustee insists that the term "lessee" as used in the lease must be strictly construed, and, so construed, must be held to refer to the original lessees, Lindy and Friedman, only. I think such construction too narrow, too technical, because it does not accord with the contemplation of the parties to the lease. It is not to be doubted that the organization of the corporation, now the bankrupt, was contemplated, for the lease itself shows such to be the fact; and I think it is not unfair or unreasonable to say that the intention of both the parties was that the corporation, when organized, should step into the shoes of the original lessees, Lindy and Friedman, and become as fully bound in every respect as Lindy and Friedman were bound. It is not disputable that, if the assignment of the lease had been in the manner and form provided for in the lease, the corporation, the bankrupt, would have been entitled to all the rights and benefits conferred upon the "lessee" named in the lease, and correspondingly would have been subject to all of the obligations imposed upon the "lessee," Lindy and Friedman. Bearing in mind the purposes and objects sought to be accomplished by this provision in the lease, "if a petition in bankruptcy be filed by or against the lessee," etc., it seems clear to me that for all practical purposes the corporation would be considered the lessee—taking the place of Lindy and Friedman under the contract with all the privileges granted, and together with the restrictions, reservations, and conditions stipulated in the lease instrument. While the lease was not formally assigned to the corporation, the trustee claims that the assignment was verbal, and that the original lessees simply admitted the corporation into possession of the leased premises, and that thereafter the corporation paid the monthly rental. If the lease is to be treated as having been formally assigned to the company, now the bankrupt, then, assuredly, the bankruptcy of the company operated as a forfeiture of the lease, and the landlords had the option to re-enter their premises because the contract in express terms provided that the bankruptcy of the lessee should work such forfeiture. The express provision is that—

"If a petition in bankruptcy be filed by or against the lessee in any court of competent jurisdiction, the lessor shall have the right at his option to re-enter said premises and annul this lease."

[6] Whatever view may be taken of the questions hereinabove discussed, there is still another reason why the trustee should not be allowed to hold possession of the leased premises during the life term of the lease. It is hardly necessary to say that this bankruptcy court is a

court of equity, and has the power to administer the bankruptcy law according to its spirit and purposes. Of course, the fundamental purposes of the Bankrupt Act (Comp. St. §§ 9585-9656) are to relieve an unfortunate debtor in certain circumstances from the burden of his debts, take possession of the estate of the debtor subject to the demands of his creditors, and to apply his assets equitably and ratably to the payment of his debts. It is the duty of the trustee to administer and wind up the estate as economically and expeditiously as practicable. In rare instances the trustee is permitted to carry on the business of the bankrupt for a limited time, where it is plainly to the best interests of the estate that such course be pursued. But such is not the case here, for the trustee does not seek to carry on the mercantile business of the bankrupt, but merely asks to be allowed to be subrogated to the leasehold right originally possessed by the lessees. He predicates the petition upon the idea that the lease is of value to the bankrupt estate, but it is to be said that, apparently, he did not so believe for some time after his appointment, nor did he conclude to assert any right to the leasehold estate until after two certain creditors of the bankrupt filed their petition to compel him so to do.

Manifestly, if the trustee assumes this lease it is probable that he cannot wind up the estate in several years. Furthermore, whether or not the assumption of the lease would prove to be a benefit or a loss to the estate is problematical. That the trustee could continue to sublease the leased premises at a profit and not at a loss is mere conjecture. The lease has some five years or more to run. If the trustee becomes a party to it, it will be his duty to see that all its numerous terms or provisions are carried out on the part of the lessee during the entire period of the contract. An examination of the parts of the lease contract which are herein quoted show some of these numerous provisions and requirements. While I do not so decide, it must be observed that the lessors might have the right to insist that the assets of the estate, or so much thereof as necessary, should be kept intact for the payment of future rents as the same may become due. Therefore, conceding *arguendo*, the right of subrogation, it would be unwise to allow the trustee to exercise such right. This bankrupt case should be closed with convenient speed, and without hazarding a considerable portion of the estate upon the chance of possible gain to be derived by subleasing the premises at an advanced rental.

Decree and order will be entered, vacating and annulling the order of the referee, made and entered on June 10, 1921.

LINEKER et al. v. DILLON et al.

(District Court, N. D. California, Second Division. August 8, 1921.)

1. Banks and banking ⇨112—Banks chargeable with knowledge of officers.

Banks accused in contempt proceedings of having conspired with judgment debtor in obstructing the enforcement of a judgment, and in aiding judgment debtor in removing her tangible property beyond the reach of process, are chargeable with the knowledge, purpose, and intent of their officers.

2. Execution ⇨158(1)—Bank held to have intentionally aided judgment debtor in removing tangible assets beyond reach of process.

Evidence held to prove that banks and bank officers, accused in contempt proceedings of having conspired with judgment debtor in obstructing the satisfaction of the judgment, and of having aided judgment debtor in removing her tangible assets beyond the reach of process, by enabling her to sell real estate and assisting purchaser thereof without security, during stay of execution, participated in such transactions with knowledge of judgment debtor's purpose to avoid payment of judgment, and with intent to aid her to so do.

3. Execution ⇨158(1)—Purchaser of judgment debtor's land held without sufficient knowledge of fraudulent character of transaction to be in contempt.

Evidence held insufficient to prove that purchaser of judgment debtor's real estate immediately after rendition of judgment, accused in contempt proceedings of having conspired with judgment debtor to defeat enforcement of judgment, had sufficient knowledge of the fraudulent character of the transaction to render him in contempt.

4. Torts ⇨13—Persons who participate in judgment debtor's disposition of his property with knowledge held liable to creditor.

Judgment debtor's disposition of her property must be for a legitimate and valuable consideration, and not for the fraudulent purpose of evading the judgment, and if the disposition is for the purpose of defeating the judgment creditor's rights, others, who participate in the transaction with knowledge of such fraudulent purpose, are liable to the creditor for the damages caused by their interference.

5. Execution ⇨158(1)—Granting of stay discretionary with court.

The granting of a stay of execution is not a matter of right, but is discretionary with the court.

6. Execution ⇨174—Rights of parties to remain in statu quo during stay of execution.

During stay of execution, the rights of the parties are to remain in statu quo, and neither has the right to take any steps intended to impair the rights of the other under the judgment; such conditions being implied in the order as though expressly written therein.

7. Execution ⇨158(1)—Aiding judgment debtor in removing property beyond reach of process during stay of execution held contempt.

Banks and their officers, who assisted judgment debtor in removing her tangible property beyond the reach of process pending stay of execution, held guilty of contempt, having violated court's order staying execution, impliedly prohibiting, during such stay, any step intended to impair the rights of the parties under the judgment.

8. Execution ⇨158(1)—Court authorized to punish as in contempt persons who aided judgment debtor in removing property beyond reach of process during stay of execution.

Court having granted a stay of execution was empowered to punish as in contempt persons who, during pendency of stay, undertook to render judgment nugatory by aiding judgment debtor to remove her tangible property beyond reach of process, notwithstanding Judicial Code, § 268

(Comp. St. § 1245), relating to the court's power to punish contempts, since such statute conferred no power not previously granted, and imposed no conditions not previously existing.

9. Execution ⇨158(1)—Persons who aid judgment debtor in disposing of her property, subject to judgment lien, to evade lien, held guilty of contempt.

Banks and their officers, who aided judgment debtor in disposing of her real estate with the purpose of impairing or evading judgment lien with which the property had become impressed, held guilty of contempt.

10. Judgment ⇨760—Of federal court in California a lien on judgment debtor's land in a county, though transcript is not filed with recorder thereof.

Judgment of United States District Court held to constitute a lien on judgment debtor's land in California from the date of its docketing, though transcript is not filed with recorder as is necessary in the case of a judgment of the state court under Code Civ. Proc. Cal. § 674, notwithstanding Comp. St. § 1606, making judgments of the United States Courts liens on property to the same extent and under the same conditions only as if such judgments had been rendered by a state court, and providing that such act should be applicable in a state wherein the laws require a judgment to be registered, etc., before a lien should attach, only whenever the laws of such state should authorize the federal judgments rendered by courts in such state to be registered, etc.; such statute being inapplicable notwithstanding Code Civ. Proc. Cal. § 671a, as added by St. 1917, p. 142, providing that a transcript of judgment of a federal court within the state may be filed and recorded with the county clerk, and, when certified by clerk, may be filed for record with the county recorder, and shall become a lien on land in the county when recorded and indexed by the recorder, since such statute does not put the federal judgments on an equality with the judgments of the state courts as contemplated by the federal act.

11. Execution ⇨158(1)—Persons in contempt for aiding judgment debtor in removing property required to pay judgment creditor amount lost.

Persons adjudged in contempt for conspiring with judgment debtor to defeat enforcement of a judgment, and aiding debtor to remove her tangible property beyond the reach of process, will be punished by being required to make judgment creditors good in the amount they have lost through the interference of such persons, without the judgment creditors being required, after having been put to great annoyance and expense in the collection of a portion of the judgment, to go to further expense, and to be subjected to further annoyance and hazard, in attempting to reach land claimed as a homestead and setting aside judgment debtor's sales of her property.

At Law. Action by Norvena Lineker and another against Mary J. Dillon, formerly Mary J. Lynam, and Thomas B. Dillon. Judgment for plaintiffs. In the matter of the contempt of the First National Bank of Modesto and E. C. Peck, President, the Union Savings Bank of Modesto and C. D. Swan, President, and G. W. O'Connor. Proceeding dismissed as to G. W. O'Connor. Respondents other than O'Connor adjudged in contempt.

John L. Taugher, of San Francisco, Cal., for plaintiffs.

John S. Partridge, of San Francisco, Cal., for respondent O'Connor.

Heller, Powers & Ehrman, of San Francisco, Cal., for respondents First Nat. Bank of Modesto, E. C. Peck, Union Sav. Bank of Modesto, and C. D. Swan.

VAN FLEET, District Judge. This is a proceeding in contempt of a civil and remedial nature arising in the above-entitled cause, based upon a sworn petition by the plaintiffs, wherein the respondents named therein, the First National Bank of Modesto and E. C. Peck, its president, the Union Savings Bank of Modesto and C. D. Swan, its president, and one G. W. O'Connor, are charged with having conspired and confederated with the defendants in the action to obstruct and defeat the enforcement and satisfaction of a judgment recovered therein by the plaintiffs and to render the same nugatory and fruitless by doing certain acts and things in aid of such conspiracy and to accomplish its purpose. The facts upon which the charge rests, as disclosed by the evidence, are in substance these:

The judgment in question was recovered on October 3, 1919, for \$32,000 and costs, and on the same date duly entered and docketed, but on which execution was, at the request of the defendants, stayed for a period of 30 days. While the judgment ran against both defendants, the cause of action arose upon certain tortious acts of the defendant Mary J. Dillon, committed prior to her marriage to the defendant Thomas B. (the latter being joined in the action under the state statute) and the judgment was accordingly directed to be satisfied out of the property of the former. At the time of the rendition of the judgment the defendants resided in the town of Modesto, Stanislaus county, and the defendant Mary J. Dillon was possessed in her own right of a large amount of property in that county. She had between \$7,000 and \$8,000 in cash in the respondent First National Bank, and in addition thereto was the owner of real and personal property of the value of upwards of \$35,000, consisting of a home in the town of Modesto of a value in excess of \$7,500, a ranch or farm outside the town of the value of \$25,000, and a note secured by a trust deed of certain real estate in the county, on which there was due her something over \$8,200, principal and interest. This constituted, so far as shown, all the property she owned.

Immediately upon the rendition of the judgment and the order staying execution, the defendants returned to their home in Modesto, and Mrs. Dillon at once set about "covering up" her property from seizure under execution by putting it in a form that it could not readily be found or taken for that purpose. Her husband filed a claim of homestead on her residence in Modesto, and her other tangible property was precipitately and expeditiously sold and turned into ready money at a very considerable sacrifice. To thus dispose of her property she enlisted the aid of the two respondent banks, of which she was an old patron, and the advice and assistance of their respective presidents, the respondents Peck and Swan, with whom she was on familiar terms of business dealing. These latter procured her a purchaser for her ranch or farm in the person of the respondent O'Connor, a local land agent and speculator, who had had more or less frequent and intimate dealings with the two banks and their presidents, and to whom the respondent First National Bank advanced and loaned, without any collateral security, the necessary funds with which to make the purchase.

This piece of property, as stated, was of the value of at least \$25,000, but had an incumbrance on it of \$4,000, and it was sold to O'Connor, subject to this incumbrance, for \$15,000 cash, or at a sacrifice to Mrs. Dillon of at least \$5,000 or \$6,000. An assignment of the note and trust deed was taken by the respondent Savings Bank to itself, for which it allowed and paid Mrs. Dillon the sum of but \$7,500 in cash—the amount of the note and interest being, as stated at the time, \$8,200, and fully secured by property far in excess of that value. The proceeds of these sales, with the cash she then had in bank was by Mrs. Dillon at once turned into negotiable certificates of deposit issued to her by the two respondent banks; several, in varying sums, amounting to \$22,000 by the First National, and one, for \$7,500, by the Savings Bank. All of these transactions were accomplished by Mrs. Dillon with the active aid of the respondents on and prior to the 6th of October, or within three days from the rendition of the judgment, and she and her husband a day or so thereafter left Modesto leaving no knowledge of their destination with any one but her bankers and her attorneys.

These facts coming to the knowledge of the plaintiffs, they, being unable to locate Mrs. Dillon's whereabouts, brought the matter to the attention of the court, which at once vacated the order staying proceedings on the judgment, and an execution was on October 11th issued and placed in the hands of the marshal; but the marshal was unable to find any property of Mrs. Dillon upon which to levy, other than the dwelling upon which a homestead had been declared and a remnant of some \$500 still on deposit in the two banks, and apparently overlooked, which was represented by their officers as all the money or property of Mrs. Dillon in their keeping or of which they had any knowledge. Thereupon this proceeding was instituted; the prayer being that the respondents be adjudged guilty of contempt, and that they be punished by being required to pay plaintiffs compensatory damages in the amount of the judgment.

As to the facts thus far stated, they stand in the main established without substantial conflict. The respondents in fact do not deny, in their sworn answers or in their evidence, that they aided Mrs. Dillon in the disposition of her property substantially in the manner stated; but their defense on the facts is in effect that what they did was without knowledge of her purpose in thus disposing of her property, that they treated the transactions as ordinary business dealings with a patron who had a perfect right to dispose of the property, and in which they had a perfect right to aid her, and that there was no intent on their part to aid her to defeat or obstruct the satisfaction of the judgment or the process of the court.

[1, 2] As to the legal aspects of what was done, they will be discussed later. As to the knowledge and intent of the respondents in what they did, it is sufficient to say that, as to the two respondents, Peck and Swan, I regard their claim of innocence of the purpose of Mrs. Dillon, as well as their own lack of wrongful purpose in the transactions to which they lent their aid and connivance, as wholly at variance, not

only with the obvious, but, indeed, with the only reasonable, deductions to be drawn from the circumstances, and as to the two banks, they, of course, are chargeable with the same knowledge, purpose and intent as their officers through whom alone they could act. The two individual respondents swear very positively, it is true, in support of their alleged lack of wrongful intent; but their evidence is shifting, unsatisfactory and evasive, and the court is unable to give it credence as against the overwhelming effect of the circumstances appearing in evidence. They both, for instance, positively denied having any knowledge of the judgment against Mrs. Dillon before October 5th, which was subsequent to the date the conspiracy is alleged to have been initiated, and claimed that they did not learn of the order staying execution until later. But the circumstances tend to wholly refute both these claims. One of them, Swan, was a witness for the defendants at the trial, apparently took an active interest, and remained in attendance admittedly until after the evidence was closed. He claims to have left for home before the verdict was rendered, but, however this may be, the result of the trial was known in Modesto the same evening—was, in fact, published in the local evening paper of the 3d and again in the morning paper of the 4th, and Modesto, being a town of but 12,000, was generally known to all its inhabitants; Mrs. Dillon being an old and prominent resident, and the case having excited general interest. O'Connor, the correspondent, asked when he first heard of the judgment, testified:

"I think on the same day it was rendered. I think it was in the Modesto Evening News the same day. I think it was about the 3d of October."

And, further:

"Well, I knew about this judgment, it was in the papers that she had a judgment against her for \$32,000. I read it in the papers. I knew that the same as all the rest of us knew it."

Moreover, the attorney who tried the case for Mrs. Dillon was the regular attorney for the respondent banks and lived in Modesto. Under these circumstances it is idle to ask a reasonable person to believe that neither of these prominent, active, business men, living in this small community, had heard of this judgment prior to October 5th—a judgment against an old and valued patron. And what either of them knew the other undoubtedly knew. The two banks were interrelated and connected in business, occupying the same premises; Peck being president of the National Bank and vice president of the other, and Swan being president of the Savings Bank and vice president of the Commercial Bank, while the subordinates performed service for both interchangeably if occasion required. Of course, it would not necessarily negative the truth of the charge, had they not known of the judgment before the 5th of October as the acts charged to have been done in pursuance of the alleged conspiracy were done on the 6th; but the respondents evidently believed or had been advised otherwise, and shaped their evidence accordingly.

They both testified further, in their defense, that they regarded the

transactions in which they participated with Mrs. Dillon as simply "ordinary, every day" matters in which they had a perfect right to lend her their aid; that they had no knowledge or reason to believe that there was any purpose on her part to dispose of her property to avoid the judgment against her, and that they had no intent to aid her in any such purpose or to interfere with the execution of the judgment; and this attitude is strongly urged upon the court by their counsel as the reasonable construction to be put upon their acts. But, as stated, the evidence does not warrant this view. To the contrary, it very clearly shows that, not only were the transfers made by Mrs. Dillon not in any proper sense "ordinary" or "usual" business transactions, but moreover, that they were conducted in her behalf by these respondents in a very unusual manner—in a manner, indeed, to indicate very clearly that they knew perfectly well that Mrs. Dillon was engaged in hot haste in fixing her property to avoid the execution of this judgment and that they did everything they could to aid her to accomplish that purpose. A brief statement of some of the more salient circumstances will demonstrate the correctness of this view.

In the first place, it is idle to call it an ordinary or usual business transaction for a woman of Mrs. Dillon's age (upwards of 70 years), situated as she was in a comfortable home and surroundings where she had lived for years, in easy financial circumstances, with thousands of dollars in bank in ready money, and her other property invested to produce a good income, to suddenly and with no apparent necessity determine to dispose of all her tangible property, at a large sacrifice, simply to enable her to turn it into cash to be invested in a manner to produce a much less rate of income and then to leave her old home for strange surroundings. And the evidence shows that these respondents were perfectly familiar with Mrs. Dillon's financial circumstances, having known and dealt with her for years, and could therefore fully appreciate the utter lack, to say the least, of good business judgment in what she proposed to do; but there is not a word in their testimony that they asked a question as to her purpose or reasons for her extraordinary course, or expressed the slightest surprise or dissent, or gave her a word of admonition against her proposed folly, but proceeded with alacrity and the most apparent readiness to carry out her request—because, as they say, they regarded it as a perfectly "reasonable" proposition.

And how was the disposition of the property accomplished? On being advised by Mrs. Dillon that she wished to dispose of her property, Mr. Peck at once called up O'Connor on the telephone, a man with whom respondents were on intimate business relations, and with whom one of them was at the time interested in a real estate deal, and informed him that Mrs. Dillon wished to dispose of her land, and he thought would sell cheap, and that she was in a hurry to dispose of it. O'Connor had already heard of the judgment and knew Mrs. Dillon was "in trouble." He goes immediately to the bank and finds Mrs. Dillon there, but he does not talk with her; he talks with Peck and Swan; they do the negotiating; they tell him the national bank will

loan him the money with which to purchase the land—which it does without an indorser or a scrap of security; the price is agreed upon, and O'Connor never has a word with Mrs. Dillon until he passes her his check and receives her deed, the transaction being had entirely with Peck and Swan up to that time, and being rushed through the same afternoon on which the proposition was first made to O'Connor and within the brief period of two hours. This was on October 6th, and on the same day the savings bank took over the note and deed of trust for \$7,500, issuing to Mrs. Dillon its time certificate of deposit in that sum at 4 per cent. interest in liquidation of the purchase price.

When O'Connor received her deed and gave his check for the land, he instructed Peck and Swan that they were not to cash the check for Mrs. Dillon until he had had the title examined and should notify them that it was all right; that, should the title prove bad, the deal would be off. But it appears that, instead of observing this instruction, respondents on the same day, October 6th, passed the check to Mrs. Dillon's credit in the First National Bank, and the latter issued to her therefor three six-months' certificates of deposit for \$5,000, bearing 4 per cent. interest. On the same day the bank split up a like certificate for \$7,000, previously issued to her, and in its place issued two demand certificates for \$500 each and a time certificate for the sum of \$6,000. Immediately after these transactions, as before stated, Mrs. Dillon disappeared from Modesto, leaving no trace, and her whereabouts were not discovered by plaintiffs until some months thereafter. Before she left the respondents delivered to her the \$6,000 and the two \$500 certificates of deposit last mentioned, but the three \$5,000 certificates, and the one issued by the savings bank for \$7,500 were left in the keeping of the two banks—for what reason does not appear.

There were, moreover, several very unusual and significant things done by these two respondents and their subordinates in the banks, wholly inconsistent with their claim that they had no knowledge of the purpose of Mrs. Dillon in concealing her property and showing the readiness and alacrity with which they lent their aid to carry out her wishes and instructions. Within a couple of days after Mrs. Dillon left Modesto—about October 10th—she called up on the telephone and asked that respondents send her a demand certificate for \$3,000 out of the \$7,500 certificate issued by the savings bank. Her message was taken by Mr. Stoddard, who was vice president of the National Bank. He took the \$7,500 certificate, which had not been indorsed by Mrs. Dillon, indorsed it in her name, issued one for \$3,000, and mailed it as requested, then issued another to Mrs. Dillon for the balance of \$4,500 and placed it with her other certificates. When asked where he got authority to indorse the \$7,500 certificate in Mrs. Dillon's name, Mr. Stoddard first said he considered the request on the telephone sufficient, but later said he asked Mr. Peck, who told him it was all right.

On the afternoon of October 10th the attorney for plaintiffs, accompanied by the attorney for Mrs. Dillon, came to the court's chambers, and the former advised the judge that he was informed Mrs. Dillon was disposing of her property, and, he feared, to avoid execution, and

asked to have the stay of execution vacated. He was directed to come into court the next morning and make a showing, and if the fact was as he stated the stay order would be set aside. On the following morning, October 11th, the stay order was vacated and an execution was at once issued and placed in the hands of the marshal. But early on the morning of the 11th, about 8:30 or 9 o'clock, the court's purpose having apparently got abroad, the respondents were requested by telephone to send all the certificates left in their possession to Mrs. Dillon's address in San Francisco at once. The call was received by Mr. Stoddard. It purported to come from San Francisco, but Mr. Stoddard could not say from whom; it stated that the party speaking was telephoning on behalf of Mrs. Dillon, who was not well; the name of the sender of the message was neither asked nor given, but the certificates, consisting of the three for \$5,000 each and the one for \$4,500 (\$19,500 in all), were at once, and without further inquiry by the bank, mailed to Mrs. Dillon's address in San Francisco. This was on Saturday and on the following Monday, when the marshal and plaintiffs' attorney called on respondents and told them they had come to levy execution on Mrs. Dillon's property, they were promptly informed by Swan that he thought they had "come a little late"; and, asked what he meant by that, he said "that so far as the bank was concerned the assets of Mrs. Dillon had been withdrawn," and that "so far as he knew there was nothing left there." Subsequently, in their return to the garnishment served by the marshal, they first made return of but \$55.59 remaining on deposit as belonging to Mrs. Dillon, and that they had "no other property of any kind or character" belonging to her. Later they notified the marshal that they had "found" \$430.14 more, which had been in the savings bank, but overlooked. The several certificates outstanding in favor of Mrs. Dillon were not set out in their return—as they claimed, on the advice of their attorney. They denied any knowledge whatsoever of the whereabouts of Mrs. Dillon, although they had been in communication with her by telephone within two days and knew her address; they denied ever consulting with the attorney for the banks about the judgment against Mrs. Dillon, or as to the propriety of any of the transactions concerning her property; and the equivocating and evasive character of their testimony throughout is well illustrated by that of Mr. Peck on this subject. He was asked by counsel for plaintiffs:

"Did you consult Mr. Hawkins concerning any of these transactions? A. No, sir. Q. Not at all? A. No, sir."

The court then asked him:

"Did you never discuss this transaction during any of its history or in any of its phases with the attorney for the bank? A. Which transaction? Q. What we are investigating here. A. I never discussed it with Mr. Hawkins, only in a casual way, visiting. I never discussed it professionally at all. Q. That is putting your characterization on it when you say only in a casual way. What do you mean by that? What was said between you? A. Mr. Hawkins was present at the time we met down in Mr. Ehrman's office, and we just discussed the matter in a general way. Q. Would you tell us what was said, and leave out the characterization as to whether it was in a general

way or a casual way? I want to get at the facts, not somebody's construction of them, because I have to construe these facts."

But the witness never did state anything of a specific character said between him and the attorney, other than that the latter advised them not to include the certificates of deposit in their return. The same witness, being examined about issuing certificates to Mrs. Dillon on the O'Connor note on October 6th, after being instructed by O'Connor to withhold cashing it until the title had been passed on—which was not until October 9th—was asked by the court:

"Q. How did that come about? A. You mean, how were they dated before the 9th? Q. How did they come to be issued at a time when she did not have the funds there? A. The check of Mr. O'Connor was dated the 6th. If we had waited until the 9th to date them, we would be simply beating her out of three days' interest on the transaction. Q. You are not in the habit of drawing certificates of deposit in favor of one who has not the funds in your bank, are you? A. No; not in an ordinary transaction perhaps, but this was a transaction where she was putting the money all on interest. Q. How did you know that? A. Because she had us issue certificates of deposit. She said, 'put that on interest right now.'"

That testimony was given on December 1st. On December 4th the witness, being again asked about the same transaction, gave the reason for issuing the certificate on October 6th that escrow transactions were "always handled that way." It is quite obvious, I think, that the real reason for issuing these certificates so precipitately, and at a time when they did not know if the sale would go through, was to have the security in such a form that, in case of emergency, would enable them to be assigned or passed to others, so they could not be readily reached—as was subsequently done.

I have stated the facts and circumstances thus at length, in view of the strenuous denial by the respondents of any knowledge of a wrongful purpose on the part of Mrs. Dillon, or any intent on their part to aid her in defeating the satisfaction of the judgment in question; but I have not the slightest hesitation upon these facts in finding, and that beyond any reasonable doubt, that these respondents knew perfectly, not only about the judgment and its stay, but of Mrs. Dillon's purpose in the transaction, and with that knowledge deliberately aided her, so far as lay in their power, to accomplish it.

[3] As to the respondent O'Connor the case presents a somewhat different aspect. What he did in the matter is perhaps what most any man engaged in his business would have done, without inquiring too closely into the circumstances. He, like his correspondents, denied any guilty knowledge or purpose; but there are some phases of the evidence as to him which strongly indicate that he participated with a pretty shrewd idea of what the real purpose was on the part of Mrs. Dillon and his correspondents in the transaction, but was willing to "take a chance." One of the things that casts grave doubt in my mind of O'Connor's perfect innocence of such purpose was his extreme desire to shield his correspondents by denying on the stand significant things previously stated to the marshal and the attorney for the plaintiffs. He told the marshal, for instance, that Peck had called him

on the telephone and told him of Mrs. Dillon's urgent desire to dispose of her property, and that he went to the bank in response to such call. On the stand he denied this, and said, in effect, he "happened in the bank" on the occasion, and his purchase of the land was the result of his own inquiry whether it was for sale—prompted by his knowing that Mrs. Dillon was "in trouble." I prefer to believe the version given by him when questioned by plaintiffs' attorney and the deputy marshal, Mr. Burnham. There are some other things of a like kind which tend to cast doubt on O'Connor's perfect innocence; but, without further discussion of the evidence, it is enough to say that it does not satisfy me beyond a reasonable doubt of his having sufficient knowledge at the time he made the purchase of the real purpose of the others concerned to render him culpable. If the finding rested upon a preponderance of the evidence the case might be different; but within the principles stated by the Court of Appeals of this circuit in *Hanley v. Pac. Live Stock Company*, 234 Fed. 522, I do not feel justified in holding him.

The question still remains as to whether the acts done by the other respondents, as above stated, constitute in law a contempt of this court. Respondents contend, with apparent confidence, that the facts stated afford no competent basis in law for a judgment in contempt against them; that the judgment against Mrs. Dillon was, at the time in question, a naked common-law judgment, upon which execution had not issued, and which cast no lien or hold of any character upon her property, real or personal; that such a judgment in no way restrained or affected her right to transfer or dispose of her property in such manner as she might see fit; and that what she was at liberty to do the respondents had a perfect right to aid or assist her in doing, without rendering themselves liable in any way to the plaintiffs. This contention involves several propositions more or less distinct which should properly be discussed separately. Whether the judgment constituted a lien on the property dealt with is a question much mooted, and of conceded importance in its effect upon the acts of the respondents, and it should not be confused with a discussion of the rights of the parties under the judgment considered apart from such effect. The question may therefore be laid on one side for later consideration.

[4] That an ordinary judgment at law for damages, casting no lien on the property of the judgment debtor, presents no legal obstacle to the alienation or encumbering of the property by the debtor, may, as an abstraction, be conceded; but even there the disposition in order to protect the judgment debtor must be for a legitimate end, for a valuable consideration, and not for the fraudulent purpose of evading the judgment. And if the disposition be for the purpose of defeating the rights of the judgment creditor and is knowingly participated in by others the latter are liable to the creditor for the damages caused him by their interference. "The right of a judgment creditor to proceed by action against those who * * * interfere with the goods of his debtor, so as to prevent a levy or sale by the sheriff to satisfy his judgment, is well recognized at common law." *Findlay v. Mc-*

Allister, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930. And the interference may under some circumstances involve a contempt. See authorities cited in that case.

[5-8] But we are not here dealing with the effect of the judgment, standing alone. The contention of respondents ignores a factor which puts the case in a very different aspect as to the acts of the respondents from that of a mere naked judgment. As we have seen, the defendants upon the rendition of the judgment asked of the court and were granted a stay of execution against them, and at the time of the acts complained of this stay order was still in force and was within the knowledge of the respondents. This fact introduces an element into the case which may not be ignored. This stay order was not a matter of right in the defendants, but was purely discretionary with the court and intended only to maintain the rights of the parties in statu quo pending steps for a new trial or appeal as they might be advised. Both parties were charged as matter of law with a knowledge of this purpose, and that neither was rightfully at liberty during the existence of the order to take any steps intended to impair the rights of the other under the judgment; and these things were as plainly implied from this order as though written into it in express terms.

When, therefore, the respondents undertook to render this judgment nugatory and valueless by lending their aid to remove the only tangible property of the judgment debtor beyond the reach of process, they were as guilty of violating the court's order as though it had forbidden their acts in positive terms, and under well-established principles their acts constituted a contempt of the court. Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. These courts, equally with those of the state, are possessed of ample power to protect the administration of justice from being thus hampered or interfered with. Nor is this power in any wise limited by section 268, Judicial Code (Comp. St. § 1245). That section "conferred no power not already granted, and imposed no limitations not already existing." *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186. The above principles will be found amply sustained in the leading cases on the subject. *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1030; *Wartman v. Wartman*, Taney, 362, 29 Fed. Cas. 303; *Merrimack Bank v. Clay Center*, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320; *Clay v. Waters* (C. C. A. 8th Circuit), 178 Fed. 385, 391, 101 C. C. A. 645, 21 Ann. Cas. 897; *In re Mardenfeld*, 256 Fed. 920; *State ex rel. Morse v. District Court*, 29 Mont. 230, 74 Pac. 412.

Ex parte Kellogg is aptly analogous. There the party, on examination as to his property on supplemental proceedings and in anticipation of an order being made requiring him to turn certain personal property over to the sheriff, asked for a continuance, which the lower court found was to enable him to dispose of the property to a third party, thus rendering himself unable to comply with the anticipated

order when subsequently made. He was held guilty of contempt, and the Supreme Court, speaking through Judge Ross, held that this action was "but a bold attempt" to defeat the order subsequently made "and cause the plaintiffs' proceedings to be barren of result," and that he was properly punished for the contempt. This case will be found cited with approval in both *Merrimack Bank v. Clay Center* and *Clay v. Waters*.

In *Merrimack Bank v. Clay Center*, a bill to prevent removal of certain poles and wires from the streets was dismissed by the court below on demurrer, and an appeal to the Supreme Court was dismissed by the latter tribunal without opinion; an application for rehearing was filed, and during its pendency respondents proceeded to remove the poles. The Supreme Court pronounced them guilty of contempt in thus undertaking to interfere with their appellate jurisdiction before the controversy was finally determined, saying:

"That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of the suit to prevent."

So here the purpose of the stay order to maintain the status quo was negated and its effect wholly defeated by the acts of the respondents.

In *Wartman v. Wartman*, heard by Chief Justice Taney on circuit, the question was whether a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into court was thereby in contempt. His act was held to be in contempt of the authority of the court, "as a final decree would be idle and nugatory, if pending the litigation he should be held at liberty to put the fund beyond the reach of the process of the court."

In *State ex rel. Morse v. District Court*, a chief of police and his subordinates, having knowledge that a writ of habeas corpus had been issued for a prisoner in their custody, eluded the service of the writ until they had delivered the prisoner to the messenger of the Governor of another state under extradition process. They were held guilty of contempt of the court issuing the writ, and it was said:

"Although there was no technical, actual, personal service of the writ upon Morse prior to the removal of the prisoner from the county by the messenger to whom he was delivered by the police, it must have been apparent to the District Court, upon the hearing on contempt, as it is apparent to us, that all of the relators herein, having knowledge that the writ had been issued, used their utmost endeavors to avoid it. * * * It is impossible to conceive of a more flagrant act of contempt of court than the unlawful interference with such a writ."

See, also, *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, Id., 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041, as to the duty of the court, pending a stay of the execution of the judgment, to protect the rights of the parties against a violation of such stay.

[9, 10] But there is another ground for which it must be held that respondents' acts constituted a contempt. It was tacitly conceded by respondents in argument that, if the judgment constituted a lien on the real estate of Mrs. Dillon, it would put a very different aspect upon their acts; that is, if those acts were found to have been committed in the face of a judgment lien, with the purpose of trying to impair or evade it, it would undoubtedly constitute a contempt. And I think there can be no doubt of the correctness of this view under the authorities above cited. That the judgment did constitute such a lien, attaching from the date of its docketing, may, I think, be readily shown. The theory of the respondents is that, in order to constitute a lien, the judgment being rendered in a county other than that in which the defendants' real estate was situated, it was necessary for plaintiffs to comply with the provisions of the state statute prescribing the method of making the judgment a lien on real property of the judgment debtor situated in a county other than that wherein the judgment is rendered. That statute is found in section 674, Code of Civil Procedure, which, so far as here pertinent, provides:

"The transcript of the original docket of any judgment, * * * certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county," etc.

Let us see if plaintiffs were called upon to comply with this provision, or if it would have availed them anything had they done so. Prior to any action by Congress making express provision upon the subject, it had become the settled doctrine of the federal courts that judgments of those courts had the same effect precisely in their operation as a lien upon the property of the judgment debtor as the law of the state in which they were rendered, prescribed for judgments in the state courts, and that such lien extended to all counties within the limits of the territorial jurisdiction of the court; that is, to the limits of the state or district for which the court sat. This construction was deemed necessary to put the judgments of federal courts on a parity or plane of equality with those of the state courts in protecting the rights of suitors. The rule is thus stated in *Metcalf v. Watertown*, 153 U. S. 671-678, 14 Sup. Ct. 947, 950, 38 L. Ed. 861:

"In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."

And see *Dartmouth Savings Bank v. Bates* (C. C.) 44 Fed. 546; *Rock Island National Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; *Seventeenth Street Land Co. v. Hustead*, 263 Pa. 342, 106 Atl. 540; *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209; *Massingill v. Downs*, 7 How. 760, 12 L. Ed. 903; *U. S. v. Humphreys*, 3 Hughes, 201, 26 Fed. Cas. 430, No. 15,422; *Cropsey v. Crandall*, 2 Blatchf. 341, 6 Fed. Cas. 873, No. 3,418, where the history and reason of the doctrine is fully gone into.

This effect ascribed to judgments in United States courts led to some hardship through the loss of their lands by citizens unaware of the fact of the existence of liens from such judgments, not of record in the county where the land was situated, and this, with kindred considerations, led Congress to pass Act Aug. 1, 1888, c. 729, 25 Stat. L. 357 (Comp. St. §§ 1606, 1607). The applicable feature of that act is this:

"That judgments and decrees rendered in a Circuit or District Court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: Provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

It will be observed that under the terms of the proviso the act is to have effect only in those states wherein the state law has made provision by which the mode of casting liens by judgments and decrees of the federal courts shall be "conformed to the rules and requirements relating to the judgments and decrees of the courts of the state"; in other words, until the state shall have provided—which obviously Congress did not possess the power to do—for docketing, or filing abstracts of the judgments of federal courts in the local state or county offices in the same manner as provided for judgments of state courts, and giving them like effect, thus putting them upon an equality with the latter as a protection to suitors, the limitations of the act should not apply, but a judgment or decree of a federal court should continue to cast a lien coextensive with the territorial limits of the jurisdiction of the court rendering it. And such has been the construction of the act. See *Dartmouth Savings Bank v. Bates*, and other cases last above cited.

Has this state met the requirements of this act in a manner to put judgments of these courts on an equality in this respect with judgments of state courts? Until 1917 there was no legislation on the subject, but in that year the Legislature passed an act adding a new section to the Code of Civil Procedure, numbered 671a (St. 1917, p. 142), reading as follows:

"Transcripts of judgments and copies of judgments, rendered in the district or other courts, of the United States within the state of California, when certified by the clerk of said courts under the seal thereof, may be filed and recorded in the office of the county clerk of any county in this state, and when so filed the clerk shall immediately enter the same in the judgment docket in the same manner as judgments rendered in the superior court are entered and such transcripts of judgments and copies of judgments, when so certified, may be filed for record in the office of any county recorder of this state and when so filed for record the county recorder shall record and index the same in the same manner as transcripts of judgments and copies of judgments of the courts of this state are recorded and indexed; and from such recording the

judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county," etc.

It may be assumed that this provision was intended in good faith to meet the requirements of the above act of Congress by an endeavor to create similar provisions as to the mode of acquiring judgment liens under judgments of the federal courts as those existing as to judgments of the state courts; but it will be seen at a glance that, if such was the purpose, it has signally failed in some very material respects to accomplish it. Quite evidently the section has been hastily, if not carelessly, drawn, and apparently without the draftsman having before him the Code provisions applying to judgments of the state courts, since it departs from the latter in several matters of substance. In the first place, one important feature of the Code provisions is wholly omitted. Under the state law judgments of its courts operate as a lien on the real estate of the judgment debtor in the county where rendered instantaneously upon its being docketed (Code Civ. Proc. § 671), nothing more being required of the judgment creditor; it being only to create a lien upon property in another county that a transcript of the docket must be there filed.

It will be observed that no such provision is embraced in section 671a, but, to the contrary, that section is so drawn as evidently to contemplate that the judgment of a federal court is not intended or to be permitted to operate as a lien, even in the county of its rendition, until a transcript or copy of the judgment has been first filed and recorded in the office of the county clerk and then filed with the recorder and by the latter duly "recorded and indexed." This omission alone would work a great disadvantage and embarrassment to a judgment creditor in a federal court.

In the next place, the provision for making a judgment of a federal court a lien in a county other than that where rendered is markedly different and more onerous than that provided for state judgments. As to the latter, the requirement is simply that "the transcript of the original docket * * * may be *filed* with the *recorder* of any other county, and *from such filing* the judgment becomes a lien" in such county; nothing being said about recording (Code Civ. Proc. § 674), while as to judgments of federal courts the requirement is that "transcripts of judgments and copies of judgments * * * may be *filed and recorded* in the office of the *county clerk* of any county," whereupon the clerk shall first enter it in his docket in like manner as judgments of the superior courts "and such transcripts of judgments and copies of judgments, when so certified may be filed for record in the office of any county recorder of this state and when so filed for record the county recorder shall *record and index* the same * * * and *from such recording* the judgment becomes a lien," and only then. It will be readily seen that, not only is the judgment creditor under a federal judgment put to great circumlocution and necessarily greater expense than one holding a judgment of a state court, but that in the frequently important matter of time in getting his judgment to a point where it would operate as a lien the former would be hopelessly out-distanced by the latter.

The judgment creditor from the state court has his lien in the county where the judgment is rendered immediately the judgment is *docketed* by the clerk, without more; the judgment creditor from the federal court must, even in the county of its rendition, file a transcript or copy (possibly both) of his judgment first with the county clerk and then with the recorder, and wait until it is there *indexed and recorded*, before his lien attaches. And in securing his lien on property in another county the holder of the state judgment merely *files* his transcript with the *recorder* and at once his lien attaches; whereas the suitor in the federal court must go through the apparently useless process of first *filing and recording* his documents with the county clerk and then with the recorder, and again await the recording and indexing by the latter before the lien of his judgment attaches. Moreover, there is a serious question, arising from the loose and ambiguous language of the section, whether the suitor seeking to act under it would not in each instance be required to file and record with each clerk and recorder both a transcript and copy of the judgment. It will be observed that its language throughout is "transcripts of judgments *and* copies of judgments" that are to be filed and recorded; the terms being used conjunctively. It may possibly be that "and" should be construed as "or"; but, however this may be, I am satisfied that the legislation, whether from inadvertence or otherwise, does not, for the reasons stated, afford that degree of "conformity" which the act of Congress contemplates as essential to bring it within the latter and put judgments of federal courts on an equality with those of the state; that consequently the act of Congress does not take effect in this state, but the judgments of these courts must be regarded as constituting therein liens on the real estate of judgment debtors throughout the extent of their territorial jurisdiction. (*Italics in above quotations volunteered.*)

[11] As a result of these considerations, the acts of the respondents must be held to constitute a contempt of the process of the court, and, having in mind all the circumstances, I regard it as a more than ordinarily aggravated one. It remains only to consider the punishment to be imposed. Pending this proceeding, which was much delayed and interrupted through the inability to find Mrs. Dillon, the court, upon motion for new trial, reduced the amount of the judgment recovered to \$28,000, and this judgment was subsequently affirmed on writ of error. After great annoyance and expense to plaintiff in the employment of officers in the search, they eventually succeeded, after the lapse of many weeks, in ascertaining the whereabouts of Mrs. Dillon, where she was living under an assumed name, and she was finally brought before the court on supplemental proceedings to answer as to her property, and by dint of much effort and difficulty a considerable part of the funds she had concealed and carried away was finally uncovered; she had cashed most of her certificates of deposit issued by the respondent banks, reinvested the larger part in like certificates, issued to her under assumed names in stranger banks, and spent, or otherwise disposed of, the balance, so that it could not be reached. As a result of her examination the marshal was enabled to seize and ap-

ply to the judgment enough to satisfy all but \$3,367.11 by September 24, 1920. No further available property has been discovered, and that balance, with interest, now remains unpaid on the judgment.

While plaintiffs might possibly be able to upset the homestead or the sale of the other property, I do not think they should be put to further expense, or subjected to the annoyance and hazards of any such effort, in order to realize the balance of their judgment. The respondents, by their aid and connivance, made it possible for Mrs. Dillon to carry away funds much in excess of the sum sufficient to satisfy the judgment in full, and it would seem but bare justice that they should be called upon to make plaintiffs good in the amount they have lost through their interference. The respondents and Mrs. Dillon are in their unlawful acts joint tort-feasors, and it is not a case where plaintiffs should first be required to exhaust their remedy against the latter. Accordingly the plaintiffs may prepare findings to accord with the facts as above outlined, and upon such findings, when signed and filed, the clerk will enter judgment adjudging the two banks and the respondents Peck and Swan jointly guilty of a contempt of the court; that they be fined and adjudged to pay to the plaintiffs, as compensatory damages, such sum as will be found to cover the balance remaining due and unpaid on the judgment, with interest thereon from September 24, 1920, together with plaintiffs' costs, both of this proceeding and the proceedings supplemental to execution, and, in addition, an attorney's fee in the sum of \$750; that the judgment direct that, if the amount thereof be not paid within 15 days from notice of its entry, plaintiffs may have execution thereon against the property of the respondents named, and each of them.

As to the respondent O'Connor, an order may be entered, for the reasons stated, that the rule be discharged, and he dismissed.

LANE et al. v. WHITAKER, Pros. Atty., et al.

(District Court, D. Connecticut. August 29, 1921.)

1. Municipal corporations ⚡703 (1)—States, under police power, may regulate use of streets.

Persons who invest in vehicles to be used in the public streets of cities or towns do so, and hold the property and the right to use it, subject to such reasonable regulations as the state in the exercise of its police powers may impose for the safety, convenience, and welfare of the public.

2. Constitutional law ⚡235, 292—Municipal corporations ⚡703 (1)—Connecticut Jitney Act held constitutional.

Pub. Acts Conn. 1921, c. 77, defines a "jitney" as a public service motor vehicle operated on streets or highways in such manner as to afford a means of transportation similar to that of a street railway company and running on a regular route or between fixed termini. It makes operators of jitneys common carriers, subjects them to regulation by the state Public Utilities Commission, the same as street railroad companies, and requires them to obtain a certificate from the commission, after a hearing, specifying the route and that public convenience and necessity re-

quire their operation over such route. From the decision of the commission on an application for a certificate an appeal lies to the superior court. *Held*, that the act is not unconstitutional, as denying the equal protection of the laws, nor as taking the property of those affected without due process by conferring arbitrary power on the commission which permits it, in its discretion, to refuse certificates or to discriminate between applicants.

In Equity. Suit by Leslie Lane and others against Sheridan T. Whitaker, prosecuting attorney, and others. On motion by complainants for preliminary injunction. Denied.

This suit is instituted by the several complainants for an injunction seeking to restrain the prosecuting attorneys of the respective counties, the chief of police of the city of New Haven, and the superintendent of the state police of Connecticut, from enforcing a law recently enacted in the State of Connecticut, which makes it a penal offense for the complainants to carry on their business as jitney bus carriers. Chapter 77, Public Acts 1921, is found in the margin.¹

¹ An act concerning public service motor vehicles operating over fixed routes.

"Be it enacted by the Senate and House of Representatives in General Assembly convened:

"Section 1. The term 'public service motor vehicle' shall include all motor vehicles used for the transportation of passengers for hire. The term 'jitney' shall include any public service motor vehicle operated in whole or in part upon any street or highway in such manner as to afford a means of transportation similar to that afforded by a street railway company, by indiscriminately receiving or discharging passengers, or running on a regular route, or over any portion thereof, or between fixed termini.

"Sec. 2. Every person, association or corporation owning or operating a jitney is hereby declared a common carrier and subject as such to the jurisdiction of the public utilities commission, and, while so operating, to such reasonable rules and regulations as said commission may prescribe with respect to routes, fares, speed, schedules, continuity of service and the convenience and safety of passengers and the public.

"Sec. 3. No person, association or corporation shall operate a jitney until the owner thereof shall have obtained a certificate from the public utilities commission specifying the route over which such jitney may operate and the service to be furnished, and that the public convenience and necessity require its operation over such route. Such certificate shall be issued only after written application for the same has been made. Upon receipt of such application said commission shall fix a time and place of hearing thereon, which shall be in a town within which such route or a part thereof is proposed, and shall give notice of the pendency of such application and of the time and place of hearing thereon to such applicant, the mayor of the city, the warden of the borough or the first selectman of each town in or through which the applicant desires to operate, and to any common carrier operating over any portion of such route or over a route substantially parallel thereto, and public hearing held thereon. Any town, city or borough within which, or between which and any other town, city or borough in this state, any such common carrier is furnishing service, may bring a written petition to the commission in respect to routes, fares, speed, schedules, continuity of service and the convenience and safety of passengers and the public. Thereupon the commission shall fix a time and place for a hearing upon such petition, and shall mail notice thereof to the parties in interest and give due notice thereof at least one week prior to such hearing. The commission may amend or revoke any certificate.

"Sec. 4. The owner or operator of every jitney shall display in a conspicuous place therein such certificate or a certified copy thereof.

"Sec. 5. Upon the granting of a certificate of necessity and convenience as hereinbefore provided for, the commissioner of motor vehicles shall have

The Connecticut Company, operating trolley lines in the territory affected by this transportation through jitney service, has appeared by intervention and is now a party to this suit.

Robert J. Woodruff and Arthur Klein, both of New Haven, Conn., for plaintiffs.

DeForest & Klein, of Bridgeport, Conn., for parties similarly interested.

George D. Watrous, of New Haven, Conn., and Walter C. Noyes, of New York City, for the Connecticut Co.

Arnon A. Alling, State's Atty., and Edwin S. Pickett, Pros. Atty., both of New Haven, Conn. (Joseph F. Berry, of Hartford, Conn., and Seth W. Baldwin, of New Haven, Conn., of counsel), for defendants.

William F. Healey, Atty. Gen., of Connecticut, for superintendent of police.

Before MANTON, Circuit Judge, and THOMAS and KNOX, District Judges, holding the court pursuant to section 256 of the Judicial Code (Comp. St. § 1233).

MANTON, Circuit Judge (after stating the facts as above). The plaintiffs have been engaged in the business of operating public motor vehicles in the city of New Haven and own motor busses for this service. They therefore have a property investment in this equipment. They charge a fare to the passengers carried by them. The defendants, except the Connecticut Company, are public officials who have as their duty the enforcement of the statute which is here considered. The Connecticut Company is interested in the litigation for the reason that it has franchise grants and runs trolley cars along the streets of New Haven, and is now in competition with the plaintiffs' jitney busses.

[1] The streets are the property of the public. *Davis v. Mass.*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71. They are under the control of the public, and therefore subject to the police powers of the state,

jurisdiction over the registration of any jitney and over the licensing of its operator, its lighting, safety and sanitary conditions.

"Sec. 6. Every jitney shall carry markers to be furnished by the motor vehicle commissioner, which markers shall indicate that such vehicle is licensed for jitney service.

"Sec. 7. Any person, association or corporation aggrieved by any act or order of the public utilities commission may appeal to the superior court in the same manner and with the same effect as any person, association or corporation may appeal from orders relating to street railway corporations.

"Sec. 8. Any person or the officers of any association or corporation who shall violate any order, rule or regulation adopted or established under the provisions of this act or any provision hereof, shall be fined not more than one hundred dollars or imprisoned not more than sixty days or both.

"Sec. 9. Upon the passage of this act the public utilities commission is authorized to make such rules and regulations, to hold hearings and issue such certificates as may be required under the provisions of this act. Any such certificate shall not become effective until ninety days after the passage of this act.

"Sec. 10. The provisions of section 9 of this act shall take effect from its passage; all other provisions of this act shall take effect ninety days after its passage."

excepting where the power is delegated by statute upon a municipality or other agency. *Hendrick v. Maryland*, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385; *Nolen v. Riechman* (D. C.) 225 Fed. 812. The right to exercise the police power is a continuing one, and may be exercised so as to meet the ever-changing conditions and necessities of the public. Those who make investment for this purpose, as the plaintiffs, do so and hold their property and the right to use it subject to such other and different burdens as the Legislature may reasonably impose, for the safety, convenience, and welfare of the public. The state Legislature may regulate the use, by automobiles and motor cars, of the highways of the state. *Hendrick v. Maryland*, 235 U. S. 611, 35 Sup. Ct. 140, 59 L. Ed. 385. It may also authorize municipalities to regulate the use of streets by vehicles and may exclude vehicular traffic. *Barnes v. Essex Co. Park Comm.*, 86 N. J. Law, 141, 91 Atl. 1019.

[2] The Legislature of the state of Connecticut by the enactment referred to (chapter 77 of the Public Acts of 1921) provided for the use of the highways through the granting of licenses for persons situated as are the plaintiffs. It declared the operation of the jitney to be that of a common carrier, and subjected persons or corporations so operating jitneys to the restriction of the Public Utilities Commission. It provided that reasonable rules and regulations should be made by the commission with respect to routes, fares, speeds, schedules, continuity of service, and the convenience and safety of passengers and the public. It required the person, association, or corporation to obtain a certificate from the Public Utilities Commission, specifying the route over which the jitney may operate and the service to be furnished, and that the public convenience and necessity require its operation over such route. It required written application be made and notice to be given to the towns through which the route or part thereof was proposed, and to any common carrier operating over any portion of such route or over a route substantially parallel thereto. A public hearing is provided for, as is the method of giving notice thereof. The commission has authority to grant the certificate of necessity and convenience, also the licensing of its operation, and has jurisdiction over the lighting, safety, and sanitary conditions to prevail. Provision is then made for an applicant who feels aggrieved by the action of the Public Utility Commission to appeal to the superior court of the state in the manner provided for in such appeals from orders relating to street railway corporations for a violation of any order or regulation adopted or established under the provision of the act. A fine of \$100 or imprisonment for not more than 60 days or both is provided for a breach of the act. The Public Utilities Commission is authorized to make such rules and regulations; to hold hearings and issue certificates as may be required under the provisions of the act.

In this complaint the constitutionality of this act is questioned. The superior court of the state has held the act constitutional. *Derby Bus Corp. v. Whittaker et al.*, decided January 21, 1921, in an opinion filed by Judge Keeler. It is claimed that the statute violates the federal Constitution for the following reasons:

First, that the act confers arbitrary powers on the Public Utilities Commission, and permits the commission to discriminate against the plaintiffs, and therefore denies to them the equal protection of the laws; second, the statute constitutes an unlawful delegation of legislative powers to the administrative body; third, that it is unconstitutional, and violates the due process of law guaranteed by the Fourteenth Amendment, in that it confers an unregulated discretion and arbitrary power upon the Public Utilities Commission to grant or refuse or revoke a license; fourth, the statute in not requiring the commission to grant a hearing in the issuance, refusal, or revocation of a license, denies due process of law.

We think the several objections urged as to the constitutionality of the act are not well founded. As to the first, the claim is that, because the statute provides that all jitney busses are common carriers and shall be subject to the jurisdiction of the Public Utilities Commission, it discriminates against the plaintiffs. The citizen has the right of travel upon the highways, and may transport his property thereon in the ordinary course of life and business; but this is a very different thing than permitting the highway to be used for commercial purposes, as a place of business, for private gain, in running jitney busses. The right, common to all, to the use of highways, is the ordinary use made thereof; but where, for private gain, a jitney owner wants a special and extraordinary benefit from the highway, to use it for such commercial purpose, the Legislature may, in the exercise of its police powers, wholly deny such use or it may permit it to some and deny it to others, and this is because of the extraordinary nature of such use. And where the Legislature grants the permission to use the highway, it may do so under regulations which are common to all applicants. They may grant, refuse, or revoke the license, and in so doing the Legislature may permit of rules and regulations when such use is granted. This it has done in the act in question, by providing that a body created under the law (the Public Utilities Commission) may make such rules and regulations and grant such license when public convenience and necessity require it.

It is essential that motor vehicles on the highway used for such purposes should do so with safety to the public, and that owners should contribute to the maintenance of the highways by such payments as may be required with such grant. In examining the act, we are satisfied that it is clear that the Legislature, in comprehensive terms, intended a regulation which is for the interest and convenience of the inhabitants of the localities which are on the proposed route. It left the granting or refusal of a license, and the regulations as to the sanitary conditions and safety of the public, with the Public Utilities Commission, and in conferring this power the Legislature kept well within the confines of its constitutional limitations. *Pub. Service Comm. v. Booth*, 170 App. Div. 590, 156 N. Y. Supp. 140.

As to the second, it is argued that the statute "purports to permit" this sovereign power (legislating) to be exercised at the arbitrary discretion and will of the administrative body. We find nothing in the

act in question which grants to the Public Utilities Commission purely legislative powers. The state could, as it did, grant to the Commission the right to provide rules applicable to the particular situation, and provided for the investigation of facts before granting a certificate of convenience and necessity, all with the view to making such orders as were just for the purposes of the act. A delegation of power to make rules and regulations does not breach the federal Constitution. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Interstate Commerce Comm. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729. Indeed, the Legislature might unite the legislative and judicial powers in the same body without violating the Fourteenth Amendment. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.

As to the third, we find no arbitrary power granted to the Public Utilities Commission to say that a certificate should not be granted to an applicant. The act provides that an examination may be held by the Utilities Commission to first ascertain the public necessity and convenience for the route in question and others, and the authority is granted to the commission to issue such license if it is satisfied with the requirement therefor. We are not concerned with what has been described, both on the argument and the briefs, as an arbitrary action on the part of the personnel of the commission. If there has been such arbitrary action, a remedy is provided for by an appeal to the superior court by the party feeling aggrieved thereby.

As to the fourth, the act provides for a hearing on the application for a license. If the application be denied, provision is made in the act for an appeal to the superior court. Full authority is vested in the superior court under the laws of the state of Connecticut to reverse and direct the Commission to carry out its mandate if the result on such appeal be different than that reached by the Commission. Thus due process of law is accorded to the applicant.

We think the act in question does not violate the federal Constitution and that this motion may not be granted.

Motion denied.

In re BRASHEAR.

(District Court, W. D. Pennsylvania. September 16, 1921.)

No. 9287.

1. Bankruptcy \Leftrightarrow 360—**Creditor's attorney held "duly authorized" to receive and indorse dividend check.**

Where attorney, whose appearance for a creditor has been entered on the record of the referee in bankruptcy, has prepared proof of creditor's claim and procured allowance thereof, he is, under Bankruptcy Act, § 1 (9), being Comp. St. § 9585, the "duly authorized" attorney of the creditor, especially in view of section 58 of such act (Comp. St. § 9642), General Order 4 in Bankruptcy (89 Fed. iv, 32 C. C. A. viii), Form No. 20 in Bankruptcy (89 Fed. xxxvi, 32 C. C. A. lxi), and Judicial Code, § 272 (Comp. St. § 1249), and, hence the receipt and indorsement by such

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
275 F.—31

attorney of dividend check, payable to creditor's order, is sufficient acquittance to trustee; neither Bankruptcy Act, § 47 (4), being Comp. St. § 9631, nor General Order in Bankruptcy No. 29 (89 Fed. xii, 32 C. C. A. xxviii) requiring that dividend checks shall be made out to attorney's client.

2. Courts ⇨340—State act requiring filing of warrant of attorney not applicable to bankruptcy proceedings.

Act Pa. April 14, 1834 (P. L. 354) §§ 71, 72, providing that an attorney, when required, shall file his warrant of attorney, has no application to the bankruptcy courts, since such courts follow the practice in equity within Rev. St. U. S. § 914 (Comp. St. 1537), where such practice is not defined by the Bankruptcy Act or the general orders and forms made in pursuance thereof.

In Bankruptcy. In the matter of Harry Bazil Brashear, bankrupt. On certified questions from referee. Questions answered.

H. D. Montgomery, of Pittsburgh, Pa., for bankrupt.

ORR, District Judge. The referee has certified to this court the following question:

"Where a member of the bar of this court has been employed by a creditor of a bankrupt, has prepared the creditor's proof of claim and procured its allowance in the bankruptcy proceeding, and his appearance for the creditor is entered in the referee's record, does such member of the bar remain the agent of the creditor for the purpose of collecting the money due, to the extent that a dividend check issued by the trustee and countersigned by the referee and made out in the name of the creditor and indorsed by such member of the bar with the creditor's name, per the attorney, will constitute an acquittance by the creditor to the trustee in bankruptcy, and to the depository?"

[1] This question must be answered in the affirmative. In support of this conclusion, the Bankruptcy Law (Comp. St. §§ 9585-9656), the general orders and the forms in bankruptcy all not only lend their aid, but compel assent. The member of the bar of this court who has performed the duties assumed in the question in looking after his client's interest up to the time a dividend is declared, and who has caused his name to be entered upon the docket together with his place of business and with the date of the entry, is clearly entitled to receive the dividend.

The definition of "creditor" in the act was not intended to include alone the person who owns a demand or claim in bankruptcy, but was intended also to "include his duly authorized agent, attorney or proxy." Section 1 (9). The words "duly authorized" should not be disturbing in arriving at a conclusion as to the powers of an attorney at law who is a member of this court, so far as he may be concerned for a creditor in bankruptcy proceedings. That such an attorney is "duly authorized" is presumed when he enters his appearance in the proceedings, and such presumption exists until it is overcome by evidence.

General Order 4 (89 Fed. iv, 32 C. C. A. viii) relates to the conduct of proceedings, and is as follows:

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

"Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the Circuit or District Court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney."

In that general order there is express provision for the conduct of bankruptcy proceedings by attorneys. The particular requirements with respect to entering upon the docket the attorney's place of business, with the date of the entry, may be noted. The first is required in order that notices and orders may be served upon him. The second fixes the time when his responsibility with respect to the particular proceedings begins. The powers of the attorney for a creditor must have been intended to be broad. Most of the notices provided in the Bankruptcy Law are to be given 10 days before the purpose of the notice may be accomplished. Section 58 provides:

"a. Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings."

In view of the definition of "creditor" before referred to, in view of the provisions of General Order 4 above set forth, in view of the territorial extent of the United States within which the uniform system of bankruptcy provided by the act of 1898 and its supplements prevails, it cannot be doubted that the notices to be given under section 58 are intended to be given to the creditors according to their respective addresses, and that the word "creditors" includes the attorney who has complied with the rule by having his name and place of business and the date entered upon the docket. If such notices are not to be served upon attorneys, how is it possible for the client in Southern California to act on such short notice with respect to matters in a bankruptcy court in Maine? The fact, then, that the notices contemplated in said section 58 are to be served upon the attorneys who have appeared for creditors and conformed with General Order 4 creates the further inference that the persons upon whom notices are to be served are the persons who are to take part in the proceedings which are intended to be had pursuant to the notices. That is a logical conclusion. That being so, it is apparent that under the Bankruptcy Law the attorneys at law are intended to have very broad powers in the representation of their clients' interests. That

they should have broad powers is more specifically pointed out by reference to the forms in bankruptcy, notably Form No. 20 (89 Fed. xxxvi, 32 C. C. A. lxi). This form was prepared by the Supreme Court in pursuance of direct enactment in the body of the Bankruptcy Law, and it is entitled by the Supreme Court: "General Letter of Attorney in Fact When Creditor is Not Represented by Attorney at Law." Plainly the inference is that, when a creditor is represented by an attorney at law, the latter has all the powers which are intended to be given to an attorney in fact when the creditor is not so represented. The main features of that letter of attorney are as follows:

"To attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof, may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy, and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee, and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever."

There is added to that language a power of substitution, which power has never been recognized as inherent in a member of the bar. This does not tend to diminish the strength of the inference which is derived from that form, because it was never recognized that an attorney at law had any power of substitution, although he has always had power to associate with him one or more members of the bar for whose conduct he has always been deemed responsible.

It is clear, therefore, that the law contemplates that a member of the bar of this court, representing a creditor of the bankrupt, may attend meetings of creditors and vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy, and in the choice of trustee or trustees of the estate of the bankrupt, and to assent to such appointment of trustee; that he may accept any composition proposed by the bankrupt in satisfaction of his debts and receive payment of dividends and all money due under any composition, etc. Clearly such member of the bar maintains a relation with his client which involves the duty of collecting the money due to his client. In the certified question it appears that the collection of the money due the client is made difficult because the dividend check issued by the trustee and countersigned by the referee is made out to the order of the client. But nowhere in the act is there any provision that dividend checks shall be made to the client and issued to the attorney for the client. Section 47 (4) provides that trustees shall "disburse money only by check or draft on the depository in which it has been deposited." General Order 29 (89 Fed. xii, 32 C. C. A. xxviii) is specific with respect to the manner in which

checks or warrants shall be signed and countersigned and what they shall contain; but there is no provision therein that the name of an attorney's client should be inserted as payee of the check.

Before concluding this opinion, it may be well to note the law in the federal courts with respect to attorneys at law generally. By the General Judiciary Act of September 24, 1789 (1 Stat. 73), it was provided that in all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of said courts respectively are permitted to manage and conduct causes therein. This provision is carried into section 747 of the Revised Statutes and again carried into section 272 of the Judicial Code (Comp. St. § 1249).

In *Osborn v. United States Bank*, 9 Wheat. 738-830 (6 L. Ed. 204), Chief Justice Marshall had under consideration a contention by the appellants that a decree of the Circuit Court was erroneous because no authority was shown in the record from the bank authorizing the institution or prosecution of the suit. He finds no distinction between cases where an attorney at law represents an individual and where he represents a corporation, and expresses the rule which seems to have been then, and ever since, recognized in the federal court, that the authority of an attorney or counselor to appear in court is not required to be expressed by the filing of his warrant of attorney, in the following language:

"Certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state or of the Union."

This case was referred to in *Aaron v. United States*, 155 Fed. 833-836, 84 C. C. A. 67-70, and the quotation just made is there found. The court also says that Chief Justice Marshall gave expression to a rule "now universally recognized."

[2] Referring to the quotation again, it is to be noted that since Chief Justice Marshall used such language the state of Pennsylvania passed the act of April 14, 1834 (P. L. 354), which in sections 71 and 72 provides that an attorney shall, when required, file his warrant of attorney. Such act, however, has no force or effect in the bankruptcy courts, because the practice, pleadings, and forms and modes of procedure, where not specified in the act itself, or the General Orders or forms in bankruptcy, must be according to practice in equity.

We do not want to be understood, however, as expressing an opinion that the conformity section, 914, of the Revised Statutes (Comp. St. § 1537), which requires the federal court to follow the practice, pleadings, and forms and modes of procedure of the state courts in actions at law, might not include within its operation the Pennsylvania act of 1834.

In view of the foregoing considerations, having in mind all the conditions expressed in the certified question, we are bound to answer the same in the affirmative.

GARVAN v. MARCONI WIRELESS TELEGRAPH CO. OF AMERICA.

(District Court, D. New Jersey. September 20, 1921.)

1. **War ⇌12—Alien Property Custodian had power to determine alien enemies.**
 In view of Executive Orders of October 12, 1917, and December 3, 1918, promulgated pursuant to sections 5 (a) and 6 of such act, the Alien Property Custodian had authority under the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j) to determine who were alien enemies whose property should be turned over to him.
2. **War ⇌12—Demand by Alien Property Custodian of transfer of stock vested title.**
 A demand by the Alien Property Custodian upon a domestic corporation to transfer stock held by an alien enemy immediately vested in such officer title to the stock, outstanding certificates being merely evidence of the ownership of the stock, which had its situs in the United States where it was deemed to be held by the corporation for the benefit of the owner, in view of Rules 2 (a) and 2 (c), promulgated by the President on February 26, 1918, under the authority of Trading with the Enemy Act, § 5 (a), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c.
3. **War ⇌12—Property, tangible or intangible, could be seized under Trading with the Enemy Act.**
 Congress intended, when enacting the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j), that the President should cause property of every kind belonging to an alien enemy, tangible or intangible, to be seized.
4. **War ⇌12—Vesting of title in corporate stock of alien enemy by demand held reasonable.**
 Rules 2 (a) and 2 (c), promulgated by the President on February 26, 1918, under the authority of Trading with the Enemy Act, § 5 (a), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c, providing that a demand by the Alien Property Custodian would effect a transfer of corporate stock owned by an alien enemy and that such a demand would forthwith vest in such officer title to such stock, were both reasonable and effective.
5. **War ⇌12—Claims of third persons no excuse for not transferring stock on demand of Alien Property Custodian.**
 That third persons might have claims upon or an interest in corporate stock, ownership of which was determined to be in an alien enemy by the Alien Property Custodian, was no reason why the corporation should not transfer the stock to such officer upon his demand under the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½-3115½j), since section 9 provides an adequate remedy for the true owner, and the corporation is completely protected by section 7 (e).
6. **War ⇌12—Corporation could be required to issue new certificates without cancellation of old on demand by Alien Property Custodian.**
 After the amendment of Trading with the Enemy Act, § 7 (c), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d, a corporation could be required on demand of the Alien Property Custodian to issue new certificates of stock held by alien enemies without presentation of the outstanding certificates for cancellation; such act being a war measure, and Congress not intending that old certificates be presented for cancellation.
7. **Statutes ⇌174, 175—Cover only matters included expressly or by necessary implication.**
 Statutory law covers only such matters as are expressly or by necessary implication included within its terms.

8. War ⇐33—Armistice held not to affect court's construction of Trading with the Enemy Act.

In a proceeding by Alien Property Custodian to compel transfer of corporate stock owned by alien enemy on books of a domestic corporation, the decision of the court should not be affected by the armistice between the United States and Germany, on suggestion that, whether or not, in view of the armistice, the action in question should be prosecuted, was a matter for the determination of those charged with the administration of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j).

Proceeding by Francis P. Garvan, as Alien Property Custodian, against the Marconi Wireless Telegraph Company of America. On rule to show cause why shares of stock of the company standing in the name of the Dresdner Bank should not be transferred to the Alien Property Custodian. Rule made absolute.

Elmer H. Geran, U. S. Atty., of Asbury Park, N. J., and Lucien H. Boggs and Dean Hill Stanley, Sp. Asst. Attys. Gen., both of Washington, D. C., for petitioner.

Griggs and Harding, of Paterson, N. J. (John W. Griggs, of Paterson, N. J., of counsel), for respondent.

RELLSTAB, District Judge. Under section 7(a) of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), the Marconi Wireless Telegraph Company reported that 2,945 shares of its common capital stock stood on its books in the name of the Dresdner Bank of Bremen, Germany. Upon investigation the Alien Property Custodian concluded that the bank was an alien enemy within the purview and meaning of the act, and accordingly demanded the Marconi Company to transfer the stock to him as Alien Property Custodian, cancel the old certificates of stock, issue new ones, and account to him for the dividends on the stock. The company refused to do so, and the Alien Property Custodian filed a petition to compel compliance with his demand on which rule to show cause was issued. The company made a return to that rule in the form of an answer setting out reasons for its refusal. These reasons constitute the issues before me.

The company gave six reasons for not complying with the demand, which will be taken up in order.

[1] 1. The determination that the Dresdner Bank was an alien enemy should have been made by the President and not by the Alien Property Custodian.

Section 5(a) of the act (section 3115½c) provides that the President may exercise any power or authority conferred by the act through such officer as he shall direct. Section 6 (section 3115½cc) gives him the authority to appoint an Alien Property Custodian: By Executive Orders of October 12, 1917, and December 3, 1918, the President delegated to the Alien Property Custodian certain powers, among which is included the power and authority to make the determination in question. Under these the determination of the status of the Dresdner Bank as an alien enemy was properly made. Kahn v. Garvan (D.

C.) 263 Fed. 909; *Stoehr v. Wallace et al.*, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. Ed. — (decided February 28, 1921).

[2-4] 2. The seizure of the stock by the Alien Property Custodian was not complete without the seizure of the outstanding certificates.

The Alien Property Custodian served written demand on the Marconi Company to transfer, etc., the stock on its books to him. The certificates are merely evidence of the ownership of the stock, which has its situs here in New Jersey, and is deemed to be held by the company in this state for the benefit of the owner. *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. On February 26, 1918, the President, under the authority of section 5(a) of the act, promulgated certain rules. Rule 2(a) prescribes a "demand" by the Alien Property Custodian as the proper method to effect a transfer of stock, and rule 2(c) provides that such a demand "shall forthwith vest in the Alien Property Custodian such right, title, etc., in the money or other property demanded * * * as may be included in the demand." Congress intended that the President should cause property of every kind, tangible and intangible, to be seized. The act does not prescribe the mode of seizure, but a mode must have been intended which is both reasonable and effective. The mode used in this case and prescribed by the rules is reasonable, and when the demand was made the seizure was complete and effective. *Kohn v. Jacob & Josef Kohn, Inc., et al.* (D. C.) 264 Fed. 253; *Miller v. United States*, 78 U. S. (11 Wall.) 268, 20 L. Ed. 135.

[5] 3 and 4. Third persons might have claims upon or an interest in the stock, and the company would incur risk of liability in transferring it to the Alien Property Custodian.

Before the transfer is made in accordance with the demand, the Alien Property Custodian must determine whether or not the property belongs to an alien enemy. Of course, he may possibly make a mistake. If he does, section 9 (section 3115½e) provides an adequate remedy for the true owner, and the corporation is completely protected by section 7(e) of the act, which provides that—

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

See *Biesantz v. Alien Property Custodian*, 106 Misc. Rep. 545, 175 N. Y. Supp. 46; *Garvan v. Certain Shares of International Agricultural Corporation*, 276 Fed. 206 (decided January 31, 1921).

[6, 7] 5. The company should not be required to issue new certificates of stock until the outstanding ones are presented for cancellation.

Before outstanding certificates of stock may be cancelled and new ones issued in lieu thereof, in time of peace, a corporation is justified, both by reason and legislative enactment, to require the production of the old certificates. But the act under which the Alien Property Custodian is proceeding is a war measure. Under section 12, paragraph 4 (section 3115½ff), it was the duty of every corporation issuing shares to transfer them upon its books to the name of the Alien Property Custodian "upon demand accompanied by the presentation of the certifi-

cates which represent such shares of beneficial interest." The Executive Order of February 26, 1918 (3d), authorized the Alien Property Custodian to demand the transfer of corporate stock on the books of the company to his name, and provided that—

"It shall be the duty of any corporation * * * to comply with such demand when accompanied by the presentation of the certificates which represent such corporate stock."

The Executive Order of July 16, 1918 (6a), provided that—

"Shares of stock * * * in a corporation * * * may be advertised and sold wherever the Alien Property Custodian shall determine; and it shall be immaterial whether such shares of stock * * * be represented or evidenced by certificates or instruments or writings of any kind and whether the Alien Property Custodian shall or shall not have the possession or control thereof in the event that the same shall be thus represented or evidenced."

In selling such shares of stock, however, considerable difficulty was experienced in securing purchasers because the Alien Property Custodian did not have the certificates representing the stock to present to the purchaser as evidence of his ownership. This difficulty was set forth in the remarks of Lee C. Bradley, Esq., at that time General Counsel for the Alien Property Custodian, before the Committee on the "First Deficiency Appropriation Bill, 1919."

On November 4, 1918, and doubtless in consequence of the difficulty thus experienced, section 7(c) of the act was amended. As amended it provides that it shall be the duty of any corporation issuing shares of stock belonging to or held for or by an alien enemy, to cancel the same on its books, and in lieu thereof to issue certificates for such snares to the Alien Property Custodian when required by him to do so. In this amendment the requirement that the outstanding certificates be presented to the corporation before being cancelled, and new ones issued in lieu thereof, was omitted. No reason, other than the difficulties encountered, sufficiently accounts for the omission. The requirement as it stood in section 12 practically placed the enforcement of the act in many cases into the hands of alien enemies. Some refused to surrender their certificates of stock. Others were in Germany and could not present them even if they desired to do so. The respondent, however, says that while "the amendment of November 4, 1918, did not specifically state that in cases of the demand for transfer of corporate certificates, the certificates should be produced, * * * such condition is implied." Statutory law covers only such matters as are expressly or by necessary implication included within its terms. "Such condition" is not expressly included in the amendment itself, and there is nothing in its language showing necessary implication. The history of the act indicates that the omission was not accidental, but intentional. The law prior to November 4, 1918, and Executive Orders based thereon, expressly contained the provision requiring the presentation of the outstanding certificates before the stock could be transferred on the books of the company. The difficulties thus caused were brought to the attention of certain members of Congress, and the amendment referred to followed and the requirement was left out. The only conclusion tenable is that it was inten-

tionally omitted. This conclusion seems sound in reason, and is supported by the only two courts, so far as I am informed, in which the question has been raised. *Garvan v. Certain Shares of International Agricultural Corporation*, supra; *Garvan v. Continental Oil Company* (United States District Court for the District of Colorado, no opinion filed).

[8] 6. Whether or not, in view of the armistice, this action should be prosecuted, is a matter for the determination of those charged with the administration of the statute.

It is the duty of the court to declare the law when a case is properly before it as in this case. Consequently, contrary to the suggestion of the respondent, the decision should not abide, or be affected by, the diplomatic relations between the United States and Germany.

The rule to show cause therefore will be made absolute, and the transfer of the stock ordered in accordance with the prayer of the petition.

THE CITY OF BALTIMORE.

(District Court, D. Maryland. September 22, 1921.)

No. 720.

1. Collision ⚡102—Overtaking and overtaken vessel held both at fault.

Where a steamer collided with a tug while attempting a starboard passage from the rear after signaling for a port passage, both vessels held at fault; the steamer, even though the tug turned to port after assenting to the port passage and thence to starboard as the steamer, signaling for a starboard passage, veered in that direction, in failing to put her engines full speed astern, and attempting a starboard passing without having first secured the tug's assent, and the tug, with the steamer so near and either directly astern or a trifle on her starboard quarter, in assenting to a port passing.

2. Collision ⚡14—Blunder, though excusable, no defense, if master without license.

Though a tug's error in agreeing to a port passing by a steamer too near astern was in extremis, and the situation, in which cool judgment was difficult, was not created by her, such facts are no defense where her master had no license as required by law, since, if the man in charge blunders and does not have the legally required evidence of competency, it is insufficient that he had all needful skill or that his lack of it made no difference.

In Admiralty. Libel by the Baker-Whitely Coal Company against the steamer City of Baltimore, arising from a collision with the tug Britannia. Both ships held at fault.

H. N. Abercrombie, of Baltimore, Md., for libellant.

Floyd Hughes, of Norfolk, Va., and George Weems Williams, of Baltimore, Md., for respondent.

ROSE, District Judge. The collision with which we are concerned cost two lives and not a little money. Admittedly it was inexcusable; the only possible controversy being as to which of the vessels involved

was free from blame, if either was. They were the passenger and freight steamer, City of Baltimore, hereinafter for brevity styled the Baltimore, and the tug Britannia. The former is 310 feet long, and of upwards of 2,300 tons burthen. The latter was one-third of the other's length, and one-fifteenth of its tonnage. They came together somewhere between 6:50 and 6:55 on the evening of October 7, 1920, in the Ft. McHenry Channel in the vicinity of Buoy 18; that is, about 3,500 or 3,600 feet beyond the Lazaretto Light, at the entrance to the inner harbor of Baltimore. The steamer's stem struck the starboard quarter of the tug, and pushed her so far over that she never righted. Water poured over her side, and she sank so quickly that two of her crew were drowned. The tug was moving at the rate of 8 to 9 knots an hour. The steamer had followed her down the harbor and the Ft. McHenry Channel, and just before the collision was gaining upon her with increasing rapidity. The Baltimore for some time had had the tug in sight, but not until very shortly before the disaster was the Britannia aware of her approach. The steamer wanted to pass the tug, and gave a two-blast signal. It was unheard and unanswered. It was repeated with a like negative result. A third attempt drew from the tug the assenting two blasts.

So far the facts are satisfactorily established, although witnesses on each side, as well as some who are apparently disinterested, do not agree as to them. The evidence is unusually contradictory, even for a collision case. Many of those who testify are mistaken and confused not only as to time and distance, but as to the order of events and the number and character of the signals sounded. The account sworn to before the steamboat inspectors was not always the version testified to in court. Some of the comparatively numerous witnesses who were not of the company of either ship speak as to matters which are important, if true, but all or nearly all who do so are demonstrably in error as to other things. Doubtless everything happened within so brief a compass of time that observation and recollection were alike hopelessly blurred.

Both ships had agreed that the steamer should pass to the port of the tug, but nevertheless her stem struck the tug's starboard quarter. Why she was on that side is the vital issue in the case. She says that when she received the tug's assent she went a quarter of a point to port, but that simultaneously the tug made a sharp turn of six or seven points in the same direction, and in consequence went clear across her bow. Her master explains that he supposed the tug was bound for the Canton piers, to the north and east of the channel, and was cutting across the steamer's course to get to them. He thereupon threw the Baltimore's head to starboard, and blew the corresponding one blast. No sooner had he done so than the tug again started across his bow, this time from port to starboard. He promptly put his engines full speed astern. It was too late. The collision followed instantly. That the steamer immediately before the disaster went to starboard is admitted by the tug, and is said to have been the cause of the accident, but the Britannia strenuously denies going to port at any time after it knew that the

Baltimore was in the neighborhood. Those on the tug claim that the only change of course she made was a movement to starboard to facilitate the steamer's port passing. The Britannia was not bound for the Canton piers. Her destination was Curtis Bay, to reach which she would have kept to the channel for some time longer, and would then have gone out of it to starboard. Yet, unless the steamer saw or thought she saw that the Britannia was turning to the left, there was no reason why she should have gone to the right.

The weather was clear; neither wind nor tide counted for anything. All that was out of the ordinary was the presence in the channel of the British steamship Peterton. She had dropped anchor in the anchorage grounds to the south and west of the channel, but had swung into it. If some of the witnesses on each side are accurate in their statements, she occupied two-thirds or more of its 600 feet of width, for, according to them, she left less than 200 feet clear. It appears probable that she did take up about a half of it, perhaps more, possibly less, but there was plenty of passing room left. The collision took place at a point about 600 feet beyond or down channel from her. At the speed the tug was making, it must have occurred in a trifle over 40 seconds after she got by the anchored vessel.

[1] In passing judgment upon the legal consequences of the tug's actions, it must be borne in mind that until she was aware of the Baltimore's proximity she was free to move in whatever direction her convenience dictated. It is therefore important to fix accurately in relation to the third two-blast signal the time at which the Britannia went to port, as within not much, if at all, exceeding 3 minutes before the collision she must have done at least once. The line of the Ft. Mc-Henry Channel is sufficiently to the eastward of that followed by vessels coming down the harbor to require them to turn to port when outward bound. The tug was ahead, and must therefore, in getting from one channel to the other, have crossed the steamer's course from right to left. When the Baltimore subsequently made the like change, the tug would appear to one on the steamer's deck to be returning from port to starboard.

How far, if at all, some of the witnesses may have had these ordinary and necessary movements in memory does not appear. Some of them say that from their position on the Baltimore's forward deck they saw the red light of the tug as she went across their steamer's bow. Within the fixed limits of time and distance then existing, that was physically impossible. It is, however, not difficult to comprehend how they may have fallen into error. On the eastward side of the channel there is a red gas buoy. As the tug went to port, and before on her journey down channel she came opposite this buoy, it might to one on the Baltimore's deck have come in range along the Britannia's side and have been mistaken for her red light. The movement of the tug to the left, observed by those on the Baltimore, who also claim to have seen her red light, must therefore have been before she reached the gas buoy, that is to say, before she went by the Peterton's stern, for the position of that stationary ship is satisfactorily established as one in which the gas

buoy was directly astern of her or possibly a little off her starboard quarter. The *Peterton's* witnesses speak of a port movement of the tug apparently around that steamship's stern, although they differ as to whether the position of their vessel required the tug to go in that direction. None of them noticed any subsequent swing of the *Britannia* to the left, and I do not think there was one. The porting of which the *Peterton's* people speak must have been made not more than a minute before the collision. The inquiry, then, is whether the tug heard and answered the *Baltimore* before or after she passed the British ship.

The evidence from the deck of the last named is that the *Britannia* was well by their ship before the *Baltimore* blew her third two-blast signal, and that, when the *Britannia* answered, the steamer herself had altogether passed. If that be true, and I think it is, the bow of the *Baltimore* had, when she received the tug's assent, already gotten within less than 300 feet of the point of collision, which, upon that assumption, took place within 15 seconds thereafter. She must, moreover, have been not much, if any, over 100 feet from the tug's stern. Thereafter neither time nor space were seemingly sufficient for the tug to have gone completely across the steamer's bow from starboard to port, so that she was from 20 to 50 feet off the *Baltimore's* starboard bow, and then to have almost completed a second crossing in the opposite direction. The preponderance of disinterested evidence from those so placed as to be best qualified to speak with accuracy as well as the probabilities resulting from an analysis of the time and space available require it to be found as a fact that the tug's movement to port was before, and not after, she agreed to the steamer's port passing, and may not be charged to her as fault.

How, if so much be held established, are the *Baltimore's* subsequent actions to be accounted for? Here, too, it is necessary to keep in mind with what rapidity events followed each other.

The master of the *Baltimore* says he blew his first two-blast signal when he was abreast the *Lazaretto*—that is, a trifle less than three minutes before the collision—but his mate on watch at the time says it was not sounded until they were outside that point. The way in which the witnesses from the *Peterton* speak of these signals strongly suggests that the first of them was not given until the *Baltimore* had gotten considerably further down channel. The three two-blast signals must have followed very quickly one upon another to produce the impression upon the master of the *Florida*, to which reference will presently be made. It is quite possible that a minute will cover the time which passed after the giving of the first signal and before the collision, and two will almost certainly do it.

The *Baltimore's* master does not impress one as likely readily to give way, or, without reluctance, to change his own plans. As with haste, and it may be with irritation as well, he gave one signal after another without getting a response, he may have failed to note or to appreciate that the tug was going to port, or he may have supposed that she was doing so merely the more safely to get by the *Peterton*, and

would, so soon as she had passed that vessel, resume her former position in the channel. At the moment he blew his last two blasts he may not have registered in his mind how little time was left in which anything could be done, but before the answer came he may have realized how perilous the situation had become. A port passing may have appeared impossible. The instant which it may have taken for him to detect the starboard movement of the tug may have been that in which he decided to go himself to starboard, and to give the one-blast signal, telling the tug what he was doing. The tug had no time to answer, much less to co-operate in this latest proposal.

Much thought and as careful an analysis of all the evidence as I am capable of making leads me to believe that the true story of what happened has been above given. It is in conflict with what some of the witnesses, as well for the tug as against her, say. For example, the Britannia's people all claim that when they looked back after hearing the third two-blast signal they saw the Baltimore's green, but not her red, light. That was what all of them who were any distance forward of her stern would have seen immediately before the collision. They may realize that it is questionable whether the tug should have assented to a port passing by a rapidly moving ship already close to her starboard quarter. There is in this case that which leads one to fear that not much weight can be given to a good deal of the testimony as well on one side as upon the other. It is unnecessary to speculate how many inaccuracies are intentional, if indeed any are. The speed with which everything was crowded together and the unconscious bias of witnesses account for much. The impression already stated as to what happened is the only one I have been able to reconcile with such facts as seem to me to be established. Accepting it as sound, in what legal position does it put the two vessels? The fault of the Baltimore is clear, as I think it would be even if the Britannia's movement to the left was not begun until after she had assented to a port passing. The steamer had been getting closer and closer to her. So far as those on the Baltimore could judge, she had not heard any signals, and they must have understood why she had not. Almost every witness who was not on the tug has something to say about the noise her exhaust was making. The Baltimore's captain must have appreciated how difficult it would be for any one in her pilot house to hear anything coming from astern. Still the steamer came rushing on, diminishing by some 400 feet a minute the distance between them. Was she justified in so doing?

The experienced master of the Florida, a vessel of not dissimilar size and speed, and which was following the Baltimore, stopped his ship when he heard the third two-blast signal. He could not see the tug. He did not know to whom or to what the Baltimore was attempting to signal, but he felt that, when it had been necessary in quick succession thrice to sound two blasts, caution was required of every one in the vicinity. The Baltimore's master says that the tug was far enough to starboard to make it apparently safe for him to keep on, but that was necessarily upon the assumption that the Britannia, who knew nothing of his whereabouts, would maintain her course. Usually

a following vessel which takes such chances must pay the penalty. Assuming without deciding that under the conditions as he claims they were he was not required to slacken speed until and unless the tug had refused permission to pass, he is nevertheless, upon his own version of the facts, in fault for what he did and refrained from doing after the tug had answered, and, in spite of her assent to his request, had gone to port as he says she did. His guess that for some reason of her own she had undertaken to cut across his bows might be correct, but it was also possible that she wanted to do what in effect she had promised she would, and that her turn to port was due to some momentary failure of either steering gear or human element to function as it should, and that she would at once seek to correct her error by returning to starboard. Under such circumstances, he should have taken no chances. There were at possible peril too many lives on the Baltimore, to say nothing of those on the tug. Her engines should at once have been put full speed astern. If this had been done at the time the one-blast signal was given, and her head thrown to starboard, it is certainly possible, if not probable, that there would have been no collision. He had no right to attempt a starboard passing without having first secured the tug's assent to it. On any reasonable theory of the facts, her own as well as those of others, the Baltimore must be held in fault.

How is it with the tug? Upon the steamer's version of the facts, the Britannia blundered, but, even if the accident happened, as it has already been found that it probably did, would she be free from blame? If the Baltimore was not more than 100 feet away, and either directly astern or a trifle on the tug's starboard quarter, the latter should not have assented to a port passing. She appreciated that the situation was one of peril, and that unusually quick action was required if the passing was to be made in safety. She threw herself so sharply to starboard that the resulting list to port frightened one of her crew, at the time below, and sent him hurrying on deck in alarm, although he must, in the every day work of the tug, have been used to sharp and sudden changes of direction.

[2] It may be argued that, if the Britannia was wrong in agreeing to a port passing, her error was in extremis, and that she had had no part in creating a situation well calculated to make cool judgment difficult. For this contention much may be said, but, unfortunately for her, she was at the time under the command of a man who had no master's license. As she was of upwards of 150 tons, she was being navigated in flat defiance of law. Some months later he obtained his master's certificate. It is quite possible that he would have acted as he did even had he then possessed that particular scrap of paper. But if the man in charge blunders, no matter how easy the mistake may have been, and he does not have the legally required evidence of competency, it will seldom, if ever, do to say that even so it was possible that he had all needful skill or that his lack of it made no difference.

Both ships were in fault. If an agreement as to the amount of damage done cannot be reached, the advocates will be further heard.

In re COUCH COTTON MILLS CO.

(District Court, N. D. Georgia. June 11, 1921.)

No. 7246.

1. Courts ⇨474—Time of filing proceeding governs in determining priority in appointment of receivers.

Where receivers are appointed by courts of concurrent jurisdiction, it is a rule of comity that courts will look to the priority in the time of filing the proceedings in determining the right to possession of assets.

2. Bankruptcy ⇨20(2)—Receiver in bankruptcy has priority over receiver of state court in certain matters.

As between a court of bankruptcy and other courts of equity, priority of acquiring jurisdiction is not conclusive in many matters, such as proceedings to perfect or enforce liens or titles invalidated by bankruptcy, creditors' bills and receiverships filed against bankrupts, or stockholders' bills to settle the rights or control of the stockholders of bankrupt corporations.

3. Bankruptcy ⇨20(2)—Rights of receiver appointed by state court are superior to the rights of receiver in bankruptcy where proceedings in state court were begun first.

Although the receiver in bankruptcy holds possession of property, where the proceedings for a receiver in state court were commenced before bankruptcy proceedings, the rights of the receiver appointed by the state court are superior to those of the receiver in bankruptcy.

4. Bankruptcy ⇨20(2)—Rule of comity applies to case made by original bill in state court, but not as to amendment making substantially new case after bankruptcy proceeding.

As between a court of bankruptcy and a state court, the rule of comity based on the priority of proceedings in the state court does not extend to amendments in the state court after commencement of bankruptcy proceedings, if the amendment substantially changes the case.

In Bankruptcy. In the matter of the Couch Cotton Mills Company, bankrupt. Application of temporary receiver of state court for direction from the bankruptcy court to its receiver to surrender certain assets. Denied, with directions.

Spalding, McDougald & Sibley, of Atlanta, Ga., for intervener Penfield.

H. H. Turner, of Atlanta, Ga., for bankrupt.

Brandon & Hynds and A. S. Grove, all of Atlanta, Ga., for intervening creditors.

SIBLEY, District Judge. The Couch Cotton Mills Company was organized about June 1, 1920, to effect a consolidation of several manufacturing companies, including the Beaver Cotton Mills. The stock of the latter was exchanged for stock of the former with the exception of a single stockholder, Penfield. The Couch Company took a deed to the assets and assumed the operation of the Beaver mill. In November, 1920, Penfield, as a stockholder, in behalf of himself and other stockholders, filed a bill in Fulton superior court seeking a rescission for fraud of the merger, asking for recovery in damages as for a conversion of the assets of the Beaver Company, and praying injunction and a receiver for both companies. A restraining order was

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

granted against altering the status and a hearing set for January 8, 1921. The Couch Company, knowing of Penfield's dissatisfaction but in ignorance of his bill, ordered a rescission of the merger and an audit of the accounts on condition that the Beaver Company should assume the loss and operation of its mill since June 1st, and its proportion of the overhead expenses of the Couch Company during that time. Beaver Company held no stockholders' meeting to act on the proposal, and the restraining order then served prevented any further action by Couch Company. No hearing was had January 8th. On May 14, 1921, involuntary bankruptcy proceedings were begun against Couch Company and a receiver appointed with authority to continue operations of the factories for a limited time and purpose. He took charge of the Beaver mill and operated it for a few days. On May 17, 1921, Penfield amended his bill in the state court, asserting rights as a creditor of the Beaver Mills, and a temporary receiver was appointed ex parte for the assets of the Beaver Company. By authority of the state court, this temporary receiver is asking that the court of bankruptcy direct its receiver not to interfere with the possession and control of the Beaver mill by the state court receiver. A hearing on the question of permanent receiver is set before the state court for an early date.

[1] 1. The receiver of this court was first appointed and first in possession, having charge of the mill when the state court receiver was appointed; but neither fact is material. Courts of concurrent jurisdiction will not enter into a race with one another to appoint receivers nor permit their officers to scramble for first possession of assets as a basis of right. They will rather as a rule of comity look to the priority in the time of filing of the proceedings which invoke the jurisdiction in aid of which possession of the assets is sought.

[2] 2. But as between a court of bankruptcy, whose authority is derived from the Constitution of the United States, and other courts of equity, this priority is not conclusive, for in many matters the bankruptcy jurisdiction supersedes and excludes the ordinary jurisdiction. This is true of all proceedings to perfect or enforce liens or titles which are invalidated by the bankruptcy (*In re Brinn* [D. C.] 262 Fed. 527); of creditors' bills and receiverships filed against the bankrupt (*In re Grafton Gas & Elec. Light Co.* [D. C.] 253 Fed. 668); of stockholders' bills to settle the rights or the control of the stockholders of a bankrupt corporation (*Bank of Andrews v. Gudger*, 212 Fed. 49, 128 C. C. A. 505). But these instances may be laid aside here because the receiver of the state court is not a receiver for the bankrupt estate or for the creditors or stockholders of the bankrupt, but represents wholly adverse interests.

[3] 3. The bankrupt corporation was actually in possession of the property in dispute at the time of the bankruptcy, and this possession ordinarily entitles the bankruptcy court to take and protect its possession summarily, drawing to it all controversies over title and liens. The rule would apply here as against any proceedings filed subsequently to the bankruptcy petition, but does not solve the question of comity involved as to this bill filed previously. As to this bill the possession of

the bankrupt must be held to have been subject to its potentialities. Indeed, the possession seems to have been continued because the restraining order of the bill prevented any other disposition. The property was in gremio legis though in the bankrupt's possession, and the possession taken by the receiver of the bankruptcy court was subject to the same qualification. The rights under the rule of comity of a receiver appointed under this bill would relate to the time of its filing.

[4] 4. But it is not apparent that this temporary receiver was appointed on the case made by the original bill. The unexplained delay to act on it until after the bankruptcy indicated an abandonment of it, perhaps in view of the action of Couch Company authorizing rescission of the merger. There may be doubt whether the original bill set forth a cause of action that would justify the appointment of a receiver. He was appointed only after an amendment allowed ex parte setting up a substantially different cause of action. While this court should respect the priority of proceedings in the state court as to the original bill, the rule of comity would operate otherwise if the litigant in the state court should, after bankruptcy, seek to pervert the original bill to other and different uses, making a substantially new litigation.

5. Since the temporary receiver is not to administer but only to preserve, a function that can be continued by the bankruptcy receiver, and since a hearing is imminent in the state court, it is thought best not to change the custody of the estate pending that hearing. Leave is given by this court to its receiver to appear specially in the case in the state court and contest the appointment of a permanent receiver, if he is so advised, either because no sufficient case is shown on the face of the original bill, or because on the merits there is no case, or because in the discretion of that court under all the circumstances a receiver should not be appointed. These, of course, are all questions for the judgment of the state court. The receiver of this court will report here the conclusions of the state court when final instructions as to the disposition of the Beaver Mill now in the hands of the receiver here will be given.

In re BEAVER COTTON MILLS.

(District Court, N. D. Georgia, N. D. July 27, 1921.)

No. 7310.

1. **Bankruptcy** ⚡49—Minority stockholder held entitled to intervene in voluntary bankruptcy proceedings started by directors of corporation.

Although collateral inquiry by stockholders as to the action of directors of corporation in bringing litigation will not usually be permitted, a stockholder may present objections to voluntary bankruptcy proceedings.

2. **Bankruptcy** ⚡43—Appointment of a receiver for corporation by state court does not deprive directors of power to file voluntary bankruptcy proceedings.

Since directors of a corporation have general control and, among other powers, the right to put the affairs of the corporation into voluntary bankruptcy, the appointment of a receiver by a state court, since it does not

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

destroy the corporation or deprive the directors of their power, does not deprive the directors of the right to file a voluntary petition in bankruptcy.

3. Bankruptcy ⇔43—Voluntary petition in bankruptcy by corporate directors held not fraudulent.

Where the indebtedness of a corporation exceeded the value of its assets and it was no longer a going concern and owed debts which it was unable to pay in full, *held*, that filing a voluntary petition in bankruptcy by the directors was not fraudulent.

4. Bankruptcy ⇔20 (2)—Receiver in bankruptcy has a right superior to receiver appointed by state court.

Where receiver of the assets of corporation was appointed by state court on stockholders' bill, a receiver in bankruptcy of the same corporation has rights to the property superior to those of the receiver appointed by the state court.

In Bankruptcy. In the matter of the Beaver Cotton Mills, bankrupt. Application of A. H. Penfield, minority stockholder, to annul adjudication of the Beaver Cotton Mills as a voluntary bankrupt. Application denied.

Spalding, McDougald & Sibley and Little, Powell, Smith & Goldstein, all of Atlanta, Ga., for intervener.

H. H. Turner, of Atlanta, Ga., for bankrupt.

Dorsey, Brewster, Howell & Heyman, Hugh Howell, Brandon & Hynds, and A. S. Grove, all of Atlanta, Ga., for intervening creditors.

SIBLEY, District Judge. A. H. Penfield, a minority stockholder, seeks to annul an adjudication of Beaver Cotton Mills as a voluntary bankrupt because (1) the directors were without authority at the time of filing the petition, and (2) because the petition was in fraud of his stockholders' bill then pending in the state court.

The facts in outline are these: On April 19, 1920, the stockholders of the Beaver Mills, including Penfield, unanimously voted to unite with two other mills in the organization of a new corporation to be called Couch Cotton Mills, Inc., to which they would sell their respective plants and assets for stock in the new corporation, which would assume their several liabilities. About June 1st, the new corporation was organized. Beaver Mills made a deed to its plant and an assignment of all its assets and received the stipulated stock. The Couch Company took possession of the assets, operated the plant, assumed the debts, amounting to some \$114,000, and paid many of them, as was also true as to the other merging mills. In October, 1920, Penfield demanded of the directors of Beaver Mills, who were also directors of the new company and majority stockholders in both, that the property of the Beaver Mills be restored to it on account of misrepresentation of the condition of the other merging companies and of the failure on the part of one of them to clear its property of liens as agreed. The Couch Company passed a resolution offering to do this if Beaver Mills would repay what had been paid to its creditors and assume the loss in operation of its mill since June 1st and its proportion of the overhead expenses of Couch Company during that time. Beaver Mills took no action on the proposal, and Penfield, on December 20, 1920, filed in a

state court his bill in behalf of himself as a stockholder and all other stockholders similarly situated, and, averring the invalidity of the transfer of the Beaver Mills assets to Couch Company because of the fraud and failure of consideration mentioned above, and that the Couch Company and the directors had wasted and converted the assets and mixed them inextricably with those of the Couch Company, he prayed an accounting and a judgment in favor of Beaver Mills against the Couch Company and the directors for the value of the assets so converted and a special lien on such as remained to secure the judgment, and prayed for a receiver for the assets of both the Beaver and Couch Companies to preserve them to meet the judgment. An order was obtained setting a hearing as to the receiver for January 8, 1921, and an injunction issued against the defendants prohibiting them from "in any wise changing the status of the properties of Beaver Cotton Mills." The hearing was not had as appointed.

On May 14, 1921, a petition in involuntary bankruptcy was filed against Couch Cotton Mills, Inc., and a receiver appointed to take charge of all the property in its possession, including that coming from the Beaver Company. On May 17th, Penfield amended his bill in the state court, alleging rights as a creditor and otherwise altering his case and his prayers, which were made to cover a liquidation of Beaver Company and a distribution to its creditors and stockholders. A temporary receiver was appointed and a new hearing set for May 28th, as to making the receivership permanent. The temporary receiver applied to this court in effect for the surrender to him by the receiver for Couch Company of the Beaver Mills properties. This was declined pending the hearing for permanent receiver. On June 8th, the directors, being also the majority stockholders, passed a resolution authorizing voluntary bankruptcy of the Beaver Mills. On June 8th the state court made its receiver permanent "under the rights asserted in the original bill in this case," and on the same day the voluntary petition in bankruptcy was filed and an adjudication had. Besides the intervention of Penfield seeking to annul the adjudication, an intervention by numerous creditors of the Couch Cotton Mills, Inc., who became such between June 1st and December 20th, has been allowed, who allege special rights in the controversy, and seek to uphold the adjudication and pray that the property be retained in the hands of the receiver of this court for marshaling and administration.

[1] 1. A motion is made to dismiss the intervention of Penfield on the broad ground that a stockholder, and especially a minority stockholder, has no standing to object to a voluntary bankruptcy by his corporation. Where directors bring litigation of the corporation before the court, collateral inquiry will ordinarily not be made into the propriety of their action at the instance of stockholders. Their remedy, if any, is in a direct proceeding against the directors in a court of original jurisdiction. *Railway Co. v. Alling*, 99 U. S. 463, 472, 25 L. Ed. 438. A voluntary bankruptcy, however, presents a special situation, for it involves an abandonment of the corporate enterprise, a thing about which all stockholders ought to have a hearing somewhere, especially

if the corporation be not insolvent. A proceeding by them in any other court would not be a satisfactory remedy because it would involve the enjoining of the proceeding in bankruptcy, which would seem inadmissible and also impracticable, as the directors lose control of the bankruptcy proceeding so soon as they file it. The bankruptcy court, as a court of equity, has power, and should in a proper case exercise it, of inquiring into the propriety of the voluntary bankruptcy. Illustrative cases are *In re Associated Oil Co.* (D. C.) 271 Fed. 788; *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 244 Fed. 719, 157 C. C. A. 167. In each of these cases the corporation was solvent. The assets had been taken from the directors' control by a receiver in the state court, and the only substantial indebtedness was controlled by the directors who could, through it, control the bankruptcy administration. The case alleged in the intervention here is similar to these and is such as to entitle it to a hearing. The motion to dismiss is overruled.

[2] 2. The contention of intervener that the appointment by the state court of a receiver between the time of the passage, on June 8th, of the resolution authorizing the bankruptcy and the actual filing of the petition on June 28th, deprived the directors of power to file it, is not sustainable. The directors of a Georgia corporation have general control of it and exercise its ordinary corporate powers. *Wood Mining Co. v. King*, 45 Ga. 34. They must be considered as having power to place the company's affairs in voluntary bankruptcy. *In re United Grocery Co.* (D. C.) 239 Fed. 1016; *In re De Camp Glass Casket Co.* (C. C. A.) 272 Fed. 558. The appointment of a receiver for the preservation of certain assets pending a suit about them did not destroy the corporation nor deprive the directors of their powers, except that they could not interfere with the receiver's control of the property committed to him. The injunction prohibiting them from "in any wise changing the status of the properties of the Beaver Cotton Mills" disabled them to themselves dispose of the assets, as did the charter in the case of the Glass Casket Co., *supra*, but would hardly be construed as prohibiting an invocation of the bankruptcy jurisdiction in a proper case, any more than as prohibiting an appeal from the order placing the property in the receiver's hands. Both would be but orderly court procedure which were hardly intended to be prohibited and which, indeed, could probably not lawfully be prohibited, though each, if successful, would defeat the receivership. While the directors were complained against, there was no prayer to oust them. Had there been such, they would nevertheless have remained corporate officers and could act as such, except as restrained by the injunction, up to the very moment of final judgment of ouster. *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707. The receivership was granted expressly under the rights asserted in the original bill where the relief sought was a money judgment in favor of the corporation and not a dissolution nor a general receivership for its corporate affairs. And a general receivership applied for or granted does not ordinarily block a bankruptcy. That there should be uniform laws respecting bankruptcies was deemed of such importance as to be made the subject of

special provision in the federal Constitution. The laws of Congress made in pursuance of it are paramount not only by the provision of that Constitution but by the Constitution of Georgia also. Georgia Constitution, art. 12, § 1, par. 1. It will not be doubted that the creditor's right to an administration under the Bankruptcy Law in the federal court (Comp. St. §§ 9585-9656) cannot be defeated by state court receiverships, whether partial or complete, preservative or for final administration. *In re Adams & Hoyt Co.* (D. C.) 164 Fed. 489; *Bank of Andrews v. Gudger*, 212 Fed. 49, 128 C. C. A. 505. Voluntary bankruptcies in which insolvency is not a prerequisite and where creditors' rights are not so prominent are within the scope of the constitutional provision. *Hanover Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. A bankrupt has there a valuable federal right to a discharge, after surrendering all of his property, or the right to effect a composition with creditors by the judgment of a majority in number and amount overruling an unreasonable minority. A state receivership, though four months old, has been held not to preclude the voluntary bankruptcy of a corporation. *In re Grafton Gas & Electric Light Co.* (D. C.) 253 Fed. 668. Neither the injunction granted nor the appointment of a receiver in itself prevented this action of the directors.

[3] 3. Nor does the evidence show such fraud on the stockholders or on the jurisdiction of either court as to make the petition improper to be entertained. The reasons for the bankruptcy plainly avowed in the resolution of June 8th are that "the affairs of this company are in a chaotic condition and a petition for a receiver is pending in the state court, and there is a question as to whether or not this corporation has merged into Couch Cotton Mills, Inc., and whether or not it has ever separated after having been merged, and the corporation, if separated, cannot make headway financially against debts which it owes"; and the purpose avowed is "that its assets may be properly administered and the corporation relieved from pending suits." The purpose to transfer the litigation and administration from the state to the bankruptcy court, we have seen, is but the exercise of a right and is not in itself a fraud. *In re Dressler Producing Corp.* (C. C. A.) 262 Fed. 257. Insolvency is not requisite to voluntary bankruptcy and is not claimed in the resolution. But there ought, especially in the case of a corporation whose bankruptcy has not been formally authorized by the stockholders, to be "debts which it is unable to pay in full" in the language of the prescribed form for the petition. Forms in Bankruptcy No. 1 (89 Fed. xv. 32 C. C. A. xxxix). If, contrary to the contention of Penfield, the merger was effectual, the Beaver Mills owes undisputedly \$3,000 and \$500 to two attorneys, and \$1,800 is claimed by Penfield to be due him, and it has nothing to pay with and is insolvent. If, as contended by Penfield, there should be a rescission, the situation is much complicated. Besides the debts just mentioned, such of those assumed by Couch Company for Beaver Mills as have not been paid or novated are still enforceable against Beaver Mills, and such as have been paid or novated are due and owing to Couch Company, subject to such offsets as may exist. The Couch Company claims a balance of \$160,000. Penfield, in

this trial, admitted that it would amount to probably \$50,000. The plant alone would remain as a substantial asset. Its present value, the evidence indicates, is not exceeding \$125,000. The company might or might not be insolvent, according as its account with Couch Company resulted; but in any case it is evidently no longer a going concern and "owes debts which it is unable to pay in full," except by a sale of its plant. This, indeed, is admitted and set up by Penfield in the amendment to his bill. In addition to this, between June 1st and December 20th, the Couch Company, while in possession of the Beaver Mills assets, and on the faith of them, contracted new debts amounting to some \$500,000. As to these creditors the contract of Beaver Mills was in the nature of a subscription to the stock of the Couch Company, and if the frauds and failure of consideration claimed by Penfield be established, nevertheless the right of these creditors are probably superior to those of the Beaver Mills in its assets. *Empire Life Insurance Co. v. Brown*, 145 Ga. 818, 89 S. E. 1085. These rights would either operate to defeat a rescission or would follow the assets into the hands of Beaver Mills as an equitable lien for such balance as was not realized from other assets of Couch Company. In this event the balance would be the equivalent of a further indebtedness of Beaver Mills. The facts proven support the recitals of the resolution and show the propriety of a bankruptcy for the corporation. Nor will the effect in this case be to screen the directors from any liability they may be under. If Penfield has any personal right against them he may prosecute it independently. Any claim the corporation may have will pass to its trustee in bankruptcy. Since Couch Cotton Mills, Inc., is really not the sole creditor, and possibly not the majority creditor, it could not control the administration and shield directors who are also its directors. And being itself bankrupt, its creditors and not its directors will control its claim against Beaver Mills. There is no reason to suppose that all claims will not be duly enforced. The bankruptcy, therefore, does not appear to be fraudulent in fact.

[4] 4. The adjudication in bankruptcy of Beaver Mills being sustained, the question remains of the disposition of the disputed assets. They are now in the hands of the receiver in bankruptcy of Couch Cotton Mills, Inc. On a prior hearing, when Beaver Cotton Mills was not in bankruptcy and the question was one between the receiver of Couch Company in this court and of Beaver Mills in the state court, the bill in the state court was stated by counsel to be and was treated by this court as being one in substance to determine an adverse claim of title to property. As to such a question between a bankrupt estate and the Beaver Mills it was thought the courts were of concurrent jurisdiction, and the state court was held to have priority because of the prior appeal to its jurisdiction on the original bill. Now the question is between the bankruptcy jurisdiction of this court over the property of Beaver Mills and that of the state court on a stockholder's bill. The opposing jurisdictions are no longer concurrent. The paramount character of the bankruptcy jurisdiction and the necessity for having possession of all the bankrupt's assets result in their surrender when

they are actually in the hands of the state court, on orderly procedure therefor (In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933), unless, indeed, the state court is enforcing some lien not invalidated by the bankruptcy (In re Brinn [D. C.] 262 Fed. 527 and cases cited). But here the property is not and has not been in the possession of the state receiver, and the relief sought in the stockholders' original bill, being only an accounting and a money judgment in favor of the corporation with a claimed lien to secure it, is wholly foreign to that sought in the bankruptcy. In such a case this court, aside from the paramount character of bankruptcy proceedings, would not disable itself to proceed by surrendering possession of the res. *Empire Trust Co. v. Brooks*, 232 Fed. 641; 146 C. C. A. 567, followed in *Ward v. Foulkrod* (C. C. A.) 264 Fed. 627. Remembering the exclusive character of the bankruptcy jurisdiction, like that in admiralty, the dissent of Judge Walker in the *Empire Trust Co.* Case would become a concurrence here. No necessity is perceived to appoint a receiver in this case pending the election of a trustee for Beaver Cotton Mills, but the present receiver of this court in possession of the disputed assets will be directed to retain them until the further order of this court.

LAEMMLE v. EISNER, Ex-Collector of Internal Revenue.

(District Court, S. D. New York. August 9, 1920.)

No. 20-103.

Internal revenue ⇨7—Attorney's fees paid in litigation for control of stock not a "necessary expense in carrying on business."

Attorney's fees paid in litigation for control of certain stock, resulting in practically the ownership or control thereof and the consequent management of the company, *held* to have constituted a capital investment, and not a "necessary expense actually paid in carrying on any individual business," deductible from income derived from such business.

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

Action by Carl Laemmle against Mark Eisner, ex-Collector of Internal Revenue, etc. Verdict directed for defendant, and against plaintiff.

At the close of the plaintiff's case, defendant, without submitting any evidence, moved for the direction of a verdict in his favor. The facts disclosed by the evidence introduced in behalf of the plaintiff are substantially as follows:

The Universal Film Manufacturing Company was organized in 1912 with a capital stock of \$2,000,000, consisting of 10,000 shares of preferred stock and 10,000 shares of common stock, of the par value of \$100 each. On May 5, 1913, the plaintiff, in conjunction with a man named Swanson and others, controlled a majority of the stock of the company under a voting trust agreement, and the plaintiff was president of the company. On the above date one David Horsley was the owner of 1,250 shares of the preferred stock and 1,540 shares of the common stock of the Universal Film Manufacturing Company. On that day Horsley entered into an agreement with one Patrick Powers, a former stockholder of the company, who at that time had apparently disposed of all

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

his stock, whereby Powers for good and valuable consideration was given an option to purchase the stock held by Horsley for the sum of \$167,400, to be paid \$57,400 in cash and \$110,000 in notes. The stock was deposited in escrow with the Bank of the Metropolis, and the option was to extend for a period of 30 days, and thereafter for three periods of 30 days each, provided it was not terminated by 10 days' notice in writing prior to the expiration of any one of these periods. No such notice was given prior to the happening of the events hereinafter set forth.

On the same day—May 5, 1913—a collateral agreement was executed between Horsley and Powers, wherein and whereby it was agreed that, if Powers purchased the Horsley stock for 60 per cent. of its par value, he should receive a brokerage fee of \$5 a share, and furthermore that Powers should not exercise the option unless Laemmle, the plaintiff, refused to sell to Powers the stock held by him in the company. On June 7, 1913, while the option agreement was still apparently in effect, but before any formal exercise of the option on the part of Powers, the 1,250 shares of preferred stock deposited by Horsley under the agreement with the Bank of the Metropolis were transferred to the name of Powers on the books of the company. This transfer was made by Swanson, the vice president and secretary of the company, and Burton Garrett, the assistant secretary, apparently acting in collusion with Powers.

About this time, also, according to the testimony of the plaintiff, Swanson, in violation of his voting trust agreement, transferred his own stock to Powers, thereby depriving the plaintiff and his group of the control of the company. Instead of taking legal steps to restrain and remedy what the plaintiff characterizes as criminal action on the part of Swanson, plaintiff entered into negotiations with Horsley and induced him to sell him the stock covered by the option agreement with Powers for the sum of \$172,475, of which \$97,475 was to be paid in cash and \$75,000 in notes. In the agreement of sale between the plaintiff and Horsley the option agreement with Powers was expressly referred to, and the plaintiff agreed to defend Horsley against any suit by Powers for breach of this agreement, and to pay any judgment which the latter might recover. This transaction took place the 11th day of June, 1913, and, according to the admissions of the plaintiff and the documentary evidence introduced, was had with full knowledge of the prior agreement between Horsley and Powers. The plaintiff's contention on this point is that he was advised and believed that the prior option agreement was void.

On June 13, 1913, Powers formally exercised the option, and, being unable to secure the stock, on July 24, 1913, brought suit against the plaintiff and the Universal Film Manufacturing Company to have himself declared the owner of the Horsley stock. The plaintiff, Laemmle, appeared by one George N. Sage; but, according to his testimony, the litigation was conducted mainly by Stanchfield & Levy. An answer was interposed in his behalf, and subsequently an amended complaint filed, to which Laemmle demurred. No trial was ever had, and subsequently, on December 30, 1914, a settlement was reached between Powers and Laemmle, whereby the Horsley stock was divided between them, and Laemmle retained control of the company and remained its president. The action was discontinued on January 15, 1915.

In the course of this litigation plaintiff, during the year 1914, paid to his attorneys, Stanchfield & Levy, the sum of \$7,500 for their services therein. During the year 1915, plaintiff paid to these attorneys the sum of \$51,700, likewise for their services in this action. These sums represent no services performed in any other action, and were paid solely for the defense and settlement of the action brought by Powers over the Horsley stock.

In making return of his income for the purposes of taxation for the years 1914 and 1915, plaintiff attempted to include the sums so paid as deductions from his gross income, under the heading: "The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any individual business." After an audit of his returns by the internal revenue officials, these amounts were disallowed as deductions and additional taxes for these years assessed. After assessment of these additional taxes, plaintiff filed claims for abatement, which were rejected by the Commissioner of Internal Revenue. After such rejection the amount of the additional taxes, with interest and penalties, were paid by plaintiff, though not

under protest, and claims for refund filed. These claims were subsequently rejected by the Commissioner of Internal Revenue, and this action was brought to recover the amount of the additional taxes so assessed and collected.

Stanchfield & Levy and J. Morgan Sheen, all of New York City, for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City (Richard S. Holmes, Asst. U. S. Atty., of New York City, of counsel), for defendant.

SHEPPARD, District Judge. After a full consideration of the facts of this case, I am constrained to the view that the sum of attorney's fees paid in the litigation for the mastery of the Horsley stock, resulting in practically the ownership or control thereof and the consequent management of the company, under the facts and circumstances disclosed by the record, constituted a capital investment, and not a "necessary expense actually paid in carrying on the business," deductible from income derived from such business. Therefore a verdict will be directed in favor of the defendant, and against the plaintiff.

Counsel will prepare form of judgment desired.

UNITED STATES v. ARMSTRONG.

(District Court, S. D. Florida. July 21, 1921.)

No. 1350.

Intoxicating liquors ⇨248, 249—**Search warrant and affidavit changed to apply to different premises held invalid.**

A search warrant for certain described premises, but which was afterward changed as to date, location of premises, and name of owner to apply to the private dwelling of petitioner, *held* invalid; the affidavit, also changed, but not resworn to, containing no charge that the premises were being used for the unlawful sale of liquor as required by National Prohibition Act, tit. 2, § 25, is not a predicate for the issuance of a search warrant for a private dwelling.

Criminal prosecution by the United States against D. R. Armstrong. On petition by defendant for return of property unlawfully seized. Petition granted.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and Damon G. Yerkes, Asst. U. S. Atty., of Jacksonville, Fla., for plaintiff.

Cockrell & Cockrell, of Jacksonville, Fla., for petitioner.

CALL, District Judge. A petition was filed in this cause, setting up that a prohibition officer unlawfully entered the private dwelling house of petitioner and seized therefrom certain liquors therein enumerated, and praying a return of such property; that such prohibition agent claimed to have acted upon a search warrant issued by a United States commissioner, but that said warrant was void: (1) Because said search warrant had been long prior thereto issued to search other and different

premises, and was changed by the prohibition agent to relate to petitioner's dwelling, without the consent or knowledge of the commissioner; (2) because said search warrant was void on its face and issued contrary to the Fourth Amendment to the Constitution of the United States.

Affidavits were submitted by the government and petitioner, and the matter submitted upon the petition and such affidavits. From these sources the facts may be epitomized as follows:

In May, 1921, an affidavit was made and a search warrant issued to search premises in Broward county. In June this warrant and affidavit were so changed as to date, name of owner of premises, and location of same as to make it apply to the petitioner and his dwelling house in Dade county.

There is a sharp conflict between the commissioner and the prohibition agent as to the knowledge of the commissioner of these changes. But this conflict becomes of little moment in the consideration of the question here involved, because it is nowhere claimed by the prohibition agent that he reswore to the affidavit after the changes.

The affidavit, as changed, alleges that L. C. Devlin "has good reason to believe, and does verily believe, that a fraud upon the revenue of the United States has been and is being committed by the use of a certain house and room for unlawful possession of intoxicating liquors, at 65 S. E. 2d street," in Miami, the property of D. R. Armstrong. Clearly the affidavit was made with the provisions of section 3462, R. S. (Comp. St. § 6364), in view.

Section 2, title 2, of the Volstead Act (41 Stat. 305), makes section 1014, R. S. (Comp. St. § 1674), and the provisions of title 11 of the Act of June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 $\frac{1}{4}$ a-10496 $\frac{1}{4}$ v), applicable to the enforcement of the act. Section 1014, R. S., provides the method of procedure in the commencement of prosecutions, etc. Title 11 of the Act of June 15, 1917, provides who may issue search warrants, grounds for issuance, and then in sections 3, 4, 5, and 6 provides as follows:

Section 3: "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 4: "The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits to take their depositions in writing and cause them to be subscribed by the parties making them."

Section 5: "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 6: "If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

The statute then provides how the warrant shall be served and by whom, limiting the time within which it shall be returned to the judge or commissioner.

Section 25 of the Volstead Act provides that a search warrant may issue as provided in title 11 of the Act of 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. That section then proceeds:

"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 unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house."

Section 33 of the act makes it lawful to have in one's private dwelling for his personal use intoxicating liquors lawfully acquired.

I apprehend that it will not be seriously contended, in the light of the Act of June 15, 1917, and the many decisions of the courts, that a search warrant issued upon the information and belief of the affiant is valid for any purpose. As long ago as 1903, and before the passage of the act of 1917, Attorney General Knox called the attention of the Secretary of the Treasury to the fault in section 3462 allowing affidavits of revenue officers to be made on information and belief. I quote from the letter of June 19, 1903, 24 Opinions of Attorney General, 688:

"The section"—meaning section 3462, R. S.—"does not state all that must be stated in the application therefor. The Fourth Amendment to the Constitution provides that 'no warrant shall issue, but upon probable cause, supported on oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.' The determination of the question whether this requirement and those of the section referred to have been met, and whether the warrant should issue in a particular case, is a highly responsible and important duty."

In *Ripper v. United States*, 178 Fed. 24, 101 C. C. A. 152, Circuit Judge Hook, delivering the opinion of the court, ably discussed such an affidavit as the officer produced in this case and shows its clear and unmistakable violation of the rights guaranteed to the citizen by the Fourth Amendment. And this ruling has been followed by many District Courts since. Among them I refer to *United States v. Kelih* (D. C.) 272 Fed. 484, and *United States v. Borkowski* (D. C.) 268 Fed. 408. There are many others sustaining this doctrine, and I have not had my attention called to any holding the contrary.

In the instant case there is not even an affidavit with this defect; for, as remarked before, the officer nowhere in his affidavit filed on this hearing contends that he swore to the changed affidavit after it was changed, and this would have been necessary, even though the commissioner had given his consent to the change.

I might with propriety have stopped when that fact was apparent, but the matter is so important to the economical administration of the National Prohibition Act that I deem it my duty to go fully into the matter. For that reason I have quoted the portions of title 11 of the Act of June 15, 1917, and also the portion of section 25 of the Vol-

stead Act referring specifically to private dwellings, for the guidance of United States commissioners in this district, and particularly impress these regulations upon them.

The Congress left no doubt in the mind of one reading the act that, when a search warrant was applied for to search a private dwelling, something more must be stated than for a store or other place of business. A man's private dwelling, being his castle, should not be invaded, except and unless it was being used for the unlawful sale of intoxicating liquor, or unless it was being partly used for one or more of the businesses mentioned in the quotation above; and these facts must appear in the affidavit, or such facts be therein contained as will raise in the mind of the officer issuing the warrant a reasonable ground to believe such fact exists.

It is apparent in this case that the search and seizure of the liquor from petitioner's private dwelling was illegal, and under the law there is nothing to do but grant his petition. It will be so ordered.

CONNELLY v. UNITED STATES.

(District Court, N. D. New York. August 4, 1921.)

Criminal law ⇨395—Intoxicating liquors ⇨249, 255—Liquor cannot be seized without warrant, and where unlawfully seized is not admissible in evidence and must be returned to owner.

The fact that prohibition agents had evidence of the sale of intoxicating liquors in a private dwelling did not legalize their search of the dwelling without first obtaining a search warrant as required by National Prohibition Act, tit. 2, § 25, and liquor unlawfully seized therein is not admissible in evidence in a prosecution against the owner, and will be ordered returned on motion.

Criminal prosecution by the United States against Sarah Connelly. On petition of defendant for return of liquors. Granted. .

Richard P. Byrne, of Syracuse, N. Y., for petitioner.

Clarence E. Williams, U. S. Atty., of Utica, N. Y.

COOPER, District Judge. Petition is made for the return of certain intoxicating liquors taken from the possession of the petitioner, Sarah Connelly, at Syracuse, N. Y., by two prohibition enforcement agents.

The premises from which the liquors were taken was a private dwelling house occupied by the petitioner. The agents went into this house of the petitioner without a search warrant and seized these liquors, of which there was a large quantity. The contention of the agents is that they observed one Cameron coming out of the petitioner's house, and upon questioning and searching him they were informed that the petitioner had sold him some liquor. The agents had been secreted across the street from the petitioner's house and had seen Cameron enter and shortly thereafter leave the petitioner's house.

After searching Cameron and finding the liquor on his person, they went into the petitioner's house and seized the liquors in question.

Manifestly it was in utter disregard of the constitutional rights of the petitioner to enter her private dwelling house without a search warrant and seize these liquors.

The Fourth Amendment reads:

"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 warrant 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."

That part of the Fifth Amendment essential to this controversy is as follows:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

Under section 25 of the National Prohibition Enforcement Act, it is provided that no search warrant shall issue to search any private dwelling occupied exclusively as such unless an unlawful sale has been made therein, in which case there would be the probable cause required by the Constitution for the issuance of a search warrant by a duly authorized officer empowered to issue the same. Had the agents in this case laid whatever information they were able to secure from Cameron before such officer, and secured the warrant, they would have performed their work as it should have been performed. Violations, if any, could then properly be checked. Under the circumstances as they now exist, it is unfortunate that evidence illegally seized cannot be used to secure the conviction for wrongdoing, if wrongdoing there was.

The provisions of the Fourth and Fifth Amendments were adopted with the thought uppermost that they would safeguard the rights and liberties of the people against the encroachment of unlawful or arbitrary power. They are now too firmly entrenched in our system of jurisprudence to require any justification for their existence.

In *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, it was held that the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for crime, penalty, or forfeiture, is equally within the prohibition of the Fifth Amendment.

In *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, which followed and extended the doctrine laid down in the *Boyd Case*, it appeared that the United States marshal without a search warrant entered the private dwelling of the defendant and seized the papers which incriminated him. It was there held that he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government and under color of his office, but that he undertook to make a seizure of private papers in direct violation of the constitutional provisions against such action, and their restoration was compelled.

More recent cases upon this subject are: *Silverthorne Lumber Co.*

v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, holding that the rights of a corporation against unlawful searches and seizures are to be protected, even if the same results might have been achieved in a lawful way; *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. —, delivered February 28, 1921, holding that the Fourth and Fifth Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly over-zealous, executive officers, that papers so secured cannot be used, and that it makes no difference whether they have pecuniary value or not.

The contention of the government is that, although the seizure may be unlawful, yet intoxicating liquors are contraband, and under no circumstances should they be returned, even though it is impossible to use them as evidence against the accused. The mere possession of intoxicating liquors in a private dwelling house, if acquired before the date when the Volstead Act took effect, is not unlawful. *National Prohibition Enforcement Act*, § 33; *Street v. Lincoln Safe Deposit Co.*, 255 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. —. There is nothing to indicate when the liquor was acquired, and, as was stated in the *Street Case* by Mr. Justice Clarke:

"An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for their operation in effecting a purpose clearly indicated and declared."

If the seized property could not possibly be lawfully in the possession of the accused, such as an illicit still (*United States v. Rykowski* [D. C.] 267 Fed. 866), stolen goods, smuggled goods, implements of crime (*Haywood v. United States* [C. C. A.] 268 Fed. 795, 803), and the like, then resistance to a motion to impound would be of little avail. However, the government cannot call upon the accused to explain the possession under the provisions of section 33 of the Volstead Act under the circumstances of this case, and, as the possession may be upon an hypothesis just as consistent with innocence as it would be with guilt, a forfeiture should not result. The property unlawfully taken from the possession of the petitioner without a search warrant must be restored.

The motion for restoration is granted, and the counter motion to impound is denied. An order may be entered accordingly.

In re BAKER.

(District Court, S. D. New York. September 6, 1920.)

Bankruptcy ⇨404(2)—**Bankrupt may be discharged from debts not scheduled in prior proceeding.**

On a new voluntary petition, filed more than six years after his discharge in prior proceedings, a bankrupt may be discharged from all outstanding debts, including a debt existing when the first petition was filed, but not scheduled thereunder.

In Bankruptcy. In the matter of Charles S. Baker, bankrupt. On motion to vacate order allowing amendment of bankrupt's schedules. Motion denied.

Herbert G. McLear, of New York City, for appearing creditor.
George Bell, of New York City, for bankrupt.

MAYER, District Judge. On September 3, 1910, Baker was adjudged a bankrupt, and was discharged on October 2, 1911. No dividends were paid because of lack of assets. There was outstanding a promissory note for \$281.10, dated November 18, 1904. This debt was not scheduled through inadvertence. Some payments were made on account of this note. After the discharge, the creditor sued the bankrupt in a Municipal Court, and obtained judgment for \$145.70 on January 12, 1912. There is now due on the judgment \$90.70, with interest. The defense interposed by Baker in the Municipal Court action was that the creditor had actual knowledge of the bankruptcy proceeding, and therefore that the discharge operated to discharge the debt on the note; but Baker was unsuccessful. Baker has now filed a voluntary petition, more than six years since his discharge.

The only effect of failure to schedule is that an otherwise dischargeable debt is not discharged. Thereafter the creditor may pursue his remedies, unaffected by the discharge. When, however, more than six years later, a new petition is filed the bankrupt may schedule every outstanding debt, and he discharged in respect of a debt still existing, which had been omitted from the schedules of the first bankruptcy.

Failure to schedule and consequent failure to discharge a particular debt does not operate to adjudicate that the debt is not dischargeable. There is no *res adjudicata* doctrine, because nothing has been adjudicated so far as affects an unscheduled debt. If a discharge is refused, then, of course, that refusal is *res adjudicata*; but such is not this case. Cases cited by the attorney for the creditor are those where either (1) a discharge was previously refused, or (2) where a previous petition in bankruptcy is still pending. Of course, where there is a refusal to discharge, the adjudication necessarily is that for some reason justified by the statute the bankrupt cannot obtain discharge of any of his debts.

Where there is a previous proceeding pending, obviously the court will not entertain a second proceeding, so far, in any event, as affects debts existent at the time of filing the petition in the first proceeding. The case at bar, however, is different. Here the bankrupt did no act to bar his previous discharge, and the effect of failure to schedule was merely to let the debt remain alive. When, therefore, the bankrupt after six years seeks a discharge upon a new petition, the act contemplates that he may be discharged of any then existing debts.

On July 8, 1921, this court made an order allowing the bankrupt's schedules to be amended by adding this claim, and staying all proceedings upon execution, etc. The motion to vacate this order is denied.

ATWOOD et al. v. RHODE ISLAND HOSPITAL TRUST CO. et al.

(Circuit Court of Appeals, First Circuit. January 14, 1921. On Rehearing. October 14, 1921.)

No. 1479.

1. Wills ⇨267—Beneficiary having interest antagonistic to others necessary party to suit against trustee to avoid gift to trustee.

The interest of the trustee in a suit to have declared void a clause of a will adding to the principal of the trust theretofore created by testator is the same as the beneficiaries', except one whom testator attempted to strike out as a beneficiary under the trust, so that, the trustee being a defendant, the beneficiaries other than the one attempted to be stricken are not indispensable, though proper, parties; but such one must be made a party.

2. Courts ⇨343—Necessary defendant may be joined by amendment, if not ousting jurisdiction.

An indispensable defendant to a suit may be added by amendment, if her residence be such that she can be added as a party defendant without ousting the court of jurisdiction; otherwise, the suit must be dismissed.

On Rehearing.

3. Equity ⇨96—Presence of necessary party not indispensable for federal court proceeding as to the other parties with suit to avoid clause of will.

Under the rule that a federal court, without service or appearance of a person beyond the court's jurisdiction, ordinarily considered a necessary party to the litigation, may entertain jurisdiction and proceed with the cause, and enter a decree that will be binding on the parties before it, if the decree can be so framed as not to prejudice the rights of the absent party and do justice as between those before the court, it will do so in a suit to declare void a clause of a will adding to the principal of a trust; any interest of the absent party being an amount certain, which can be protected by the decree providing for retention of that amount by the executor, or for security being given to him.

4. Wills ⇨669—Devise to existing trust created by testator void, where under trust deed trustor could thereafter change disposition by trustee.

Clause of will, adding to the principal of trust theretofore created by testator by deed of trust, under which the trustee was to dispose of the property to such persons and in such proportions as the trustor had instructed or should thereafter instruct, is void, as attempting to prospectively create for testator power to dispose of his property by an instrument not duly executed as a will.

Bingham, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit by Kate Atwood and another against the Rhode Island Hospital Trust Company and others. From a decree dismissing the bill (264 Fed. 360), plaintiffs appeal. Reversed and remanded.

See, also, 255 Fed. 162.

Lyman K. Clark, of Boston, Mass. (Warren H. Atwood of Ayer, Mass., on the brief), for appellant Atwood.

Herbert Parsons and William E. Carnochan, both of New York City (William R. Harvey, of Newport, R. I., on the brief), for appellant Boal.

William R. Tillinghast, of Providence, R. I. (James C. Collins, Harold B. Tanner, and Tillinghast & Collins, all of Providence, R. I., on the brief), for appellee Rhode Island Hospital Trust Co.

Eugene A. Kingman, of Providence, R. I. (Kirk Smith and Edwards & Angell, all of Providence, R. I., on the brief), for appellee Metropolitan Museum of Art of the City of New York.

Herbert Barry, of New York City, and Frank G. Easton, of Providence, R. I., for appellees Andrews and another.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is a proceeding in equity, in which it is sought to have the residuary clause of the will of Theodore M. Davis declared inoperative and void. Kate Atwood, a resident of Massachusetts and a half sister of the testator, brings the suit in her individual capacity and as executrix of the estate of Gertrude Gallo-way, a sister of the testator. Theodore Davis Boal, a resident of Pennsylvania and executor of the will of Annie B. Davis, widow of the testator, is also a party plaintiff.

The bill originally was brought against the Rhode Island Hospital Trust Company, a Rhode Island corporation, as administrator with the will annexed and as trustee under a deed of trust made by Mr. Davis and bearing date August 14, 1911. Afterwards the Metropolitan Museum of Art, a New York corporation, Emma B. Andrews, a resident of Rhode Island, and Elizabeth A. Price, a resident of New York, intervened as defendants and by the direction of the court Annie Ghio, Margaret Lafarge, and Andrew Dwyer, all residents of Rhode Island and beneficiaries under the trust deed, were made defendants.

Mr. Davis resided at Newport, Rhode Island. August 14, 1911, he signed a trust agreement in which he made the Rhode Island Hospital Trust Company, trustee. August 16, 1911, he delivered the trust deed and securities of more than \$2,000,000 in value to the Trust Company, and August 17, 1911, the Trust Company signified in writing its acceptance of the property and agreed to carry out the trust.

Under the terms of the trust the trustee was to manage the property, and pay the net income to Mr. Davis during his life, and upon his decease convert a sufficient amount of it into cash and pay forthwith certain sums to designated beneficiaries. The remainder of the trust estate, not required for the payment of certain benefits and annuities, was to be held in trust to pay the net income to Mrs. Davis and Mrs. Andrews. Upon the decease of the survivor the trustee was directed to divide the principal of the remaining trust estate into equal parts, and to pay over said parts, free of all trusts, to certain persons designated in the deed of trust, comprising about 30 in all. In the deed Mr. Davis reserved the right at any time during his life to revoke "any or all of the trusts herein declared," and "add to, annul, change, or modify in any respect whatsoever any of the trusts or powers hereby created or conferred."

On the same day that he signed the trust deed, August 14, 1911, but subsequent to its execution, Mr. Davis executed his will, the ninth

or residuary clause of which is in question. October 4, 1911, he executed a codicil to his will in which, after making certain modifications, he confirmed his will except as therein modified. October 5, 1911, which was the day after the execution of the codicil, he added four beneficiaries to the trust, giving them sums varying from \$5,000 to \$15,000 and amounting in the aggregate to \$35,000. October 17, 1913, he made a further modification of the trust instrument by adding a new beneficiary, with a gift of \$5,000, and canceling the provision made in the original trust deed of \$3,000 to Amelia Burgnon. Neither of these modifications was executed as required by the statute of wills.

In the residuary clause of his will the testator provided as follows:

"Ninth: I give, devise and bequeath all the remainder of the property, real and personal, of which I die possessed or over which I have any power of disposition, including any of the foregoing gifts which shall fail for any reason, but excepting the remainder in my real estate in said Newport after the decease of my said wife and the said Emma B. Andrews, to my said executors, or any duly appointed administrator of my estate, in trust nevertheless, to convert the whole of said property into cash as soon as reasonably possible, with power to sell the same or any part or parts thereof at either private or public sale, and the net proceeds of such sale or sales to pay over to the said Rhode Island Hospital Trust Company to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate and property; and the receipt of said Trust Company shall be a full discharge to my said executors or administrators relieving them from all further liability or accountability in respect thereof. And I devise to the said Rhode Island Hospital Trust Company after the deaths of my said wife and the said Emma B. Andrews the estate in said Newport hereinbefore given to them for their lives, but in trust nevertheless for said Trust Company to convert said estates into cash as soon as reasonably possible after it becomes entitled to the possession of said estates, * * * and to add the net proceeds of any such sale or sales to the principal of the trust estate and property then held by it under the trusts theretofore created by me, and to divide and distribute said net proceeds to the same persons and in the same proportions as they are entitled to the principal of my said trust estate under the terms of said trusts. * * *"

In the court below it was held that the interest of the Rhode Island Hospital Trust Company in the litigation was identical and common with that of the beneficiaries under the trust deed, and that the same was true as to the Metropolitan Museum of Art, so far as it could be said to have any interest; that, this being so, neither the Metropolitan Museum of Art nor all the beneficiaries were indispensable parties; that the beneficiaries residing within the jurisdiction of the court were proper parties, and, as such, might be joined in accordance with rule 38 (198 Fed. xxix, 115 C. C. A. xxix) to defend for all the beneficiaries as a class.

We think this ruling was correct, except in the particular hereinafter considered.

[1, 2] It is urged that the ruling was erroneous, in that Amelia Burgnon, who was made one of the beneficiaries under the trust as originally constituted, and whose name, on October 17, 1913, was stricken from the list by Mr. Davis, is an indispensable party to the litigation; that her interest is not common with that of the Hospital Trust Company,

either as administrator or as trustee, nor with the interest of the other beneficiaries; that her interest is antagonistic to those of all the other parties and especially to the interests of the other beneficiaries, for if she is entitled to receive the \$3,000 which the trust deed gives her, the interests of the other beneficiaries will be to that extent lessened.

If the contention of the Hospital Trust Company in its capacity as trustee and administrator should be upheld, as it was upheld by the decision of the court below, Amelia Burgnon would be precluded from receiving her gift of \$3,000 because her rights would be determined by the trust instrument as a nontestamentary disposition of Mr. Davis' property.

On the other hand, if the will is construed as speaking from the date of the codicil, and the trust deed can be said to be sufficiently referred to in the residuary clause as an existing instrument, so as to be incorporated therein, it would seem that, inasmuch as the trust deed was in existence at the time the will was executed and confirmed by the codicil and Amelia Burgnon was named as beneficiary in the deed, she might be entitled to the \$3,000 given to her, as a testamentary disposition, the gift not having been revoked in the manner provided for revoking testamentary dispositions. If, however, the trust deed should not be found to be incorporated in the residuary clause of the will, then Amelia Burgnon would not be entitled to the gift of \$3,000 unless she could show that the trust deed, being executed with all the formalities required by the statute of wills of Rhode Island, constituted a component part of the will and as such entitled her to participate as a beneficiary, the gift to her not having been revoked as required by law.

As the interest of Amelia Burgnon is practically in every aspect antagonistic to the interests of the other parties to the litigation, we regard her as an indispensable party to the proceeding. The record does not show where she resides. If her residence is such that she may be added as a party defendant without ousting the court of jurisdiction, she may be made a party by amendment; otherwise, the proceeding must be dismissed.

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

On Rehearing.

ANDERSON, Circuit Judge. Since our opinion in this case was handed down, on January 14, 1921, a rehearing has been had upon the question whether, in the absence of Amelia Burgnon, a decree may be so framed as to do justice between the parties now before the court without injuriously affecting her rights. This question was not presented at the previous hearing. It has now been called to our attention that the record discloses that Amelia Burgnon is not a resident of Rhode Island and is without the jurisdiction of the court, and it is conceded that she is probably now residing in France.

If Amelia Burgnon could be regarded as a member of a class and be said to be sufficiently represented by the trustee and the other beneficiaries, who were made parties to the suit as to the question whether

Mr. Davis died testate or intestate as to the residue of his estate, then there would seem to be no question as to the jurisdiction of the court to proceed to judgment and enter a decree that would be binding upon the trustee and all the beneficiaries, including Amelia. *Supreme Tribe of Ben Hur v. Cauble et al.*, 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. —, decided by the Supreme Court, March 7, 1921. But in our previous decision it was held that Amelia Burgnon was not sufficiently represented by the trustee and the other beneficiaries, so that the court could proceed to judgment and enter a decree that would be binding upon her, that her interests were antagonistic to those of the other beneficiaries, and that the trustee occupied an inconsistent position as between Amelia and the other beneficiaries.

[3] The question raised by the motion for rehearing, therefore, is whether the court may entertain jurisdiction and proceed with the cause in her absence, and enter a decree that will be binding upon the parties before it. The rule of the federal courts is that it may do so, if it can so frame its decree as not to prejudice the rights of the absent party and do justice as between those before the court (*Waterman v. Canal-Louisiana Bank & Trust Co., Executor*, 215 U. S. 33, 49, 30 Sup. Ct. 10, 54 L. Ed. 80); that if this may be done the absent party, though ordinarily considered a proper or necessary party to the litigation, is not an indispensable party, in the sense that the court is without jurisdiction of the cause.

In *Waterman v. Canal-Louisiana Bank & Trust Co.*, supra, it appeared that Frances E. Waterman, a citizen of Illinois, brought suit in the Circuit Court of the United States for Louisiana against the bank, executor of the will of Caroline S. Tilton, against seven charitable institutions, and against Robert Waterman and Frederick Waterman, all citizens of Louisiana. In the bill it was alleged:

That by her will Caroline S. Tilton bequeathed to Robert Waterman \$3,000, to said Robert Waterman and his wife 15 premium bonds, to Frederick Waterman \$3,000, and to Frederick Tilton Davis \$1,000 and the whole series of No. 5963 premium bonds; that said Caroline died July 6, 1908; that the executor duly proved the will in the probate court for Louisiana, undertook the executorship, and possessed itself of the personal estate of the testatrix to an amount more than sufficient to discharge her debts, funeral expenses, and legacies.

That the complainant was the sole surviving niece of said Caroline; that Robert and Frederick Waterman and Frederick Tilton Davis were her sole surviving nephews; that there were no other persons within as near a degree of kinship, and that Frederick Tilton Davis resided in Alabama, outside the court's jurisdiction; that Robert and Frederick Waterman and Frederick Tilton Davis had received their legacies, and by so doing had renounced the succession of said Caroline, and also renounced all their rights as heirs at law, and became estopped and debarred from claiming any portion of the residue of the estate because of certain provisions of the will, stating them; that by reason of the renunciation and estoppel the complainant became the sole heir at law of said Caroline, and as such entitled to the shares

which would have gone to Frederick and Robert Waterman and Frederick Tilton Davis by right of accretion.

That the will bequeathed seven special legacies, among which were one to the Home for Insane of \$3,000, and one to the Christian Woman's Exchange of \$1,000; that after the satisfaction of these special legacies, and after payment of all costs and expenses in the settlement of the estate, the testatrix directed that the residue, if any remaining, should be divided between the seven charitable institutions pro rata in proportion to the amount of the legacies made to them respectively; that at the time of the making of the will and at the death of the testatrix there was no such institution or corporation in existence known as Home for Insane, nor was the testatrix capable of incorporating any such institution under her will; that the special legacy of \$3,000 to the Home for Insane and its pro rata share of the residue remained undisposed of, because of the facts stated, and devolved upon complainant as sole heir and next of kin; that the Christian Woman's Exchange was not entitled to share in the residue, because the bequest to it was not a charitable bequest and the Exchange was not one of the institutions mentioned in the will to share in the residue.

The prayers were: (1) That the legacy to the so-called Home for Insane and also the interest of said legatee in the residuum be declared to have lapsed because of the nonexistence of said legatee; (2) that Robert and Frederick Waterman had abandoned their rights as heirs in the lapsed legacy in favor of the so-called Home for Insane; (3) that the complainant alone was entitled to the special legacy bequeathed to the so-called Home for Insane, and to its proportionate share in the residue, and that the bank, the executor, pay over to the complainant the lapsed legacy together with its proportionate share in the residuum; (4) that it be decreed that the Christian Woman's Exchange was not a charitable institution or entitled to participate in or receive any portion of the residue.

In the opinion it was pointed out that the complainant did not seek to set aside the prior regular probate of the will, but to have her interest in the legacy alleged to have lapsed and in the residuary portion of the estate established, and that the controversy was within the equity jurisdiction of the courts of the United States.

As to the question whether Frederick Tilton Davis, the nonresident legatee, was an indispensable party to the suit, and in his absence a dismissal of the cause would be required for want of jurisdiction in the court to proceed without him, the court said:

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the rights of such absent party. 1 Street's Fed. Equity Practice, § 519.

"If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook*, 7 Wall. 425."

And, applying the above rule to the facts of that case, the court held :

"That the presence of Frederick T. Davis as a party to the suit is not essential to the jurisdiction of the federal court to proceed to determine the case as to the parties actually before it. In other words, that while Davis is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party without whose presence a court of equity cannot do justice between the parties before it, and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court."

See, also, on this subject, *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664; *United States v. Allen*, 179 Fed. 13, 21, 103 C. C. A. 1; *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, 250 Fed. 160, 171, 162 C. C. A. 296; *Stevens v. Smith*, 126 Fed. 706, 61 C. C. A. 624; *Grigsby v. Miller* (D. C.) 231 Fed. 521, 523.

If the rule of law stated in *Waterman v. Canal-Louisiana Bank and Trust Co.* was applicable to the facts of that case, then a fortiori is it applicable to the facts in the case before us, for here the interest, if any, of Amelia Burgnon in the residue, is fixed at \$3,000, while in the *Waterman Case* it would seem that the interest of Frederick T. Davis might be found to be a quarter, a third, a half, or perhaps the whole of the lapsed legacy, and a like proportion of the accretion from the residue, depending upon whether all the other heirs, or some one or more of them, had lost their rights in the lapsed legacy and its accretions.

Again, unless it can be said that Frederick T. Davis was sufficiently represented by the complainant in the issue with the seven charitable organizations that were to share in the residue, as to whom it was open to assert that the legacy of \$3,000 to the Home for Insane never had any existence and fell with its accretions into the residue to swell the shares going to them, it would seem that Frederick T. Davis was an indispensable party to the issue as to whether Caroline died intestate as to that legacy, in which case it would go to the heirs at law, or whether she died testate and it fell into the residue to be divided between the seven charitable organizations, among whom the residue was to be proportionately distributed, unless it could be said that, as to that issue, the decree could also be so framed as not to prejudice his rights.

The interest, if any, of Amelia Burgnon in the residue, is \$3,000, and we think the court may so fashion its decree as to protect her rights in case the complainants should prevail, by directing the retention of a sufficient sum in the hands of the executor to be adjudicated in another suit, or by requiring that the executor be given adequate security to protect any interest which she may have.

In view of the foregoing, our previous order of January 14, 1921, is vacated, and we proceed to consider the case on its merits.

The discussion, not only in the elaborate opinion of the District Judge, but in the briefs and oral arguments of counsel, has taken a wide range and evoked a wealth of learning. But the real case seems

to us to fall within narrow compass. On analysis, it is apparent that there is and can be no substantial difference of opinion as to the construction of the ninth paragraph, contended by the plaintiffs to be void for indefiniteness. Abbreviated, it provides:

"I give * * * the remainder * * * to my said executors, * * * with power * * * to sell * * * and pay * * * the proceeds over to the * * * Trust Company, to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate. * * *"

Concerning this paragraph there is general agreement:

(1) That it does not incorporate by reference any existing trust instrument.

This case, therefore, is not within the doctrine of *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 433. This point requires no further comment.

(2) That, unexplained by parol evidence, it is manifestly void for indefiniteness.

(3) That, interpreting this paragraph in the light of the parol evidence admitted below as to the inter vivos trust, the paragraph is to be construed as covering trust provisions then and thereafter made by the testator.

The first question that arises, therefore, is as to the admissibility of parol evidence concerning the trusts. We regard it as far from clear that the weight of argument and of authority is not against the admissibility of such evidence. See *Olliffe v. Wells*, 130 Mass. 221; *Booth v. Baptist Church*, 126 N. Y. 215, 246, 28 N. E. 238; *Wigmore on Evidence*, §§ 2407, 2472, 2473; *Lewis v. Douglass*, 14 R. I. 604; *Rhode Island Hospital Trust Co. v. Bradley*, 41 R. I. 174, 103 Atl. 486; *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396; *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860; *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734; *Best v. Berry*, 189 Mass. 510, 75 N. E. 743, 109 Am. St. Rep. 651; *Jones v. Bennett*, 78 N. H. 224, 99 Atl. 18; *Perkins v. Mathes*, 49 N. H. 107; *Stratton v. Stratton*, 68 N. H. 582, 44 Atl. 699; *Cotton v. Smithwick*, 66 Me. 360; *Golder v. Chandler*, 87 Me. 63, 70, 32 Atl. 784; *University of North Wales v. Taylor* (1908), L. R. Prob. 140; *Allen v. Maddock*, 11 Moore, P. C. 427, 454; *Bryan v. Bigelow*, 77 Conn. 604, 613, 614, 60 Atl. 266, 107 Am. St. Rep. 64; *Reynolds v. Reynolds*, 167 App. Div. 90, 152 N. Y. Supp. 661; *Id.*, 224 N. Y. 429, 121 N. E. 61; *Turner's Appeal*, 48 Mich. 369, 12 N. W. 493; *Glass v. Glass*, 127 Iowa, 646, 103 N. W. 1013; *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429.

Compare *Baskett v. Loge*, 23 Beav. 138 (1856); *Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220; *Eustace v. Robinson*, 7 L. R. Ir. 83 (1880); *In re North*, 76 L. T. 186 (1897); *In re Walpole's Marriage Settlement*, 1 Ch. 928 (1903); *In re Beaumont*, 1 Ch. 325 (1913); *Dexter v. Harvard College*, 176 Mass. 192, 198, 57 N. E. 371 (1900); *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Berry v. Dunham*, 202 Mass. 133, 138, 88 N. E. 904; *Metcalfe v. Sweeney*, 17 R. I. 213, 21

Atl. 364, 33 Am. St. Rep. 864; *Abbott v. Lewis*, 77 N. H. 94, 88 Atl. 98; *Ginter v. Shelton*, 102 Va. 185, 45 S. E. 892; *In re Becker*, 39 Misc. Rep. 756, 80 N. Y. Supp. 1115; *In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798; *Clarke v. Treasurer & Receiver General*, 226 Mass. 301, 115 N. E. 416, L. R. A. 1917D, 800; *Shepard v. Shepard*, 57 Conn. 24, 17 Atl. 173; *In re Benson's Estate*, 169 Pa. 602, 32 Atl. 654; *In re Bacon's Estate*, 140 Wis. 589, 123 N. W. 262; *Knowles v. Knowles*, 132 Ga. 806, 65 S. E. 128; *McKinley v. Martin*, 226 Pa. 550, 75 Atl. 734, 134 Am. St. Rep. 1076; *Markham v. Hufford*, 123 Mich. 505, 82 N. W. 222, 48 L. R. A. 580, 81 Am. St. Rep. 222; *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526; *Lear v. Manser*, 114 Me. 342, 96 Atl. 240; *Reinheimer's Estate*, 265 Pa. 185, 108 Atl. 412; *Harriman v. Harriman*, 59 N. H. 135; *Jay v. Lee*, 41 Misc. Rep. 13, 83 N. Y. Supp. 579.

[4] But we think it unnecessary for us to reach a conclusion on this point; for, assuming it determined in the respondents' favor, we are clear that the plan disclosed in the will and the inter vivos trust together is obnoxious to the statute of wills, falling plainly within the condemnation of the rule pungently stated by Sir George Parker in *Johnson v. Ball*, 5 De G. & Sm. 85, 91, where he said:

"A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil."

This is exactly what Davis undertook to do as to the residue of his testamentary estate.

The case is on all fours with *Olliffe v. Wells*, 130 Mass. 221, and the other numerous cases to the same effect.

Reading the ninth clause of the will in connection with the trust instrument, which contains full power of revocation and modification, Davis said:

"I give the residue of my estate to said Trust Company to be disposed of to such persons and in such proportions as I may have instructed or shall hereafter instruct said Trust Company."

Such instructions might be given in writing or orally. A cablegram from him sent from Egypt would have been legally sufficient to change the destination of the entire trust fund, including the increment from his testamentary estate under the residuary clause. Indeed, the defendants concede that oral instructions would, as matter of law, have been equally effective; that writings are of no importance, except as persuasive evidence. Nor is the fact that in this case the trust fund was upwards of \$2,000,000, and the residue of the testamentary estate by comparison small, of any import; the plan devised would have been equally effective if the inter vivos trust had been \$5,000, divisible under the trust instrument into fractions to various named persons (and subject to change or modification at any time, orally or in writing), and the augmentation under the will had been \$5,000,000.

Manifestly, then, the real disposition of this residuary estate is made, not by the will, but by the shifting provisions in the trust instrument. No amount of discussion or elaboration could make plainer

the absolute destruction by such plan of the safeguarding provisions in the statute of wills.

Learned counsel for the respondent Trust Company recognize that the case cannot be distinguished from *Olliffe v. Wells*, and attack *Olliffe v. Wells* as bad law. We do not so regard it. In our view, the decision in *Olliffe v. Wells* is sound in principle and supported by the overwhelming weight of authority. *Hammond v. Hammond*, 234 Mass. 554, 125 N. E. 686; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149; *Bailey v. Wood*, 211 Mass. 37, 43, 97 N. E. 902, Ann. Cas. 1913A, 950; *Davison v. Wyman*, 214 Mass. 192, 195, 100 N. E. 1105; *Blunt v. Taylor*, 230 Mass. 303, 119 N. E. 954; *Payton v. Almy*, 17 R. I. 605, 24 Atl. 101; *Fitzsimmons v. Harmon*, 108 Me. 456, 81 Atl. 667, 37 L. R. A. (N. S.) 400; *Haskell v. Staples*, 116 Me. 103, 100 Atl. 148, L. R. A. 1917D, 819; *Amherst College v. Ritch*, 151 N. Y. 282, 332, 45 N. E. 876, 37 L. R. A. 305; *Reynolds v. Reynolds*, 224 N. Y. 429, 434, 121 N. E. 61; *Condit v. Reynolds*, 66 N. J. Law, 242, 49 Atl. 540; *Magnus v. Magnus*, 80 N. J. Eq. 348, 84 Atl. 705; *Smith v. Smith*, 54 N. J. Eq. 1, 32 Atl. 1069; *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29; *In re Davis* (D. C.) 112 Fed. 129.

Our views are also confirmed by the recent decision of the Court of Appeals in the Eighth Circuit, Circuit Judges Sanborn and Hook, and District Judge Amidon, in *Thomas v. Anderson*, 245 Fed. 642, 158 C. C. A. 70, holding invalid a gift of a residue to the executor "to * * * dispose of * * * following as nearly as may be possible for him to do, any instructions, directions or requests that I may hereafter give, make or request." That learned court held that this trust was "too indefinite for enforcement," citing as the cases which presented the closest analogies, the following: *Christman v. Roesch*, 132 App. Div. 22, 116 N. Y. Supp. 348; *Ingram v. Fraley*, 29 Ga. 553; *McCurdy's Appeal*, 124 Pa. 99, 16 Atl. 626, 10 Am. St. Rep. 575; *Briggs v. Penny*, 3 De Gex & Sm. 525; *Schmucker's Estate v. Reel*, 61 Mo. 592; *Condit v. Reynolds*, 66 N. J. Law, 242, 49 Atl. 540; *Davison v. Wyman*, 214 Mass. 192, 100 N. E. 1105; *Gross v. Moore*, 68 Hun, 412, 22 N. Y. Supp. 1019; *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694.

But it is contended that this case can be distinguished from *Olliffe v. Wells*, because, in the language of Denio, C. J., in *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, the trust in this case is not "indifferent in itself and having no pertinency, except its effect upon his testamentary dispositions."

Applying this somewhat abstruse and confusing language to this case, we understand it to mean that, because the trustee named in Mr. Davis' will had, with reference to some of Mr. Davis' property, functions to perform other than those created by the will alone, the gift to such trustee is thereby made valid; in other words, that because the respondent Trust Company had, apart from the provisions in the will, a trust relationship to Davis, the bequest to it became valid, although it would have been invalid if this Trust Company had stood

towards the testator as Wells stood in *Olliffe v. Wells*, with no trust relationship except that arising under the will itself.

In our view, this is a distinction without any legal difference. The real question is whether the residue of this estate was disposed of by Mr. Davis' will. Plainly it was not. No additional sanctity attaches to this trust because as to the property vested in the same trustee by Mr. Davis during his lifetime it had duties enforceable either in a court of equity or to the performance of which it was bound by contract. No multiplication of words or refinements can alter the result above stated—that Davis had by this plan sought “prospectively to create for himself the power to dispose” of property vested in him at the time of his death by instruments not executed in accordance with the statute of wills.

It seems equally clear to us that this case does not fall within the rule which permits a testator to determine to some degree the objects of his testamentary bounty by his own subsequent conduct, as, for instance, in cases of gifts to servants in the employ of the testator at his decease, or to surviving partners, or to the persons or institutions caring for the testator in his last sickness. It is, of course, true that the volition of the testator as to who shall be his servants or partners, or final attendants, is a factor in selecting the objects of his testamentary bounty. But it is not the only factor. The volition and acts of such legatees are also factors in determining whether the designated relationship shall or shall not exist at the time of the testator's death. There is a great practical as well as legal difference between such relationship—arising “in the ordinary course of his affairs or in the management of his property”—and a relationship which arises solely out of the bounty-giving volition of the testator. The distinction, however fine, is well recognized in the authorities, and we cannot hold ourselves at liberty to disregard it. *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526; *Lear v. Mansar*, 114 Me. 342, 96 Atl. 240; *Harriman v. Harriman*, 59 N. H. 135.

These cases, as well as cases involving advancements (see *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Lawrence v. Lindsay*, 68 N. Y. 108; *Moore's Case*, 61 N. J. Eq. 616, 47 Atl. 731; *Robert v. Corning*, 89 N. Y. 225; *Harris v. Harris' Estate*, 82 Vt. 199, 72 Atl. 912; *Coyne v. Boyce*, 78 Md. 22, 26 Atl. 1021; *Blackstone's Appeal*, 64 Conn. 414, 30 Atl. 48; *Holmes v. Coates*, 159 Mass. 226, 34 N. E. 190; *Sanford v. Raikes*, 1 *Merivale*, 646, 653), undoubtedly involve gifts dependent in part upon future acts of the testator. But we agree with counsel for the plaintiff that none of them sustains the proposition that a testator may make a valid testamentary provision incorporating an extrinsic trust created by him and subject to change as his testamentary desires may change, so that every alteration, oral or written, of the trust instrument is really a change in the disposition of his testamentary estate.

Compare *In re Sexton*, 162 Ill. App. 214, 221; *Hartwell v. Martin*, 71 N. J. Eq. 157, 63 Atl. 754.

The decisions in *Condit v. De Hart*, 62 N. J. Law, 78, 40 Atl. 776, and *Matter of Piffard*, 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193,

seem to us to rest on the principle of incorporation by reference, admitted by learned counsel for the respondent Trust Company not to be applicable to the instant case.

The result is that, on principle and authority, we find ourselves constrained to conclude that the residue of the personal property of Theodore M. Davis, held by the respondent Trust Company, is—subject to proper proceedings in the Probate Court as prayed for, and subject also to the contingent provision hereinabove indicated safeguarding the rights, if any, of Amelia Bergnon—held under a resulting trust for the plaintiffs.

The decree of the District Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion, with costs for the appellants.

BINGHAM, Circuit Judge (dissenting). As to the question of jurisdiction I agree with the opinion of the majority, but as to the merits of the case I am unable to do so.

The material questions involved in a decision of the merits are: (1) Whether the testator, in the ninth clause of his will, where he referred to the principal of the estate and property held by the Trust Company in trust, referred to it as it existed at the time he republished his will by the codicil, or as it should exist at his decease; and (2) if the latter, whether the circumstances are such that parole evidence is admissible to identify the persons the testator intended should take the residue and define their shares, inasmuch as the facts referred to—the persons who should take the principal of the trust estate and their shares therein—might depend upon or be the result of future acts of the donor (the testator) of the trust.

If the testator, by the ninth clause of his will, referred to the principal of the estate and property in the hands of the Trust Company as it existed at the time he republished his will, to identify the persons and define the shares which he intended they should take, there can be no doubt but that parole evidence would be admissible for this purpose, as the reference in the will would be to facts then in existence.

And there would be no reasonable doubt as to the admissibility of the evidence if the principal of the estate and property held in trust and referred to in the will was created or to be created by a stranger and as it should exist at Mr. Davis' death, for in such case the existence of the fact or facts referred to in the will would not depend upon the future act or acts of the testator in the establishment of the trust. *Harriman v. Harriman*, 59 N. H. 135.

It is only in case the ninth clause refers to the principal of the estate and property held in trust as it should exist at the time of the testator's decease that any debatable question can arise, as the extrinsic fact or facts referred to in the will may be the result of future acts of the donor in changing the donees or their shares in the trust fund; the donor being also the testator under the will. In such case there can be no objection to the introduction of the extraneous evidence, unless it can be said that to do so would be to contravene the statute of wills.

The question is a fairly close one, and its answer depends largely upon the decisions of the courts through a long series of years, in construing the statute and applying it in cases involving facts of the same character or so similar that they cannot reasonably be differentiated.

My Associates in their opinion take the position that Mr. Davis did not dispose of the residue of his estate by the ninth clause of his will, but undertook by that clause to reserve to himself a power to dispose of it as he should in the future direct by a written instrument other than a will or codicil, and therefore died intestate as to the residue. That this is so appears from the language of the opinion, where they state that the "disposition of this residuary estate is made, not by the will, but by the shifting provisions in the trust instrument," that "a testator cannot by his will prospectively create for himself power to dispose of his property by an instrument not duly executed as a will or codicil," that "this is exactly what Davis undertook to do as to the residue of his testamentary estate," and that "the case is on all fours with *Olliffe v. Wells*, 130 Mass. 221, and the other numerous cases to the same effect." The error of the majority, as I view it, lies in their assumption that Mr. Davis, by the language of the ninth clause of his will, undertook to reserve to himself power to dispose of the residue of his estate by a future instrument, when, as a matter of fact, there is no allusion in that clause of the will to an instrument, present or future, of any kind or description.

It will be seen by looking at the will that it does not refer to a trust instrument, but refers to a trust fund and the rights of the donees in that fund, and that it gives the residue of the estate to the same persons and in like shares as those who shall take the principal of the estate and property held under the trust. It is an absolute disposition—not a reservation of a power of disposal; and, if this is so, the question is one as to the admissibility of extraneous evidence to explain and make certain the language of the will and thus identify the persons who are to take the residue and define their shares.

Now let us look at the trust deed as it existed when the codicil was made and later when Mr. Davis died, and see whether it refers to the residue under the will or in any way undertakes to dispose of that residue. It can be stated without fear of contradiction that the trust deed never at any time or in any way referred to the residue of the estate under the will. Hence it is not even arguable that Mr. Davis intended to dispose of the residue under his will by the trust deed. As the trust deed does not undertake to dispose of the residue of Mr. Davis' estate, it is of no consequence whether that instrument, in the disposition of the inter vivos trust fund, is or is not a testamentary instrument. It is not and cannot be as to the residue under the will, for it does not undertake to dispose of it. It simply disposes of the trust fund deposited by the donor with the trustee during the donor's lifetime, and, under the law of Rhode Island and Massachusetts, would not be testamentary as to its disposition of that fund. *Talbot v. Talbot*, 32 R. I. 72, 103, 78 Atl. 535, Ann. Cas. 1912C, 1221; *Stone v. Hackett*, 12 Gray, 227.

There are vital distinctions between this case and that of *Olliffe v. Wells*. In *Olliffe v. Wells* the language of the will was:

"13th. To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him."

In that case the testatrix did not dispose of the residue of her estate by her will, for she did not undertake by the language used to disclose who her beneficiaries were, or state circumstances by which they might be identified and their shares ascertained. She simply undertook to reserve a future power of disposal and in a manner not authorized by law. Not having disposed of the residue of her estate by her will, the extraneous wishes which she had expressed or might in the future express to Rev. Mr. Wells relating to its disposition were necessarily testamentary, and, not having been set out in a subsequent will or codicil, no other conclusion could have been reached than that she died intestate as to the residue. To have received extraneous evidence of her wishes would have been to contravene the statute of wills. I do not question the correctness of the decision in that case. My position is that it has no application to the facts in this case, and belongs to a class of cases such as *Johnson v. Ball*, 5 De G. & Sm. 85, 91, and *Thomas v. Anderson*, 245 Fed. 642, 158 C. C. A. 70, relied upon by the majority of the court in their opinion.

The language of the ninth clause of the will is as follows:

"Ninth. I give, devise and bequeath all the remainder of the property, real and personal, of which I die possessed or over which I have power of disposition, including any of the foregoing gifts which shall fail for any reason, but excepting the remainder in my real estate in said Newport after the decease of my said wife and the said Emma B. Andrews, to my said executors, or any duly appointed administrator of my estate, in trust nevertheless, to convert the whole of said property into cash as soon as reasonably possible, with power for this purpose to sell the same or any part or parts thereof at either private or public sale, and the net proceeds of such sale or sales to pay over to the said Rhode Island Hospital Trust Company to be held, managed and disposed of as part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate and property; and the receipt of said Trust Company shall be a full discharge to my said executors or administrators relieving them from all further liability or accountability in respect thereof. And I devise to the said Rhode Island Hospital Trust Company after the deaths of my said wife and the said Emma B. Andrews the estate in said Newport hereinbefore given to them for their lives, but in trust nevertheless for said Trust Company to convert said estates into cash as soon as reasonably possible after it becomes entitled to the possession of said estates, hereby empowering said Trust Company in the discretion of its officers or committee having the charge of trust estates and with the approval in writing of the said Thomas L. Manson and Herbert Parsons or the survivor of them so long as both or either of them is living, to sell said estates from time to time at either private or public sale, and to add the net proceeds of any such sale or sales to the principal of the trust estate and property then held by it under the trusts theretofore created by me, and to divide and distribute said net proceeds to the same persons and in the same proportions as they are entitled to the principal of my said trust estate under the terms of said trusts; and no purchaser from my said executors or administrators, or from said Trust Company shall be under any obligation to inquire into the propriety or regularity of any such sale or sales or to

see to the application of the purchase moneys, but all transfers and conveyances from my said executors and administrators, and from said Trust Company, shall give to the purchaser as good, valid and sufficient titles to said properties, real and personal, as I die possessed of, without other act by the purchasers than the payment of the purchase moneys."

Returning to the first question presented by this case as hereinbefore stated: Did the testator by this provision of his will refer to the trust fund and rights of the donees therein as they existed at the time he executed his codicil and republished his will, or as they should exist at the time of his decease, to identify the persons who were to take the residue of his estate and define their shares? It seems to me that the reasonable and necessary construction of the language is that the testator intended to refer to the trust fund and rights of the donees as they should exist at the time of his decease for this purpose. He there states that the residue is to be paid—

"over to the said Rhode Island Hospital Trust Company to be held, managed and disposed of as a part of the principal of the estate and property held by it in trust for my life and the lives of others in the same manner as though the proceeds of such sales had been deposited by me as a part of said trust estate and property."

It would seem that, as Mr. Davis' will was to take effect on his death, the reference in the will was to the trust fund as created by him in his lifetime and as it should exist at his death. And later in the same paragraph, in speaking of the Newport property, of which he had given the use to his wife and Emma B. Andrews during their lives and the life of the survivor, he states that the remainder in that Newport real estate shall go to the Trust Company as trustee to convert into cash and—

"to add the net proceeds of any such sale or sales to the principal of the trust estate and property then held by it under the trusts theretofore created by me, and to divide and distribute said net proceeds to the same persons and in the same proportions as they are entitled to the principal of my said trust estate under the terms of said trusts."

Clearly, as to this matter, the testator contemplated that his wife or Emma B. Andrews, one or both, would outlive him, which they did, and that the remainder in the real estate should be added to the trust estate created by him in his lifetime and as it existed at his death.

But the majority in their opinion maintain that by this paragraph the testator did not intend to refer to the inter vivos trust fund as an extraneous fact and as it should exist at the testator's death, to identify the beneficiaries in the residue under the will and define their shares, but to a trust deed as a paper or writing, thereby intending to refer to the trust deed as he had made it, or should make or change it after he executed his will or the codicil republishing it; and the reference being, according to their interpretation, to a future instrument, it was not, under the law, incorporated in and made a part of his will, and, being a future instrument that was not intended to be a will, that he died intestate as to the residue.

It is undoubtedly the law that if the reference in the ninth paragraph was to an existing paper, or one thereafter to be made by the testator and expressing his wishes as to whom and the shares in which the

residue of his estate should go, the instrument or paper would be testamentary in nature, and, if it was not, or by reason of its future character could not, be incorporated by reference in the will, would be inoperative as a testamentary disposition. This is the plain import of the decision in *Olliffe v. Wells*, supra, where the thirteenth clause of the will did not even refer to a memorandum, present or future, expressing the wishes of the testatrix. The reference there may have been to oral instructions, present or future. It was not to facts which should exist at the testatrix's decease and by which the beneficiaries described in her will might be identified, for her will did not undertake to describe any beneficiaries. Consequently, if there was any disposition of the residue of her estate, it was by the extraneous wishes which the testatrix had expressed or might afterwards express in some manner to Rev. Mr. Wells, which wishes, if they could be regarded as extraneous facts, would have no pertinency apart from a disposition of the residue under the will. *Langdon v. Astor's Executors*, 16 N. Y. 9, 25.

The remaining question, as I see it, is whether an extraneous fact referred to in a will, having pertinency in itself apart from any effect it may have upon some testamentary disposition of the testator, and which may depend upon the future act of the testator for its existence, can be shown by parol without contravening the provisions of the statute of wills. The question is not, as in many cases, whether the extraneous fact referred to, if introduced in evidence, will clearly identify the persons who are to take and define their shares, but whether such extraneous fact, having its origin in the future act of the testator, is testamentary and cannot be shown. The circumstance that the ninth clause of the will does not designate the beneficiaries by name does not militate against its efficacy, for it is and must be conceded that that clause contains language describing the beneficiaries by which their identity may be ascertained. As held by the court in *Lear v. Manser*, 114 Me. 342, 96 Atl. 240, it is not necessary that the beneficiaries be designated by name in the will; some other designation will suffice if it make certain the beneficiaries intended, and it is not necessary that the testator have in mind the particular individual, if the particular object of his bounty is ascertainable with certainty—if the person intended can be identified by the description given in the will, interpreted in the light of the extraneous fact or facts referred to.

As I understand the law, it is that an extraneous fact referred to in a will by which the intended object or objects of a testator's bounty may be identified can be shown in evidence to make certain those objects, and that this is so, even though the extraneous fact referred to may be the result of a future act of the testator, provided that future act is one of a business nature and has reason for its existence apart from any disposition of the property under the will. It cannot be said in this case that the deposit of securities of the value of \$2,000,000 by Mr. Davis with the Trust Company was not a business transaction and did not have pertinency in itself, apart from any disposition of property made by him in his will.

In *Harriman v. Harriman*, 59 N. H. 135, the devise of a farm, after the termination of a life estate, was to such person or persons as shall take care of and support A. H. and his wife (the life tenants) in their old age. In that case the fact by which the identity of the devisee was to be determined did not depend upon the future act of the testator, but upon the acts of third parties occurring after the testator had made his will and died, and during the old age of the life tenants, and it was held that the only question to be determined was one of identity; that, if no one fulfilled the conditions of the will, the devise failed, but if parol evidence disclosed a person complying with its conditions, then that person was entitled to hold the land under the will.

In *Lear v. Manser*, 114 Me. 342, 96 Atl. 240, the bequest was of a sum to the testator's executor in trust for "such person or persons, or to such institution as shall care for me in my last sickness." Here the person who was to care for the testator in his last sickness could be selected by him and might and probably did depend upon his future act in making the selection. But the court evidently did not regard his future act of selection as testamentary, but simply as presenting the question whether evidence could be introduced for the purpose of establishing the identity of the beneficiary. This act of the testator was one which had direct relation to making provision for his care in his last sickness, and incidentally lent aid to the language used in his will describing his beneficiary. It was held that the testator's intention was plain, if it could be effectuated consistently with the rules of law; that the trust sought to be established was a private one, and the question was whether there was a cestui que trust clearly identified or made capable of identification by the terms of the will creating the trust; that it was not necessary that the beneficiary should be designated by name in the will; that some other designation would suffice, if it made certain the beneficiary intended; and that it was not essential that the testator have in mind the particular individual, if the particular object of his bequest was ascertainable with certainty; and, as the person intended could be identified by the description given in the will, the gift did not fail.

In *Reinheimer's Estate*, 265 Pa. 185, 108 Atl. 412, the gift was of the residue "to the party or parties, their heirs and assigns forever, who may be farming my farm and taking care of me at the time of my death." Here, as in the previous case, the identity of the beneficiary depended upon the future acts of the testator in the selection of the person or persons who should work his farm and be caring for him at the time of his death. But those acts were not regarded as testamentary, for they related directly to making provision for working his farm and caring for him at the time of his death, though incidentally they made it certain who was intended by the language of his will to take the residue of his estate.

In *Stubbs v. Sargon*, 2 Keen, 255 (s. c., on appeal, 3 Myl. & Cr. 507, 510), certain land was given by will in trust to pay the rents to X. for life, and after her decease—

"in trust to dispose of and divide the same unto and amongst my partners, who shall be in partnership with me at the time of my decease, or to whom I may have disposed of my said business, in such shares and proportions as my said trustees shall think fit and deem advisable."

The testatrix, in her lifetime and after the execution of her will, disposed of her business to her former partner, Y., and the questions raised were (1) whether the devise was good within the meaning of the statute of wills, and (2) whether it was or was not void for uncertainty. It was argued that it was void for the reasons (1) that it was a declaration of intention to be completed by a future act unaccompanied by the formalities required by the statute of wills and was testamentary; and (2) that it was void for uncertainty, the object of the devise not being sufficiently defined. It was held that the future act of the testatrix in disposing of her business was not testamentary, that the beneficiary as described in the will could be identified by parol proof of the extraneous fact, and the gift thereby upheld.

In *Abbott v. Lewis*, 77 N. H. 94, 88 Atl. 98, the gift was—

"to the employees of the O. J. Lewis Mercantile Company who have been in the service of the house ten years and are so employed at the time of my death, ten thousand dollars, to be equally divided among them at the termination of this trust."

The O. J. Lewis Mercantile Company was a corporation of which the testator was the active manager and practically the sole owner. It is certain that the testator, during his lifetime, had it in his power to increase or diminish the number of employees, and say who should be employed in the service of the house, and by increasing or diminishing their number thereby increase or diminish the shares which the beneficiaries under his will would receive in the \$10,000 fund. But the court did not regard the disposition as an infraction of the statute of wills and, inasmuch as the beneficiaries could be identified by the description in the will aided by parol evidence of certain extraneous facts referred to in the will, the gift was good.

For a case of like nature in Rhode Island, see *Metcalf v. Sweeney*, 17 R. I. 213, 21 Atl. 364, 33 Am. St. Rep. 864.

In *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526, the testatrix bequeathed all of her property to—

"whoever shall take good care of me and maintain, nurse, clothe, and furnish me with proper medical treatment at my request, during the time of my life yet, when I shall need the same."

The court in discussing the question whether the future acts of the testatrix in selecting a person to perform the services specified in the will said:

"This person, it is true, depended upon the future volition of the testatrix in being chosen to perform the exacted services, and upon the consent of the latter in accepting the request, and in discharging the obligation imposed by the will; but the subsequent volition exercised by Mrs. Shull [the testatrix] in this respect cannot be deemed or considered in a legal sense as testamentary in its nature or character."

In *Langdon v. Astor's Executors*, 16 N. Y. 9, the testator in the second codicil of his will bequeathed a legacy of \$100,000 deposited in

the New York Life Insurance Trust Company to the plaintiff, and qualified all his legacies and beneficial provisions in all his testamentary papers with a provision that if he should, in his lifetime, advance to the legatees the whole or a part of what he had given them in those papers, and should indicate his intention that such advancements were on account of such legacies or beneficial provisions, by charging the same in his books of account, then such legacies were to be considered paid and satisfied, in whole or in part, according to the amount of such advancements. The testator in his lifetime advanced to the plaintiff funds of the same description as those bequeathed, and made entries in his account books describing the funds advanced. The question was whether the testator could defeat the provisions in the will by future acts of the character described, or whether they were testamentary in nature and, not being in compliance with the statute of wills, could not be availed of to defeat the bequest. Denio, C. J., in discussing this question at page 25, said:

"There is no principle in the law which forbids the making of testamentary gifts dependent upon the happening or not happening of any event in the future, whether in the testator's lifetime or afterwards. A bequest may be made with a provision that it shall not be operative if the legatee shall in the testator's lifetime receive a particular sum of money from another person, or if he shall within that time become entitled to an estate as the heir or legatee of another. So a testator may very properly provide that a legacy given in his will shall not be operative if he shall in his lifetime give the legatee the like sum. This is not the reservation of a license to alter or revoke his will by an unattested paper. The fact which is to destroy the legacy in such a case is not a change of purpose, a new act of testamentary volition, which requires an instrument in writing clothed with testamentary forms. The gift *inter vivos* is a fact in pais, which does not require a writing, and the effect given to it, of superseding and extinguishing the legacy, is prescribed by the will itself, and is authenticated in the same manner as the legacy, of which it is in fact a part. It differs, it is true, from a condition which looks to the act of a third person, or the happening of an event in respect to which the testator is to have no agency; and I concede that a testator cannot prescribe in his will that an act to be performed by him, indifferent in itself and having no pertinency except its effect upon his testamentary dispositions, shall change such dispositions. Such a provision would allow a testator to alter his will otherwise than by an attested instrument. He cannot therefore declare that any mere entry in his books, or other writing without attestation according to the statute, shall in itself have any effect upon the provisions of his will. But the bestowal of a substantial sum of money or amount of property is an act of a different kind. It is a pecuniary transaction belonging to the actual business of life. It is an act which he may perform whether he has made a will or not. It effects a substantial change in the pecuniary condition both of the testator and the donee. * * * The circumstance which is to determine whether the testamentary gift shall be operative at the testator's death is, in this case, an act taking effect in present, and is one of those transactions of business which every owner of property may perform for its own sake, and without reference to its operation upon any instrument he may have executed. There is nothing in the policy of the law requiring it to be proved by other than the usual evidence. There is no special danger that it may be simulated or set up by false testimony against the truth of the case. Not being promissory or executory in its character, but taking effect as it does *eo instanti*, with the volition of which it is the result, there is no danger that it may be done without a due appreciation of its character; as testaments, promises and other engagements, looking to the future for their consummation, may be and frequently are. It has not one of the characteristics of a testamentary act, and there is not, in my opinion, any-

thing in the law that requires that it should be authenticated by testamentary formalities."

In *Lawrence v. Lindsay*, 68 N. Y. 108, the court stated that if the testator intended that an entry in his books should defeat a legacy, without the legacy having been paid in fact, it was doubtful whether such a provision would be valid. It intimated very strongly that it would not; that it would be "in substance a provision for canceling a provision in the will by an unattested writing."

To the same effect, see *Moore's Case*, 61 N. J. Eq. 616, 47 Atl. 731, *Harris et al. v. Harris Estate*, 82 Vt. 199, 72 Atl. 912, and *Coggeshall v. Home for Children*, 18 R. I. 696, 31 Atl. 694. In most of these cases, if not in all, it is clearly pointed out that a declaration of the testator noted in his books of account, standing alone and apart from the fact of payment, would not be admissible; but, where payment has been made, a declaration noted in books of account that it was made as an advancement is admissible, for the reason that it is a part of the act or transaction which it accompanies and explains.

In the *Matter of Piffard*, 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193, the testator by his will gave to his daughter S. one-fifth of all his estate absolutely. By a codicil he directed that S. should have power by her will "heretofore or hereafter" executed to dispose of the share devised and bequeathed to her, and to that end he directed that such share should be paid over by his executors to the executors or trustees named in her will in case of her death during his lifetime, but, in case she survived, then that such share should be paid over to her. S. died before the testator, leaving a will disposing of her estate. The testator's will was construed by the court to mean, not simply that he gave to his daughter a power of appointment, but that it showed the testator intended, in case S. predeceased him, to devise and bequeath by force of his own will the daughter's one-fifth share to such person or persons and in such shares or proportions as she had directed or should direct by will in the disposition of her own property, and that the will of the daughter could be referred to, to define and make certain the persons to whom and the proportions in which the one-fifth should go. In its opinion the court said:

"And while * * * the testator gave a power of appointment, which, as a power, the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership, yet the further language of the codicil shows its intent to be that, in case of the death of the daughter in the lifetime of the father, the latter intended to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as by an existing will, made before or after the date of the codicil, she had determined and directed or should determine and direct in the disposition of her own property; and 'to that end,' in aid of that result, he explicitly declares that the one-fifth given to her shall be paid over to her executors for the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property at her death, and had become distributable as such by force of her will."

And again the court said:

"Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the

proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime."

In that case it appeared that at the time the testator made his first codicil, directing how his daughter's one-fifth share should go in case she predeceased him, the daughter was alive and that the language of the codicil referred, not to any particular will which the daughter had then made, but to a will which should be her last will, whether made before or after the codicil. The testator, therefore, at that time intended by his will to refer to a future act of his daughter, to explain the language of his will and to identify the beneficiaries and define the shares which they should take in the one-fifth interest under his will. It is true that it appeared that after the daughter's death, leaving a last will, the testator made two codicils, confirming his will and the first codicil, but no weight is given by the court to this fact other than as confirming its view of the meaning of the language used in the first codicil. Whether the daughter's will was in existence at the time he made his first codicil or the last two codicils was apparently of no importance, as, under the law of New York, the doctrine of incorporation of existing documents by reference did not prevail. The material thing was that the daughter left a last will disposing of her property and that it existed at the time of the testator's decease.

In the Matter of Fowles, 222 N. Y. 222, 118 N. E. 611, Ann. Cas. 1918D, 834, the decision in the Matter of Piffard, supra, was approved. It is true that three judges dissented in the Fowles Case, but a careful reading of the opinions shows that the question upon which the members of the court were in disagreement was the interpretation of the ninth article of the husband's will. The majority of the court were of the opinion that this article, by implication at least, referred to the legatees named in the wife's will and made them his legatees, while the minority were of the opinion that this article of the testator's will could not be so construed, and that as it could not the decision in the Matter of Piffard was not applicable. They did not question the correctness of the decision in the Piffard Case, but denied its applicability in view of the construction which they placed upon the ninth article. In this case the reference in the husband's will was, not to a will of his wife then in existence, but to "such last will and testament as my said wife may leave," clearly contemplating a future act.

In *Condit v. De Hart*, 62 N. J. Law, 78, 40 Atl. 776, it was held that the provisions of the father's will disposing of his residuary estate disclosed that he intended that the residue should go to such persons and in such shares as the son had disposed of the same, "by his last will and testament duly made and executed by him at any time." The son died leaving a last will, and the father thereafter made a second codicil, confirming his will and prior codicil. Whether the doctrine of incorporation by reference prevails in New Jersey the opinion does not disclose. The ground of the decision was that of the Piffard Case. The gist of the decision as stated by the court was that the son's will could be—

"referred to for the purpose of ascertaining the person to whom that estate [the residuary estate of the father] passes by the father's will. The latter

instrument effectuates what the son attempted to do, but could not do by his own will."

Whether the New York and New Jersey courts were right in the construction which they placed, in the former case on the husband's will, and in the latter on the father's, is of little consequence so far as the questions with which we are dealing are concerned. The important thing is that they construed the respective wills of the testators as making complete dispositions of their property, and as referring to the future wills of the wife and son simply as extraneous facts explaining and defining the meaning of the language used in the testator's wills; that these extraneous facts were not testamentary acts—that is, did not dispose of the husband's or father's property—and could be shown by parol to make definite the dispositions under the husband's and father's wills.

The case of *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429, is not in conflict with the *Fowles* or *Condit* Cases. In *Curley v. Lynch*, the scope of the inquiry by the court was limited, for—

"it was agreed that the only questions involved in the case were whether a valid power of appointment was given to Mary E. Lynch during her life by the will of her husband, and whether she could, or did by her will, make a valid appointment under such power, and also whether her nephews and nieces took under the wills of Eugene Lynch and Mary E. Lynch any interest in his estate."

In that case Eugene Lynch, the husband, by his will, divided the residue of his estate into two equal parts, one of which he designated as the Mary E. Lynch trust estate, and devised and bequeathed this part to trustees (1) to pay the net income in quarterly payments to his wife during her lifetime; and (2) after her death to make equal division of said part and pay over one of said equal divisions "as my said wife shall in and by her last will and testament devise and bequeath the same."

Mary E. Lynch died January 23, 1909, three days before her husband, leaving a will in the residuary clause of which she stated:

"All the rest and residue of my property, including my stocks * * * I give, devise and bequeath to my nieces and nephews, there being seven in number. * * *"

The wife's will was made four days before the husband's. It was held (1) that the power of appointment given in the husband's will did not and could not come into existence until the husband's death; (2) that, the wife being then dead, "the power itself never came into existence"; (3) if the language of the wife's will could be regarded as an attempt to exercise the power given under the husband's will, it was a mere nullity; and (4) that although her will was in existence at the time the husband executed his will, and might have been incorporated in his will, the language of his will did not warrant such an interpretation, as it referred to "whatever last will his wife should leave at her decease, whenever she might execute it, and not solely to the will which, as he knew, she had then executed." All that this case stands for is (1) "that Mrs. Lynch took no valid power of appointment under the will of her husband, and did not by her will make

a valid appointment of any part of his estate;" and (2) that the wife's will was not incorporated by reference in the husband's will. The question was not considered whether there was language in the husband's will manifesting an intent to devise and bequeath one-half interest in the Mary E. Lynch trust estate to the persons and in the shares in which the wife had devised and bequeathed the residue of her own estate, and his will contained no language, as did the will in the Piffard Case, capable of such construction.

In view of the principles announced in the foregoing decisions, and many others which I have examined, but find it unnecessary to refer to, I am of the opinion that Mr. Davis did not die intestate as to the residue of his estate; that when he, in his lifetime, delivered the securities of the value of \$2,000,000 to the trustee, with the trust instrument or instruments explaining and characterizing his act or acts, vested interests in certain shares of the trust fund at once accrued to the beneficiaries therein, which could only be divested or changed upon the happening of a condition subsequent occurring in the donor's lifetime and which became indefeasible upon his death (*Stone v. Hackett*, 12 Gray [Mass.] 227; *Talbot v. Talbot*, 32 R. I. 72, 103, 78 Atl. 535, Ann. Cas. 1912C, 1221); that having died leaving in existence the trust fund, with donees having vested interests therein, and a will in which he describes his legatees and their shares in the residue of his estate by reference to the trust fund, stating that it should be divided in the same way and go to the same persons as the trust fund would go at his decease, the trust, as it existed at his decease, may be referred to as an extraneous fact, to make certain the meaning of the language of the will, and, this having been done, the residue passes under the will, and not by force of the trust deed, in the shares and to the persons thus made certain.

In re L. P. LARSON, JR., CO.

L. P. LARSON, JR., CO. v. WILLIAM WRIGLEY, JR., CO.

(Circuit Court of Appeals, Seventh Circuit. March 31, 1921. Rehearing Denied July 20, 1921.)

Nos. 2822, 2831.

1. Trade-marks and trade-names and unfair competition ⇨98—Scope of accounting for unfair competition.

Where complainant, in a suit for unfair competition, prayed for an accounting for profits only, and not for damages, and the court awarded an injunction, perpetual in time and universal in place, and directed an accounting "of all gains and profits accruing from the manufacture and sale" of defendant's product, the master is without authority to compel complainant to submit to an examination as to the extent of its trade, for the purpose of limiting the inquiry to sales made in common territory.

2. Appeal and error ⇨1203(7)—Authority of master on an accounting limited by terms of decree.

A decree directing an accounting, entered pursuant to the mandate of an appellate court, is in effect the decree of that court, and while it remains in effect the trial court can give the master no different authority.

3. Trade-marks and trade-names and unfair competition ⚡98—Scope of accounting for unfair competition.

Where the court found that complainant was the originator and had the exclusive right to make and sell a package, and that defendant had willfully trespassed on its right by placing the package of its own manufacture on the market to forestall complainant's trade, and ordered an accounting of profits by defendant, such accounting will not be limited to sales by defendant in complainant's territory.

4. Appeal and error ⚡14(2)—Order relating to carrying out decree entered on mandata is reviewable by appeal.

While questions arising on an accounting before a master under an interlocutory decree are not reviewable by appeal until the master's report has been disposed of by the trial court, the master has no authority to open questions adjudicated by the decree, and where that was entered on a mandate from the appellate court, the question whether it is being correctly carried into execution may be raised in the appellate court, either by appeal from an order of the trial court or by petition for mandamus.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the L. P. Larson, Jr., Company against the William Wrigley, Jr., Company. From an order of the District Court, complainant appeals, and also petitions for a writ of mandamus. Order reversed, and writ granted.

Charles H. Aldrich and Frank F. Reed, both of Chicago, Ill., for petitioner.

Isaac Mayer and Wallace R. Lane, both of Chicago, Ill., for respondent.

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. [1] In *Larson Co. v. Wrigley Co.*, 253 Fed. 914, 166 C. C. A. 14, on appeal from a final decree dismissing Larson Company's cross-bill, we reversed the decree "with the direction to enter an injunction and order an accounting." That decision is referred to for the status of the controversy anteceding the present inquiry.

True, we did not specifically direct what sort of an injunction to enter. Looking to the pleadings, the proofs, and the decision of this court, the District Court entered a final injunction, perpetual in time and universal in place. No appeal was taken to question the correctness of the District Court's interpretation of our mandate in that respect.

True, we did not specifically direct what sort of an accounting to order. Looking to the pleadings, the proofs, the decision of this court, and Larson Company's prayer for profits and its waiver of its prayer for damages, the District Court ordered the master—

"to take an account of all gains and profits of Wrigley Company to it accruing or arising from the manufacture and sale of its Doublemint gum in the dress hereinbefore enjoined, from its first sale on July 28, 1914, to the date of the entry of this decree and such further time, not exceeding ninety days, as may be necessary to comply with this decree, and until compliance therewith."

No petition or motion has ever been presented to this court to question the correctness of the District Court's interpretation of our mandate in that respect.

While Larson Company before the master was endeavoring to make Wrigley Company account for "all gains and profits accruing from the manufacture and sale of its Doublemint gum," Wrigley Company, relying on the territorial limitation doctrine of the "Tea Rose" case (*Hanover Star Milling Co. v. Allen & Wheeler Co.*, 208 Fed. 513, 125 C. C. A. 515, L. R. A. 1916D, 136; 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713), interposed as a defense against accounting for any of its sales outside of "common territory" the claim that Larson Company was a small manufacturer, had been making and selling its Wintermint gum for only seven months before Wrigley Company embarked upon its Doublemint adventure, had only a very limited trade, and had neither the ability nor the present intention to extend its trade, and Wrigley Company insisted upon examinations of the officers and books of Larson Company in order to prove those matters. A controversy developed between opposing counsel, from which it became apparent that such an investigation might be indefinitely prolonged, and Larson Company, on advice of its counsel, finally refused to submit to further investigation. Thereupon the master ruled that Wrigley Company's investigation of Larson Company's trade, finances, etc., should proceed, and the present actions in this court were brought to question the District Court's refusal to control the master in this regard.

[2] If Larson Company were asking for a measurement of the damages caused by Wrigley Company's undermining of its trade, an inquiry into the extent and value of that trade would be necessary. But Larson Company was actor, was in control of its own side of the litigation, and neither Wrigley Company nor the master nor the District Court, in view of the decree as entered, could properly compel it to litigate the "undermining of its trade"—a matter that it had waived in this court by its briefs and in the District Court by its tender of form of decree. Inasmuch as the decree specifically directs the master to take an account of all of Wrigley Company's gains and profits from the manufacture and sale of Doublemint gum, and submits no other matter for his report, his duty to refrain from excursions should be sufficiently apparent. And since the decree, if truly entered in pursuance of the mandate of this court, is in effect the decree of this court, the master can be given no different authority while the decree remains in force.

Despite the fact that the foregoing paragraph seems to us a complete answer to Wrigley Company's contention, we will examine the question whether the territorial limitation issue has been adjudicated.

[3] We ordered (in effect, though not in direct words) a final injunction, perpetual in time and universal in place, because, on consideration of the pleadings and the evidence, we found that in Wrigley Company's Spearmint suit it had obtained a pendente lite injunction against Larson Company's Peptomint gum by willfully deceiving the

court and had thereby oppressed its opponent; that Larson Company, while its trade was stopped by that wrongful injunction, brought out its Wintermint gum; that before Wintermint trade could be well established Wrigley Company put its Doublemint on the market for the purpose of forestalling Larson Company's growing trade in Wintermint; that Wrigley Company thereupon sued for an injunction against Wintermint on the grounds that Doublemint was the elder product and that the two articles were one and the same in the eyes of the trade; that Larson Company, by answer and counterclaim, agreed with Wrigley Company that the two packages were substantially the same, but asserted that Wintermint was the elder; that Wintermint was in fact the elder; that Wrigley Company, before adopting and bringing out its Doublemint, had knowledge of Larson Company's Wintermint; and that both parties were bound by their sworn pleadings, and Wrigley Company additionally by the testimony of its officers, to the fact that the two articles were one and the same in the eyes of the trade.

Looking to Larson Company's legal rights flowing from these adjudicated issues of fact, we found Larson Company entitled in law and equity to a perpetual and universal injunction against Wrigley Company's Doublemint; and in adjudicating that issue of law (or mixed conclusion of fact and law), we necessarily adjudicated the following subordinate or foundational issues, averred in the pleadings and covered by the finding of facts, though we did not deem it necessary to enumerate them: That Larson Company was the owner of the common package and had the exclusive right to make and sell it; that Wrigley Company knowingly and willfully trespassed upon Larson Company's rights; that Wrigley Company was intentionally forestalling Larson Company; that Wrigley Company thereby constituted itself the agent of Larson Company in making and selling the common package that was the property of Larson Company; and that Larson Company was therefore entitled to stop the activities of its self-appointed agent. And although Wrigley Company in its pleadings did not directly tender the territorial limitation issue, that issue was substantially included in Wrigley Company's general denial of Larson Company's allegation that everywhere that Wrigley Company went it was putting Larson Company's product on the market.

[4] Now, it is true that the order to the master to take an account of all of Wrigley Company's profits from making and selling Doublemint is interlocutory, and therefore no question arising out of such an accounting is reviewable in this court until after the District Court shall finally have disposed of the master's report. But that does not authorize the master to open any question of fact or of law that was adjudicated in the decree of perpetual and universal injunction.

Wrigley Company moves to dismiss the appeal. We think that the question whether the directed decree of an appellate tribunal is being correctly carried into execution may properly be brought to that tribunal's attention either by petition for a writ of mandamus or by appeal from an order of the subordinate tribunal that is alleged to be in violation of the directed decree or by motion. If this is done only by a peti-

tion for a writ of mandamus, the opposing litigant is not directly brought into court; and it would seem to be not unreasonable to give the opponent direct notice in some way. The appeal will be allowed to stand as serving the purpose of motion and notice.

In our judgment the District Court should have controlled the action of the master and that court is accordingly advised to direct the master to proceed with the accounting in conformity with the order as entered.

In No. 2822 the writ will issue.

In No. 2831 the order is reversed.

A. BOURJOIS & CO., Inc., v. KATZEL.*

(Circuit Court of Appeals, Second Circuit. June 8, 1921. On Petition for Re-hearing June 30, 1921.)

No. 252.

Trade-marks and trade-names Ⓒ64—Use of trade-mark by competitor on genuine article not infringement.

The importation and sale in the United States of an article made in a foreign country, bearing the trade-mark under which it is known and sold in the country where made, and also in this country, is not an infringement of the American trade-mark on the same imported article though that is owned by a competitor.

Hough, Circuit Judge, dissenting.

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

Suit in equity by A. Bourjois & Co., Inc., against Anna Katzel. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 274 Fed. 856.

John B. Doyle, of New York City (John R. Rafter, of New York City, of counsel), for appellant.

Briesen & Schrenk, of New York City (Hans v. Briesen and William A. Redding, both of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. In July, 1913, the plaintiff, a corporation of the state of New York, bought the business and good will in the United States of A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs, a French firm which had since 1879 sold in the United States a face powder manufactured by it in France described as "Java." The French firm registered in the United States Patent Office the trade-mark "Java" in 1888, the trade-mark "A. Bourjois & Cie." in 1908, and the word "Java" on the top and side of its box in 1912. The plaintiff in 1916, 1918, and 1919 registered three other trade-marks used by the French firm for face powder. Under all these trade-marks the plaintiff imports in bulk the face powder manufactured by the French firm, and packs and sells it here in boxes.

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

*Certiorari granted 256 U. S. —, 42 Sup. Ct. 92, 65 L. Ed. —.

The defendant conducts a retail pharmacy in New York City, and sells in New York, New Jersey, and other states the same genuine face powder manufactured by the French firm, imported by her in its original boxes, on which are printed its trade-marks and labels. The only difference between the trade-mark and labels of A. Bourjois & Co., Inc., and A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs, is that the powder sold by the defendant is called Poudre de Riz de Java, as the plaintiff called it until 1916, when it altered the name to Poudre Java, and that on the bottom of the plaintiff's boxes is printed "Trade-Mark Reg. U. S. Pat. Off. Made in France—Packed in the U. S. A. by A. Bourjois & Co., Inc., of N. Y., Succ'rs in the U. S. to A. Bourjois & Cie. and E. Wertheimer & Cie."

The plaintiff filed this bill on the ground of infringement of its registered trade-marks, praying that the defendant be enjoined both provisionally and finally from selling the French firm's face powder under the trade-mark "Java" or the trade-mark "Bourjois," or under any of the plaintiff's registered trade-marks and for an accounting. The District Judge granted the motion for a preliminary injunction, and the defendant appeals from that order.

It is to be noticed in the first place that, the residence and citizenship of both parties being in the state of New York, no question of unfair competition is involved, and indeed there is no evidence of any such competition.

The assignment from A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs, to A. Bourjois & Co., Inc., is not produced, but we assume for the purposes of this case that the plaintiff is entitled to the French firm's trade-marks under *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, and *Wertheimer v. Batcheller* (C. C.) 185 Fed. 850, and that it would be a breach of the French firm's obligations to sell its face powder in this country. *Le Page v. Russia Cement Co.*, 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

We set on one side all authorities cited by the plaintiff arising out of sales under the same trade-marks of two different competitive articles manufactured by different persons, such as *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713; *Scandinavia Co. v. Asbestos Co.*, 257 Fed. 937, 169 C. C. A. 87, because it is quite clear that the defendant could not sell face powder manufactured by her or by any other person than A. Bourjois & Cie. under these trade-marks. But the article sold by the plaintiff and covered by its registered trade-marks is the face powder actually manufactured by the French firm, imported in bulk and packed here by the plaintiff, which is the precise article imported by the defendant in the French firm's original boxes and sold here. The question is whether the defendant has not the right to sell this article under the trade-marks which truly indicate its origin. We think she has. The question has been so decided in three cases in this circuit, *Apollinaris Co. v. Scherer* (C. C.) 27 Fed. 18; *Russian Cement Co. v. Frauenhar*, 133 Fed. 518, 66 C. C. A. 500; and *Gretsch v. Schoening*, 238 Fed. 780, 151 C. C. A. 630.

In the *Apollinaris Case Saxlehner*, owner of the Hunyadi Janos

spring in Hungary, gave to the Apollinaris Company the exclusive right to sell the water under the trade-mark "Hunyadi Janos" in Great Britain and the United States. The Apollinaris Company registered the name and the label as trade-marks in the United States Patent Office. Scherer applied to Saxlehner to sell him the water for importation into the United States, which Saxlehner refused to do, telling him of the Apollinaris Company's exclusive rights. Thereafter Scherer purchased the water from other parties in Germany, imported it into the United States, and sold it under the name Hunyadi Janos and with the same label as the Apollinaris Company's with one immaterial variation. Judge Wallace said:

"The complainant established an agency for the sale of the water in this country, but, as it now asserts, is unable to maintain its own prices for the article because the defendant purchases the water in Germany from persons to whom it has been sold by Saxlehner, imports it, and sells it here at lower prices. It is shown that the defendant purchases the water in bottles under the label adopted by Saxlehner containing the cautionary notice, and that he does this after having applied to Saxlehner to sell him the water and been refused and informed by Saxlehner of the complainant's rights.

"The bill of complaint proceeds in part upon the theory that the defendant is infringing the complainant's trade-mark in the name and label applied to the water, but all the averments in this behalf may be disregarded as irrelevant to the real question in the case. No doubt is entertained that the name when applied to the water is a valid trade-mark, and that the complainant should be protected against the unauthorized use of the trade-mark by another. The complainant would be entitled to this protection entirely irrespective of the registration of its trade-mark in the patent office. The same observations apply to the use of the label. The complainant has a common-law right to the name and the label as a trade-mark by which its mineral waters are identified; and as the necessary diversity of citizenship exists between the parties to confer jurisdiction upon this court, the only effect of registration is to afford and perpetuate the evidence of the complainant's title. But the defendant is selling the genuine water, and therefore the trade-mark is not infringed. There is no exclusive right to the use of a name or symbol or emblematic device except to denote the authenticity of the article with which it has become identified by association. The name has no office except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked.

"The real question in the case is whether the defendant is unlawfully interfering with any exclusive right of the complainant to control the sale of the water in the territory ceded to the complainant for that purpose by Saxlehner. It is manifest that the acts of the defendant tend to deprive the complainant of the substantial advantages which it expected to obtain from the privilege transferred to it by Saxlehner. It can no longer maintain its own prices for the mineral water or hold out the inducements it formerly could to the agents it has selected to introduce the article to the patronage of the public, and build up a trade. It can no longer protect itself as efficiently against the chances of a spurious article being palmed off upon the public as its own. It is therefore measurably deprived by the acts of the defendant of the profits and benefits which it contemplated when it purchased from Saxlehner the exclusive right of importing the water into this country and selling it here. If the complainant could acquire an exclusive right to sell the water here the case would be plain. If it could not it still remains to consider whether the defendant has violated any duty which the law recognizes in his relations to the transactions. There would seem to be no doubt that the agreement between Saxlehner and the complainant was a valid one. He had

the right to dispose of his property in the product of his spring as he saw fit, and it is not apparent how the transfer of a part of his exclusive right to vend the water by which a territorial division in its enjoyment was created, can be deemed obnoxious to any principle of public policy as tending to create a monopoly or an unlawful restraint of trade. If Saxlehner were now endeavoring to compete with the complainant in the sale of the water in the ceded territory, his conduct would furnish a ground for equitable jurisdiction and the remedy of an injunction because of the inadequacy of a remedy at law, Bisp. Eq. 463. It is equally clear that if the defendant were co-operating with Saxlehner collusively to violate the complainant's right to the exclusive sale of the water he also would be restrained. In such a case the foundation of equitable redress would be the breach of covenant on the part of Saxlehner, and the defendant when acting in aid would be identified with Saxlehner and amenable to the remedy as though he were Saxlehner himself. But it is important to bear in mind that the case would become for equitable cognizance, and the remedy of an injunction merely upon the ground that the complainant's damages arising from the breach of covenant could not be reparably redressed at law."

In the *Russia Cement Co. Case*, 133 Fed. 518, 66 C. C. A. 500, the defendant bought in bulk of third parties glue made and sold by the plaintiff under the trade-name of "Le Page's Glue" and bottled and sold under that name. We said:

"Counsel for complainant argues that defendants should be enjoined from applying the name 'Le Page' to a glue made by complainant, which is inferior to the most expensive brands sold by complainant under that name, on the ground that this is a gross fraud and an imposition upon the public. How such conduct constitutes a fraud upon the public does not appear from the evidence. The labels on defendants' bottles contain no statement as to whether the glue put up by it is either of a superior or inferior quality, but merely that this glue is manufactured by complainant and is bottled by defendants, and that 'this glue is known all over the world as the best for cementing wood, leather, glass,' etc. If the public gets an inferior quality of glue when it purchases that bottled by defendants it is because the complainant has seen fit to sell such glue under the same trade-name as it had applied to a superior article, and has chosen thus to reap the profit from the sale to the public of two qualities or grades of the same article under the same trade-name. A court of equity will not enjoin a person from affixing to goods sold by him their true name and description, in the absence of any evidence of an attempted fraud, such as by representing his goods as of a different origin or quality or manufacture from what they actually are. The case of *Gillott v. Kettle*, 3 Duer, 624, cited by complainant as 'very close in point,' illustrates the rule and its application. There the defendant removed the labels from an inferior quality of pens manufactured by complainant, and affixed other labels which imitated the labels on a superior quality of pens made by complainant. The court held that 'by such a practice the defendant endeavors by a false representation to effect a dishonest purpose; he commits a fraud upon the public and upon the manufacturer.' But here there is no false representation by spurious label or false statement. The label tells the truth, and nothing but the truth. There is no fraud upon the public, for it gets the genuine, identical thing described by the label (*Apollinaris Co. v. Scherer* [C. C.] 27 Fed. 18); there is no fraud upon the manufacturer, for its vendees resell its manufacture, to which it has applied its name (*Vitascope Co. v. United States Phonograph Co.* [C. C.] 83 Fed. 30), coupled with the statement that it (the vendee) is responsible for the bottling of the manufacture."

In the *Gretsch Case* the *Gretsch Company* had the exclusive agency for the United States of the sale of violin strings made in Germany by *Mueller* under the name "Eternelle," and with *Mueller's* approval registered the name as the trade-mark in the United States Patent

Office. Schoening purchased such strings in Germany, and imported them into the United States. The case arose under section 27 of the Trade-Mark Act (Comp. St. § 9513) as to the importation of merchandise copying or simulating a trade-mark registered in the United States Patent Office. After referring to the two foregoing cases we said:

"The rationale of both decisions is that the defendant in each case was selling the genuine article identified by the trade-mark and the public was not misled, but was getting exactly what it paid for. These decisions, however, were made before the act in question was passed. Assuming that Congress could protect the owner of a registered trade-mark against the importation by third parties of the genuine article under that trade-mark, has it done so? We think not. The act prohibits the entry of imported merchandise which shall 'copy or simulate' a trade-mark registered under it. The obvious purpose is to protect the public and to prevent any one from importing goods identified by their registered trade-mark which are not genuine. In this case, however, the imported goods were the genuine articles identified by the trade-mark. We assume that Schoening has a valid trade-mark, even if he does not manufacture the strings (*Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526), applying to the whole of the United States, and still are of opinion that it is not infringed by one who buys in Germany the genuine article identified by the trade-mark, imports it into the United States, and sells it so marked here."

The analogy between patents and trade-marks is not complete. A patent gives the patentee a monopoly to make, sell, and use and grant to others the right to make, sell, and use the subject patented in the United States for the term of the patent. Hence articles lawfully made, used, and sold in foreign countries cannot be sold in this country if they infringe the patent. Trade-marks, on the other hand, are intended to show without any time limit the origin of the goods they mark, so that the owner and the public may be protected against the sale of one man's goods as the goods of another man. If the goods sold are the genuine goods covered by the trade-mark, the rights of the owner of the trade-mark are not infringed.

The order is reversed.

HOUGH, Circuit Judge (dissenting). The majority opinion states as the question in this case whether defendant "has not the right to sell this article under the trade-marks which truly indicate its origin." With this statement I agree, but disagree with the meaning given by the decision to the word "origin."

It is not yet settled whether a trade-mark is to be primarily regarded as protecting the trade-mark owner's business from a species of unfair competition, or protecting the public from imitations.

The decision in this case seems to me to lean the wrong way, because in my opinion a trade-mark is primarily a protection to the owner's business. It is attached to the business, is a part of it, and cannot be detached therefrom; there being no such thing as the transfer of a trade-mark in gross. If this be true, it makes no difference whether the plaintiff's business grew out of an agency for another, provided only that it be shown that it is an honest business and belongs to the person who attached, and (perhaps) duly registered the trade-mark, which describes the product of that business.

This plaintiff made a business in Java powder. It is an honest business, and whatever rights the French manufacturer had in the United States became the rights of the plaintiff. If, therefore, the primary function of the trade-mark is to protect this plaintiff's business in his own country, it makes no difference at all that the genuine French article is the thing offered by defendant. That genuine article has become an infringement because the business of dealing in that article within the United States is the plaintiff's business.

On Petition for Rehearing.

Hans v. Briesen, of New York City (William A. Redding, of New York City, of counsel), for petitioner.

L. E. Varney, of New York City, *amicus curiæ*.

PER CURIAM. We are asked to certify the question involved in this case to the Supreme Court on the ground of its supreme importance in view of the many businesses with their accompanying trade-marks of German citizens, bought during the European War by citizens of this country from the Custodian of Alien Property.

It is not doubted that an American citizen may buy the business of a foreigner in the United States, with its accompanying trade-marks, and, having done so, may subsequently change the character and quality of the goods at pleasure. But that is not this case. The owner of the trade-mark cannot change them and still assert that they are the actual goods manufactured by the foreigner and imported by him. Such a misrepresentation would deprive him of the protection of the law.

The precise question decided by us has been misapprehended. The trade-marks and labels complained of are those of the French house, and the plaintiff asserts that it is selling under them face powder manufactured by the French house in France and imported by it in bulk and repacked here. It treats this repacking as a very material consideration. The defendant says that this is precisely the product made by the French house in France and imported by her in the boxes of the French house with the same trade-marks and labels, which she is selling here.

If in the case of *Menendez v. Holt*, *Holt* had asserted that he was selling the flour under the trade-mark *Favorita* which had been made by a miller under that trade-mark, the case would be more like the one under consideration.

It is sought to distinguish the three cases decided in this circuit, which we have followed, upon what we think a misapprehension of their facts.

It is said that in the *Apollinaris Case* that company was the mere agent of *Saxlehner*. This is not so. The company bought the genuine spring water from *Saxlehner*, imported it into the United States, and sold it here as the water of that spring. All that it owed *Saxlehner* was the price it agreed to pay; there was no relation whatever of agency. Judge *Lacombe*, in *Saxlehner v. Eisner & Mendelson Co.*, 91 Fed. 538, 33 C. C. A. 291, and Mr. Justice *Brown* in *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, both said that the company was not *Saxlehner's* agent.

In the *Le Page Case* it is said that the plaintiff owner of the trade-mark sold the *Le Page* glue to the defendant. This is not so. The plaintiff refused to sell to the defendant, who thereupon bought the glue from third parties in bulk and rebottled it.

So in the *Gretsch Case* it is said that Schoening was merely the exclusive agent of Mueller for the sale of his violin strings called "Eternelle," in the United States. The District Judge found that there was an exclusive agency, though the evidence on the subject was very meager, and we, assuming that to be true and also that Schoening had a valid trade-mark, held nevertheless that Gretsch could lawfully import Mueller strings from Germany and sell them here.

The petition is denied.

McELLAGOTT v. KISSAM et al.

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

No. 246.

1. Courts ⇨354—Federal court judgment must determine entire controversy.

The judgment in an action at law in the federal courts must settle the entire controversy, leaving no issues undetermined.

2. Internal revenue ⇨2—Estate tax is an "excise tax," and not a "direct tax" on property, and is constitutional.

The estate tax imposed by Act Sept. 8, 1916, § 201, as amended by Act March 3, 1917, § 300 (Comp. St. 1918, § 6336½b), is an "excise tax," and not a "direct tax" on property, within the meaning of Const. art. 1, § 9, subd. 4, and is constitutional.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Direct Tax; Excise.]

3. Internal revenue ⇨8—Estate of decedent includes property in which he had a joint interest.

Under Estate Tax Act Sept. 8, 1916, § 202(c) being Comp. St. § 6336½c(c), the gross estate of a decedent for tax purposes includes the entire interest in property held jointly by decedent and any other person with the exception of any part of the property which belonged to such other person before the joint interest was created.

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

Action by Cornelia B. Kissam and John C. Knox, Executrix and Executor of the will of Jonas B. Kissam, against Richard J. McElligott, late acting Collector of Internal Revenue. Judgment for plaintiffs, and defendant brings error. Reversed.

Francis G. Caffey, U. S. Atty., of New York City (Richard S. Holmes, Sp. Asst. U. S. Atty., of New York City, of counsel), for plaintiff in error.

Stark B. Ferriss, of New York City (Joseph T. Stearns, of New York City, of counsel), for defendants in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 15, 1912, Jonas B. Kissam assigned 10 certain bonds and mortgages of individuals and certain bonds of corporations owned by him to John C. Knox, and subsequently Knox assigned them to Jonas B. Kissam and his wife, Cornelia. In the instruments of assignment Knox, as party of the first part, assigned the bonds and mortgages "to the party of the second part, their survivor, such survivor's executors, administrators and assigns," and to hold "to the party of the second part, the survivor of them, and to the successors, personal representatives, and assigns of the said party of the second part forever," and it was further stated that—

"It is the intention of this assignment that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bond and mortgage and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

The instrument of assignment of the corporate bonds contained the same provisions. All parties concede that the ownership was at least joint, and that it could have been severed and turned into a tenancy in common by either party, notwithstanding the reservation that neither party could affect the right of the survivor. June 2, 1917, Kissam died, leaving all his estate to his wife, Cornelia; she and John C. Knox being executors of the will.

The Act of September 8, 1916, known as the Estate Tax Law, by section 201 as amended by Act March 3, 1917, § 300 (Comp. St. 1918, § 6336½b), provides:

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States:

"One and one-half per centum of the amount of such net estate not in excess of \$50,000. * * *

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *"

Comp. St. § 6336½c.

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement

of the estate arising from fires, storms, shipwreck or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

"(2) An exemption of \$50,000. * * *"
Comp. St. § 6336½d.

The executors included in their return to the Commissioner of Internal Revenue one-half of said joint property in the decedent's gross estate as being his property, and paid the transfer tax on the net estate so ascertained; but the Commissioner reviewed their return and included the whole of the joint property in the gross estate, and assessed the net estate returned in this way. The executors paid the additional tax under protest, and after unsuccessfully seeking to obtain a refund brought this action; the complaint containing four causes of action, of which the first involved the considerations above mentioned. They claimed that the assessment was void as to the half of the joint property which vested in Cornelia before the passage of the Act of September 8, 1916, as amended, and also that the act itself was unconstitutional, as a direct tax upon property without apportionment among the several states as required by article 1, section 9, subdivision 4, of the Constitution.

The executors moved for judgment on the first cause of action, which motion the District Court granted, and the collector has sued out this writ of error.

[1] We point out in the first place that the practice pursued was wholly erroneous. What has become of the three causes of action as to which there was no answer or demurrer? Judgment should have been entered in favor of the executors on the merits on the first cause of action, and by default upon the second, third, and fourth causes of action. Actions at law cannot be brought up in the federal courts by writ of error piecemeal; the whole controversy must be settled in one final judgment. As the judgment will be reversed, the whole controversy can be disposed of upon a new trial.

[2, 3] The joint property mentioned in section 202, subdivision (c), is included as a measure of the tax payable by the estate for the decedent's privilege of disposing of his property by will or intestacy. It is an excise tax, and not a direct tax upon property. *New York Trust Co. v. Eisner* (D. C.) 263 Fed. 620; *Prentiss v. Eisner* (D. C.) 260 Fed. 589; *Id.* (C. C. A.) 267 Fed. 16. The language of the subdivision plainly applies to property in which the decedent was interested jointly with any other person, and all of which was originally his; i. e., any part of the property which originally belonged to such other person, and never at any time belonged to the decedent, is not to be included. The expression "originally" refers, not to the time of death, but to the time the joint interest was created. So the words "never to have belonged to the decedent" mean at any time before the creation of the joint estate. The act takes effect upon the death; it does not become retroactive, because it measures a transfer tax payable

by the estate in part by property which the decedent has given away in his life time. This seems to us perfectly fair, and an answer to the constitutional objection.

Judgment reversed.

VAN ATTA v. MONTANA NAT. BANK.

(Circuit Court of Appeals, Ninth Circuit. September 12, 1921.)

No. 3663.

Partnership ⇐199—Partner cannot sue third party for conversion of his interest in partnership property.

One member of a partnership which is still in existence and its affairs not settled cannot sue one to whom his partner has pledged notes owned by the partnership to secure partnership indebtedness for conversion of his interest in such notes.

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

Action at law by Tisdale F. Van Atta against the Montana National Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

The complaint upon which this action was tried in the court below was an amended one, the original not appearing in the record.

The amended complaint alleges in paragraph II, in substance, that on July 27, 1915, the plaintiff and one W. F. Guy were joint owners and holders in equal shares of certain described promissory notes, to wit: One dated June 12, 1914, for \$600; one of the same date for \$300; one of the same date for \$2,035; one of the same date for \$2,000; and one of the same date the amount of which is not stated—all of which were executed to the plaintiff and Guy by one Mike Morley and his wife, Louise, the notes being secured by a mortgage given by the Morleys on a certain described tract of land in Rosebud county, Mont., containing 666.83 acres; that about July 27, 1915, the defendant bank entered into a conspiracy with Guy for the purpose of defrauding the plaintiff out of his interest in the notes by which Guy to secure his individual indebtedness to the defendant bank pledged to the latter all of the notes, including the plaintiff's half interest therein, the defendant, its agents and officers well knowing that the plaintiff was the owner of a one-half interest in the notes; that on April 1, 1920, the plaintiff demanded of the defendant bank "the possession of one-half of said promissory notes, which demand was refused by defendant, and it thereby converted such notes to its own use; that some time prior to such demand defendant, under the aforesaid collusive and pretended agreement with said W. F. Guy as pledgee, sold such notes, and at such pretended sale it bid the same in its own name, and claims to own the same. The prayer was for judgment in plaintiff's favor in the sum of \$8,150, the alleged value of the plaintiff's notes, with interest thereon from April 1, 1920, with costs.

The answer to the amended complaint, in addition to certain denials, for further defenses set up: That on July 27, 1915, the plaintiff and Guy were partners doing business under the name of Guy & Van Atta, and that the notes were owned by the partnership, and that both of the partners on July 27, 1915, so held themselves out to the defendant bank, as they had done for two years theretofore; that Guy is still living, and the partnership has never been dissolved; that on or about December 1, 1914, the said partnership was indebted to the First National Bank of Forsyth, Mont., in the sum of about \$4,500, as security for which they pledged the notes described in the amended complaint under a collateral agreement which is set out in the answer and

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

which authorized the pledgee to sell the pledged property upon the maturity of the \$4,500 note in the event it was not paid, and to itself become the purchaser thereof, duly accounting for the proceeds; that the \$4,500 note became due on or about March 1, 1915; that on July 27, 1915, the First National Bank of Forsyth sold it to the Bank of Montana, doing business under the laws of that state at Billings, for the sum of \$4,536.65, and thereupon delivered it to that bank, the said \$4,536.65 being the amount due the Forsyth National Bank on the \$4,500 note executed to it by the partnership; that such sale was made in good faith and in accordance with the terms of the collateral agreement; that on June 6, 1914, the plaintiff executed to said Bank of Montana his individual promissory note for the sum of \$1,000, with interest, etc., and on the 27th of the same month of June the plaintiff executed to the said Bank of Montana a promissory note on behalf of the partnership in the sum of \$1,500, with interest, etc., and on September 28, 1914, the plaintiff executed to the said Bank of Montana his individual promissory note in the sum of \$650, with interest, etc.; that upon the maturity of the said three last mentioned notes the said Bank of Montana duly demanded payment thereof, but that both plaintiff and Guy refused to pay the same; that both of them were duly notified of the sale by the Forsyth bank under the collateral pledged to it, at which time Guy was and for a considerable time theretofore had been endeavoring to settle with the plaintiff the partnership transactions involving, in addition to the notes mentioned, certain real property in the city of Great Falls, Mont.; that on or about January 5, 1915, the said Bank of Montana brought an action in one of the courts of the state against the partnership to collect the amount due on the \$1,500 note of June 27, 1914, and also an action against Van Atta individually for the enforcement of the payment of the \$1,000 and \$650 notes already mentioned, all of which the respective defendants thereto refused to pay, and that finally Guy executed to the Bank of Montana at Billings, on said 27th day of July, 1915, his individual promissory note in the sum of \$8,221.36 with interest, etc., which latter note was given for the purpose of paying to the said Bank of Montana the money it had paid to the First National Bank of Forsyth on its above-mentioned purchase, and also for the purpose of paying to the said Bank of Montana the amount due on the \$1,500, \$1,000, and \$650 notes that have been mentioned, the said bank reserving the right to hold all of the notes for which his \$8,221 note was executed and subject to a certain pledge agreement by which he transferred and delivered to the said Bank of Montana all of the Morley notes, aggregating \$11,535, with the right in that bank to sell all or any of the said property in satisfaction of his (Guy's) indebtedness to the said bank, and to itself become the purchaser; that the said Guy did not pay the \$8,221 note, and, after frequent demands for such payment, the bank on January 23, 1917, sold all of the said notes so pledged to it by Guy, pursuant to the terms of the pledge, at which sale it became the purchaser; that the said Morley notes so purchased by the said Bank of Montana were secured by a mortgage on the Rosebud tract of lands, which mortgage was second to a mortgage theretofore given on the same property by Van Atta and his wife, and by Guy and his wife, to one Larson, in the sum of \$10,000, interest on which had not been paid, nor had the taxes on the mortgaged property been paid, and at which time the said mortgaged property was not worth more than \$15,000; that subsequently Larson commenced suit in one of the courts of the state to foreclose the mortgage held by him, to which action Van Atta and wife and Guy and wife were made parties defendant, and that under a decree of foreclosure entered in that suit the mortgaged property was bid in by the Montana National Bank, the defendant to the present action, September 29, 1917, which bank thereupon became the owner of the mortgaged property subject to the right of redemption on the part of the parties entitled to redeem from such sale; that the plaintiff in the present action made no attempt to redeem from such sale, and that at the end of the time therefor the said plaintiff lost his right in the said property, if any he had; that at such sale the defendant to the present action paid the sum of \$12,014.03 and also the sum of \$4,000 for delinquent taxes and water assessments on the property; that, the period of redemption from such sale having expired, the second mortgage

securing the notes described in paragraph II of the plaintiff's amended complaint became of no value.

The answer also set up in defense of the action certain provisions of the statute of limitations of the state, and also pleaded an estoppel.

T. F. McCue, of Great Falls, Mont., for plaintiff in error.

Grimstad & Brown, of Billings, Mont., and J. W. Speer, of Great Falls, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The record shows that it was after a very considerable portion of the evidence that it contains had been introduced on the trial that the plaintiff asked and obtained leave to file the amended complaint, thereby basing his action upon the alleged conversion by the defendant of his interest in the notes therein described.

We have no means of knowing what the original complaint contained, but find in the opinion of the court below the statement that in it "were various allegations of firm property, of partnership property." At all events the evidence not only tended to sustain the allegations of the answer of the defendant bank, but showed, we think, beyond dispute, that there had been no settlement of the partnership business of Guy and Van Atta in so far as third parties were concerned, of which the defendant bank was one, whatever may have been agreed upon by the partners as between themselves. Obviously, without a settlement of the partnership business, it could not be known what the interest of the plaintiff in the notes described in the complaint amounted to, in which adjustment the defendant bank, as holder of the notes for value, was plainly entitled to take part. Clearly, therefore, the trial court was right in holding that the evidence introduced afforded no ground for a finding by the jury of a conversion by the defendant of the plaintiff's interest in the notes, nor of the value of such interest, dependent, as the latter was, upon the adjustment of the partnership affairs.

The judgment is affirmed.

EDDY, County Treasurer, et al. v. FIRST NAT. BANK OF FARGO.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1921.)

No. 5608.

Taxation ⇐12—**Tax on national bank shares held invalid as discriminatory.**

A tax at a rate in excess of 35 mills on the dollar, levied on the assessed value of shares of national and state banks, where by a state law (Laws N. D. 1917, c. 230) other moneys and credits of citizens are exempt from all taxes, except a 3-mill tax thereby imposed, as to national bank shares is in violation of Rev. St. § 5219 (Comp. St. § 9784), prohibiting taxation of such shares "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," and is invalid as to the excess above the 3-mill rate, though all other property except such other moneys and credits, is taxed at the same rate.

Appeal from the District Court of the United States for the District of North Dakota; Joseph W. Woodrough, Judge.

Suit in equity by the First National Bank of Fargo against E. C. Eddy, as Treasurer of Cass County, N. D., and another. Decree for complainant, and defendants appeal. Affirmed.

Frank E. Packard, Asst. Atty. Gen., of North Dakota (William Langer, Atty. Gen., of North Dakota, on the brief), for appellants.

Edward Engerud, of Fargo, N. D. (A. G. Divet, D. B. Holt, and J. S. Frame, all of Fargo, N. D., on the brief), for appellee.

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

HOOK, Circuit Judge. This is an appeal by the treasurer and auditor of Cass county, N. D., from a decree in favor of the First National Bank of Fargo enjoining the collection of taxes for the year 1919 upon its capital shares in excess of the taxes "assessed upon other moneyed capital in the hands of individual citizens of such state." Rev. Stat. § 5219 (Comp. St. § 9784). The suit was brought by the bank as the statutory tax paying representative of the shareholders. Comp. Laws N. D. 1913, §§ 2115-2117; *Cummings v. Bank*, 101 U. S. 153, 25 L. Ed. 903. The general taxes for city, county, and state purposes, including schools, etc., assessed upon the shares of banks, national and state, aggregated 35.3 mills per dollar of valuation, exclusive of that invested in real property and taxed as such. That was the tax rate applied generally to real and personal property. By the Money and Credits Act of North Dakota (chapter 230, Laws 1917; section 2074, Comp. Laws 1913) all other moneyed capital in the hands of individual citizens of the state (except mortgages on which a registration fee was collected in lieu of taxes), such as moneys loaned at interest and invested in interest-bearing notes, bonds and securities, and shares of associations engaged in such business, were exempted from all taxes, except at the statutory rate of 3 mills on the dollar of valuation. The result of this was that the taxes assessed against the shares of the plaintiff bank amounted to \$17,483, whereas, had the 3-mill rate of the Money and Credits Act been applied the amount would have been but \$1,482. The bank made and kept good a tender of the latter amount and the injunction appealed from went to the excess.

The effect of an exemption or partial exemption from the general burden of state taxation, in relation to the provisions of the act of Congress (Rev. Stat. § 5219) designed to prevent injurious discrimination against the moneyed capital of individual citizens invested in the shares of national banks, is always open to consideration. This is so because the discrimination must be appreciable or substantial, else it will be taken as but an instance, generally unavoidable, of a failure to maintain exact uniformity in taxation, or as ascribable to the variable schemes or forms of taxation largely within the control of the states. But it would be quite improbable if a major part of the moneyed capital

individually held by citizens of North Dakota, giving to the term "moneyed capital" its accepted meaning (*Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, 34 Sup. Ct. 114, 58 L. Ed. 274; *Mercantile, etc., Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895), were found invested in the shares of national and state banking associations. Such a condition would be most unusual. We need not, however, indulge in what might be said to accord with common knowledge. The record before us discloses that in the city of Fargo, the domicile of the plaintiff bank, there was at least \$2,000,000 of moneyed capital in the hands of individual citizens taxed at the 3-mill rate, and \$1,383,023 of national and state bank shares taxed at the rate of 35.3 mills; also that the same relative proportion existed throughout the county and the state.

We are unable to say that this is not a case of serious, substantial discrimination, forbidden by the act of Congress by virtue of and within the limitations of which alone may shares of national banks be taxed. *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706, 28 L. Ed. 1089; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053. This is not a case under the equal protection clause of the Constitution, in which a state possesses rather wide powers of classification for legislation, and it is not enough to say that the shares of state banks are treated equally with those of national banks or to make comparisons generally with corporations and their property. The act of Congress itself makes the classification and the comparison, for equal treatment in taxation of moneyed capital is between that belonging not to banks, national and state, or other corporations, as a class, but to the individual citizens of the state, who make its laws and fix their burdens of taxation. It is contended that, were it not for the state statute fixing the small 3-mill rate, much of the individual moneyed capital would escape taxation. If so, it would be largely due to a failure to enforce the laws against individual evasion of taxes, and if that condition, being recognized, is dealt with by statute so broadly as here, substantially equal treatment should be accorded the shares of national banks individually held. The conclusion in this case is fully supported by *Merchants' National Bank v. City of Richmond* (decided June 6, 1921) 256 U. S. —, 41 Sup. Ct. 619, 65 L. Ed. —, in which the facts were quite similar.

The decree is affirmed.

CALUMET & HECLA MINING CO. v. EQUITABLE TRUST CO

(District Court, S. D. New York. November 24, 1919.)

1. Money received 16—Persons through whom money was received are not necessary parties.

In an action against defendant to recover moneys which defendant had received and which it ought to repay to plaintiff, it is not necessary to join as defendants those persons through whose operations the money was received by defendant.

2. Pleading ⇨8(2)—**Allegation persons acted as agent for defendants is mere conclusion.**

An allegation in a complaint that persons acted in the transaction as agents for defendant, without any averment of the facts showing defendant had authorized them to act as such, is a legal conclusion, and is insufficient to charge defendant with liability for the fraudulent representations of such agent.

3. Shipping ⇨32—**Mortgagee not liable for contracts of mortgagor.**

A mortgagee of a ship is not liable for the contracts of the mortgagor who was operating the ship, even though the ship had been registered in the name of the mortgagee, and the money received from the contract had been paid to it in accordance with the terms of the mortgage.

4. Shipping ⇨32—**Complaint held not to allege notice to mortgagee of false representations by which money was secured from plaintiff.**

A complaint for money received by a mortgagee of a ship, the proceeds of a contract obtained from plaintiff by false representations of those operating the ship held insufficient to allege notice to the trustee who held title for the mortgagee, or to the mortgagee, of the false representations, so that the mortgagee was not liable for the return of the money.

Action by the Calumet & Hecla Mining Company against the Equitable Trust Company for money had and received. On demurrer to the complaint for failure to state a cause of action and for defect of parties defendant. Demurrer sustained on first ground, and overruled as to second ground.

This is an action to recover money had and received for plaintiff's use. The complaint alleges that Stafford purchased the steamer H. M. Whitney, and that the defendant loaned \$225,000, being part of the purchase price, that in order to secure repayment Stafford transferred the legal title of the steamer to a third party (the treasurer of the defendant), and that he thereafter held the legal title to said steamer for the defendant to secure the repayment of the \$225,000. The complaint further alleges that Robert E. Miller and Stafford, either in person or doing business under the name of Acme Steamship Company, with the knowledge and consent of the defendant, operated said steamer, and that a corporation known as the Acme Operating Corporation, with the knowledge and consent of the defendant, acted as agent for said Miller and Stafford, individually or doing business as Acme Steamship Company, in entering into affreightment contracts and issuing bills of lading for the carriage of freight by said steamer; that it was understood and agreed between Miller and Stafford and the defendant that until the \$225,000 had been repaid to the defendant in full the moneys earned in the operation of the steamship and received by Miller and Stafford individually, or doing business as Acme Steamship Company, or Acme Operating Corporation, should be paid by them to the defendant, to be applied by it in the payment of the indebtedness of \$225,000. The complaint further alleges that Miller and Stafford, doing business under the trade-name of Acme Steamship Company and Acme Operating Corporation, as agents for Miller and Stafford, individually, or doing business as Acme Steamship Company, and the defendant falsely and fraudulently represented to plaintiff that the steamship was to enter on a voyage to Genoa and would carry freight, and requested plaintiff to pay freight payable in advance; that plaintiff believed the representations to be true, and, relying on the same, delivered to Stafford and Miller, doing business as Acme Steamship Company and Acme Operating Corporation, its check for \$19,503.35 for freight of copper to be shipped on the steamship, which said agents well knew the United States government had refused permission to sail; that the copper was delivered to the ship and the check was indorsed payable to the defendant and received by it; that the copper was not

shipped on the steamer; that the plaintiff has elected to rescind the contract and seeks to recover the \$19,503.35 from the defendant.

The defendant demurs to the complaint:

(1) Because it states no cause of action.

(2) Because of a defect of parties defendant in that the presence of Miller and Stafford, individually, and doing business as Acme Steamship Company and Acme Operating Corporation, is necessary for a complete determination of the action.

In this action for money had and received the complaint alleged that A. and B., as agents for the defendant, falsely represented to plaintiff that a certain steamship was to make a voyage to Genoa and would carry freight, and requested plaintiff to pay freight in advance; that plaintiff believed the representations to be true, and, relying on the same, delivered to A and B. its check in payment for the freight of copper to be shipped on the steamship, which said agents well knew the United States government had refused permission to sail; that the copper was delivered to the ship and that the check was indorsed payable to the defendant and received by it; that the copper was not shipped on the steamer; that the plaintiff had elected to rescind the contract and seeks to recover the amount of the check from the defendant. Defendant demurred to the complaint on the ground that it stated no cause of action. Held that the demurrer should be sustained because there was no proper allegation of agency. There was in the complaint, in addition to the allegations above recited, an allegation that A. and B. operated the steamer as agents, but this was not equivalent to an allegation that they had been appointed as agents to operate the ship, but was only a legal conclusion. Moreover, there was no allegation that the defendant had knowledge or was put on notice respecting the equities and claims which the plaintiff might have in the money by reason of any false representations, and, though there were additional allegations that defendant was a mortgagee of the ship, this would not render it liable for affreightment or other contracts made by the mortgagor or his agent, who was really in possession.

Murray, Prentice & Howland, of New York City (Winthrop W. Aldrich and Franklin P. Ferguson, both of New York City, of counsel), for demurrant.

Bullowa & Bullowa, of New York City (Lawrence E. Brown, of New York City, of counsel), for plaintiff.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). [1] I agree with the plaintiff that there is no defect of parties defendant. If the defendant received moneys which it ought to repay in an action of indebitatus assumpsit, I can see no reason why other persons by means of whose operation these moneys reached the defendants should be made parties in an action at law.

[2] In regard to the first ground of demurrer, the complaint, if it can stand, must do so because of a proper allegation of agency. I find no allegation that the defendant received the money from the plaintiff, but, on the contrary, it apparently received it from Miller and Stafford in a check which was indorsed and paid to the defendant. There is no allegation that the defendant had knowledge or was put upon notice respecting the equities or claims which the plaintiff might have in the money by reason of any false representations. The false representations were not alleged to have been made by the defendant, but by Miller and Stafford. Now, if they were agents for the defendant and acted for it in making the representations, an equity would apparently arise which would entitle the plaintiff upon the alle-

gations in the complaint to recover; but no allegation can be found which sets forth the appointment of these men as agents to operate the ship. A mere allegation that they did operate her as agents is nothing but a conclusion of law, which nowhere discloses the basis upon which the agency is founded, unless it be thought to be founded upon the mere fact that the defendant was a mortgagee to secure the repayment of \$225,000.

[3] The fact that the defendant was a mortgagee would not render it liable for affreightment or other contracts made by the mortgagor, or his agent, who was really in possession (Jackson v. Vernon, 1 Henry Blackstone, 114; Myers v. Willis, 17 C. B. 77; Law Guaranty & Trust Company Soc. v. Russian Bank for Foreign Trade, 1905, 1 K. B. 815; Morgan's Assignees v. Shinn, 15 Wall. 105, 21 L. Ed. 87; Davidson v. Baldwin, 79 Fed. 95, 24 C. C. A. 453; Thorn v. Hicks, 7 Cow. [N. Y.] 697), and this is true under the doctrine laid down by the foregoing authorities, even though the steamship is registered in the name of the mortgagee.

[4] It is to be noticed that there are two Millers named in the complaint, one Arthur A. Miller, the treasurer of the defendant, who took title to the vessel to secure repayment of the loan. It is not alleged that he made any false representations, or had anything to do with the management of the ship. He apparently merely held the legal title as trustee for the defendant to secure its loan. The complaint alleges that:

"Robert E. Miller and Bartholomew L. Stafford, doing business under the trade-name and style of Acme Steamship Company, * * * and the Acme Operating Corporation, as agents for said Robert E. Miller and Bartholomew L. Stafford, individually or doing business as Acme Steamship Company, and the defendant, falsely and fraudulently stated and represented to plaintiff that the steamship * * * was shortly thereafter to enter upon a voyage to Genoa. * * *"

I think it clear, therefore, that the complaint cannot stand upon any theory that it discloses notice to the defendant through its treasurer, Arthur A. Miller, of any of the transactions complained of.

For the foregoing reasons, the demurrer is sustained on the ground that the complaint states no cause of action. The demurrer based upon a defect of parties is overruled.

In re BRANCHE.

(District Court, N. D. New York. September 12, 1921.)

No. 9141.

Bankruptcy ⚡77—Small current claims not counted in computing number of creditors.

Small current debts, contracted to be paid monthly or on demand, and which have been previously so paid, such as claims for rent, groceries, drugs, club dues, etc., cannot be resorted to by an insolvent for the purpose of increasing the number of his creditors to 12 or more, to defeat an involuntary petition by a large creditor.

In Bankruptcy. In the matter of Walter L. Branche, alleged bankrupt. Hearing on petition and answer. Order of adjudication.

Muhlfelder & Ilch, of Albany, N. Y., for petitioning creditors.

Charles R. Watson, of Albany, N. Y. (George J. Hatt, 2d, of Albany, N. Y., of counsel), for bankrupt.

COOPER, District Judge. The question to be decided here is whether or not Walter L. Branche should be adjudicated a bankrupt. A petition in involuntary bankruptcy was filed against Walter L. Branche by Rosenthal Bros., Cigar Manufacturers, Inc., a creditor, alleging that the bankrupt had less than 12 creditors. An answer was interposed, alleging that there were 18 creditors at the time of the filing of the petition, but not controverting any of the alleged acts of bankruptcy or disputing the petitioner's claim. Subsequently two other creditors filed intervening petitions, and as to the Autoelectric Company, one of them, it appeared that its debt had been paid prior to the filing of its petition. The sole question upon the original petition, then, is whether the creditors are less than 12 in number, within the meaning of the Bankruptcy Law.

Proof was taken as to the issues raised by the answer, and it appeared that the gross debts of the bankrupt amounted to \$16,000. Of this amount there is due the petitioner \$13,419 for merchandise, consisting of cigars sold. There are no real assets, and the bankrupt is hopelessly insolvent, having squandered his money at the race tracks. Two of the creditors are brothers, and are not to be counted, since they are within the third degree of consanguinity. Bankruptcy Law, § 59e (Comp. St. § 9643). A third creditor is secured by a chattel mortgage, claimed to be fraudulent, and she may not petition. Section 59b. By stipulation the Albany Times Union, a creditor, was stricken from the answer, its debt having been paid. The total number of creditors are thereby reduced to 15, excluding the petitioner and Ellis Kellert, who was permitted to intervene.

Of the remainder, the St. Agnes Cemetery claim, for balance due on contract for purchase of a cemetery lot not yet deeded, is substantially a secured claim. Then there is the debt (for groceries) of Harder, who testified that all bills previous to a month before filing of the petition herein were paid, and all subsequent to that time paid, and that he expected the amount of his charge, \$18.12, to be paid. Next, there is a debt due the Albany Yacht Club. It appeared that Branche paid his dues in advance up to the 1st of February (the petition was filed February 22d), and the only amount due was \$1.65. There are two bills for medical services, either or both of which might have been contracted after the filing of the petition. Then there remain several small claims for rent, nurse's bill, storage charge, drug charge, and club dues. Some of these claims are of doubtful validity as subsequent debts, such as that of Bruce McDonald Company, Inc., where the dealings of the parties are inconsistent with the existence of a valid debt, and the same is true of the Perry claim for nursing. The garageman

has a statutory lien on the automobile for his storage charge. Few seem to be debts unpaid in good faith.

Mere schemes and artifices to avoid the letter and the spirit of the law will not be tolerated. To treat the holders of such claims just enumerated as creditors, to be considered in determining the number in existence for the purpose of preventing an insolvent debtor from meeting his honest debts, after he has avowedly dissipated and preferentially transferred his only remaining assets, in utter disregard of the rights of creditors, would be folly. Creditors of this kind, who feel secure in having their bills promptly paid, and can have them paid immediately upon insistence, cannot be counted to create an excess number of creditors and defeat the purposes of the Bankruptcy Act. These claims are for current accounts, such as are contracted to be paid from month to month. The folly of considering these people as creditors is demonstrated in the case of the debt of one Westervelt. He claims \$16 for meals from January 3d to 15th. The bankrupt paid regularly each week before that time and has since paid regularly each week in advance. Nevertheless, the contention is that he should be counted among the others as a creditor.

To permit such a scheme to be resorted to, claiming that Westervelt and the others referred to are creditors within the intendment of the statute, for the purpose of keeping alive the claims of 12 creditors and by this indirect means to defeat the whole scheme of the statute, is unlawful and void. See *In re Blount* (D. C.) 142 Fed. 263, where the bankrupt sought to defeat the purposes of the statute by setting up the claim that there were more than 12 creditors, claiming to have bills for groceries, dry goods, drugs, laundry, newspapers, and the like. In answer to this the court stated:

"If the contention of the respondent is to be sustained, the involuntary feature of the Bankruptcy Act would be a dead letter; for any insolvent who desired to prefer some of his creditors, leaving out one or two, could always manage to have as many as 20 creditors by purchasing for his personal use and * * * his family small things amounting to sums ranging, as in the case at bar, from 10 cents to \$2, and having them charged. By paying them the succeeding month, after he had made some small purchases, to be charged again, it would always leave a number of creditors ready to be used whenever proceedings of this kind are instituted against him. It is hardly reasonable to suppose that creditors of that kind, who feel secure in having their bills promptly paid, would want to incur the risk of losing a good customer in order to join a bona fide creditor to institute proceedings in bankruptcy. All laws must be given a reasonable construction, and for this reason the claims herebefore recited must be disregarded in determining the number of the creditors of Mr. Blount at the time these proceedings were instituted, and if this is done it clearly appeared that there were less than 12 creditors."

In this case the bills referred to were contracted to be paid monthly, were secured for all intents and purposes of the Bankruptcy Law, and the creditors could refuse further credit, unless the bills complained of were paid upon specified times. As was stated in *Re Burg* (D. C.) 245 Fed. 173, which followed the *Blount* decision:

"The list filed by defendant, showing his creditors at the date of filing of the petition, discloses 24, not including the plaintiff. Only 3 of them were for sums more than \$100; the highest being for \$252.56, and 12 of them for sums

under \$5. These small claims were current accounts for groceries, drugs, dry goods, milk, gas and oil, telegrams, telephone bills, water, light and gas bills, etc., such as are contracted to be paid for from month to month. Such creditors are practically secured, as their bills have to be paid from month to month before further necessities can be obtained. The Bankruptcy Law is never invoked for such small creditors, who themselves have adequate remedies for the collection of their accounts by cutting off further supplies. As to these accounts I think the maxim, 'De minimis non curat lex,' applies."

If these claims be disregarded, there are accordingly less than 12 creditors. It is not necessary to consider the questions arising upon the later petitions to intervene.

A decree may be entered adjudging Branche a bankrupt.

UNITED STATES v. RATAGCZAK.

(District Court, N. D. Ohio, E. D. September 15, 1921.)

No. 6756.

1. Criminal law \Leftrightarrow 167, 168—Former acquittal or conviction, to constitute bar, may be upon warrant and without jury, but court must have jurisdiction.

If a former conviction or acquittal was by a tribunal having jurisdiction of the offense, defendant cannot again be prosecuted for the same offense though the trial may have been on a warrant and without a jury; but it must appear that such tribunal had jurisdiction of the offense charged in the later indictment or information.

2. Criminal law \Leftrightarrow 201—Conviction under state statute not bar to prosecution under federal statute for same act.

Acquittal of a defendant by a state municipal court under a state statute on a charge of having unlawfully in his possession a quantity of whisky held not a bar to a prosecution in a federal court for the same act under the National Prohibition Act, on the grounds (1) that the state court was without jurisdiction of an offense against the federal statute, and (2) that the acts charged constituted separate offenses under the state and federal statutes, respectively, though their provisions violated were the same.

On Information. Criminal prosecution by the United States against Steve Ratagczak. On demurrer to plea in bar. Demurrer sustained.

B. W. Henderson, Asst. U. S. Atty., of Cleveland, Ohio.

N. C. Beckerman, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Defendant is by information charged under the National Prohibition Act (41 Stat. 305) with the offense of having on or about the 11th day of May, 1921, had unlawfully in his possession 92 quarts of Gibson whisky. To this information the defendant has filed a special plea of former acquittal, to which the plaintiff has demurred generally. The allegations as to the identity of the defendant and of the transactions are sufficient to make a good plea in bar, but the former judgment of acquittal thus pleaded, it is alleged, was rendered by the criminal branch of the municipal court of Cleveland, state of Ohio.

[1] The fact that the former trial and acquittal in the municipal court was not upon an indictment and by a jury is not material. The law is settled that, if the former conviction or acquittal is by a tribunal having jurisdiction of the offense, the defendant cannot be again prosecuted for the same offense, notwithstanding the trial may have been upon warrant and without a jury. See *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655.

The former conviction or acquittal, however, must appear to have been by a court having jurisdiction of the offense charged in the later indictment or information. The exact question then involved here would seem to be whether the criminal branch of the municipal court had jurisdiction to try the defendant for an offense against the laws of the United States, particularly a violation of the National Prohibition Act. The question as thus stated would seem to answer itself. It is plain that the defendant could not have been tried upon warrant or otherwise in that court for a violation of the National Prohibition Act.

[2] The argument made in support of defendant's plea, briefly stated, seems to be this: The Eighteenth Amendment to the Constitution of the United States, by section 1, prohibits the manufacture, sale, transportation, exportation or importation of intoxicating liquors for beverage purposes in any state or territory subject to the jurisdiction of the United States; but section 2 further provides:

"That Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

Congress has passed the National Prohibition Act for this purpose. The state of Ohio has passed for the same purpose what is known as the Crabbe Act taking effect November 2, 1921. This last act, it is also urged, was passed by virtue of the concurrent power conferred on the several states by section 1 of the Eighteenth Amendment. Both acts make it an offense to have in one's possession intoxicating liquors, except under certain restrictions, and the Ohio act embodies in it the same restrictions as the National Prohibition Act, thus making it an offense to have intoxicating liquor in one's possession in the same situation under either act.

The conclusion deduced from these statements is that, when one is tried in a state court for a violation of the state law, he has in legal effect been tried for an offense created under authority of the United States and in a tribunal deriving its jurisdiction over the offense and its authority to try the offender from the United States itself. Obviously no contention of this kind could be made, except for the concurrent power conferred on the several states by section 2 of the Eighteenth Amendment to enforce the first section of that amendment by appropriate legislation. The same act, it has long been held, may violate both a state law and a federal law, and a transgressor may be tried and punished in courts of both jurisdictions as for two separate offenses, and a plea of former acquittal or conviction is unavailing. See *Fox v. Ohio*, 5 How. 410-435, 12 L. Ed. 213; *U. S. v. Marigold*, 9 How. 560, 13 L. Ed. 257; *Moore v. State of Illinois*, 14 How. 13, 19, 20, 14 L. Ed. 306;

Grafton v. U. S., 206 U. S. 333, 353, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640. In the Moore Case Justice Grier said:

"Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense, but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently this court has decided, in the case of *Fox v. State of Ohio*, 5 How. 432, that a state may punish the offense of uttering or passing false coin, as a cheat or fraud practiced on its citizens, and, in the case of the *United States v. Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States."

Upon reflection I am of opinion that this doctrine of independent sovereignties and separate offenses is applicable to violations by the same act of both the state and the national prohibition acts. In the first place, the Crabbe Act was not passed to enforce the Eighteenth Amendment. In section 1 it says:

"This act shall be deemed to be an exercise of power granted in article 15, section 9, of the Constitution of Ohio and the police power of the state."

The section 9 referred to is an amendment to the Ohio Constitution adopted November 5, 1918, prohibiting the sale and manufacture of intoxicating liquors as a beverage. In the second place, the United States Supreme Court, in the National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, has given a meaning and construction to the words "concurrent power," as used in the Eighteenth Amendment, which preserves the independent and separate sovereign power of the United States and of the several states in the matter of enforcing even the Eighteenth Amendment itself. This is the only logical conclusion from the eighth and ninth propositions declared in that opinion.

Concurrent power, it is held, does not mean joint power, or require that legislation thereunder by Congress, in order to be effective shall be approved or sanctioned by the several states or any of them, nor that the power to enforce is divided between Congress and the several states, along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs. It is further held that the power of Congress is in no wise dependent on or affected by action or inaction on the part of the several states or any of them. In the sixth proposition it is further held that the first section of the Eighteenth Amendment of its own force invalidates every legislative act, whether by Congress or by a state Legislature or a territorial assembly, which authorizes or sanctions what that section prohibits. It follows that, except as prohibited by that section, states retain and may also exer-

cise power expressly conferred by their several Constitutions or derived from their police powers to pass and enforce laws of their own prohibiting the manufacture and sale of intoxicating liquors.

The separate and independent powers of the United States and of the several states being thus preserved, the conclusion is inevitable that both are clothed with full power to legislate on the subject, and to try and punish violations of their separate acts according to the rules previously declared and established in the cases above cited. If the views expressed by Justices McKenna and Clarke in their respective dissenting opinions were adopted, defendant's present contention might not be without substantial support, if, indeed, a situation could ever arise whereby different laws could be made and separate prosecutions could be instituted. The argument of these dissenting opinions adds emphasis to the inferences which I have deduced from the court's opinion. My conclusion accords with that of other District Judges in the following cases: *United States v. Holt*, 270 Fed. 639 (Woodrough, D. J.); *United States v. Bostow*, 273 Fed. 535 (Ervin, D. J.); *United States v. Regan*, 273 Fed. 727 (Aldrich, D. J.). In *United States v. Peterson* (D. C.) 268 Fed. 864, Neterer, D. J., held the contrary; but the weight of reasoning, as well as numbers, is against his holding. In these several cases it is true, the state law under which the former conviction or acquittal had been had was enacted prior to the adoption of the Eighteenth Amendment; but on principle no distinction can be based on this fact, particularly as the Ohio act was passed by virtue of the power conferred by an amendment to the state Constitution and under its general police powers.

As a result of this process of reasoning, two conclusions follow: (1) That the defendant was not tried and acquitted in a court having jurisdiction of the offense with which he is now charged; (2) that the offense with which he is now charged is a separate and independent offense, one against a law of the United States, and triable only in its courts. The demurrer to the plea in bar will be sustained. It is to be regretted that any person may be put in jeopardy or punished twice as the result of the same acts. This, however, is incident to the fact that every one owes allegiance or obedience at the same time to two separate sovereignties, each independent within its separate sphere. The resulting hardship has frequently been noted in cases arising prior to the adoption of the Eighteenth Amendment. Officials charged with the duty of enforcing the law ought not, and it is assumed will not, prosecute under both laws, unless the interests of justice so require. Judges called on to pass sentence should, and it is assumed will, give full weight to any former punishment imposed on a conviction in another jurisdiction, so that a person cannot be said to suffer double punishment for the same offense. These considerations, however, appeal only to official discretion, and do not go to the question of judicial power.

PUBLIC LEDGER v. NEW YORK TIMES et al.

(District Court, S. D. New York. August 8, 1921.)

1. Copyrights ⇨24—"Proprietor" equivalent to "assign."

The word "proprietor" as used in Copyright Act, § 8 (Comp. St. § 9524), is equivalent to "assign," and if an author retains a part of what goes to make up any of the recognized statutory divisions of his rights, his assignee is not a proprietor, who may secure a copyright.

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

2. Copyrights ⇨24—Contract held not an assignment of literary property which carried the right to copyright.

The Times, of London, made a contract with complainant, proprietor of a newspaper in Philadelphia, by which it agreed to maintain a room in London where it would furnish to complainant's representative advance proofs of all special news articles published by it, as early as reasonably possible to enable complainant to make a copy or résumé thereof for transmission for publication in newspapers of the United States and Canada, to which complainant was authorized to sell the same. The Times further agreed that it would not furnish such proofs to other persons for transmission to American papers, and that it would do all that it reasonably could to secure to complainant the full benefit of the contract. *Held*, that the contract merely gave a license to use such matter, and did not constitute an assignment which made complainant the proprietor with the right to copyright in the United States under Copyright Act, § 8 (Comp. St. § 9524).

3. Trade-marks and trade-names and unfair competition ⇨68—Bill for unfair competition held to state a cause of action.

A bill for unfair competition, which alleged that complainant had a contract giving it the exclusive right to sell to American newspapers news articles published in the Times, of London, and that defendant, with knowledge of such contract, republished from the Times an important letter, under a heading falsely stating that it was by permission of the Times, *held* to state a cause of action.

In Equity. Suit by the Public Ledger against the New York Times and others. On motion to dismiss bill. Granted as to first cause of action, and denied as to the second.

This is a motion to dismiss a bill in equity upon its face. The bill is composed of two causes of action, one in copyright and the other in unfair competition. In each it alleged that the complainant was a Pennsylvania, and the defendant a New York, corporation, and the individual defendants citizens of New York. In each it alleged that "the value of the matter or thing actually in controversy in this case is in excess of \$3,000."

In substance the first cause of action alleged that both parties were the owners of well-known newspapers in Philadelphia and New York, respectively, and that each maintained an organization for gathering news all over the world, and purchases news from other news-gathering agencies, in some cases for resale. The plaintiff made a contract with the Times, of London, which is the basis of its rights, and the substance of which is as follows:

The Times would provide a room in London at which it would produce for a representative of the plaintiff the "proofs" of all special news articles and other matter, published "as early as is reasonably possible to enable" the plaintiff to make such copy or résumé thereof as it might think best for transmission for publication in newspapers in the United States and Canada. When possible these "proofs" should be produced enough in advance of the date of their publication in the Times to enable the plaintiff to mail proofs to Phil-

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

adelphia, the Times to indicate the date of release in such cases. The plaintiff might make such arrangements as it thought fit for the sale for publication in any other newspaper or periodicals in the United States of America and Canada of such "news and special articles and other matter" as it wished. The plaintiff agreed to publish all such matter under the heading "London Times News Service," and to secure the insertion of the same heading by any papers to which it sold the "news." The Times should not supply to any other persons the "proofs" for transmission to newspapers in the United States and Canada, and would do all that it reasonably could to secure to the plaintiff the full benefit received from the agreement. The plaintiff was to pay £150 a week during the continuance of the agreement.

The plaintiff duly gave notice of copyright in each of its issues, and specially on the articles received by cable from the Times, completing its copyright by depositing two copies at Washington in accordance with the statute.

The bill also set up the copyright law of Great Britain, and then alleged that on January 31, 1920, the Times published, and so secured a copyright in, a letter written by Viscount Grey upon the attitude of the United States Senate towards the League of Nations. This letter had been written for the Times after conference between Lord Grey and its editors, and was of great public interest and importance. Owing to the manner of its preparation and joint composition, the Times got title to the copyright in Great Britain. By the contract the plaintiff became "the assignee or partial assignee" of the rights in said letter enjoyed by the Times, and so vested with exclusive right at common law to secure copyright thereon in the United States.

Before its publication in the Times it submitted the letter to the plaintiff, which by cable transmitted it to Philadelphia, where it was received on January 31st. In spite of the exercise of due diligence, and owing to the crowded condition of the cables, it did not arrive in time to be published on the morning of January 31st, but was published and copyrighted in the issue of February 1st, which was, however, actually sold in Philadelphia on the late evening of January 31st.

The defendant on February 1st printed a copy of this letter, which it took from the published copy of the Times in London on the preceding day, and which it falsely stated to have been cabled to it by permission of the Times. The defendant also went through the form of copyrighting the letter in the United States. The bill asked for the usual injunction, delivery of plates and models and accounting for damages and profits, together with general relief.

The second cause of action alleged in substance the same facts, and depended upon them for its charge of unfair trade.

Harold Nathan and Alfred A. Cook, both of New York City, for the motion.

Thomas Raeburn White, of Philadelphia, Pa., and William C. Cannon, of New York City, opposed.

LEARNED HAND, District Judge. [1] Not being an "author," the plaintiff concedes that it must be "proprietor" of the literary property in the letter in order to secure a valid copyright in the United States, and so of course the statute requires. Section 8, Copyright Act (Comp. St. § 9524). The statute of 1909 does not define "proprietor," but under the act of 1831 (4 Stat. 436), where in one part the word "assigns" is used and another the word "proprietor," the two were taken as synonymous. *Miffin v. R. H. White Co.*, 190 U. S. 260, 262, 23 Sup. Ct. 769, 47 L. Ed. 1040. Under Revised Statutes, § 4952, as amended by 26 St. at L. 1107, it was also assumed that a licensee could not obtain copyright, *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 296, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595, but that there must be a full assignment of the literary property, *Saaka v.*

Lederer, 174 Fed. 135, 98 C. C. A. 571 (C. C. A. 3d); *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514, has nothing to the contrary; *Fraser v. Yack*, 116 Fed. 285, 53 C. C. A. 563 (C. C. A. 7th), was a distinct holding under the earlier law that a contract very similar to this, being only for a license, would not support a copyright. Under the present act Judge Mayer has said that there must be a full transfer of rights to make one a "proprietor," *New Fiction Pub. Co. v. Star Co.* (D. C.) 220 Fed. 994; and in *Fitch v. Young* (D. C.) 230 Fed. 743, affirmed 239 Fed. 1021, 152 C. C. A. 664, I ruled that there must be a statutory division of the various rights before they can be separately assigned.

[2] I think that the word "proprietor" of the present act must be treated as having the same meaning as in the old and as equivalent to "assign." If so, it follows that the author's rights may not be divided except as the statute recognizes a division, and that, if he retains a part of what goes to make up any of the recognized divisions, his assignee is not a "proprietor." In the case at bar, whatever else the parties would have done, had they been faced with this situation, they clearly did not mean to convey any literary property in the "proofs." The contract only gave the plaintiff the right to examine such "proofs" and make copies of them. It is true that it authorized the plaintiff to sell its "news" to other papers in the United States and Canada, but that I take it is no more than the right to allow them in turn to copy as the *Times* was to allow it. It is on this that the plaintiff chiefly relies. The parties were, however, thinking only of matter which presumably had a temporary interest to the plaintiff, and in which priority of publication was everything. The plaintiff would have that priority if the *Times* kept its bargain of dealing only with it, and it needed no other protection. It is argued that this is not true, because any enterprising newspaper might do just what the defendant did, owing to the difference of time between London and the United States. But I think it clear that the parties had no such possibility in mind as that. If they had, it was very strange that they should not have provided against it perhaps by the very assignment of the literary property.

However that may be, the plaintiff's right to resell the "news" is amply accounted for by the power given it under the contract to give precedence in time to such papers as it chose, a precedence which in most cases would be ample, and, indeed, in all cases, if the plaintiff is right in its position in the second cause of action. Such precedence would protect it and its customers unless against a paper enterprising enough to cable over news copied from the published edition of the *Times* in time to set it upon the same morning as it appeared in the plaintiff's columns. It is not even alleged that in the case at bar the defendant could under normal conditions have got out Lord Grey's letter on January 31st. Perhaps it could, but the bill does not say so.

Yet, even if the fact be so, and if the protection was not absolute, when the cables were free, still an assignment cannot be built on so uncertain a foundation. If it can, and was so intended, the *Times* lost its own right to publish its news here without the plaintiff's assent. A

weekly edition of the paper circulates in this country, and if it meant to subject that circulation to the plaintiff's pleasure, I think there ought to be some express indication of such a purpose. The plaintiff's right to sell the "news" elsewhere is not enough.

Moreover, if the contract was an assignment it was unnecessary for the Times to agree not to give the same rights to others. I know that the plaintiff argues that it is from this feature along with the other features of the contract that the assignment is to be inferred, but I answer that if people mean to make an assignment, they do not usually go about it in that way. What they appear to have been doing here is only to give the plaintiff the first look at the Times' "proofs," and not to give it to any one else. That is an understandable agreement without ambiguity, but it stops there. The plaintiff must go further and read into it a purpose undisclosed and even disguised, which the parties had no possible reason for leaving to conjecture, if they had really had it.

Finally, something is made of the phrase by which the Times agrees to do everything else necessary to protect the plaintiff. What, it is asked, can be the purpose of this if only a license was intended? It might retort, What was its purpose if an assignment was intended? So far as appears, the plaintiff was in either case protected by what it got in the contract. If it became a "proprietor," the Times could do nothing to help it get its copyright. Such clauses are common enough, and mean nothing more than a vague obligation to do whatever else may come up that will secure to the other party the fruits of its bargain. In the case at bar perhaps the clause would cover such steps as the Times could consistently take to prevent the defendant and other American papers from getting early copies of its own issues, or by way of giving the plaintiff assistance in the despatch of mail or the use of the cables. Out of such general provisions nothing definite can be raised. It would indeed be a perverse interpretation which read into it any intention to include an assignment which could have been so easily expressed otherwise. I conclude, therefore, that the plaintiff was not the "proprietor" of the letter, and that the first cause of action must fail.

[3] The second is thought to involve a question of the extent of the doctrine of *International News Service v. Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. Ed. 318, but I think it does not. The bill alleges that the defendant published the letter with a statement that it had been cabled to it with the permission of the Times, and that this was false. It further alleges that the defendant well knew of the plaintiff's contract, and had often come into conflict with the plaintiff about their relative rights, because of it. If proved, the false statement would be a clear case of unfair competition. In saying that it had the permission of the Times, the defendant informed its readers that at least in this instance the plaintiff was not the sole purveyor of the Times' news. As the plaintiff's right to resell the news was dependent in large measure upon the exclusiveness of its relations with the Times, this might, and probably would, be highly injurious to its

business as a news seller. Furthermore, the plaintiff was entitled, and indeed obliged, under the contract to advertise its articles as under the "London Times News Service." Its readers would naturally attribute less value to that service if they learned that it was shared with the defendant. These consequences are real injuries, and, if they result from false statements by the defendant, they are actionable.

Thus the second cause of action is good to some extent, and a motion to dismiss will not lie. Whether the relief should go beyond the false statement I need not now discuss. There must, in any event, be a trial, and the extent of the remedy can probably be better measured after the proofs are in than from the mere allegations of the bill. It may well be that to the degree of the "time differential" news collectors have a kind of property in what they collect for publication. Contemporaneous history may be property in the hands of such collectors for so long as the sun takes to travel from place to place, and, if there be a hitch in the cables, possibly for even longer. But with all that I shall not deal now; it is enough that the plaintiff is entitled to some relief.

The allegation of the jurisdictional amount is sufficient on such a motion as this. *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 575, 20 Sup. Ct. 222, 44 L. Ed. 276.

Motion granted as to the first cause of action; denied as to the second. Defendant to answer in 20 days after order filed.

DEXTER & CARPENTER, Inc., v. UNITED STATES.

(District Court, D. Delaware. July 30, 1921.)

No. 3 Dec. Term, 1920.

1. **United States ⇨135—Action for price of coal, requisitioned by Director General as agent of Fuel Administrator, held not against Director General.**
Though neither Act Aug. 29, 1916 (Comp. St. § 1974a), authorizing the appointment of, nor the President's proclamation appointing, the Director General of Railroads, conferred on him the power to requisition property, the United States Fuel Administrator, under the order delegating to him the President's power under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½§ii), to requisition foods, fuels, etc., might make the person holding the office of Director General his agent, so that an action against the United States to recover a balance owing for coal requisitioned for the use of a railroad, the petition in which, though it alleged the Director General requisitioned the coal, made it clear he did so individually, as agent of the Fuel Administrator, is not one against the Director General.
2. **United States ⇨127—Held proper defendant in action for balance owing for coal requisitioned by Director General as agent of Fuel Administrator.**
Under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½§ii), and in view of the constitutional obligation of the United States to compensate the owner of property taken for public use, from which the law will imply a promise to make such compensation, action will lie against the United States to recover the balance due for coal requisitioned by the Director General of Railroads as agent of the United States Fuel Administrator.

3. **United States ⇨140—Petition for balance owing for coal requisitioned under Lever Act held sufficient, though not alleging necessity to common defense.**

In view of Act Aug. 29, 1916 (Comp. St. § 1974a), authorizing the President to assume control of the railroads, and the President's proclamation pursuant thereto, a petition, in an action to recover the balance owing for coal requisitioned by the Director General of Railroads as agent of the United States Fuel Administrator, to whom was delegated the powers of the President, under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), to requisition foods, fuels, etc., necessary to the common defense, *held* sufficient, though it did not expressly allege that the coal was necessary to the common defense; the railroads being operated by the United States as a war measure and as part of the common defense after, as well as before, the Armistice, and the necessity of the taking being for the exclusive determination of the executive.

4. **Pleading ⇨7—One suing United States for balance owing for coal requisitioned under Lever Act need not allege necessity of taking, that being presumed.**

In an action against the United States for balance owing for coal requisitioned by the Director General of Railroads as agent of the federal Fuel Administrator, to whom were delegated the powers of the President under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), to requisition foods, fuel, etc., it was not necessary to plead the necessity of the taking, as it must be presumed that the taking was necessary.

5. **United States ⇨140—Petition to recover balance owing for coal requisitioned under Lever Act held sufficient, though not alleged fixing price deemed necessary for prosecution of war.**

A petition in an action against the United States to recover the balance owing for coal requisitioned by the Director General of Railroads, as agent of the Fuel Administrator, under the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e-3115½kk, 3115½l-3115½r), alleging the amount of compensation to be paid as ascertained by an order of the Fuel Administrator, *held* sufficient, though it did not allege that the act of fixing the price was deemed necessary for the efficient prosecution of the war, as provided in section 25 (section 3115½q); the requisition having been made under section 10 (section 3115½ii), requiring the ascertainment of a just compensation, which the statute does not require to be ascertained under section 25.

6. **Courts ⇨426—Liquidated balance less than \$10,000 for coal requisitioned under Lever Act recoverable only under Tucker Act.**

The jurisdiction of the District Court under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), requiring the President to ascertain and pay a just compensation for foods, fuels, etc., requisitioned for the common defense, being limited to controversies in which the compensation fixed is not satisfactory, recovery of a balance of \$9,850.98, owing for coal requisitioned under the act, must be had pursuant to the Tucker Act and Judicial Code, § 24 (20) being Comp. St. § 991 (20) the amount sued for in such case being liquidated.

At Law. Action by Dexter & Carpenter, Inc., against the United States. Demurrer to petition overruled.

William S. Hilles, of Wilmington, Del., and William B. Symmes, Jr., of New York City, for plaintiff.

James H. Hughes, Jr., U. S. Atty., John Biggs and Percy Warren Green, all of Wilmington, Del., for the United States.

MORRIS, District Judge. This is a demurrer to a petition filed by Dexter & Carpenter, Inc., a corporation of the state of Delaware, against the United States, to recover the sum of \$9,850.98, claimed to be the balance due for coal of the plaintiff requisitioned between October 30 and December 31, 1919, and diverted to the Pennsylvania Railroad. It appears from the petition that the requisition was made by the Director General of Railroads, acting under an order of the United States Fuel Administrator dated October 31, 1919. That order, after reciting the previous suspension of the orders of the Fuel Administrator dated January 14, 1918, and May 25, 1918, in part provides:

"I hereby restore the said order of January 14, 1918, and said portion of the order of May 25, 1918, to like effect as if they had not been suspended, and I designate the Director General of Railroads and his representatives to carry into effect the said order of January 14, 1918, and to make such diversions of coal which the railroads under his direction may, as common carriers, have in their possession, as may be necessary in the present emergency to provide for the requirements of the country in order of priority set out in the preference list included in the order of the United States Fuel Administrator of May 25, 1918, as follows: (a) Railroads. (b) * * *

The coal, when requisitioned, was in the possession of the railroads as common carriers, and the railroads were then under the direction of the Director General. The causes of demurrer assigned are:

"(1) For that it nowhere appears in said petition that the said the United States is any way connected with said matters therein alleged.

"(2) For that it nowhere appears in said petition that the said the United States is a proper party defendant.

"(3) For that it nowhere appears in said petition that the coal alleged to have been requisitioned by the said defendant was taken for any of the purposes permitted by the said Act of August 10, 1917, to wit: That the said requisitioning of coal was 'necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense.'

"(4) For that it nowhere appears in said petition that the act of fixing the price for coal alleged to have been requisitioned was deemed necessary in the judgment of the said defendant for the efficient prosecution of the war."

In support of its first and second causes of demurrer the defendant urges that the cause of action, if any, set up in the petition, is against the Director General of Railroads, and not against the United States. The plaintiff, on the other hand, takes the position that the United States is liable for all acts of the Director General during the period of federal control of railroads, and cites *Westbrook v. Director General of Railroads* (D. C.) 263 Fed. 211, and *Haubert v. Baltimore & O. R. Co.* (D. C.) 259 Fed. 361, in support of its contention.

The Director General of Railroads was appointed and his duties defined by a proclamation of the President (40 Stat. 1733), acting under and by virtue of an Act of Congress of August 29, 1916 (39 Stat. 645 [Comp. St. § 1974a]). Neither the statute under which he was appointed nor the proclamation of the President making the appointment purported to confer upon the Director General of Railroads power to requisition property. The powers of the Fuel Administrator, on the contrary, were derived through an order of the President, dated August 23, 1917, made by virtue of the Lever Act (Act Aug. 10, 1917,

c. 53, 40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{8}$ e-3115 $\frac{1}{8}$ kk, 3115 $\frac{1}{8}$ l-3115 $\frac{1}{8}$ gr]). The order of appointment delegated to the Fuel Administrator the power and authority vested in the President by that act in so far as it pertained to fuel, section 10 of which provides in part:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor." Section 3115 $\frac{1}{8}$ ii.

[1] The Fuel Administrator, necessarily and as he was authorized to do, appointed agents and representatives to perform acts required to be performed by him. One of such agents was the Director General of Railroads, appointed by the above-mentioned order of October 31, 1919. It is, of course, manifest that the Fuel Administrator did not and could not, by that order or otherwise, enlarge the powers of the Director General as such; but it is equally clear that he could make the person holding the office of Director General an agent of the Fuel Administrator, and could in the order appointing such agent designate by official title, instead of by individual name, the person so appointed. The adoption by the Fuel Administrator of this method in designating the person holding the office of Director General as an agent of the Fuel Administrator could not consolidate the two offices of Director General and agent of the Fuel Administrator, or transform an act done in one capacity by the individual holding the two offices into an act done in the other capacity. While paragraph B of the petition alleges that "the Director General of Railroads and his representatives did * * * requisition for public use * * * coal owned by the plaintiff," yet the remaining allegations of the petition make it clear that such act was done by the individual so designated, not in the capacity of Director General, but as agent or representative of the Fuel Administrator under the latter's order of October 31, 1919. It follows, I think, that the cause of action set up in the petition is not one against the Director General of Railroads.

[2] The liability of the United States for coal properly requisitioned by the President through the Fuel Administrator, his agents and representatives, is expressly provided for by section 10 of the act authorizing the requisition. It provides that "he [the President] shall ascertain and pay a just compensation therefor." Furthermore, the Supreme Court, in *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656-657, 5 Sup. Ct. 306, 311 (28 L. Ed. 846), quoted with approval in *United States v. Lynah*, 188 U. S. 445, 462, 23 Sup. Ct. 349, 354 (47 L. Ed. 539), said:

"* * * We are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property to which the government asserts no title,

is taken, pursuant to an act of Congress, as private property to be applied for public uses."

I am therefore of the opinion that the petition discloses that the United States is a proper party defendant.

[3] The third ground of demurrer questions the legality of the taking of the coal. It challenges the sufficiency of the petition, in that it fails expressly to allege that the coal taken was "necessary to the support of the Army or the maintenance of the Navy or any other public use connected with the common defense," as provided in section 10 of the Lever Act. The petition, however, states when the coal was taken, by whom it was taken, the authority of the officer taking it, and that the railroad to which the coal was diverted "was operated by and under the control of the President of the United States, through his agent, the said Director General of Railroads, and that said coal was used and consumed by said Pennsylvania Railroad." The act of Congress (39 Stat. 645) by virtue of which the United States took possession and assumed control of the railroads provides:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

The proclamation of the President (40 Stat. 1733), made by virtue of the last-mentioned statute, provides:

"And whereas, it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same: * * * Now, therefore, I, Woodrow Wilson, President of the United States, * * * do hereby * * * take possession and assume control * * * of each and every system of transportation * * * located wholly or in part within the boundaries of the continental United States. * * *"

The railroads were being operated by the United States as a war measure and as a part of the common defense. *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. This was as true after the signing of the Armistice as before. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194. It clearly appears from the petition that the executive branch of the government had legal power and authority to take coal for a public use connected with the common defense, and that plaintiff's coal was taken for that purpose. Whether the taking was "necessary" was for the exclusive determination of the executive branch of the government, and its decision upon that matter is not subject to judicial review, and consequently is not here in issue. *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. 910, 4 A. L. R. 1623.

[4] Viewed from another aspect, and considering, in connection with the legal authority of the executive to take the coal, the fact that the coal was retained by the United States and consumed in the operation of the railroads controlled by it, and that this is a suit for

compensation, and not for a wrongful taking, it must be presumed against the United States as a matter of law that the taking was necessary. *United States v. Lynah*, 188 U. S. 463, 23 Sup. Ct. 349, 47 L. Ed. 539; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846. It is a rule of pleading that what the law will presume need not be alleged. *Perry on Common Law Pleading*, p. 369. I am of the opinion that the petition is not defective, as charged by the third cause of demurrer.

[5] The fourth cause of demurrer is concerned, not with the taking of the coal, but with the ascertainment of the compensation therefor. With respect to the ascertainment of the compensation the petition alleges that the compensation to be paid plaintiff for the coal taken and requisitioned was ascertained to be \$46,234.65, of which amount \$36,-383.67 was paid to the plaintiff by the Pennsylvania Railroad under an express stipulation that the payment and receipt of the sum paid should be without prejudice to the rights of the plaintiff or of the United States. This suit is to recover the difference between the amount so ascertained and the amount so paid, or \$9,850.98. The cause of demurrer now under consideration is based upon section 25 of the Lever Act, which provides in part:

"That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign. * * *" Section 3115½q.

I fail to see that section 25 is involved in any way. The requisition was made under section 10, not under section 25. The statute does not require that the compensation for coal taken under section 10 shall be ascertained under section 25. I do not understand the petition to allege that the compensation was ascertained under section 25. It does allege that the compensation was ascertained by an order of the Fuel Administrator of January 17, 1919, a copy of which is annexed to the petition, but it does not allege that the order relied upon was made solely under the powers conferred by section 25. The question ultimately will be, I take it, whether that order will support the allegation of the petition that compensation for plaintiff's coal was ascertained to be the sum of \$46,234.65, and the answer to that question will depend upon whether that order is effective as an ascertainment under section 10 of compensation for plaintiff's coal. Those questions are not raised by the demurrer, have not been debated by counsel, and consequently will not be now considered.

[6] Although I find from the allegations of the petition that the requisition was made pursuant to section 10, I do not mean to be understood as thereby also finding that the nature of the jurisdiction of this court over this case is that conferred by section 10. The jurisdiction conferred upon this court by that section is over controversies in which the compensation determined under that section is not satis-

factory to the person entitled to receive the same; that is, over controversies in which the amount sought to be recovered is unliquidated. It is alleged by the petition that the amount sought to be recovered in this case has been liquidated, but remains unpaid. In such instances the recovery, if any, may and must be had pursuant to the Tucker Act (24 Stat. 505). Judicial Code, § 24 (20) being Comp. St. § 991 (20). I think *United States of America v. Pfitsch*, 256 U. S. —, 41 Sup. Ct. 567, 65 L. Ed. —, decided by the Supreme Court June 1, 1921, *United States v. McGrane* (C. C. A.) 270 Fed. 761, and *Filbin Corporation v. United States* (D. C.) 266 Fed. 911, and (D. C.) 265 Fed. 354, not inconsistent with this conclusion.

Demurrer overruled.

MINERALS SEPARATION, Ltd., et al. v. MIAMI COPPER CO.

(District Court, D. Delaware. July 15, 1921.)

No. 331.

1. Patents ⇨197—"Assignment" must be in writing and with intent to pass present title.

Under Rev. St. § 4898 (Comp. St. § 9444) an assignment of a patent may be made only by a written instrument, and though no particular form of words is essential, yet to constitute an assignment the instrument must be substantially a transfer, actual or constructive, with the clear intent at the time to part with the legal interest, in whole or in part, in the thing transferred, and with full knowledge of the rights so transferred, and an instrument which does not purport to convey any present interest in an existing patent, or in one for which an application is pending, is not an assignment within the statute.

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

2. Patents ⇨195—Executory agreement to assign held not to operate as assignment.

An agreement between two corporations for the sale by one to the other of property, including certain patents, which bound the seller on completion of the purchase "to execute and do all assurances and things for vesting in" the purchaser the premises mentioned in a schedule which specifically named the patents, and to give to the purchaser the full benefit of the agreement, *held* executory, and not to operate in itself as an assignment of the patents, though subsequently fully performed by the purchaser.

In Equity. Suit by the Minerals Separation, Limited, and the Minerals Separation North American Corporation, against the Miami Copper Company. On supplemental bill asking that the Minerals Separation North American Corporation be admitted as party complainant. Granted.

Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, and Thomas F. Bayard, of Wilmington, Del., for plaintiffs.

Charles Neave, Maxwell Barus, and John F. Neary, all of New York City, for defendant.

MORRIS, District Judge. The prior history of this cause is recorded in 237 Fed. 609; 244 Fed. 752, 157 C. C. A. 200; 264 Fed. 528; 268 Fed. 862; (C. C. A.) 269 Fed. 265. The matter now before the court arises upon supplemental bill, answer, and proofs taken thereunder. The supplemental bill was filed against Miami Copper Company, the defendant, by Minerals Separation, Limited, the original plaintiff, hereinafter called the Company, and by Minerals Separation North American Corporation, a Maryland corporation, and alleges that the latter corporation has acquired from the original plaintiff through Minerals Separation American Syndicate (1913), Limited, hereinafter called the Syndicate, the beneficial interest in the patents in suit, and that on March 28, 1917, the Company filed its disclaimer to so much of the thing patented by claims 9, 10, and 11 of letters patent No. 835,120, one of the patents in suit, as it did not choose to hold or claim by virtue of that patent. The special prayer of the supplemental bill is:

"That your orator, Minerals Separation North American Corporation, have leave to join in, and it does hereby join in, all the prayers of the bill of complaint, and that it have the full benefit of all the record and proceedings heretofore had and taken herein and of the interlocutory decree and injunction, and of the accounting proceedings."

The defendant contends that in July, 1913, the Company parted with and the Syndicate acquired the complete title, both legal and equitable, to the patents in suit and all rights to damages or profits thereunder; that the Maryland corporation, by bill of sale of December 7, 1916, became and now is the sole owner of all the rights so acquired by the Syndicate, and that, consequently, the Company, not having the legal title to the patents, may not further prosecute this suit, either as sole plaintiff or as coplaintiff with the Maryland corporation; that the Maryland corporation must proceed alone in seeking any relief to which it may deem itself entitled; that the disclaimer, having been filed by the Company after it parted with its entire title to the patent, is void; that more than a reasonable time has elapsed since, by reason of the decision in the Hyde Case, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286, it became the duty of the owner of the patent to file a disclaimer; that the Maryland corporation, the sole owner, has filed none, and that, for the foregoing reasons, the supplemental bill should be dismissed. The defendant does not deny, but, on the contrary, asserts, that the beneficial interest in the patents passed from the Company to the Syndicate at the time of the execution of the agreement. It does not deny that a person holding the beneficial interest in a patent may properly be joined as coplaintiff with the holder of the legal title. Nor does it deny that all the rights acquired from the Company by the Syndicate were, in December, 1916, transferred to the Maryland corporation and are now owned by it.

The crucial question now for determination is therefore whether in 1913 the Company parted with and the Syndicate acquired the legal title to the patents in suit. The transaction in question between the Company and the Syndicate is evidenced by a written agreement, dated July 8, 1913, the pertinent portions of which are as follows:

"1. The Company shall sell and the Syndicate shall purchase

"First. The letters patent and rights mentioned in the schedule hereto but subject to certain licenses granted by the Company, * * *

"Secondly. The benefit and rights of the Company of and under the said licenses and of any other licenses that may be granted prior to the completion of the purchase, and

"Thirdly. The exclusive right so far as the Company can confer the same to apply for and obtain in the republic of Cuba and the Philippine Islands patents in connection with any of the inventions comprised in the letters patent and applications mentioned in the schedule hereto and generally in connection with processes and apparatus for separating different pulverulent materials by oil selection, gaseous floatation or other surface tension phenomena.

"2. Part of the consideration for the said sale shall be the sum of £93,750, which shall be paid and satisfied by the allotment to the Company, or its nominee or nominees of 187,500 fully paid B shares of ten shillings each in the capital of the Syndicate.

"3. As the residue of the consideration for the said sale, the Syndicate shall indemnify the Company against all liability and obligations of the Company under or in respect of any of the licenses granted by them and particulars of which are set out in clause 1 hereof and shall also indemnify the Company against all liability and obligations of the Company under or in respect of all costs and charges already or hereafter to be incurred by the Company in connection with applying for and taking out patents in the said republic of Cuba and the Syndicate shall further indemnify the Company against the liabilities of the Company under a letter dated second day of March one thousand nine hundred and ten from the Company to one James M. Hyde and against all sums which the Company may have been ordered and may be ordered to pay to the said James M. Hyde in connection with certain litigation pending between the Company and the said James M. Hyde in the United States of America and against the costs, charges and expenses of the Company in connection with the said litigation and the Syndicate shall at once repay to the Company all disbursements already made by the Company on account thereof or in connection therewith. The Syndicate shall be entitled to receive all damages and any other profits or benefits which may be derived from or in connection with the said litigation.

"4. The purchase shall be completed on or before the tenth day of October one thousand nine hundred and thirteen at the registered office of the syndicate when one hundred and thirty-seven thousand five hundred fully paid B shares of ten shillings each in the capital of the Syndicate part of the said one hundred and eighty-seven thousand five hundred fully paid B shares shall be allotted to the Company or its nominees and the Company and all other necessary parties if any shall at the expense of the Syndicate, execute and do all assurances and things for vesting in the Syndicate or as it shall direct the premises mentioned in the Schedule hereto and giving to the Syndicate the full benefit of this agreement as shall be reasonably required. As to fifty thousand fully paid B shares of ten shillings each in the capital of the Syndicate the balance of the said one hundred and eighty-seven thousand five hundred B shares the same shall be allotted to the Company or its nominees at the rate of two shares for every one 'A' share of one pound each in the initial capital of the Syndicate part of the last twenty-five thousand A shares in such capital which shall be hereafter allotted that is to say when one of such 'A' shares shall be allotted there shall be allotted to the Company or its nominees two of such fully paid 'B' shares. No new shares in the capital of the Syndicate shall be created or issued until the whole of the shares in the initial capital of the Syndicate shall have been allotted.

"9. The Syndicate shall cause this agreement to be duly filed with the Registrar of Companies pursuant to section 88 of the Companies (Consolidation) Act 1908, and also in the cases of shares allotted to nominees shall cause a sufficient contract to be filed constituting the title of such nominees.

"The schedule above referred to:

"Part 1.

"1. The benefit of the following letters patent granted in respect of the United States of America: [Here follows a list of United States patents including the first two patents in suit and the application for the third patent in suit].

"2. The benefit of all extensions and prolongation of the terms and privileges granted by any such patents as aforesaid."

It is disclosed by the evidence that 137,500 of the B shares called for by that agreement were allotted to the Company by the Syndicate on or before July 23, 1913, and that on October 6, 1916, the 50,000 additional B shares mentioned in clause 4 of the contract were allotted to the Company. Defendant's construction of the above-mentioned agreement is that the equitable title to the patents passed thereby at the time of its execution, and that the legal title to the patents passed at the time of the subsequent allotment of the shares, namely, on or before July 23, 1913, its position being that upon the subsequent allotment of shares the agreement became effective and operated as an assignment. It does not contend that there was any other assignment. The position of the plaintiffs in the supplemental bill, on the other hand, is that the contract of July 8th is a mere executory agreement of sale to be subsequently consummated and carried out by the performance by each of the parties thereto of such acts, including an assignment, as might be necessary and proper for that purpose.

[1] An assignment of a patent may be made only by an instrument in writing. R. S. § 4898 (Comp. St. § 9444). Conceding that no particular form of words is essential to effect an assignment of a patent (*American Tobacco Co. v. Ascot Tobacco Works* [C. C.] 165 Fed. 207), yet to constitute an assignment the instrument must be substantially a transfer, actual or constructive, with the clear intent at the time to part with the legal interest, in whole or in part, in the thing transferred, and with the full knowledge of the rights so transferred. *Ormond v. Connecticut Mut. Life Ins. Co.*, 145 N. C. 140, 58 S. E. 997, 998. An instrument which does not purport to convey any present interest in an existing patent, or in one for which an application is pending, is not an assignment within the contemplation of R. S. § 4898. *National Cash Register Co. v. New Columbus Watch Co.*, 129 Fed. 114, 116, 63 C. C. A. 616.

[2] There must be some operative words, expressing at least an intention to assign, in order to constitute an assignment. *Campbell v. James*, 17 Blatchf. 42, 54; Fed. Cas. No. 2,361. Considering the agreement of July 8th as a whole and applying to it the above legal principles and the ordinary and usual rules of interpretation, I do not find that intention. Defendant construes that portion of paragraph 4 of the agreement providing:

"The Company and all other necessary parties if any shall at the expense of the Syndicate execute and do all assurances and things for vesting in the Syndicate or as it shall direct the premises mentioned in the Schedule hereto and giving to the Syndicate the full benefit of this agreement as shall be reasonably required"

—as the ordinary covenant for further assurances. On the contrary, I think this clause calls for the delivery by the Company to the Syndicate, at the time in that paragraph specified, of an instrument “vesting in the Syndicate * * * the premises mentioned in the Schedule” thereto. It seems to me that the absence from the clause in question of the word “further” or “other,” or both, before the word “assurances,” is peculiarly significant, and is a definite refutation of defendant’s contention. The agreement might be further analyzed and with the same result. The defendant has failed to show any subsequent acts of the parties construing the agreement of July 8th as an assignment. Whether or not the Company and the Syndicate made subsequent agreements extending the time for the performance of the acts required by the agreement of July 8th to be performed by one or both of the parties thereto is, I think, a matter of no moment. The plaintiffs, in my opinion, do not need such subsequent agreements to show that the agreement of July 8th was not an assignment. The absence of such subsequent agreements indicates only that the Company is in default; and, as such default would not operate as an assignment, or as a substitute therefor, I fail to see how the defendant can be concerned therewith. Consequently it follows, and I find, that the Company is, and that the Maryland corporation is not, the owner of the legal title to the patents in issue.

In view of the conclusions hereinbefore arrived at and of what was said by the Supreme Court in *Minerals Separation v. Butte, etc.*, Min’g Co., 250 U. S. 336, 354, 39 Sup. Ct. 496, 63 L. Ed. 1019, touching the disclaimer, I think nothing need be added to show its validity.

I am of the opinion that the prayer of the supplemental bill should be granted.

In re McCLELLAND.

(District Court, S. D. California, S. D. December, 1920.)

1. Bankruptcy ⚡342½—**Conclusions of referee not binding on court, where evidence is not conflicting.**

In bankruptcy proceedings, where there is no conflict in the evidence on objections to a claim, and the conclusions of the referee are based entirely upon inferences drawn from the evidence, or want of evidence, such conclusions are not binding upon the court; the court being as able as the referee to indulge in inferences from the testimony.

2. Bankruptcy ⚡314(1)—**Relative creditor may file claim and participate in dividends.**

A relative of a bankrupt has a perfect right to loan the bankrupt money, and, having done so, may file a claim in the bankrupt’s estate and participate in the dividends properly allowed.

3. Bankruptcy ⚡340—**Claim by relative carefully scrutinized.**

A claim by a relative of the bankrupt for money loaned bankrupt will be carefully scrutinized.

4. Bankruptcy ⚡340—**Claim for money lent bankrupt by sister allowed.**

On objections to claim for money lent bankrupt by his sister, where there is no evidence directly or even inferentially contradicting the sis-

ter's sworn statements as to the money lent the bankrupt, and there is nothing in her evidence rendering it inherently improbable or absolutely incredible, the claim should be allowed.

In Bankruptcy. In the matter of George B. McClelland, bankrupt. On trustee's and creditors' objections to the allowance of claim of Margaret Warren for \$1,620. Order of referee, disallowing the portion of the claim not conceded, reversed, and claim allowed.

The opinion of Force, referee, disallowing the portion of claim not conceded, is as follows:

On the hearing, the objecting creditors and the trustee, on the one hand, withdrew the objections to the item of \$35 and conceded that the amount was advanced as set forth in the claim. On the other hand, the attorney for the claimant, with the permission of the referee, withdrew the item for \$325, and the same is to be deemed expunged from the files and records of the case. This leaves a balance of the claim for consideration amounting to \$1,260, which is made up of the four loans alleged either on the face of the claim or in the testimony to be made as follows:

June 15, 1914.....	\$500.00 in cash.
August 2, 1914.....	350.00 in cash.
January 16, 1915.....	210.00 in cash.
April 6, 1915.....	200.00 in cash.

Total\$1,260.00.

On the hearing the position taken by the trustee and the objecting creditors was that it was not only improbable that the loans had been made, but that it was absolutely incredible; that the claim was not sustained by sufficient proof offered or introduced on the part of the claimant, and that the evidence, viewed from the standpoint of ordinary human experience, would not justify a belief or sustain a finding to the effect that the money had been loaned.

These purported loans constituted what is sometimes called in the bankruptcy court a family affair, the claimant being a sister of the bankrupt. Testimony shows that she is of about the age of 55 years, and that the bankrupt is _____ years of age. There is testimony to the effect that during their lives it has been their custom to lend money, the one to the other, although the amounts and the times of such loans are left very indefinite and vague. If the referee is to allow the claim, he must do so largely, if not entirely, upon the mere weight of the oath of the claimant and of the bankrupt that the amounts named were loaned at the dates specified. There is scarcely, if any, evidence, and no very satisfactory evidence, where claimant obtained the money which she loaned to her brother, for what purposes the bankrupt obtained the same, what he did with it, or the circumstances surrounding the passing of the money from the hands of the sister to the brother. The claimant does not seem to have presented her claim with detail which is naturally to be expected in such a case. The referee feels that it is the duty of the bankruptcy court to scrutinize with extreme care such claims, and to examine the details at length before allowing them. The referee feels that there is an additional responsibility upon him in deciding these cases, because every cent that is left in the family is taken away from the outside creditors.

In these family cases, it is the custom of the referee to divide the examination, so far as he is concerned, into three or four portions or topics: First, he investigates at length the sources from which the claimant may have obtained the money loaned or advanced; secondly, the purposes for which the money was to be used; thirdly, in great detail the circumstances leading up to, surrounding and following the passing of the money; and, lastly, the manner in which the money was used. In all these respects, the evidence in this case is extremely meager. There is no evidence definitely showing the source from which the claimant obtained the moneys loaned. It appears that she is a housewife, married to a carpenter, who has been accustomed to earn about \$100 a month. It does not appear what the expenses of the claimant's house-

hold were, although the referee endeavored to obtain information on that point. It seems that the claimant and her husband live in a rented house, but there is no testimony showing the amount of the rental. There is also testimony brought out by the referee that the claimant rented one or two rooms, but did not take boarders. The referee was unable to learn the amount of the room rentals, or the number of roomers, either as an average or otherwise. There is testimony to the effect that the claimant received some property from her mother, either at the time of her mother's death or immediately prior thereto. The referee was unable to learn the amount of this property or its nature, or what the claimant had done with the property so received, or whether she had invested it in any manner. So far as the referee could learn, the claimant kept no bank account, but had been accustomed to keep the money which she loaned to the bankrupt in her house. It does not appear where in the house she kept it, or in what amounts, or how much she had on hand over and above the amount of the loans which she made to the bankrupt. It does not appear whether or not the claimant's husband was accustomed to give her money which she was in the habit of saving. In short, the referee was not able to determine the source from which the claimant obtained the amount of these loans, with any satisfaction to the mind of the referee; and the referee feels that it is the duty of claimants in such cases to render the referee greater assistance in making such determinations.

Further, the testimony of the circumstances surrounding the passing of the money is of the most general and vague character. There are no details which are reasonably to be expected in such cases. The claimant simply produced the money in gold and bills, at no certain or specified time, and with little or no inquiry as to the amount required or the purposes for which it was to be used, counted the money into the hands of the bankrupt. In the first instance, \$500 on June 15, 1914, and \$350 additional on August 2, 1914—\$850 in less than six weeks; the money coming from an unknown source and going to an ambiguous and uncertain destination. The referee does not know why the loan of June 14, 1914, was \$500 instead of more or less, nor why the loan of August 2, 1914, was \$350, instead of more or less. Mr. McClelland testified that he needed the money in connection with a certain patent which had been applied for, and in which he was interested. The claimant testified that she understood that the money was to be used in connection with certain real estate deals or speculations, but it seems that nothing definite was discussed at the time of the loan. The referee feels that in transactions involving such amounts of money there would be some discussion between the parties in respect to the need or use of the money, and that such discussion would leave a more distinct impression upon the memory than seems to have been left upon the memory of the claimant and the bankrupt in this case. Not only are the purposes for which the money was to be used vague and uncertain, but the uses to which the money was actually put. There is no satisfactory testimony as to where it came from or where it went to.

The referee regards this as a case of considerable importance, for it involves questions which are repeatedly arising in the administration of bankrupt estates by the referee. The question which the referee presents to himself is this: Is he now and in the future to allow claims of this kind, supported simply by the statement and oath of the parties immediately concerned, both of whom belong to the same immediate family? If the referee is to allow such claims, supported by such testimony, it will be extremely easy for claimants to present such claims, and for the referee to approve and allow them. The referee is of the opinion that one of the most dangerous kinds of evidence that is presented to courts or to judicial officers is evidence that is based upon the mere weight of an oath, upon the mere assertion of the witness testifying without anything of a tangible, palpable nature accompanying the assertion; evidence unsupported by any vestige or trace in the form of a writing or some similar, substantial, material record of the transaction which came into existence at the same time with, and was in some way connected with, the transaction to which the testimony relates. Stephen, in his *History of the Criminal Law of England*, writes with great force of the danger of such testimony, as follows:

* * * * The juries seem to have thought (as they very often still think) that a *direct unqualified oath* by an eye- or ear-witness has, so to speak, a *mechanical* value, and must be believed unless it is distinctly contradicted. * * *

"The most remarkable illustrations of these remarks is to be found in the trial of the five Jesuits. Fenwick objected that the evidence against him was entirely composed of accounts of the contents of letters not produced. 'All the evidence that is given comes but to this: There is but saying and swearing. I defy them to give one probable reason to satisfy any reasonable man's judgment how this can be.' Upon this Scroggs observed: 'Mr. Fenwick says to all this, Here is nothing against us but talking and swearing; but for that he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing, for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the book, and calling God to witness to the truth of what is said.'

"I think that Fenwick was right as to what the law, or rather the practice of juries, ought to be, and that Scroggs was right as to what it actually was and, to a certain extent, still is. It is true that juries do attach extraordinary importance to the *dead weight* of an oath. It is also true, so circumstances corroborate each other, and of the intrinsic probability of the matter sworn to, is a far better test of truth than any oath can possibly be, and I should always feel great reluctance to convict a prisoner on the uncorroborated testimony of a single witness to words spoken, or to any other isolated fact which, *having occurred, leaves behind it no definite trace of its occurrence.*" The italics are the referee's.

The referee is aware that Mr. Stephen is speaking of criminal trials and criminal evidence; nevertheless, his reasoning applies with great force to the danger of finally accepting as conclusive, even in civil cases, the "dead weight of an oath" as to "any isolated fact which, having occurred, leaves behind it no definite trace of its occurrence."

To prove the making of the loan by Mrs. Warren, there is left behind no writing or corroborating circumstance—"no definite trace of its occurrence."

The referee has been extremely concerned over the presentation of this claim; for he realizes that it is possible that the money may have been loaned and advanced in the open and careless way which the testimony indicates. Even if it has been so loaned, it is certainly to be desired in all justice that it should be returned, or at least that the claim should be allowed. But it seems to the referee that the claimant could have, and should have done much more toward assisting him in his determination with evidence which would support such an allowance.

To allow a claim in bankruptcy upon such evidence would constitute a dangerous precedent, and would open the door to conspiracy and fraud and enable dishonest people to rest their claims simply upon their own bare assertions and statements under oath.

The referee is of the opinion that the claimant has not sustained her position by evidence sufficient to justify a finding in her favor. It is to be remarked that the claimant did not appear in person upon the hearing so that the referee might interrogate her, but allowed her testimony to be presented in the form of a deposition, which the referee feels is a most unsatisfactory method of asserting one's rights in a court of justice.

The claim is therefore disallowed except for the sum of \$35, which is conceded by the trustee.

Findings, conclusions, and order will be entered accordingly.

C. E. McDowell, of Los Angeles, Cal., for trustee.

Wm. Northrup, of Alhambra, Cal., for objecting creditors.

E. B. Coil, of Los Angeles, Cal., for claimant.

BLEDSOE, District Judge. This is a review of the action of the referee in bankruptcy in disallowing a claim to the extent of \$1,260

duly and regularly made and filed in the above proceedings by Mrs. J. P. Warren, a sister of the bankrupt.

[1] The court has gone over very carefully the report of the referee containing his reasons for the disallowance of the claim, together with the claim itself and all the evidence in the case relevant thereto. It seems to be the law that, there being no conflict at all in the evidence, and the conclusions of the referee being based entirely upon inferences, drawn from the evidence, or want of evidence at hand, the conclusions of the referee are in no sense binding upon the court. The court is just as able to indulge in inferences from the testimony adduced as is the referee. It is not a case where there is a conflict in the evidence and the referee is in a more advantageous position, presumably, because of the inspection of the witnesses, etc., to arrive at a conclusion respecting the verities of the transaction. *In re Swift* (D. C.) 118 Fed. 349; *In re People's Department Store* (D. C., N. Y.) 20 Am. Bankr. Rep. 244, 159 Fed. 286.

In my judgment, the case here may well be ruled by *Baumhauer v. Austin* (C. C. A., 5th Cir.) 26 Am. Bankr. Rep. 385, 186 Fed. 260, 108 C. C. A. 306, wherein the action of the referee and of the District Court, in a transaction, not dissimilar to the one at bar, was set aside by the Circuit Court of Appeals of Fifth Circuit and the claim allowed.

[2, 3] It is fundamental, of course, that a relative of a bankrupt has a perfect right to loan the bankrupt money, and, having done so, he has a perfect right, the same as any other person, to file a claim in the bankrupt's estate and participate in the dividends properly allowed, etc. *Davis v. Schwartz*, 155 U. S. 631, 638, 15 Sup. Ct. 237, 39 L. Ed. 289. The fact that the transaction is between relatives would, of course, very naturally justify unusual care and scrutiny in examination as to its genuineness, but would in no wise debar the claimant from obtaining all rights properly belonging to him and properly supported by legal and adequate proofs.

In this case the sister lived at Santa Barbara with her husband, who was a contractor and carpenter and making about \$100 per month, and who turned over to her each month about that sum for the care of the house, etc. After paying the running expenses, with commendable frugality, she would save the balance. She also let out two of her rooms to roomers, and retained for herself all of this money. She never deposited her savings in the bank, but kept them as they grew, with her in her home, a highly undesirable, but at the same time a not infrequent, mode of procedure, as common experience will testify. In addition to that, her mother left her some money before her death, which she also kept in her home as a part of her savings. She and her brother, the bankrupt herein, a sort of irresponsible individual, were upon the best of terms, and in times gone by, when he apparently was in better luck, he had loaned her money; and now that she possessed some savings and he had need of money in furtherance of the manufacture and sale of an automobile invention, in which he was interested, it was in no wise unnatural or peculiar, much less incredible,

that he should apply to her for financial assistance. It also is in the record that he had trouble in his family, the exact nature or the consequence thereof not being developed.

On the whole case, however, there is nothing at all of a nature sufficient to induce the belief, which the referee apparently entertained, that this entire claim was fraudulent. The proven conduct of the parties was not unnatural or improbable. The money seemingly was advanced from time to time on at least five different occasions by the sister to the bankrupt for use in his business, or to tide him over, or help him along, and while his evidence, due to his obvious physical debilitation, was not as enlightening as it might have been, the sister's rights are in no wise to be prejudiced because of his inability to remember precisely what he had done with her money. The question in the case is: Did the sister loan him the money as asserted, and, if so, has it been paid back? There is no claim made that the money was ever paid back, and I can see no rational ground for indulging in the conclusion that the loan was never made, and that the whole thing is a "frame-up," to use a colloquial but forceful expression.

Some complaint seems to have been made by the referee that no indicia of indebtedness were given from time to time as the loans were made; but this is not exactly in accordance with the facts, as there seems to be no doubt from the evidence but that a memorandum of the transaction was made each time; and, if the parties had really intended to perpetrate a fraudulent scheme, they would, of course, have sought to perfect it by sedulously preparing and providing full written evidence of the things alleged to exist, but which were to exist only in the imagination and pursuant to the preconcerted plan. The fact that after four of the loans had been made, the sister complained to the brother about the amount that had been loaned and the fact that she then had no security, and that he, then and there, seemingly long before any question of his probable bankruptcy had arisen, gave her a deed to the only real property that he possessed as security for the loans, seems to me to bear out the truth of the assertions of the claimant with respect to the making of the loans. There is no doubt but that this deed was given, and it is a fact that would seem to provide a very satisfactory sort of corroboration with respect to the making of loans originally. It was a natural and probable thing to occur and to be done.

The language of the Circuit Court of Appeals in the Baumhauer Case, to the effect that the referee "failed to allow adequate probative force to the claimant's proof of claim," citing *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, seems peculiarly apposite herein. Our own Circuit Court of Appeals in *Moore v. Crandall* (C. C. A. 9th Cir.) 30 Am. Bankr. Rep. 517, 205 Fed. 689, 691, 124 C. C. A. 11, used practically the same language.

I commend, of course, the referee's zeal to protect bankrupt estates against imposition through the filing of fraudulent claims, but it seems to me that, the prima facie proof being made, there should be more evidence that perjury or attempted fraud is being or is about to be practiced in the premises. The claimant, on her examination, orally

on deposition, in no wise declined to answer any questions asked her, and if the referee was desirous of securing further evidence, or evidence upon points not covered in the deposition originally, it was his function to suggest a further examination. There was no evidence at all adduced by the objectors, tending to show that the loans had not, or could not, have been made.

[4] I repeat again, the question is not what her brother did with the money, or her brother's good faith in the premises, although the latter does not seem, in my judgment, in any wise challenged; but the question is: Did she loan the money, and has it been repaid to her? And, there being no evidence directly or even inferentially contradicting her sworn statements, is there anything in her evidence that suffices to render it inherently improbable or "absolutely incredible?" I cannot find anything of that sort, and am of the belief that the referee erred in his conclusions to that end.

The order of the referee is reversed, and he is directed to allow the claim for the sum of \$1,260, heretofore disallowed by him.

FOX FILM CORPORATION v. KNOWLES et al.

(District Court, S. D. New York. May 18, 1921.)

No. E 19-280.

1. Copyrights ⚡33—**Proprietor has no right of renewal.**

The right to obtain an extension of a copyright given by Copyright Act, § 24 (Comp. St. § 9545), is a new and independent right existing only in the persons designated without regard to the proprietor of the original copyright.

2. Copyrights ⚡33—**Neither executor nor legatee of author, as such, has right of renewal.**

Where the author of a copyrighted book died more than a year before expiration of the then existing copyright, neither his executor nor a legatee, as such, could obtain a valid extension under Copyright Act, § 24 (Comp. St. § 9545).

In Equity. Suit by the Fox Film Corporation against Frederick M. Knowles and others. On motion to dismiss bill. Motion granted.

Saul E. Rogers, of New York City (Saul E. Rogers and Percy Heiliger, both 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.

KNOX, District Judge. The bill of complaint, so far as is now material, contains the following allegations of fact:

That Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor-House," and another "Over the Hill from the Poor-House." Carleton assigned his interest in the poems, together with the right to secure copyright there-

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

on, to Harper & Bros., publishers. Upon February 21, 1873, said assignees duly copyrighted the said collection of poems and published the same under the title of "Farm Ballads." On January 7, 1901, and within one year of the expiration of the copyright to Harper & Bros., Carleton applied for and obtained a so-called renewal thereof. The expiration of this renewal was February 21, 1915.

Carleton died December 18, 1912, leaving a will, wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters testamentary were issued to Goodrich, in Kings county, N. Y., upon March 21, 1913. Upon January 21, 1915, Goodrich, "as executor and sole legatee of the estate of said Will Carleton duly filed an application for the renewal of said copyright [obtained by Carleton] * * * in accordance with the Copyright Law of the United States, * * * and on or about the 21st day of January, 1915, the said copyright of the collection of poems entitled 'Farm Ballads,' including 'Over the Hill to the Poor-House' and 'Over the Hill from the Poor-House,' was duly renewed from February 21, 1915, for the period of 14 years to and including on or about February 21, 1929." All of the various publications of the said collection of poems are said to have been suitably inscribed.

On July 27, 1915, Norman E. Goodrich died. He left a will in which he gave all of his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated, and Mrs. Goodrich qualified thereunder. By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to plaintiff the sole dramatic copyright of the above-named "Poor-House" poems, with the exclusive right to dramatize the same for production throughout the world. It is said that the poems lend themselves to the making of a practical and effective stage representation thereof.

The bill proceeds to allege that defendant Knowles, without the consent of plaintiff or its predecessors in title, and in infringement of plaintiff's dramatic rights, wrote a drama entitled "Over the Hill to the Poor-House," which drama, with its elaborations and modifications, tells the story of Carleton's poem of that name; that thereafter defendants Klein, McWatters, and Myers, likewise without proper consent and with knowledge of plaintiff's alleged rights, and within this district, gave public performances and exhibitions of a drama entitled by the name of Knowles' dramatic version of the Carleton poem.

The foregoing averments, with certain others supplementary thereto, constitute the basis of complainant's claim to equitable relief. Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) defendants seek the dismissal of the bill of complaint, it being contended that the same, upon its face, shows a failure of title to any copyright existing upon the poem in question.

It will be noted that complainant's bill does not state if, upon his decease, Will Carleton left him surviving a widow, or children, or any next of kin. In view of the source from which complainant asserts its alleged title, I consider the foregoing omission to be a defect in pleading. This is so by reason of the provisions of section 24 of the copyright statute (Comp. St. § 9545), which regulates the succession

of title to copyright renewals. However, were it not for what I consider other insuperable objections, I should allow complainant to amend its bill in the particulars just mentioned.

Since the present motion was argued and submitted, the Circuit Court of Appeals for this Circuit, speaking through Judge Hough, has decided the case of *Silverman v. Sunrise Pictures Corporation*, 273 Fed. 909. What was there said makes, I think, a substantial contribution to the law of copyright and is determinative of the result to be reached upon this motion. The court said:

"* * * We regard it as settled: (1) That the proprietor of an existing copyright as such has no right to a renewal. (2) There is nothing in *Paige v. Banks*, 13 Wall. 608, 20 L. Ed. 709, opposed to this ruling. (3) The statute confers no right of renewal upon administrators. (4) The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty."

[1] Propositions (1), (2), and (3) effectively dispose of defendants' argument that the renewal which Carleton obtained of the original copyright issued to Harper & Bros. was not held by him as trustee for the publishers.

[2] The *Silverman Case* further holds that "legatees as such never have any renewal rights, because they are not named in the statute." Therefore, assuming that Norman E. Goodrich, as legatee of the author, Carleton, acquired title to the renewal of the copyright which expired February 21, 1915, he could not again renew the same, for the reason that—and again I quote from the *Silverman Case*:

"* * * The author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right *eo nomine*, which is exactly what the statute was designed to prevent. But what may be assigned can ordinarily be devised, and it results that before the statutory year the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because, shortly, the testatrix had as yet nothing to leave."

As it was with Mrs. Wilson, so it was with Will Carleton—he died before the opening of the year within which the renewal obtained by him could again be renewed. Judge Hough further said:

"* * * We construe the section as vesting the right in, or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease. This avoids the anomaly of requiring executors, as such, to do something in respect of a property right not passing by the will appointing them, or capable of so passing. It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary *absence of a will* in respect of this right, which only came into existence some five years after the testatrix died."

From this I reach the conclusion that neither as legatee nor as executor did Norman E. Goodrich obtain any valid copyright by the action

taken by him on or about February 21, 1915. He therefore had nothing which he could bequeath to his wife, and she in turn conveyed no title to complainant.

The bill, therefore, will stand dismissed.

RICHMOND SCREW ANCHOR CO. v. BETHLEHEM STEEL BRIDGE CORPORATION.

(District Court, E. D. Pennsylvania. September 14, 1921.)

No. 2349.

Patents ⇨ 301(4)—**Preliminary injunction against infringement denied.**

A preliminary injunction against infringement of a patent denied where defendant admitted the validity of the patent and complainant's ownership, and that it had used the patented invention, but disclaimed intention of further using it, and alleged that its use was by consent of the then owner of the patent, leaving only the question of complainant's right to recover damages to be litigated.

In Equity. Suit by the Richmond Screw Anchor Company against the Bethlehem Steel Bridge Corporation. On motion for preliminary injunction. Denied.

O. Ellery Edwards, of New York City, and Francis Rawle, of Philadelphia, Pa., for plaintiff.

Fralely & Paul, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This is a patent case, but (for the purposes of the present ruling) no question of patent rights or their infringement is involved. The cause is in form a proceeding in equity, and the sole question is the right of the plaintiff to ad interim protection in anticipation of a final determination of the cause in its favor. No patent right is involved because the plaintiff's ownership of letters patent and their validity is admitted. No question of infringement is presented because the defendant confesses to have used the very invention which the letters patent protect. The averments of the bill and the facts presented by the supporting affidavits make out a clear prima facie right to the remedy invoked. Why, then, should not the pending motion be allowed? Every cause worth the expense and trouble of litigation has two sides. One is the practical injury sustained; the other the legal remedy afforded. The law has granted to this plaintiff a monopoly which it must protect, but which it can protect only by a preventive injunction against infringement or by awarding damages for infringement committed. The subject-matter of the invention and the only actual use which can be made of it are such that the real value in the ownership of the invention is in the lawful power thereby conferred to exact the payment of a royalty from users. This preliminary statement clears the way for the presentation of the defense. The bill prays relief in the form of a final injunction and an award of damages. The right to either is denied. The bill also prays

for the allowance of an injunction pending the final determination of the cause. This in a sense is to award execution before the entry of judgment. It is never done merely in anticipation of a final ruling favorable to the complainant, although it is never done without it. The real basis of the award is to preserve the situation, and through this the rights of all litigants until the rival claims can be adjudged. The defense now offered is twofold. It is first that the use now asked to be enjoined is one to which the then owner of the patent not only consented, but one which he invited. The legal consequence is that the use did him no wrong, and the present plaintiff has succeeded only to his rights. The fact upon which this defense is based, it is true, is in dispute, but we cannot allow the pending motion without determining this feature of the merits of the cause in advance of the hearing to which every litigant has a right. The line drawn between the allowance and refusal of preliminary injunctions is somewhat like that drawn between summary and plenary proceedings in bankruptcy. There must be something more than mere color in the defensive right set up, but its fact merits will not be prejudiced if a question of right fairly arises. We have had the benefit in this case of a very clear and helpful argument in support of each side of it. Counsel for plaintiff have presented a chart of the adjudged cases based upon an analysis of the facts of each and for comparison a like analysis of the facts of the instant case. Over 90 per cent. of the latter are in hot controversy. No more clarifying method of presenting the point now made could be devised. The other ground of denial of the present motion is that the act asked to be enjoined has been done. The question thus becomes one of *cui bono*. An answer which suggests itself to this question is that as the property right of the plaintiff and infringement are for the purposes of the present motion admitted these admitted rights would be denied by the flat refusal of an injunction, and that in consequence the writ should be allowed to be superseded by the defendant giving bond to pay any damages which may be awarded. If the refusal of an injunction now clouded the *prima facie* title of the plaintiff to a monopoly in the use of this invention, there would be much practical force in this suggestion. The ground upon which the refusal is urged, however, confirms the title of the plaintiff because it is an admission of all that plaintiff claims limited only by the averment that the use of the invention had been granted to this particular defendant on this special and sole occasion. To require the defendant to now give bond is under the circumstances nothing less than to require a defendant in a damage suit to give security for damages the plaintiff's right to which is disputed. The power of the court to make such an order is not denied, nor that there might be in some cases good occasion for its exercise. No real occasion to so order now appears. Inasmuch as the indicated refusal of the injunction is based upon the disclaimer of the defendant of all purpose or intent to make any future use of plaintiff's invention without the consent of the owner, the refusal should be coupled with leave to the plaintiff to renew the motion. The conclusion reached we think to be in accord with the adjudged cases to which we have been referred, among which are Mc-

Clurg v. Kingsland, 42 U. S. (1 How.) 202, 11 L. Ed. 102; Haggood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369; Lane v. Locke, 150 U. S. 198, 14 Sup. Ct. 78, 37 L. Ed. 1049; Gill v. U. S., 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480; McKinnon v. American (D. C.) 259 Fed. 873; Id. (C. C. A.) 268 Fed. 353; Wilson v. American, 187 Fed. 840, 109 C. C. A. 600; Standard v. Arrott, 135 Fed. 750, 68 C. C. A. 388; City of Boston v. Allen, 91 Fed. 248, 33 C. C. A. 485; Blauvelt v. Interior, 80 Fed. 906, 26 C. C. A. 243; Withington v. Kinney, 68 Fed. 500, 15 C. C. A. 531; Solomons v. United States, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667; Wade v. Metcalf, 129 U. S. 202, 9 Sup. Ct. 271, 32 L. Ed. 661; McAleer v. U. S., 150 U. S. 424, 14 Sup. Ct. 160, 37 L. Ed. 1130; Dalzell v. Mauf Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; Keyes v. Mining Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929.

The motion for the allowance of a writ of preliminary injunction is denied with leave to plaintiff to renew the motion at any time.

In re SASLAW.

(District Court, N. D. Ohio, E. D. September 21, 1921.)

No. 7648.

Bankruptcy Ⓒ330—**Proof of claim containing power of attorney held not effectively executed.**

A proof of claim and power of attorney may be contained in the same instrument, but in that case it must meet all requirements of Bankruptcy Act, § 57 (Comp. St. § 9641), and of General Order No. 21 (89 Fed. ix, 32 C. C. A. xxii), and the person executing it, if by a partnership, must make oath that he is a member of the partnership, and if by a corporation that he is an officer and duly authorized to execute it, and in either case the jurat of the officer before whom the oath is taken must show that deponent is known to him or his identity established by satisfactory proof.

In Bankruptcy. In the matter of M. M. Saslaw, alleged bankrupt. On review of order of referee. Affirmed.

Sidney Weitz, of Cleveland, Ohio, and Frank B. Burch, of Akron, Ohio, for creditors opposing composition.

R. W. Jeremiah and Smith, Olds & Smith, all of Cleveland, Ohio, for petitioning creditors.

WESTENHAVER, District Judge. This cause is now before me upon a petition of certain creditors to review an order of the referee in rejecting the vote, upon a composition, of attorneys purporting to represent said creditors by virtue of powers of attorney held defective by the referee. A consideration of one question certified by the referee will be decisive of the controversy, viz.: Did the referee properly refuse to permit J. P. Colburn or R. W. Jeremiah to vote for the composition?

The powers of attorney in dispute are regular proofs of claim, sworn to by a partner where a partnership was the creditor, and by the treas-

urer in those instances where a corporation was the proving creditor, at the end of which is a statement to the effect that the claimant constitutes and appoints J. P. Colburn, or R. W. Jeremiah, attorney in fact, etc. The paper is signed, and the notary states over his signature that it was "subscribed and sworn to." The proof of claim and power of attorney are thus found in one instrument.

The applicable sections of the Bankruptcy Act and General Orders are section 57 of the act (Comp. St. § 9641) and General Order XXI, paragraphs 1 and 5 (89 Fed. ix, 32 C. C. A. xxii). Section 57 provides that a proof of claim shall be a statement in writing under oath signed by the creditor. General Order XXI provides more particularly how proofs of claim shall be made. In case of a partnership, it must appear on oath that deponent is a member of the partnership. In case of a corporation, the deposition must be made by the treasurer, with certain exceptions, when there is no treasurer, or when the latter is not in the district.

In paragraph 5 of this General Order it is provided: (a) That the execution of a power of attorney may be proved or acknowledged before certain designated officers; (b) that, when executed by a partnership, the person executing the instrument shall make oath that he is a member of the partnership, and, when by a corporation, that he is a duly authorized officer of the corporation on whose behalf he acts; (c) that, when the person executing it is not personally known to the officer taking the proof or acknowledgments, his identity shall be established by satisfactory proof.

I know of no reason why the proof of claim and power of attorney cannot be in one instrument. But the instrument must in that event contain all of the allegations and requirements for both the proof and the power. In the absence of statute, no particular form is necessary to appoint an attorney in fact. When there is a statutory or other legal provision, those provisions must be followed. 31 Cyc. 1230. In the instruments here in question, all requirements of a proper proof as designated in section 57 and in General Order XXI, par. 1, are found.

Examining the instruments, however, with a view to their sufficiency as a power, they appear defective. Those executed by partnerships are proved before an officer qualified by paragraph 5; they contain the allegation that deponent is a member of a partnership, but the officer taking the proof makes no statement over his signature that the deponent was personally known to him, or that his identity was established. Those instruments executed by corporations are proved before a qualified officer, but contain no allegation that the officer executing it is duly authorized to act on behalf of the corporation (in executing the power), and do not contain a statement by the officer taking the proof that the deponent was personally known to him, or that his identity was established.

The fact that the deponent in the corporation proofs swears that he is the treasurer of the corporation is not sufficient in my opinion; there is no implication that a treasurer is duly authorized to execute powers of attorney. Furthermore, paragraph 5 of General Order XXI

expressly requires that the officer swear that he is duly authorized, not that he is merely duly elected, or that he is the treasurer.

For the reasons stated, the order of the referee is affirmed. An exception to this ruling may be noted on behalf of the petitioners.

In re MOHAWK WEAVING MILLS, Inc.

(District Court, N. D. New York. August 1, 1921.)

Bankruptcy ⇨61—**Resolution of corporation sufficient to warrant adjudication.**

In the absence of fraud or collusion, a resolution passed by the directors of a corporation, admitting its inability to pay its debts and asking that it be adjudged a bankrupt, is sufficient to warrant an adjudication, and the question of its solvency is immaterial.

In Bankruptcy. In the matter of the Mohawk Weaving Mills, Inc., alleged bankrupt. On petition and answer of objecting stockholder. Order of adjudication.

James H. Merwin, of Utica, N. Y., for objecting creditor.

M. William Bray, of Utica, N. Y. (L. G. Fowler, of Utica, N. Y., of counsel), for bankrupt.

COOPER, District Judge. A resolution was passed by a majority of the directors of the Mohawk Weaving Mills, Inc., admitting its inability to pay its debts, and asking that it be adjudged a bankrupt. The petition in bankruptcy was traversed by Thomas J. Green, a stockholder, by whose answer insolvency was denied, and who also alleged that the resolution admitting the corporation's inability to pay its debts was not duly passed. The matter was referred to a special master, who reported that a meeting was duly called, at which Green was present and the resolution adopted. Green now, at the application for confirmation of the report, for the first time questions the good faith of the proceedings, and sets forth by innuendo that the sole purpose of the bankruptcy is to liquidate the affairs of the corporation for the purposes of a reorganization.

Where a corporation, in the absence of fraud or collusion, adopts a resolution to authorize creditors to institute bankruptcy proceedings, it is sufficient to warrant an adjudication. See *In re Lisk Mfg. Co.* (D. C.) 167 Fed. 411; *West Co. v. Lea*, 174 U. S. 590, 594, 19 Sup. Ct. 836, 43 L. Ed. 1098. As stated by Judge Holt, while sitting in the Southern district in this state, in *Re Duplex Radiator Co.* (D. C.) 142 Fed. 906:

"The referee's report discusses, at some length, the question whether this corporation was solvent; but when the act of bankruptcy alleged is an admission in writing of inability to pay debts and willingness to be adjudged a bankrupt on that ground, the question of insolvency is immaterial."

In *Re Moench & Sons Co.*, 130 Fed. 685, 66 C. C. A. 37, it was held that, where a corporation admits in writing its willingness to be ad-

judged a bankrupt, and thereupon requests certain creditors to file an involuntary petition, it constitutes no ground of defense to the proceedings by a creditor who opposes the adjudication. In *Re Dressler Producing Corporation* (C. C. A.) 262 Fed. 257, 259, Judge Manton states the settled rule as follows:

Where the act of bankruptcy is a written admission, as the statute provides (section 3a [5], being Comp. St. § 9587), the question of solvency is immaterial."

To the same effect are *Home Powder Co. v. Geis*, 204 Fed. 570, 123 C. C. A. 94; *Matter of Cohn*, 227 Fed. 843, 142 C. C. A. 367; *Albers Commission Co. v. Richter*, 251 Fed. 870, 164 C. C. A. 85.

If there was any collusion or fraud, Green failed to show it at the master's hearing. Moreover, he never raised the issue in his answer, and what he failed to do when afforded the opportunity he should not be permitted to assert by insinuation.

The report of the special master should be confirmed, and an order of adjudication in bankruptcy be entered.

HARTFORD v. CLEVELAND AUTOMOBILE CO.

(District Court, D. Delaware. July 13, 1921.)

No. 419.

1. Equity ⚡140—Interrogatories must be founded on allegations of bill.

A defendant is not bound to answer an interrogatory not arising out of the antecedent matter stated or charged in the bill of complaint.

2. Patents ⚡292—Interrogatories held not pertinent to issues made by bill for infringement.

Defendant in an infringement suit is not required to answer interrogatories calling for a comparison of its device with the drawings of a patent not in suit.

In Equity. Suit by Edward B. Hartford against the Cleveland Automobile Company. On objections by defendant to interrogatories. Sustained in part.

Clifford E. Dunn, of New York City, and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Clarence D. Kerr, of Fish, Richardson & Neave, of New York City, for defendant.

MORRIS, District Judge. The defendant has presented objections to plaintiff's interrogatories 3, 4, 5, 6, the second portion of 6a, 9, 10, and 11. I find nothing to distinguish the third interrogatory from the interrogatories considered by the District Court for the District of New Jersey in the case of *General Electric Co. v. Independent Lamp & Wire Co.*, 244 Fed. 825. For the sake of uniformity in this circuit I am inclined to follow the rule of that case unless and until a different

rule is established by the Circuit Court of Appeals. The objection to this interrogatory will therefore be overruled.

[1] Interrogatory 4 and the second portion of 6a seem to be based upon an allegation of the bill. No objection having been made by the defendant to this allegation, I think I would not at this stage of the case be warranted in saying that such allegation is immaterial. The purpose of these interrogatories being to sustain this allegation, the objection thereto will be overruled. Interrogatories filed by plaintiff must be founded on the allegations of the bill or, as said in Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), must be "for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause." The defendant is not bound to answer an interrogatory not arising out of the antecedent matter stated or charged in the bill of complaint. Upon this ground the objections to interrogatories 9 and 11 will be sustained.

[2] Interrogatories 5 and 6 call for a comparison of defendant's device with the drawings of a patent not sued upon. I think such a comparison cannot be required. *Luten v. Camp* (D. C.) 221 Fed. 424, 429. The objections to these interrogatories will be sustained.

Interrogatory 10 calls for the production of documents, namely, "working drawings." I find no admission of record of the defendant that it has such documents in its possession, custody, or control. In the absence of such admission, there is nothing upon which to base an order directing their production. It is therefore unnecessary now to determine whether a defendant in a case of this character should be compelled to produce working drawings. The objection to this interrogatory will be sustained.

An order in accordance herewith may be submitted.

In re DUNAWAY.

(District Court, N. D. Georgia. September 19, 1921.)

No. 1035.

Bankruptcy ⇨224—Referee held to have jurisdiction to vacate improvident order and enforce restitution of property delivered thereunder.

A referee who, without notice to the bankrupt ordered money set apart as his homestead exemption, delivered to one claiming to be the receiver of a state court, held to have jurisdiction to vacate such order and to require restitution of the money.

In Bankruptcy. In the matter of W. H. Dunaway, bankrupt. On review of referee's order on intervention of W. E. Hall as receiver. Order affirmed.

S. C. Upson, of Athens, Ga., for bankrupt.

Chalmers & Stewart, of Atlanta, Ga., and Z. B. Rogers, of Elberton, Ga., for receiver.

SIBLEY, District Judge. The bankrupt's trustee set apart \$1,600 as a homestead. A creditor of the bankrupt applied to the state court for a receiver to take over the homestead exemption to administer it for creditors holding waivers of homestead. W. E. Hall, claiming to be such receiver, but presenting no certified copy of his appointment or other evidence thereof, applied by intervention in the bankruptcy court for possession of the homestead and the referee, prior to the expiration of 20 days after setting apart the homestead, but, without notice to the bankrupt and without hearing any evidence as to the appointment of the intervener as receiver, delivered the fund to him. Thereafter the bankrupt moved to vacate the order, and upon notice to Hall, the referee, passed an order vacating his previous order and directing the return of the homestead to the trustee. Hall now seeks to review the referee's last ruling, on the ground that the court had no jurisdiction over the homestead, and no right to order a receiver of the state court to repay a fund in his possession.

The bankruptcy court has jurisdiction over all the assets of the bankrupt. Such as are claimed to be exempt under the state law are to be set apart as homestead. The bankruptcy court has jurisdiction to set apart and deliver over the homestead, but has no jurisdiction to administer it further. If another claiming to be receiver for the bankrupt asserts a right to have the homestead delivered to him, the bankruptcy court, while without authority to direct the course of the receivership, undoubtedly has jurisdiction to ascertain whether the applicant be a lawful receiver and entitled to the possession of the homestead rather than the bankrupt. Ordinarily no question could exist as to this where certified copies of a regular appointment are presented to the bankruptcy court, but the bankrupt, being the person whose right is to be directly affected, ought, wherever practicable, to have notice of the proposed delivery of the homestead to another rather than to him, in order that he may be heard. The referee had jurisdiction, and exercised it properly to vacate, as improvidently granted, if not altogether void, his previous order, made without evidence and without notice to the bankrupt. He could adjudge, also, that the fund be returned to the trustee. If the person receiving it from the trustee is in fact the receiver of a state court and has become chargeable as such with the money, unquestionably he would be entitled to take the advice and order of the court appointing him, and if that court's opinion should differ from the referee's, a question of enforcing the referee's judgment might arise involving delicacy. Such question has not arisen in this case, and likely will not. The conclusion of the referee and his action so far taken is affirmed.

SODEMANN HEAT & POWER CO. v. KAUFFMAN.

KAUFFMAN v. SODEMANN HEAT & POWER CO.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1921. Rehearing Denied November 28, 1921.)

Nos. 5318, 5819.

1. **Patents** ⇨311—**Prior patents, not pleaded, not admissible as anticipations.**
Prior patents, not pleaded, and of which notice has not been given as required by Rev. St. § 4920, as amended (Comp. St. § 9466), while they may be admitted as showing the prior art, in aid of the construction of a claim, are not admissible as anticipations, or to invalidate the claim for want of novelty.
2. **Patents** ⇨112(3)—**Grant carries presumption of patentable novelty.**
The presumption arising from the granting of a patent is that it discloses patentable novelty, and can only be overcome by clear proof to the contrary.
3. **Patents** ⇨26(2)—**New combination of old devices may be patentable.**
A new combination of old devices, which increases the efficiency of old machines, or produces a new, useful result, or even an old result in a more facile, mechanical, useful, or effective way, may be the subject of a valid patent.
4. **Patents** ⇨328—1,170,544, for radiator shield, held valid.
The Kauffman patent, No. 1,170,544, for a radiator shield, held valid, in the absence of any admissible evidence of prior patents.
5. **Patents** ⇨28—**Patentable design must present new and pleasing effect.**
A design, to be patentable, must present to the eye of the ordinary observer a different effect from anything that preceded it, and render the article to which it is applied pleasing, attractive, and beautiful.
6. **Patents** ⇨328—48,939 and 49,149, for designs for radiator shields, held void.
The Kauffman design patents, No. 48,939 and No. 49,149, for designs for radiator shields, held void for lack of invention.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit in equity by Samuel Kauffman against the Sodemann Heat & Power Company. From the decree, both parties appeal. Reversed on both appeals.

For opinion below, see 267 Fed. 435.

John H. Bruninga, of St. Louis, Mo., for plaintiff.

James L. Hopkins, of St. Louis, Mo., for defendant.

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

TRIEBER, District Judge. These are an appeal and cross-appeal from a decree in an action instituted by Samuel Kauffman against the

Sodemann Heat & Power Company, who will be referred to in this opinion as they appeared in the court below. 267 Fed. 435.

The plaintiff is the owner of patent No. 1,170,544, granted February 8, 1916, for radiator shields, and design patents No. 48,939, granted April 25, 1916, and No. 49,149, granted June 6, 1916, in connection with the radiator shields. The complaint charged the defendant with infringement of the three patents, and prays for an injunction and an accounting of accounts, profits, and damages, in addition to the penalties of \$250 for infringement of each of the design patents, as prescribed by section 1 of the Act of Congress of February 4, 1887, c. 105, 24 Stat. 387 (section 9476, U. S. Comp. St.). The complaint contains the usual allegations in such cases.

The answer denies that the alleged inventions, or either of them, had not been known and used by others in this country, and had not been patented or described in any printed publication in this or any other foreign country, before the alleged invention or discovery by the plaintiff, and that they had not been in public use or on sale for more than two years preceding the respective applications upon which said letters patent were granted, and not abandoned to the public. It attacks the validity of all the patents upon the ground that, "in view of the prior art, they are void for want of patentability, novelty of subject-matter, and for want of invention." No prior patents are pleaded in the answer, nor was any notice given of any of the intended defenses prescribed by section 4920, Rev. St., as amended (section 9466, U. S. Comp. St.). Infringement of each of the patents is denied.

As an additional defense it is alleged that since May 1, 1916, the plaintiff has threatened suit for the alleged infringement of one or more of said letters patents against defendant, its customers, and prospective customers; that said threats were not made in good faith, but in the course of unfair competition with the defendant; that the defendant has ever since continuously invited plaintiff to institute suits against it, in order to test the validity of his patents, and the truth and falsity of the charge of infringement, but plaintiff has failed and refused to do so, until the institution of this suit (it was filed August 10, 1918), by reason whereof it is claimed that plaintiff has acquiesced in all these acts of the defendant now complained of in this action, and should be adjudged guilty of laches, and estopped from asserting any claim of infringement against the defendant.

The evidence was adduced orally in open court, in conformity with equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi). The decree adjudged the claims of patent No. 1,170,544, claimed to have been infringed, invalid, and dismissed the bill as to that patent, but sustained the validity of both design patents, and found that the defendant had infringed them. Both parties appealed.

[1] The court below held that, notwithstanding section 4920, Rev. St., as amended by Act March 3, 1897, c. 391, 29 Stat. 692 (section 9466, U. S. Comp. St.), and the failure of the defendant to either plead or give notice in writing 30 days before the hearing of his intention to

introduce proof that devices, anticipating plaintiff's patents, had been patented or described in some publication prior to the supposed invention or discovery thereof, and that the plaintiff was not the original inventor or discoverer of any material or substantial part of the thing presented, nor that it had been in public use or on sale in this country for more than two years prior to plaintiff's application for a patent, or had been abandoned to the public, evidence of previous patents anticipating plaintiff's was admissible.

The learned trial judge held that the previous patents were admissible to establish what was old and what was new, for the purpose of aiding the court in the construction of the patent, relying upon *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200. This was error. While the court so held in that case, the patent in that case was held to be void on its face; the court holding that that may be done, as the courts may take judicial notice, without proof, and of course without allegations, of facts of universal notoriety. 91 U. S. 42, 23 L. Ed. 200. That that decision must be limited to a patent void on its face is shown in *Dunbar v. Meyers*, 94 U. S. 187, 198, 24 L. Ed. 34. The court there said:

"Old processes are sometimes applied to new subjects, and where that was so, in a case which did not require the exercise of the inventive faculty, and without the development of any idea, which could be deemed new or original in the sense of the patent law, it was held that the supposed improvement was not the subject of a patent, and that courts of justice may take judicial notice of a thing in the common knowledge and use of the people throughout the country"—citing *Brown v. Piper*.

The court then held that proof of the state of art is admissible in equity cases, without any averment in the answer and notice, to invalidate the patent, saying:

"It consists of proof of what was old and in general use at the time of the alleged invention, and may be admitted to show what was then old, or to distinguish what was new, or to aid the court in the construction of the patent."

In *Grier v. Wilt*, 120 U. S. 412, 429, 7 Sup. Ct. 718, 729 (30 L. Ed. 712), it was held that, while prior patents are receivable in evidence to show the state of the art, although not set up in the answer, to aid in the construction of the plaintiff's claim, they are not admissible to invalidate that claim on the ground of want of novelty, when properly construed. In *Eachus v. Broomall*, 115 U. S. 429, 434,, 6 Sup. Ct. 229, 231 (29 L. Ed. 419), it was held that such proof is admissible only "for the purpose of defining the limits of the grant in the original patent and the scope of the invention described in its specifications." In *Philadelphia Railway Co. v. Dubois*, 79 U. S. 47, 65 (20 L. Ed. 265), it was held, quoting from the headnote:

"The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received notice. Hence the state of the art, at the time of the alleged invention, though proper to be considered by the court in construing the patent, in the absence of notice, has no legitimate bearing upon the question whether the patentee was the first inventor."

That patents not pleaded may be admitted as showing the prior art, but cannot be availed of as anticipations, is no doubt the law. *Jones v. Cyphers*, 126 Fed. 753, 62 C. C. A. 21; *Morton v. Llewellyn*, 164 Fed. 693, 694, 90 C. C. A. 514; *United States Consolidated, etc., Co. v. Selma Fruit Co.*, 195 Fed. 264, 268, 115 C. C. A. 234; *Simplex Window Co. v. Hauser Reversible Window Co.*, 248 Fed. 919, 161 C. C. A. 37.

[2] Disregarding the prior patents introduced by the defendants, there has been no substantial evidence warranting a finding that plaintiff's patent had been anticipated or was invalidated by reason of the prior art. The presumption arising from the granting of the patent is that it is a patentable novelty, which can only be overcome by clear proof to the contrary. *Fairbanks & Morse v. Stickney*, 123 Fed. 79, 59 C. C. A. 209; *Stead Lens Co. v. Kryptok Co.*, 214 Fed. 368, 131 C. C. A. 144. The patentee has the right to rely upon the presumption the patent affords, that he was the original and first inventor of the improvement in question, and, if not advised by proper notice that it would be attacked, would in all likelihood fail to secure witnesses to rebut the evidence attacking his invention by reason of anticipation by older patents. He would be surprised by the introduction of such evidence, and may be unable to secure proof in rebuttal in time. To prevent this, section 4920, Rev. St. was undoubtedly enacted. In view of the fact that under the present equity rules the evidence has to be taken orally at the hearing, the statute requiring such notice should be more strictly enforced than it was prior to the adoption of the new equity rules, when the evidence was taken by depositions.

[3, 4] While the evidence justifies a finding that patentee's device is a combination of old elements, it also justifies a finding that a new result is produced by his device, which is more efficient than any heretofore known, to deflect, by the use of the shield in his device, the dust particles arising with the heat from the radiator, into a trough, which is also a part of his device, where they will be retained, and protect the walls and ceilings from the black dust and smoke arising from the radiator. A new combination of old devices, which increases the efficiency of old machines, or if a new useful result is produced, or even an old result in a more facile, mechanical, useful, or effective way, may be the subject of a valid patent. *Cantrell v. Wallick*, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; *National Hollow Brake Beam Co. v. Interchangeable Hollow Brake Beam Co.*, 106 Fed. 693, 707, 45 C. C. A. 544; *Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co.*, 215 Fed. 362, 369, 131 C. C. A. 504; *Wm. F. Goessling Box Co. v. Gumb*, 241 Fed. 674, 679, 154 C. C. A. 432; *Pelton Water Wheel Co. v. Doble*, 190 Fed. 760, 111 C. C. A. 488; *Neill v. Kinney*, 239 Fed. 309, 313, 152 C. C. A. 297.

The lithic top, it is true, shows no invention, and by itself would

not be patentable, but in connection with the brackets adapted to be placed at the ends of the radiator, by being provided with inwardly extending flanges, and the trough above the radiator, so arranged that the dust particles, arising with the heat from the radiator, will be deflected by the shield into the trough, which is removable for emptying, and, until moved, retained therein. The lithic top is arranged with fastening devices to prevent its displacement. Such a combination makes it a useful device for protecting the walls and ceiling from being discolored, and in the absence of older patents, prior use, or other legal anticipations, would be patentable. The patented device, taken as a whole, shows something more than mere mechanical skill.

The decree adjudging the patent void is reversed, but defendant may be granted leave to amend its answer and plead former patents, which are claimed to have anticipated the plaintiff's mechanical patent, No. 1,170,544, or such other defenses required to be given notice of under section 4920, Rev. St., as it may see proper.

Design Patents.

[5] A design, to be patented, under section 4929, Rev. St., as amended by Act May 9, 1902, 32 Stat. 193 (section 9475, U. S. Comp. St.), must, in the language of the statute, be "new, original, and ornamental design for an article of manufacture not known or used by others in this country before his invention thereof." It must present to the eye of the ordinary observer a different effect from anything that preceded it, and render the article to which it is applied pleasing, attractive, and beautiful; there must be something akin to genius, an effort of the brain, as well as the hand. "The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new rôle, is not invention." *Northrup v. Adams*, 12 O. G. 430, 2 Bann. & Ard. 567, Fed. Cas. No. 10,328, cited and followed in *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 679, 13 Sup. Ct. 768, 37 L. Ed. 606. To the same effect are *Rowe v. Blodgett & Clapp Co.*, 112 Fed. 61, 50 C. C. A. 120; *Eaton v. Lewis* (C. C.) 115 Fed. 635, affirmed 127 Fed. 1018, 61 C. C. A. 562; *R. E. Dietz Co. v. Burr & Starkweather Co.*, 243 Fed. 592, 156 C. C. A. 290. In *Soehner v. Favorite Stove & Range Co.*, 84 Fed. 182, 188, 28 C. C. A. 317, 323, Judge Severens, delivering the opinion of the court, in which Judges Taft and Lurton concurred, said on that point:

"The art of ornamentation with scrollwork is ancient. The classical sculpture and architecture of the old civilization employed it in various styles, and in a variety of their productions; and its use has been continued and enlarged, not only in the old departments of the arts, but in new and familiar productions in domestic life. Not only the columns, capitals, walls, and ceiling of buildings, and tapestries, old and new, illustrate it, but the counterpanes of beds, the covers of tables, and the borders of the pages and covers of books and magazines are some of many other things seen in almost universal use. * * * All these things being so, the field for invention in decorating the plates and legs of stoves with scrollwork, if it was open at all, must necessarily be limited. It could not consist, broadly, in displaying scrollwork in general upon the margins of the sides and other prominent features of the

stove. There must be something peculiar in the formation of the scrolls themselves, or in their relative arrangement, so as to produce a distinct effect, affording a special utility beyond any ordinary work of the kind."

In *Smith v. Whitman Saddle Co.*, the court in effect held that originality and the exercise of the inventive faculty are as essential to the validity of a design patent as a mechanical patent.

See, also, *Charles Boldt Co. v. Nivison-Weiskopf Co.*, 194 Fed. 871, 114 C. C. A. 617; *Steffens v. Steiner*, 232 Fed. 862, 137 C. C. A. 56; *Goudy v. Hansen*, 247 Fed. 782, 159 C. C. A. 641.

[6] We reproduce here copies of the designs of these two patents, and also illustrations of plaintiff's two designs, with that of the defendant charged to infringe plaintiff's patents:

KAUFFMAN DESIGN PATENT 48,939.

Fig. 1

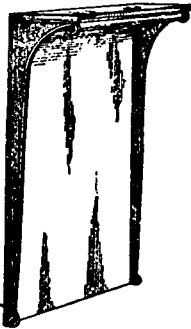


Fig. 2

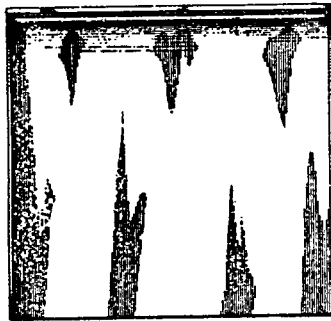


Fig. 3



KAUFFMAN DESIGN PATENT 49,149.

Fig. 1

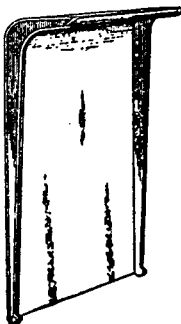


Fig. 2

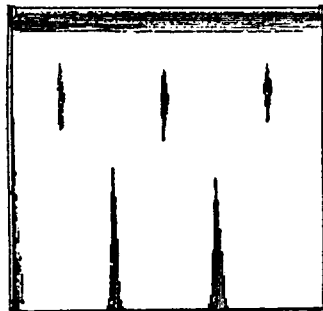
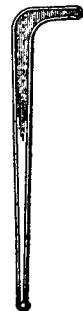


Fig. 3



ILLUSTRATIONS OF DESIGNS.

The defendant's design patent anticipated both of plaintiff's. It was granted February 1, 1916, on the application filed September 13, 1915, while plaintiff's patents were granted, No. 48,939, on April 25, 1916, on the application filed January 10, 1916, and No. 49,149 was granted on June 6, 1916, on the application also filed on January 10, 1916.

We are unable to find any originality or any added beauty in plaintiff's designs, or that they are so ornamental as to be akin to genius, and which can be said to arise to the level of invention. It is no more so than was the design in design patent No. 44,616, held to be invalid by this court in *Ferd Messmer Mfg. Co. v. Albert Pick & Co.*, 251 Fed. 894, 164 C. C. A. 10.

The decree holding that the defendant infringed plaintiff's design patents must also be reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

Fig. 3.

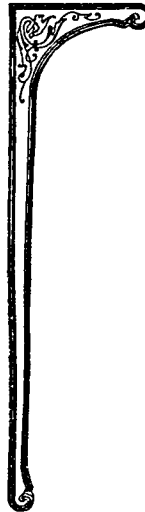


Kauffman Design
Patent No. 48,939
of April 25, 1916.

Fig. 3.



Kauffman Design
Patent No. 49,149
of June 6, 1916.



Sodemann Design Patent
of February, 1916.



ROAD IMPROVEMENT DIST. NO. 2 OF CONWAY COUNTY et al. v. MISSOURI PAC. R. CO.

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

No. 5655.

1. Appeal and error ⇨1009 (3)—Findings and decree on conflicting evidence presumed correct.

Where the chancellor in a suit in equity has considered conflicting evidence and made his finding and decree thereon, the presumption is that they are correct, and unless appellants make it clearly appear that an obvious error of law has intervened, or a serious mistake of fact has been made in the consideration and decision of the issues in the case, the adjudication will not be disturbed by an appellate court.

2. Constitutional law ⇨284 (1)—Highways ⇨122—Legislative assessment of benefits held arbitrary and void, as denying due process.

The Legislature of Arkansas by Road Laws 1919, vol. 1, pp. 1040-1042, §§ 20, 21, authorized the board of commissioners of a road district, after hearings, to make assessments of benefits on property for the construction of a highway, subject to the right of appeal to the courts by the property owners. Pursuant to such authority the board, after a hearing, made an assessment of benefits against the property of a railroad company in the sum of \$2,767.50, which was duly entered on the tax books. By Sp. Act Feb. 23, 1920, No. 308, the Legislature assumed to increase such assessment to \$25,000. *Held*, that such action was arbitrary, and the act unconstitutional and void, as taking the property of the railroad company without due process of law, and that the assessment made by the board was the only valid assessment.

3. Courts ⇨262 (4)—Federal court of equity has power to prevent taking by state of property without due process of law.

The power is conferred and the duty is imposed on a federal court, sitting in equity to relieve by its decree, injunction, or other process a citizen of the United States who properly invokes its aid from an arbitrary and unwarranted exercise of the legislative power of a state, which without due process of law or compensation threatens to deprive him of all or a part of his property.

4. Highways ⇨138—Power delegated to make special assessments is judicial in nature and can be exercised only after hearing.

When a Legislature delegates to a board or to commissioners the determination of the question what lands will be benefited by a road improvement, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in Equity by the Missouri Pacific Railroad Company against Road Improvement District No. 2 of Conway County and others. Decree for complainant, and defendants appeal. Affirmed.

The Missouri Pacific Railroad Company, a corporation, brought this suit in equity in the court below, against road improvement district No. 2 of Conway county, district of Arkansas, its board of commissioners, and the sheriff and county clerk of that county, to avoid, on the ground that it violated the Fourteenth Amendment to the Constitution of the United States, Special Act No. 308 of the General Assembly of Arkansas, approved February 23, 1920, which, by its terms, increased the assessment of benefits against the property of the company for the construction of the highway in that district

from \$2,767.50 to \$25,000, and its tax on that account from \$207.56 to \$1,875. Proper pleadings, evidence, a final hearing, a decree for the relief sought by the company, an appeal to this court by the defendant, and a statement of the case under equity rule 77 (198 Fed. xii, 115 C. C. A. xli) followed. The statement of the case consists, first, of a declaration that the appeal herein can be determined without an examination of all the pleadings and evidence, from which the inference is that there was evidence before the court below that is not in this statement; second, of certain statements; and, third, of the deposition of W. P. Strait, the attorney for the company, which was in evidence before the court below, and is declared in the statement to be "a part of the agreed statement of facts"

The statements in the second part of the statement of the case, so far as they seem to be material to the issue before this court, are that the road district embraces a large territory; that in general the highway for the construction of which the assessment of benefits was made runs parallel to the main line of the company's railroad; that at one time the board of commissioners assessed the benefits to the company's road in the district at \$25,000, caused that assessment to be entered on the assessment books and its copies, and caused notice of it to be published; that within the time specified in the act creating the road district (1 Special Acts of Arkansas 1919, Roads, p. 1025) for owners of property assessed to make complaint or objection to the assessment, Mr. Strait, the attorney for the company, appeared before the board of commissioners, sitting as a board of assessment, and protested against this assessment; that there was a hearing and discussion of the amount of the benefits between him and the board; that Mr. Strait said that if the board would reduce the assessment to \$125 per mile, making a total assessment of \$2,767.50, he would use his personal influence to have the company put in free of charge switches and sidings at convenient points along the railroad, so that rock and other materials which the board wished to use in constructing the highway could be unloaded at such points, and the board could save some hauling expenses; that thereupon the board reduced the assessment to \$2,767.50, which was at the rate of \$125 per mile; that when construction of the highway commenced the board requested the company to put in the switches and sidings, and Mr. Strait used his influence with the company to induce it to do so, but it refused the request; and that thereupon the Legislature of Arkansas passed the act of February 23, 1920, of which complaint is made. That act contained in its first section a finding and declaration that the original assessment of \$25,000 made by the board is a fair, just, and equitable assessment, and a direction that the county clerk interline the assessment books, theretofore filed by the board, which evidenced the final assessment of \$2,767.50 after notice and hearing, so as to make the assessment of benefits therein against the company \$25,000, instead of \$2,767.50, and that the county clerk extend the levy of taxes against this legislative assessment of benefits in the same proportion as the levy is made against the assessments of benefits of other property within the district, which was at the rate of 7½ per cent. of the benefits annually.

The second section of the act declared that the sheriff and collector of Conway county was authorized and directed to collect from the company the same proportion of this legislative assessment of \$25,000 as he collected of the assessments on other property in the district. After the passage of this act the county court of Conway county made an order to the effect that the county clerk and county sheriff and collector should do as directed by the act. The county clerk then drew a line through the assessment of \$2,767.50 in the assessment book, and wrote \$25,000.00 underneath those figures, extended the 7½ per cent. tax on this legislative assessment, the sheriff and collector demanded the tax, and the company offered to pay all the other taxes, but refused to pay this, and commenced this suit.

In the third part of the statement of the case, the deposition of Mr. Strait, which was read in evidence below by the company, and which appears "in full as a part of the agreed statement of the case," disclosed these facts: The highway being constructed is substantially parallel with the company's railroad, but has no physical effect upon its property. It extends from the east boundary line of Conway county to the western boundary line thereof,

where it intersects with another line of the same highway, which extends through Pope county, and at the eastern line thereof it intersects with another link of the same highway, which extends through Johnson county. The topography of the country and the developments, improvements, and population therein are substantially the same in Conway county and Pope county. The benefits assessed against the company for the construction of the highway in Pope county are at the rate of \$125 per mile of its railroad in that road district, and in Johnson county they are at the rate of \$85 per mile of its road in that district. Before any assessment was made by the board, Mr. Strait had a discussion of the amount of the benefits to the company with some of the members of the board of commissioners, in which Mr. Scroggin, one of the members, expressed the view that the benefits were about \$3,750, that that amount might be a little cheap, and the result of the conference was that it was tentatively agreed that the amount should be \$2,500. Later Mr. Strait was informed that the board had changed this tentative amount from \$2,500 to \$25,000, but that it was not intended to let the assessment remain at that amount, and it was suggested to him to let the matter wait until some other assessments were adjusted, when the board would hear his complaint and objections and treat the company right.

The act under which the board proceeded (Special Acts of Arkansas 1919, Roads, vol. 1, p. 1025, §§ 20 and 21) provided that the board of commissioners should make an assessment of the benefits to each piece of property, and give notice of the date on which they would hear complaints against and objections to such assessments; the commissioners made this \$25,000 assessment and gave this prescribed notice. Mr. Strait, on behalf of the company, made its complaint of and objections to that assessment before the board at the proper time and place. After some other assessments had been adjusted, Mr. Strait took up this matter of the company's assessment, directly discussing it with Mr. Scroggin. The assessment in the adjoining county of Pope had then been made at the rate of \$125 per mile of railroad. After that assessment was made the engineer of the company suggested that he might be able to save the board of commissioners expense by putting in spur tracks, and that he thought he could arrange to do so, and Mr. Strait told the commissioners that he would use his influence with the company to have this done, but at the same time he expressly notified them that he had no authority to make and would not make any agreement on behalf of the company to put in such spurs and switches. After the hearing and much discussion it was agreed by the board and Mr. Strait that the assessment of benefits against the company in Conway county should be at the same rate of \$125 per mile of the railroad in the district that had been made in Pope county, and the board of commissioners thereupon made its final assessment of the benefits to the company's property of \$2,767.50, and this assessment was duly entered and recorded in the proper books of the board and the county. When the time came for the board to handle its rock and materials along the line of the new highway, Mr. Strait and those in immediate charge of the engineering department took the matter of the spurs and switches up and used their influence to have them put in; but the operation and control of the railroad was then in the hands of the government, and the higher officials refused to put them in, and the act of February 23, 1920, here in question, was passed before the operation and control of the road were returned to the company. Mr. Strait testified that the benefits to the property of the railroad company from the construction of the highway parallel to the road were less than \$2,767.50, that there were no special benefits to it, that whatever benefits there were were such general benefits as the development of the country which would be received by all communities and property contiguous to the highway and that so far as he knew or as was ever discussed with him, no one ever claimed or maintained originally that anything like benefits in the sum of \$25,000 would accrue to the railroad by reason of the construction of the parallel highway.

Charles T. Coleman, of Little Rock, Ark. (Grover T. Owens, Joe T. Robinson, Joseph W. House, Jr., and Walter G. Riddick, all of Little Rock, Ark., on the brief), for appellants.

W. P. Strait, of Morrilton, Ark., and Thomas B. Pryor, of Ft. Smith, Ark. (Edward J. White, of St. Louis, Mo., on the brief), for appellee.

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

SANBORN, Circuit Judge (after stating the facts as above). By its decree in this case the court below found that the special Act of the Legislature of Arkansas No. 308, approved February 23, 1920, whereby the final assessment of benefits to the property of the railroad company made by the defendant Board of Commissioners, on account of the construction of the highway was changed from \$2,767.50 to \$25,000, was arbitrary, unconstitutional and void, and it enjoined the defendants from collecting any taxes based on that assessment or on any other assessment than the final assessment of \$2,767.50 made by the Board.

[1] The assignment of errors contained six specifications, but the answer to a single question disposes of all of them, and that question is: Have the appellants clearly established by their "statement of the case" that the court below fell into an obvious error of law or made a serious mistake of fact in its finding and conclusion that the act of February 23, 1920, was arbitrary, unconstitutional, and void? This is a suit in equity, and where the chancellor, as in this case, has considered conflicting evidence, and made his finding and decree thereon, the presumption is that they are correct, and unless the appellants make it clearly appear that an obvious error of law has intervened, or a serious mistake of fact has been made in the consideration and decision of the issues in the case, the adjudication will not be disturbed. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Coder v. Arts*, 152 Fed. 943, 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; *In re Crocker (D. C.)* 217 Fed. 167, 169; *Brookheim v. Greenbaum*, 225 Fed. 763, 764, 141 C. C. A. 89.

[2] Rule 77 in equity provides that the statement of the case thereunder "shall be taken as superseding for the purposes of the appeal all parts of the record other than the decree," so that in the disposition of this appeal it is unnecessary to look beyond that statement, the material contents of which have been recited. From that statement these indisputable and controlling facts appear: The Legislature of the state of Arkansas had delegated to the defendant, the board of commissioners, the judicial power, and had imposed upon it the judicial duty (a) to make a tentative assessment of the benefits to the property of the company in this road district from the construction of the highway; (b) to give notice to that company of its making of this assessment, and of the time and place when and where the company's complaint of and objections to that assessment could be presented to the board for hearing. Sections 20 and 21 of the act; Special Acts (Road) 1919, vol. 1, pp. 1040, 1041, and 1042. The board made the tentative assessment of \$25,000, and gave the notice; the company, at the time and place specified in the notice, made its objections to and complaint of this tentative

assessment; the board heard this complaint and these objections, and finally decided and adjudged that the assessed benefits to the company's property were \$2,767.50, and caused that assessment to be entered and recorded in the proper public books of the board and the county. A few days later the Legislature of Arkansas passed the act of February 23, 1920, to the effect that such assessment which is the basis and measure of the tax against the company on account of the highway should be \$25,000, more than nine times the amount of the final judgment and assessment of the board, instead of \$2,767.50. These facts unavoidably create a strong impression that this act of the Legislature was arbitrary and unwarranted, and that it constituted a gross abuse of legislative power.

The Fourteenth Amendment declares:

"Nor shall any state deprive any person of life, liberty or property without due process of law."

And due process of law against one must give him notice of the charge or claim against him and an opportunity to be heard respecting the justice of the judgment, order, or action sought or to be considered. The notice must be such that he may be advised by it of the nature of the claim against him, and of the relief sought or intended, if the claim is sustained. The opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue. In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497; In re Wood & Henderson, 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed. 1046.

[3] The question of fact of which the Legislature assumed jurisdiction and disposition was whether the benefits to the company's property from the construction of the highway were \$2,767.50, finally adjudged by the board, or \$25,000; but no such process of law as has been described had been invoked before the Legislature passed its act, which, if enforced effectively confiscates annually the difference between 7½ per cent. of \$2,767.50 and 7½ per cent. of \$25,000, or \$1,667.44 of its property. The power is conferred and the duty is imposed upon a federal court sitting in equity to relieve by its decree, injunction, or other process a citizen of the United States who properly invokes its aid from an arbitrary and unwarranted exercise of the legislative power of a state, which without due process of law or compensation threatens to deprive it of all or a part of its property. *Kansas City Southern Ry. Co. v. Road Improvement District No. 6 of Little River County*, 256 U. S. —, 41 Sup. Ct. 604, 65 L. Ed. —, (opinion filed June 6, 1921); *Gast Realty & Investment Co. v. Schneider Granite Co.*, 240 U. S. 55, 58, 59, 36 Sup. Ct. 254, 60 L. Ed. 523; *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 416, 40 Sup. Ct. 560, 64 L. Ed. 989; *Coe v. Armour Fertilizer Works*, 237 U. S. 414, 423-426, 35 Sup. Ct. 625, 59 L. Ed. 1027; *Hancock v. City of Muskogee*, 250 U. S. 454, 39 Sup. Ct. 528, 63 L. Ed. 1081.

In support of the constitutionality of this legislative act counsel for the defendants first argue that the first assessment of \$25,000 made by the board was valid, and call attention to statements in the statement of the case to the effect that the board, in making that assessment and

the other assessments of benefits to the property of other owners arising from the construction of the highway, considered proper elements and conditions, but that assessment was not a final, but a mere tentative, assessment, subject under the statutes of the state to the complaint and objections of the company, to a judicial hearing of such complaint and objections by the board, and if they were overruled, or the relief sought thereby was denied, to a suit and adjudication of the questions presented in the chancery court of the state of Arkansas. Section 21, *supra*. The company presented, and the board heard, its objections to and complaint of this \$25,000 assessment, and as a result of such hearing the board set that assessment aside, and finally assessed and adjudged the benefits of the company's property to be \$2,767.50, and thenceforth its tentative assessment of \$25,000 was without force or effect.

Moreover, the deposition of Mr. Strait is as much a part of the "statement of the case" as are the statements therein about the board's \$25,000 assessment; and while the statement of the case clearly shows that there was much evidence before the court below which that statement does not contain, it does contain the deposition of Mr. Strait, and no testimony of any one of the commissioners or of any other witness which contradicts the statements of Mr. Strait in that deposition that before the board made its \$25,000 assessment he discussed the amount of the benefits with some of the members of the board, that one of them thought it should be about \$3,750, but that this amount was perhaps too low, and after discussion they tentatively agreed with him that it should be \$2,500, that the assessment they finally made, \$2,767.50, after hearing his objections to the board's \$2,500 assessment, was at the rate of \$125 per mile of the road in the district, that this was the rate at which the assessment of benefits to the property of the company in the adjoining county of Pope was made, that \$85 per mile was the rate on which the assessment in Johnson county was based, that when he learned of the board's \$25,000 assessment he was informed that it was not intended that this assessment should stand, that the board would take the matter up with the company and treat it right after some other assessments were adjusted, that they did take it up thereafter, and hear the company's objections and complaint, and after the hearing and discussion finally adjudged the assessment of \$2,767.50, that there were no special benefits to the property of the railroad from the construction of this parallel highway, and that "so far as I know, and as was ever discussed with me, no one ever claimed or maintained originally that anything like benefits in the sum of \$25,000 would accrue to the railroad by reason of the construction of this parallel road."

Repeated readings of the statement of the case and deliberate consideration thereof have convinced that neither the tentative \$25,000 assessment made by the board nor anything in the statement of the case estopped the company from insisting, or the court below from finding, that the benefits to the property of the company did not exceed \$2,767.50, and that, on the other hand, there was ample evidence in that statement of the case to sustain such a finding, and that there is little doubt that the court below did so find, and on that finding based its decision and decree.

The next contention of counsel for the defendant is that the agreement to reduce the assessment to \$2,767.50 was unlawful, because it destroyed the equality and uniformity of the assessment of benefits throughout the district. Conceding that the law requires equality and uniformity in the assessments, in the sense of an absence of unreasonable discrimination between members of classes and between classes of owners and of property, the statement of the case fails to satisfy that the change of the board's tentative assessment of \$25,000 to \$2,767.50 after the hearing of the complaint and objections of the company had any such effect or was illegal. If, as the statement of the case tends to prove, the benefits to the company's property did not exceed \$2,767.50, it was the right of the company to have the tentative assessment reduced to that amount, and the duty of the board so to reduce it. If it had not done so, the company would have had the right to bring a suit in the chancery court of the state, and there to acquire a decree for such a reduction. In the face of these statutory and legal rights of the company, the suggestion that such a reduction might produce a discrimination that is not proved, and the facts that the board probably could have prevented or removed, and perhaps did prevent or remove, such discrimination by changing other assessments, or in some other lawful way, when it made the reduction, this objection of possible discrimination may not prevail.

Another contention of counsel is that the final assessment of \$2,767.50 was illegal, because the board reduced the assessment from \$25,000 to \$2,767.50 pursuant to an agreement, that it made the reduction in consideration of a representation and agreement of the attorney and engineer of the company that they would use their influence with it to induce it to put in some switches and side tracks for the board free of cost; but the statement of the case convinces that neither the attorney nor the engineer had any authority to bind the company to put in such switches and side tracks, that they notified the board and its members knew that fact before it made the reduction, that when the board called for the switches and spurs the attorney and engineer did use their influence with the company to obtain them for the board, but the operation and control of the railroad were then in the government, and higher officials refused to furnish them.

Counsel argue the illegality of the board's final assessment as though the fact were established that the value of the benefits was \$25,000. On that assumption they write that in making the final assessment the board put only \$2,767.50 of this \$25,000 on the assessment books, and gave to the company the benefit of \$22,232.50 of the \$25,000 benefits for the promise of the attorney and the engineer; but this argument is not persuasive, because the assumption is not sustained by the statement of the case, which, in the opinion of the court, warrants the conclusion, probably reached by the court below, that the benefits did not exceed \$2,767.50. As the company made no agreement about the switches and spurs, as the statement of the case warrants the conclusion that the benefits to it did not exceed \$2,767.50, the fact that the board reduced the tentative assessment to that amount after the hearing in the hope that the attorney and engineer would be able to induce the

company to put in the switches and side tracks free of charge, presents no sound or persuasive reason, either at law or in equity, why the company should not be relieved by a court of equity from the arbitrary and unwarranted increase of that assessment to \$25,000 by legislative fiat without due process of law.

The last contention is that the act of the Legislature challenged is in itself constitutional and valid, but none of the authorities cited sustain a statute analogous to this act. Counsel cite *Spencer v. Merchant*, 125 U. S. 345, 356, 357, 8 Sup. Ct. 921, 31 L. Ed. 763. In that case an assessment was made on property for street improvements without notice to the owners and an opportunity for them to be heard. Some of the owners paid, others refused to pay, and the court held their assessments void for want of notice and hearing. Thereupon the Legislature passed an act to the effect that the part of the assessments for the improvements unpaid might be assessed proportionately on the property of the owners who had failed to pay, provided that notice was given to them and an opportunity afforded for them to be heard. This act was sustained by the court, but in that case the statute expressly provided for notice to the owners of the hearing and for an opportunity for them to be heard before the assessments against them should be made. The act in hand provided neither notice nor hearing.

[4] They cite decisions of the Supreme Court of Arkansas to the effect that the Legislature has the power in the first instance to levy assessments on property in improvement districts, "subject to the right of the landowners to have an arbitrary abuse of that power reviewed by the courts," and that it can therefore adopt as correct the assessment made by the commission as a reassessment by the Legislature. *Gibson v. Spikes et al.*, 143 Ark. 270, 220 S. W. 56, 57; *Coffman v. St. Francis Drainage District*, 83 Ark. 54, 103 S. W. 179; *Davies v. Checo Drainage District*, 112 Ark. 357, 166 S. W. 170. But in the case in hand the Legislature did not undertake itself to make the assessment on the property in this district, but it delegated that power to and imposed that duty upon the board of the district. And when the Legislature delegates to a board or to commissioners the determination of the question what lands will be benefited, or what the amount of benefits to such lands will be, the inquiry becomes in its nature judicial, in such a sense that property owners are entitled to a hearing, or an opportunity to be heard, after notice, before these questions are determined. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 174, 175, 17 Sup. Ct. 56, 41 L. Ed. 369; *Embree v. Kansas City Road District*, 240 U. S. 242, 247, 36 Sup. Ct. 317, 60 L. Ed. 624. Nor did the act in question adopt an existing assessment by the board. On the other hand, it arbitrarily substituted an assessment of \$25,000 against one only of many property owners for the final assessment and judgment of \$2,767.50 which the board had made after notice to the owner of the property and a hearing in the ordinary course of its judicial proceeding, and under the established rules of law and equity no rational way of escape is perceived in this state of the case from the finding and decision of the court below that this substitution was arbitrary, unconstitutional, and void.

Finally, counsel contend that the court erred in restoring the final assessment of \$2,767.50 made by the board. But that assessment was never removed, nor was it restored. The decision of the court below, which this court sustains, is that the act of the Legislature in question was void, the assessment of \$2,767.50 was and ever after it was made, has been in equity and right in full force and effect, and the same conclusions and reasons which have led to the affirmance of that finding and decision sustain the portion of the decree here questioned, which is to the effect that the assessment of \$2,767.50 is the only valid assessment, and that the injunction against the collection of the taxes on the basis of the assessment of \$25,000 shall not prevent the collection of the taxes on the basis of the assessment of \$2,767.50.

It does not appear to this court that the court below fell into any error of law or mistake of fact in its finding or decree in this case, and it is therefore affirmed.

**BOARD OF COM'RS OF POTTAWATOMIE COUNTY, OKL., v. CLOSE
BROS. & CO.**

(Circuit Court of Appeals, Eighth Circuit. July 26, 1921.)

No. 5787.

Municipal corporations \Leftrightarrow 521—Interest collected on delinquent paving assessments held to belong to holders of certificates.

Comp. Laws Okl. 1909, § 727, which is part of an act regulating paving in cities of the first class, and authorizing the issuance of bonds or certificates for the cost of paving, to be paid from special assessments, which may be payable in installments, provides that such assessments and interest thereon shall be collected by the city clerk, and that the proceeds shall be paid to the city treasurer, and shall constitute a special fund "to be used and applied to the payment of such bonds and the interest thereon and for no other purpose." It further provides that delinquent assessments shall bear interest at the rate of 18 per cent., and that the city clerk shall certify delinquent installments to the county treasurer, to be collected as other delinquent taxes and paid to the city treasurer, "for disbursement in accordance with the provisions of this act." *Held*, that under such statute, as construed by the Supreme Court of the State, the county has no interest in such delinquent collections, and that the 18 per cent. interest collected thereon is for the benefit of the holder of the paving certificates.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by Close Bros. & Co., a corporation, against the Board of County Commissioners of Pottawatomie County, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

A. J. Carlton and F. H. Reily, both of Shawnee, Okl., for plaintiff in error.

Fred W. Green, of Guthrie, Okl., and D. M. Tibbetts, of New York City, for defendant in error.

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

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

TRIEBER, District Judge. The parties will be referred to herein as they appeared in the court below, the plaintiff in error as the defendant, and the defendant in error as the plaintiff.

The action was instituted to recover from the defendant moneys collected by its county treasurer, as interest, from delinquent taxpayers on their tax assessments on paving certificates issued by the city of Shawnee, a city of the first class in the state of Oklahoma, against certain lots in said city. The certificates were to be paid in 10 equal installments, with interest thereon at the rate of 7 per cent. per annum. The following is a copy of these certificates, varying only in amount and description of the realty charged with the special tax.

"United States of America.

"Number 1.

"Oklahoma Territory, City of Shawnee.

"Special Tax Certificate, \$258.59.

"This is to certify, that the work of paving, curbing, and doing necessary grading therefor, and putting in certain catch-basins and drain pipes on Broadway street, from the north side of the alley south of Main street to the south line of Tenth street, under the terms of the contract therefor between the city of Shawnee and the Cleveland-Trinidad Paving Company, dated the 24th day of December, 1905, has been completed in accordance with the terms of said contract and the laws and ordinances of said city of Shawnee relative thereto, and to the satisfaction and acceptance of the city engineer and the improvement committee of said city, and said work having been approved and accepted, and the benefits to the land liable to taxation therefor have been duly appraised, and the cost thereof fully determined and assessed.

"And that the said city has, by ordinance duly passed on the 5th day of December, 1905, levied, assessed, and charged each tract of land liable therefor with its proper share of the cost of making such improvements, for all charged as a special tax for the work of improvement aforesaid against lot No. 32, block No. 14, Amended Plat, in the city of Shawnee, in the sum of two hundred and fifty-eight and 59/100 dollars, which sum is hereby levied against said lot, payable in ten (10) equal installments, with interest thereon from the date hereof at the rate of seven (7) per cent. per annum, and during the next ten (10) years there shall be levied each year against said lot a sum sufficient to pay the maturing installment of that year and interest on all unpaid installments according to law.

"This certificate is one of a series issued and delivered to the Cleveland-Trinidad Paving Company, the contractor, in payment of the price of said work, the aggregate amount of such warrants so delivered to the contractor does not exceed the contract price for such work; and the assessment, with interest thereon at seven (7) per cent. per annum, shall be a lien against the lot or parcel of land above described until the entire amount thereof, with interest, is paid, and said assessment with interest, or any installment or part thereof, when collected by the county treasurer shall be paid to the holder of this certificate and indorsed thereon by the county treasurer upon presentation of this certificate to said county treasurer, provided that the owner of the above described land or parcel of ground may redeem his property from such special assessment at any time by paying the amount of unpaid installments to the county treasurer and the interest thereon until the maturity of the next succeeding installment, and upon such payment and presentation of the certificate against such property the county treasurer shall pay the same in full and cancel the same, and hold for delivery to the person making such redemption.

"In witness whereof, the mayor and council of the city of Shawnee have caused this certificate to be issued, signed by the mayor, and countersigned by the city clerk of said city, with the corporate seal attached, this 18th day of December, 1905."

It is alleged in the complaint that there is still due and unpaid on these tax certificates the sum of \$8,356.05, that many of said assessments were paid by the property owners long after the same became due and payable, and that the county treasurer of said county collected the same, with the 18 per cent. interest on the delinquent assessment, that the interest thus collected by him amounted to the sum of \$7,299.-23, which sum the county retains in its treasury and refuses to pay to the plaintiff, to be credited on the certificates owned by it. A list of the certificates, with a description of the lots, the amount of the special tax assessed against each lot, and the payments made and indorsed on each certificate, the last payments having been made on the certificate during the years 1916 and 1917, is filed with the complaint. The action was begun on May 11, 1920.

A demurrer to the petition by the defendant board of county commissioners having been overruled by the court, and the defendant declining to plead further, but electing to stand on the demurrer, judgment was rendered in favor of the plaintiff for the amount collected, with interest. To reverse this judgment this writ of error is prosecuted.

The certificates were issued by authority of section 727, Compiled Laws of Oklahoma 1909, an act regulating paving of streets in cities of the first class. This act provides:

*"Sec. 727. Collection, Payment and Notice of Assessment—Delinquents.—*The assessments provided for and levied under the provisions of this act shall be payable by the persons owning the same as the several installments become due, together with the interest thereon, to the city clerk of such city, who shall give proper receipts for such payments. The city clerk shall be required to execute a good and sufficient bond with sureties, and in an amount to be approved by the mayor and council, payable to the city conditioned for the faithful performance of the duties enjoined upon him by this act as collector of said assessments.

"It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily, the amounts of such assessments collected by him and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose.

"It shall be the duty of such city clerk, not less than thirty days and not more than forty days, before the maturity of any installment of such assessments to publish in two successive issues of a daily paper, or in one issue of a weekly newspaper, published and of general circulation in said city, a notice advising the owner of the property affected by such assessment of the date when such installment and interest will be due and designating the street, streets or other public places for the improvement of which such assessments have been levied and that unless the same shall be promptly paid shall bear interest at the rate of eighteen per cent. per annum thereafter until paid, and proceedings taken according to law to collect said installment and interest; and it shall be the duty of the city clerk promptly after the date of maturity of any such installment of assessment and interest and on or before the fifteenth day of September in each year to certify said installment and interest then due to the county treasurer of the county in which said city is located, which installment of assessment and interest shall be by said county treasurer placed upon the delinquent tax list of said county for the current year and collected as other delinquent taxes are collected and thereupon pay to the city treasurer for disbursement in accordance with the provisions of this act: Provided, that failure of the city clerk to publish said notice of the

maturity of any installment of said assessment and interest shall in no wise affect the validity or the assessment and interest."

On behalf of the defendant Seymour v. Oklahoma City, 38 Okl. 547, 134 Pac. 45, 47 L. R. A. (N. S.) 702, Hunter v. State, ex rel., 49 Okl. 673, 154 Pac. 545, and Board of Commissioners v. City of Clinton, 49 Okl. 795, 154 Pac. 513, are relied on, that the interest collected belongs to the county and that the certificate holders are not entitled to it. A careful examination of these authorities convinces that they are clearly inapplicable to the instant case, as the statutes construed in those cases differ materially from that involved herein. In Seymour v. Oklahoma, the statute construed is found in sections 990 and 991, Compiled Laws of Oklahoma 1909, and refers to the building of sewers. That act provides that "the assessments be collected as other taxes are collected." The collection of other taxes, meaning general taxes, is regulated by chapter 98, art. 9, § 7629, Compiled Laws of Oklahoma 1909, which reads:

"All the delinquent taxes shall, as a penalty, bear interest at the rate of eighteen per cent. per annum."

And in construing it, the court held that:

"As the statute makes the 18 per cent. a penalty to secure prompt payment, it cannot be said to be interest. And in the absence of any constitutional or statutory provision directing otherwise, the proceeds of fines and penalties must go to the government, whether national, state, county, or municipal, whose laws or ordinances have been violated by the act or commission of the offender."

In Hunter v. State ex rel., supra, the city sought to recover the 18 per cent. penalties collected by the county treasurer on delinquent ordinary city taxes, and it was held that, as the act provided (referring to the act regulating the collection of ordinary city taxes) that "all penalties shall be credited to the county fund, and all rebates charged to the same fund," and the act of 1897, Session Laws of Oklahoma 1897, p. 257, provided that "all penalties, interest and forfeitures now accruing or which hereafter may accrue to the counties on delinquent taxes, shall be turned into the sinking fund," etc., the city is not entitled to these penalties. To the same effect is Board of Commissioners v. City of Clinton, which was also an attempt to collect the penalties collected on delinquent city taxes. It was there sought to distinguish the Hunter Case, by claiming that it was not conclusive in an action brought by a city having a charter form of government. But the court refused to make the distinction, saying:

"In this connection it is well to observe that the penalty is not properly a part of the tax, and that neither the city nor the county can levy a penalty, but, on the contrary, the Legislature has exercised its sovereign power and imposed these penalties as an additional charge or punishment for delinquencies upon the part of the taxpayer in order to hasten the payment of the taxes due. The penalty is not created by the levy of the tax, nor has the Legislature authorized the city or the county to impose the same, and the fund being created by the Legislature, it follows that the Legislature has the right to dispose of said fund to the same extent as other fines and penalties arising from the violation of other laws of the state or the failure to perform other duties."

The statutes construed in each of these cases made the 18 per cent. a penalty. But section 727 declares the 18 per cent. to be interest, and not a penalty. By referring to the provisions of section 727, Compiled Laws of Oklahoma 1909, hereinbefore set out in full, it will be seen that the collection of the assessments to pay the tax certificates issued by a city of the first class under section 727 differs in practically all respects from the statutes regulating the collections of ordinary taxes or assessments for tax certificates issued for sewers. The assessments in the first instance are to be paid to the city clerk, and not the county treasurer. If the assessment, when due, is not paid by the property owner, it "shall bear interest at the rate of 18 per cent. per annum thereafter until paid." Thereupon it is made the duty of the city clerk "on or before the fifteenth day of September in each year to certify said installment and interest then due to the county treasurer of the county in which said city is located," whose duty it is thereupon to collect them as other delinquent taxes, and when collected "pay to the city treasurer for disbursement in accordance with the provisions of this act."

No part of these assessments is to be paid into the county treasury. The interest provided by this act is not a penalty, but as held in *Ritterbusch v. Havinghorst*, 29 Okl. 478, 118 Pac. 138, where this section (727) was construed, for the benefit of the certificate holders, to the extent of their claims for interest accruing after maturity, the court said:

"The increased interest which the assessments are made to bear after maturity was provided, no doubt, not only for the purpose of securing the prompt payment of the assessments, but also for the purpose of providing a fund with which to pay the increased rate of interest on the bonds maturing, which must occur when there is delinquency in the payment of any assessment. Nor can any provision be found in the statute for the contention that all over 7 per cent. shall be retained by the county treasurer."

This construction of a state statute by the highest court of the state is conclusive on the national courts. The court committed no error in overruling defendant's demurrer to the complaint and rendering judgment for the plaintiff.

The judgment is affirmed.

STONE, Circuit Judge, dissents.

BROWN et al. v. CAMP.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1921.)

No. 3767.

1. Chattel mortgages Ⓒ47—Description held too indefinite.

A chattel mortgage from father to son, describing the property mortgaged as "sufficient amount of lumber, shingles, brick, roofing, and cement in my possession," was void as to judgment creditors for indefiniteness of description.

2. Evidence ⇐461(3)—Parol evidence inadmissible against trustee to show intent as to indefinitely described mortgaged property.

As against a trustee in bankruptcy, parol evidence was inadmissible to show the intention of the mortgagee and bankrupt mortgagor as to the property intended to be covered by an indefinite description in a chattel mortgage.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

Petition in bankruptcy for allowance of a mortgage lien by Herbert S. Brown and others, opposed by R. T. Camp, trustee in bankruptcy of John E. Brown, bankrupt. Order denying claim sustained, and claimants bring petition to superintend and revise. Petition denied.

Stephen C. Upson, of Athens, Ga., for petitioner.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. John E. Brown executed to his son, the petitioner herein, a mortgage note; the description of the property mortgaged being:

"Sufficient amount of lumber, shingles, brick, roofing, and cement in my possession."

Thereafter the said John E. Brown was adjudicated a bankrupt. Petitioner sought to set up and establish the lien of the mortgage, which the referee declined to permit him to do. The action of the referee was confirmed by the District Judge. The ground upon which a mortgage lien was held not to exist was that the description of the property attempted to be mortgaged was too vague, uncertain, and indefinite. The referee also declined to allow parol evidence upon the question of what property was intended by the mortgagor and mortgagee to be described.

[1] Under the amendment of 1910 (Comp. St. § 9631) a trustee in bankruptcy is vested with the rights and remedies of a creditor holding a lien by legal or equitable proceedings. This mortgage would have been void as against a judgment creditor. *Reynolds v. Tifton Guano Co.*, 20 Ga. App. 49, 92 S. E. 389, and cases there cited. We are of opinion that a "sufficient amount" is not equivalent to all of the mortgagor's property attempted to be described in the mortgage. The mortgage does not purport to cover all the property, but only a portion less than the whole of it. The fact that several articles were mentioned only serves to make the indefiniteness more pronounced.

[2] Whatever the rule is as to the admissibility of parol evidence of the intention of the parties, mortgagor and mortgagee, where the rights of third parties are not involved, their understanding, except as expressed in the mortgage, could have no effect upon the power of the trustee in bankruptcy to assert the lien secured to a creditor or innocent purchaser. *Stewart v. Jaques*, 77 Ga. 365, 3 S. E. 283, 4 Am. St. Rep. 86.

The petition to superintend and revise is denied.

BONNER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1921.)

No. 5579.

Criminal law ⇨1036 (8)—**Sufficiency of evidence cannot be first challenged on appeal.**

Where the sufficiency of evidence of guilt was not challenged at the close of the trial by demurrer, motion, request for instruction, or otherwise, the question is not open on appeal.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

James Bonner was convicted of conspiracy to introduce liquor into the former Indian Territory, and brings error. Affirmed.

John H. Holland, of Ft. Smith, Ark., for plaintiff in error.
J. S. Holt, U. S. Atty., of Ft. Smith, Ark.

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

HOOK, Circuit Judge. James Bonner seeks a review of a sentence imposed upon him on conviction of conspiracy, with others, in the Western District of Arkansas, to commit an offense against the United States (Criminal Code, § 37 [Comp. St. § 10201]), to wit, the introduction of intoxicating liquor from outside the state of Oklahoma into the part of that state which was formerly Indian Territory (Act March 1, 1895, 28 Stat. 693). All his assignments of error are pointed directly or indirectly to the sufficiency of the evidence of his guilt. But there was no challenge of the evidence in that particular at the close of the trial by demurrer, motion, request for instruction, or otherwise. Consequently, according to the long-settled practice in the courts of the United States the question is not open here. Furthermore, four of the five assignments complain of the overruling of the motion of the accused for a new trial; also, it has often been held that error is not assignable on such a ruling. Notwithstanding the above, we have examined the record of the trial, and are of the opinion that there was substantial evidence of guilt. The sentence is affirmed.

This opinion was prepared by Judge HOOK in his lifetime, and has been concurred in by the judges who sat in the case, and has been filed pursuant to the order of the court.

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

FRANCIS DRUG CO. v. POTTER, Federal Prohibition Director.

**UNITED STATES v. TWELVE CASES OF FOUR ROSES WHISKY AND
TWO GALLONS OF ALCOHOL.**

(District Court, D. Massachusetts. September 28, 1921.)

No. 2045.

1. Intoxicating liquors ⇨255—Commissioner without power to order return of liquor seized.

A United States commissioner, who has issued a search warrant under National Prohibition Act, tit. 2, § 25, is without power to order a return of liquor seized thereunder, which is "subject to such disposition as the court may make thereof."

2. Intoxicating liquors ⇨247—Seizure of liquor held under permit held unlawful.

Liquor lawfully in possession of a drug company, having a permit to keep and sell the same for lawful purposes, cannot lawfully be seized under a search warrant issued on an affidavit charging an illegal sale on its premises, nor can liquor so seized lawfully be held pending a proceeding for revocation of the company's permit.

At Law. Petition by the Francis Drug Company to adjudge Elmer C. Potter, Federal Prohibition Director, in contempt of court for his failure to obey an order in a proceeding by the United States against twelve cases of Four Roses whisky and two gallons of alcohol. Both petitions denied.

Gallagher, Rogers & Shea, of Boston, Mass., for petitioner.
The United States Attorney, for respondent.

MORTON, District Judge. [1] This is a petition praying that the respondent, the prohibition director for Massachusetts, be adjudged in contempt of court for his failure to obey an order made by United States Commissioner Hayes for the return of certain liquor which was seized on a search warrant issued by Commissioner Hayes and is in the possession and control of the respondent. The facts are as follows:

The Francis Drug Company, a corporation, holds a permit under the National Prohibition Act (41 Stat. 305) to keep and sell intoxicating liquor in accordance with the provisions of the act. Evidence was brought to the attention of the prohibition enforcement officers that an illegal sale of liquor for beverage purposes had been made at the Drug Company's place of business. Thereupon an application for a search warrant was made, which stated that liquors were illegally kept on said premises; this application was supported by an affidavit stating that an illegal sale had been made there. Commissioner Hayes thereupon issued a search warrant, which was duly served by the prohibition officer, and the liquors here in question were seized and turned over to the respondent. They formed part of the stock in trade of the Drug Company, which by its permit it was authorized to keep for proper purposes.

The Drug Company brought these facts to the commissioner's attention by an intervening motion or petition praying for the return of the liquors. The commissioner, being satisfied that the facts were as stated, made an order for the return. This order was duly served upon Mr. Potter, the respondent, and under advice of counsel he declined to obey it, being advised that the commissioner had no power to make such an order. The present petition was then brought. The proceeding is in the nature of a test case, to determine whether the commissioner has the power in question. Mr. Potter stands ready to obey any order which the court may make in the premises.

The provisions of the National Prohibition Act relating to search warrants are found in title 2, sections 2 and 25. Section 2 reads:

"Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the act approved June 15, 1917."

Section 25 reads:

"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 no property rights shall exist in any such liquor or property. 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. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order."

It will be observed that both of these sections incorporate the provisions of the so-called Espionage Act (40 Stat. 228 et seq. [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 $\frac{1}{4}$ a-10496 $\frac{1}{4}$ v]) as to the issue of search warrants. These are too long to quote. The section principally relied upon by the petitioner is numbered 16:

"If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken." Section 10496 $\frac{1}{4}$ p.

The present petitioner followed the practice prescribed in this section, and the order of the commissioner which is here in question was made thereunder. It is the contention of the respondent that section 16 does not apply to seizure of liquor under the National Prohibition Act, upon the grounds that only the "issue" of search warrants is to be governed by the Espionage Act, and that section 25 of the Prohibition Act explicitly provides that "such property so seized shall be subject to such disposition as the court may make thereof." As this clause is immediately followed by provisions as to the disposition of liquor or property unlawfully held, possessed, or used under the act, it is argued that it must refer to the disposition of property which is found not to be so held, possessed, or used.

Both the Espionage Act and the Prohibition Act contemplate the possibility that property may be seized which ought not to have been seized. The Espionage Act gives the commissioner who has issued

the search warrant the power to cause such property "to be restored to the person from whom it was taken." The Prohibition Act provides that "property so seized shall be subject to such disposition as the court may make thereof." The latter is the later enactment, and refers specifically to property seized under the Prohibition Act. As to such property it supersedes, I think, the broader provisions of the Espionage Act. I therefore am of opinion that the petition of the Francis Drug Company cannot be maintained and must be dismissed.

[2] The United States of America has filed in these proceedings a petition relating to the same liquors, praying that the court will direct the federal prohibition director to hold the seized liquor until further order of court. This petition prays the direction of the court as to the property and conforms to the requirements of section 25. It gives the court jurisdiction over the liquor in question. Proceedings have been instituted against the Drug Company under title 2, section 9, of the National Prohibition Act for the revocation of its permit. The United States contends that, even if the liquor were improvidently seized, the return of it ought not to be ordered while such proceedings are pending, and that the mere fact of an illegal sale on the premises of the Drug Company warrants the finding that the liquor there was held for illegal purposes. I am unable to agree with either of these contentions. The fact that proceedings against the Drug Company are pending under section 9 seems to me irrelevant and immaterial on the questions now before the court. And I do not think the mere fact of an illegal sale on the Drug Company's premises sufficient to warrant a finding that its stock of liquor was being held for illegal purposes involving a repudiation of its obligations under its permit. The Drug Company's possession of the seized liquor was not unlawful. All the facts in relation to the matter are before the court, and it can be disposed of without further proceedings. On the petition of the United States an order will be entered denying the prayer of that petition, and ordering the return of the liquor to the respondent.

COMMONWEALTH & DOMINION LINE, Limited, v. SEABOARD TRANSP. CO.

(District Court, D. Massachusetts. September 30, 1921.)

No. 1674.

Collision ◊95(2)—Privileged vessel not in fault for keeping her course and speed.

A steamer *held* not chargeable with contributory fault for a collision at night, caused by the gross fault of a meeting tug with a long tow, which, though the steamer was the privileged vessel, turned to port across her course, where the steamer kept her course and speed, and had no reason to suppose the tug would not pass port to port, as required by the rules, until so close that collision was imminent, and any error on her part thereafter was excusable.

On rehearing. Prior decree modified.
For prior opinion, see 258 Fed. 707.

Putnam, Putnam & Bell, of Boston, Mass., and Lord, Day & Lord, of New York City, for libellant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

FitzHenry Smith, Jr., of Boston, Mass., for *Republique Française*.

MORTON, District Judge. In view of the intervention of the United States and the French Republic, as owners of the cargo in the *Port Hunter*, this case has been fully reheard upon the question whether the *Port Hunter* was at fault. As between the steamer and the tug, that issue was practically unimportant, because, if the tug were held at fault, the loss was so great that one-half the damages would more than wipe out her entire value, and it consequently was not much considered, either by counsel or by the court at the former hearing. Neither the interveners nor the steamer now urge that the description in the former opinion of the accident and of the courses taken by the colliding vessels is erroneous; the facts are assumed to be as therein stated. But the *Port Hunter* contends that upon those facts the finding that she was at fault was unjustified.

I have given this question the most careful reconsideration. Against the steamer it is urged that, with plenty of room on her left between the tow and the land, she changed course twice to starboard as she came up the Sound towards the tow; that she did not signal her intention to go to starboard until after the tug had signaled that she was going to port; and that, not being able to see the tug's side lights, and therefore in doubt as to the tug's direction, the *Port Hunter* maintained full speed on a course which was taking her so close to the other vessel that the unexpected movement of the latter to port created a situation from which there was no escape, or which demanded that the engines of the steamer should be promptly reversed.

In behalf of the steamer it is argued that under the facts as found the tug was either meeting the steamer end on, in which case it was the tug's plain duty to turn to starboard, or she was holding a course involving risk of collision, across the steamer's bow from port to starboard, in which case she was the burdened vessel, and it was her duty to keep out of the steamer's way; that in addition to this, if the Sound be regarded as a narrow channel, the tug was far over on her wrong side of it, and yet did not give way to a vessel rightly proceeding on that side, but brought about the disaster by turning to port when the vessels were close together; that the steamer, in swinging to starboard as she went up the Sound, performed her statutory duty in meeting end on or in a narrow channel; that, while she did not make out the tug's side lights, she knew she was approaching a tug and tow, and also knew that under every rule the tug was required to turn to starboard; that she had no reason to anticipate that the tug would not give way, and would make a surprising and inexcusable movement as she did in turning to port; and that, in the great and sudden emergency created by that negligence of the tug, the steamer did as well as could reasonably be demanded.

At the time when the tug gave her two-blast signal and turned to port, she probably had both side lights of the steamer in view. She herself was either head on to the steamer or was showing the steamer her starboard light. Trailing behind her, sagging off to her starboard, was her tow, which for a distance of about 2,000 feet obstructed navigation. In that situation, for the tug to turn to her left, and keep on with her tow across the other vessel's bow, was conduct for which "gross negligence" is a mild characterization. It was certainly nothing which ought to have been anticipated by the other vessel.

It seems clear that the steamer held her course and speed towards the tow because her pilot knew that he had the right of way and supposed the tow would keep out of his way. When the green light was made out, and it was evident that the tug was heading across the steamer's path, the vessels were so close that there was danger of collision if the tug did not promptly turn to starboard. If she had done so, the vessels would have passed in safety.

In *The Delaware*, 161 U. S. 459, 469, 16 Sup. Ct. 516, 521 (40 L. Ed. 771), the court said (per Brown, J.):

"The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded * * * as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. * * * In the case under consideration there was really nothing to apprise the tug that the Delaware would not port and go under her stern, until the collision became inevitable."

The rule thus laid down has been frequently applied to situations similar to that presented in the case at bar. See *The Binghamton*, 271 Fed. 69 (C. C. A. 2d); *The Hokendauqua* (D. C.) 270 Fed. 270, 272. Moreover, the tug's fault was so gross, and the steamer's fault—if she were at fault—so slight in comparison, that I think the latter should be given the benefit of the principle (applied in *The Hokendauqua*, supra) that, where one vessel is grossly at fault and the fault of the other is doubtful, and at most slight:

"It is not necessary, and indeed is not permitted, to the court to search for minute possible faults on the part of one vessel, when the great and fundamental faults are plainly to be laid at the door of the other." Hough, J., in *The Hokendauqua*, supra.

As soon as the tug's green light was made out and her two blasts heard on the steamer, the situation was recognized as a critical emergency and a case of special circumstances under the rules. It is wholly problematical how she would have come out if she had been differently handled in it. Considering the wide latitude of action allowed under such circumstances, it cannot be said that her officers were negligent.

The decisions to which I have referred were not called to my attention at the former hearing, and in view of them I think my finding that the Port Hunter was at fault cannot be sustained. The decree heretofore entered must be vacated, and there must be a new decree, adjudging the Covington solely at fault.

DREW v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. Pennsylvania. September 8, 1921.)

No. 8366.

Pleading \Leftrightarrow 343—Plaintiff held not entitled to judgment on pleadings.

Judgment cannot be entered for a plaintiff on the pleadings where defendant's affidavit of defense raises issues of fact.

At Law. Action by William Drew against the United States Shipping Board Emergency Fleet Corporation. Motion by plaintiff for judgment. Denied.

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

William Y. C. Anderson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The murky atmosphere surrounding this case is due to the fact that the parties assumed the willingness of each other to reach an amicable adjustment of their differences, and so confidently expected such an adjustment to be made that no thought was given to any possible failure. The consequence is that the legal rights of the parties arising out of conditions before the attempted adjustment have become mixed as well as mingled with possible rights arising out of agreements made during the course of the efforts to reach a final agreement. The further result which concerns us is that the whole situation has become very complicated. In order, if possible, to unravel the tangle, the best method which suggests itself is to begin at the beginning of the events out of which this litigation has grown and follow their course of happening chronologically to the present stage. We have barely more than an outline picture of these events, but the following is a history of the case. It will perhaps be helpful to make this statement in the form of numbered paragraphs. The statements are not made as verities in fact, but the facts which must be juridically assumed because of averments in the affidavit of defense and the undenied averments of the statement of claim:

(1) William Drew (the plaintiff) and one Lewis Drew were in partnership under the firm name of William Drew Marine Repair Works. The firm name indicates the business of the partnership.

(2) The Bulk Freight Steamship Corporation owned absolutely or under a contract of purchase a ship called the Hoxie. This ship was in September, 1920, in need of repair.

(3) The repairs were made by the plaintiff's firm. At whose instance and direction the repairs were made does not very clearly appear, but the fact would seem to be the work was done for the Bulk Freight Steamship Corporation, the then owner. The work was done in September, 1920, between the 17th and 21st or the 16th and 24th.

(4) The Hoxie was suffered to leave and proceed upon her next voyage without payment for the repairs made to her. A bill, however,

for \$19,162.99 was rendered and payment demanded of the Bulk Corporation. The bill was not paid.

(5) The Hoxie when at Greenoch, Scotland, was on January 30, 1921, delivered to the defendant by the Second National Steamship Company. The link or links in the chain of title from the Bulk Corporation to the Second National are missing, nor do the terms of the transfer appear. The ship, however, returned in February, 1921, making port first at Norfolk, Va. Since then the ship has been in the possession of the defendant as owner.

(6) The bill for repairs was presented to the defendant. No other question was raised than as to the sum charged. This was objected to as excessive, and an agreement, as plaintiff avers, was reached to refer the question to arbitrators, whose decision thereon should be accepted as final.

(7) Arbitrators were accordingly chosen, and made their award in writing. The award was in effect that the bill as rendered "was reasonable and just and [the arbitrators] believe that the bill should be paid as rendered."

(8) The bill, however, has not been paid, and William Drew has brought the present action therefor in his own name, ignoring the partnership.

(9) The defendant has filed an affidavit of defense denying the right of the plaintiff to maintain his action. The grounds of denial are as follows:

(a) The defendant is in legal intendment the United States, against whom the action cannot be maintained.

(b) The right of action (if any exists) is not in the plaintiff, but in the firm of which he is or was a member.

(c) The submission to arbitration is not one upon which a right of action on the award can be founded.

(d) The award itself is not one upon which a right of action can be founded.

Denials of a number of the averments of fact contained in the statement of claim are also made, among which are:

(e) A denial of the submission of the controversy to arbitration.

(f) A denial of the correctness of the bill rendered and that the sum claimed is a fair and reasonable charge for the repairs to the vessel, but this is accompanied with an avowal of the willingness and readiness of the defendant to pay for said repairs whatever a fair sum therefor may be. There is also a suggestion made to the court in the argument at bar of the want of jurisdiction, inasmuch as there is no diversity of citizenship within the meaning of the Constitution or the acts of Congress averred. The suggestion is omitted from the affidavit of defense perhaps because of the inconsistency of averring lack of jurisdiction on this ground in the face of the position taken that the action is against the United States. The question suggested, however, goes to the jurisdiction of the court, and in consequence is one of which the court must take cognizance. The pending rule is one for judgment. In the state of facts above outlined it is clear that judgment cannot be entered for the plaintiff. The rule must in consequence

be discharged. We confine ourselves to the entry of such an order without discussion. The questions which arise out of such a record are well worthy of the consideration of counsel, but their action thereon ought to be taken uninfluenced by any expression of opinion from the court at this time.

The rule for judgment is discharged.

FRANKLIN SUGAR REFINING CO. v. HOLSTEIN HARVEY'S SONS, Inc.

(District Court, D. Delaware. July 26, 1921.)

No. 4, March Term, 1921.

Frauds, statute of ⇨120—Sales contract not in writing, invalid in state where made, held not to support action in another jurisdiction, wherein similar law not in force.

Sales Act, Pa., § 4, providing that contracts for sale of property of the value of \$500 or more "shall not be enforceable" unless in writing, or unless some part of property has been received, or some part of the price paid by the buyer, as construed by the Supreme Court of the state, which construction is binding on the federal courts, relates to the validity of the contract, and not to the remedy, and a Pennsylvania contract, invalid thereunder, will not support an action in another jurisdiction wherein a similar law is not in force.

At Law. Action by the Franklin Sugar Refining Company against Holstein Harvey's Sons, Inc. On demurrer to pleas. Demurrer overruled.

William S. Hilles, of Wilmington, Del., and Henry S. Drinker, Jr., of Philadelphia, Pa., for plaintiff.

Robert H. Richards, of Wilmington, Del., for defendant.

MORRIS, District Judge. The plaintiff in the suit at law of the Franklin Sugar Refining Company, a Pennsylvania corporation, against Holstein Harvey's Sons, Inc., a Delaware corporation, sets up in its declaration a common-law contract, made and performable in the state of Pennsylvania, for the sale by the plaintiff to the defendant of sugar of the value of upwards of \$3,000 and the breach thereof by the defendant. To pleas setting up the Pennsylvania statute of frauds as a defense, the plaintiff demurs generally. The statute in question (section 4, Sales Act May 19, 1915 [P. L. 543]) provides:

"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable * * * unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

There is no similar law in force in the state of Delaware. *Alderdice v. Truss*, 2 *Houst.* (Del.) 268, 273. The broad question raised by the demurrer is, therefore, whether the *lex loci contractus et solutionis* or

the *lex fori* controls. The answer to that question depends upon whether the Pennsylvania statute relates to the validity of the contract or merely to the remedy. Wharton on the Conflict of Laws (3d Ed.) §§ 675a-694.

The Supreme Court of the state of Pennsylvania had section 4 of its Sales Act before it for consideration in *Mason-Heflin Coal Co., Appel., v. Currie*, 270 Pa. 221, 113 Atl. 202, and held that a statement of claim, not averring the facts necessary to take the case out of that statute, was substantially defective, and did not show a cause of action. *Hogle v. De Long Hook & Eye Co.*, 248 Pa. 471, 94 Atl. 190. That decision, as I understand it, is in effect a repudiation of the distinction made in *Leroux v. Brown*, 12 C. B. 801, and similar cases, between provisions of the statute of frauds declaring in substance that no action shall be brought on a contract which does not comply with their terms and those that declare in effect that such a contract shall be invalid or void. It is in harmony with *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229, *Lindsay v. Collings* (Tex. Civ. App.) 182 S. W. 879, 881, and like cases. It necessarily implies, I think, that the Pennsylvania statute relates to the validity of the contract rather than to the remedy. This court is bound by the construction placed upon the Pennsylvania statute by the Supreme Court of that state. *Soper v. Lawrence Brothers*, 201 U. S. 359, 26 Sup. Ct. 473, 50 L. Ed. 788; *Knights of Pythias v. Meyer*, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146; *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. Ed. 289.

For the foregoing reasons I am of the opinion that the statute of Pennsylvania, and not the law of Delaware, governs this case.

In re SUPERIOR MOTOR TRUCK CO.

(District Court, N. D. Georgia. September 19, 1921.)

No. 7040.

Bankruptcy ⇐140(3)—**Advance payment by buyer held property of bankrupt seller, and not held in trust by bankrupt.**

An advance payment made to a bankrupt on the purchase price of trucks, to be delivered on demand, *held* to have become immediately the property of the bankrupt seller, subject to the contract, and not to be held in trust by the bankrupt, where delivery was not ordered.

In Bankruptcy. In the matter of the Superior Motor Truck Company, bankrupt. On review of order of referee on intervention of A. J. Williams. Affirmed.

Wm. J. Davis, Jr., of Atlanta, Ga., for intervener.
Bryan & Middlebrooks, of Atlanta, Ga., for trustee.

SIBLEY, District Judge. The receipt exhibited in the intervention indicates the payment of money upon a purchase of trucks to be delivered in the future, five days after demand by the purchaser. This

appears to be merely a credit sale, in which the credit is extended to the seller rather than to the buyer. Where credit is extended to the buyer, the title to the thing delivered to him passes immediately, unless retained according to law. I do not see any reason why, when the credit is reversed, the money paid does not become immediately the money of the seller; the buyer obtaining only the obligation of the seller to make delivery on demand. When this obligation is not met, it may be that a right of rescission exists, and it is certainly true that a failure of consideration occurs, giving rise to a claim on the part of the buyer to have the money repaid. In no case, however, was the money in the meanwhile held on any sort of trust, or as the property of the buyer. I do not think that the doctrine of tracing a trust fund would have any application. If I did, I agree with the conclusion of the referee that there is a burden upon the tracing party to show more than that his money was received and not returned. He must connect it with the fund out of which he seeks payment, and show reasonably that his money contributed to and swelled it, and that it was not lost, misplaced, or diverted in some other direction.

None of these appearing from the intervention, judgment of the referee is affirmed.

WILSON v. UNION TOOL CO.

SAME v. LUCEY MFG. CORPORATION.

(District Court, S. D. California, S. D. April 15, 1921. On Rehearing,
November 18, 1921.)

Nos. E-99, E-100.

1. Pleading Ⓒ380—Attempt will be made to limit testimony to points in controversy.

In view of the growing mass of litigation, the court will use every reasonable means to simplify and lessen the issues in any case, and to narrow them to the subsisting points of controversy, and will endeavor to confine the testimony introduced to material and relevant matters.

2. Patents Ⓒ310(1, 7)—Parties required to state exact rights claimed and interference therewith.

In patent cases the plaintiff will be required to state the precise right asserted by him, and the precise trespass upon that right alleged to have been committed by the defendant, and the defendant, who sets up matters of anticipation or the like, will be required to state the precise nature of the right asserted by him, but neither will be required to state reasons for his attitude.

3. Equity Ⓒ269—Parties allowed to amend claims to conform to new information.

The requirement of the court that the parties shall state the issues in controversy with precision will not be permitted to result in injustice, and if either party acquires information subsequently justifying or requiring the assertion of a different or broader claim, he will be permitted, if he acts with due promptness, to amend his claim.

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

4. Patents \Leftrightarrow 310(1, 7)—Parties required to give particulars as to exact claims, but not those calling for argument.

In suits for the infringement of a patent, the respective parties will be required to give particulars asked for as to the claims infringed, the novel elements therein, the alleged infringing devices, and the equivalents, but will not be required to give particulars as to the respects in which the claimed infringement or anticipation consists, which calls for argument only.

On Rehearing.

5. Patents \Leftrightarrow 292—Defendant not required to answer interrogatories which might result in "penalty."

In suit for infringement of a patent, defendant, under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), is not required to answer interrogatories, if the answer may eventuate in the imposition of a "penalty," the chancery practice relative to bill of discovery being followed, so that rule that person may be compelled to give evidence against himself where action is not penal is not applicable, and the treble damages to which a defendant, decreed guilty of infringing a patent, may be subjected, being imposed as smart money or punishment in excess of actual compensation awarded to plaintiff, are in the nature of a penalty within the rule.

In Equity. Separate suits by Elihu C. Wilson against the Union Tool Company and against the Lucey Manufacturing Corporation for infringement of patents. On motions by both plaintiff and defendants for fuller statements of particulars and on objections to interrogatories propounded to defendants. Motions for further particulars granted as to some items, and refused as to others, and objections to interrogatories sustained.

Defendants' motion for further particulars embraced the following specific requests:

I. "Which of the claims of letters patent Nos. 1,314,996 and 1,341,957 in suit are alleged to be infringed by defendant."

II. "Which of the numerous devices manufactured and sold by defendant are alleged to infringe upon the letters patent in suit, and in that behalf that plaintiff identify such device or devices by reference to defendant's catalogue and catalogue number of the same."

III. "Precisely what plaintiff asserts or claims is new and patentable in each of the claims of the patents in suit charged to be infringed, and what plaintiff asserts each of such claims covers."

IV. "Precisely where, in defendant's alleged infringing device or devices, plaintiff asserts there is found the features set forth as new and patentable in response to paragraph III hereof, and in that connection that plaintiff:

"(a) Point out by reference characters applied to a drawing or cut of defendant's alleged infringing device or devices the elements of each of the claims of the patents in suit alleged to be infringed.

"(b) Point out by reference characters applied to a drawing or cut of defendant's alleged infringing device or devices the features set forth as new and patentable in response to paragraph III hereof."

V. "By a reference character applied to Figure 3 of patent No. 1,314,996 point out precisely what part of the device illustrated in the drawing of said patent plaintiff asserts corresponds to 'the swinging end' set forth in the last clause of claim 4 of said patent."

VI. "By a reference character applied to a drawing or cut of defendant's alleged infringing device or devices point out precisely what part of the same plaintiff asserts corresponds to 'the swinging end' set forth in the last clause of claim 4 of patent No. 1,314,996."

VII. "The particular cuts, illustrations, and printed matter used in complainant's circulars and advertisements and referred to in paragraph VIII

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
275 F.—40

of the bill of complaint herein as having been copied by defendant, and in that connection that plaintiff produce and file specimens of the particular circulars and advertisements containing such cuts, illustrations, and printed matter."

VIII. "The particular cuts, illustrations, and printed matter published by defendant and referred to in paragraph VIII of the bill of complaint herein, as copying the cuts, illustrations, and printed matter of plaintiff, produced in response to paragraph VII hereof, and state just wherein plaintiff asserts defendant's said cuts, illustrations, and printed matter are copies of or resemble those of plaintiff, and when and where plaintiff asserts defendant published and distributed each of the same."

Plaintiff's requests for further particulars were as follows:

I. "Which of the numerous patents pleaded by reference in paragraphs VIII and IX of defendant's answer heretofore filed, and which claims thereof, the defendant will rely upon at the trial of this cause."

II. "In what respects each of the aforesaid patents upon which defendant will rely, as set forth in its response to paragraph I hereof, discloses any of the elements or combinations of elements described in plaintiff's United States letters patent Nos. 1,314,996 and 1,341,957."

III. "In what respects the novelty and invention of the devices shown and described in plaintiff's United States letters patent Nos. 1,314,996 and 1,341,957 are negated by the features described and contained in the said claims of the said patents set forth in response to paragraph I hereof."

IV. "What particular printed matter or illustrations, contained within the indicated pages of the price book and three catalogues referred to in subdivision (b) of paragraph IX of the defendant's answer heretofore filed is alleged to negative the invention and novelty of the devices shown and described in plaintiff's said letters patent."

V. "In what respects the novelty and invention of the devices shown and described in plaintiff's said United States letters patent Nos. 1,314,996 and 1,341,957 are negated by the printed descriptions or illustrations referred to in the aforesaid price book and three catalogues mentioned in subdivision (b) of paragraph IX of the defendant's answer heretofore filed."

VI. "What elements or combinations of elements described and claimed in plaintiff's aforesaid letters patent are alleged by the defendant to be described or illustrated or shown within the indicated pages of the aforesaid price book and three catalogues referred to in subdivision (b) of paragraph IX of the defendant's answer heretofore filed."

Plaintiff's interrogatories propounded to defendants covered a variety of special subjects, but the following fairly illustrates their general nature and tenor:

III. "Does the defendant corporation now manufacture, use or sell well casing elevators containing the following elements or substitutes for any thereof, or has it done so at any time since September 2, 1919:

"(a) Two relatively movable clamping and holding members, having a hinge connection and capable of being opened or closed at such hinge connection, when a pipe is between same.

"(b) Suspension means connected with one only of the clamping members.

"(c) Securing means whereby said members are held together in working relation.

"(d) Said member with which said suspension means are connected being provided with an abutment upon which is seated the swinging end of the other clamping member."

G. Benton Wilson, of Los Angeles, Cal., for plaintiff.

Frederick S. Lyon and Leonard S. Lyon, both of Los Angeles, Cal., for defendants.

BLEDSOE, District Judge (after stating facts as above). In these cases, involving the same patents, motions for a further and fuller statement of particulars have been made, both by plaintiff and the re-

spective defendants, and interrogatories have been propounded by the plaintiff, pursuant to equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), and to all of those objection is made.

[1] Without going into detail in the premises, in accordance with the views heretofore expressed by the court at a previous argument of these matters, this court is disposed to accept the suggestions indulged in by Judge Augustus N. Hand of the Southern District of New York, contained in *McLeod Tire Corp. v. B. F. Goodrich Co.*, 268 Fed. 205, 206. It is there said:

"It has been the practice in this district to attempt to simplify the issues and limit the testimony necessary at the trial by allowing inspection and compelling answer to interrogatories in patent cases very liberally. We have stopped little short of requiring almost everything except the names of witnesses and such information as would enable the interrogator to bring forward untruthful testimony to meet the evidence of his adversary."

In the presence of the great mass of accumulated and growing litigation with which this court is now burdened, I am determined to use every reasonable and just means at my command to simplify and lessen the issues in any controversy demanding my consideration and adjudication. In that spirit and in all cases, I will make effort to confine the testimony to be adduced to those matters which are material and relevant and those only, and in addition will seek to narrow and limit the issues so that only the real subsisting points of controversy will be exhibited.

[2] In this wise, the plaintiff, in patent cases, for instance, will be required to state the precise right asserted by him and the precise trespass upon that right alleged to have been committed by the defendant; the defendant on his part, setting up matters of anticipation or the like, will be required to state the precise nature of the right thus asserted by him which is claimed to amount to a defense, etc. This will not require that either party shall write a brief, or anything in the nature of a brief. It does not mean the giving or stating of reasons for the attitude assumed or the right claimed. It simply means that there shall be a definite, succinct, and precise assertion of the thing that is relied on, either in support of claimed relief or by way of defense. I think such a course of procedure will conduce to added clarity in the statement and understanding of the issues involved, and will bring about a much hoped for economy in the matter of effort, time, and money. Litigation should not only be conducted with all due celerity; it ought to be conducted as cheaply as possible, in order that relief, to whomsoever due, may be accorded with as little cost, both to the individual and to the community, as the reasonable necessities of the case may require. These views I think are supported in spirit by the conclusions announced by Judge (now Mr. Justice) Clarke, in *Coulston v. Franke Steel Range Co.* (D. C.) 221 Fed. 669, by Judge Learned Hand, in *Grand Rapids Show Case Co. v. Straus* (D. C.) 229 Fed. 199 and by Judge Mayer, in *Dick Co. v. Underwood Typewriter Co.* (D. C.) 235 Fed 300.

It is obvious, of course, that this program may not be given any effective enforcement, except in virtue of the cordial co-operation of

the bar. This the court expects and has a right to receive. Much of the criticism indulged in against the courts arises because of the expensive and long drawn out course that litigation all too frequently has to take. This court is determined that as little as possible of this criticism shall be laid at the door of the court itself. It will be true, of course, that the court itself cannot frame or specify the issues, and it must rely upon the disposition of counsel to accommodate itself to the attitude of the court, for a proper realization of the ultimate end in view.

[3] In this behalf, too, it ought not to require special mention that, in the matter of more sharply defining the issues in a controversy, the court will at no time lend countenance to the doing of anything that will result in injustice. Its aim is to do justice in the premises, and it will not be led hastily, by its ambition in that behalf, to do that which will result in injustice in any instance. For example: Any party who may have been limited by a statement of a particular issue or claim upon which he relies, and who for any reason acquires information subsequently justifying or requiring the assertion of a different or broader claim, will be permitted, acting with due promptness, to amend his claim so made or previously stated.

[4] In conformity with these views, in E-99, the plaintiff will be required, in response to defendants' motion for further particulars, to make answer to particulars specified in paragraphs 1, 2, the first portion of paragraph 3, paragraph 4 with respect both to clauses (a) and (b), paragraphs 5, 6, 7, and the first part of paragraph 8. The latter part of paragraph 3 calls merely for argument on the part of plaintiff, and is not proper to be elicited at this time. The latter part of paragraph 8 is also argument, or mere descent into unnecessary detail. The same ruling, for the same reasons, will apply to the request for further particulars made of plaintiff in E-100. The motion of plaintiff for further particulars to be stated by defendants will be granted as to paragraphs 1, 2, 4, and 6 in each of the cases. Paragraphs 3 and 5 call for argument only, and not such statement of facts as the court is persuaded plaintiff is entitled to.

[5] Objection is urged on various grounds against the interrogatories propounded by plaintiff. It seems to be the rule, supported by reason and authority, that unless plaintiff has specifically waived such penalty, a defendant may not be required to answer interrogatories, if such answer will or may eventuate in the imposition of a penalty by way of treble damages. *Speidel Co. v. Barstow Co.* (D. C.) 232 Fed. 617. In addition, the questions propounded by the plaintiff to the defendants call for conclusions, rather than facts.

In consequence, the objections to the interrogatories submitted are sustained.

On Rehearing.

[5] Plaintiff has moved for a rehearing of that part of the ruling hereinabove sustaining defendants' objections to plaintiff's interrogatories on the ground that they may eventuate in the imposition of a penalty by way of treble damages, etc. Plaintiff's claim in this behalf

is that this proceeding is not "penal" or criminal in its nature, that a defendant is protected from being compelled to give evidence against himself only when such evidence may result in criminal proceedings being had against him, and that therefore there is no protection to be accorded to a defendant in a court of equity, with respect to a "discovery" of things done by him, the doing of which can in no wise subject him to criminal punishment. In support of his contention, plaintiff cites *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *U. S. v. Nash* (D. C.) 111 Fed. 528; *Blum v. Widdicombe* (C. C.) 90 Fed. 220; *U. S. v. Southern Pacific Co.* (D. C.) 162 Fed. 412; *LaBourgoyne* (D. C.) 104 Fed. 823; *Masseth v. Johnston* (C. C.) 59 Fed. 613; *Untermeyer v. Freund*, 58 Fed. 210, 7 C. C. A. 183; *Walker on Patents* (5th Ed.) § 568, p. 530; *Quirk v. Quirk* (D. C.) 259 Fed. 597.

In consequence of the elaborate argument made and the citation of the above authorities, no less than because of the intrinsic importance of the subject-matter, I have felt constrained to give the matter some considerable independent investigation. As a result of that, I am, I feel, compelled to adhere to the original ruling and deny the application for a rehearing. It may be conceded at the outset that a proceeding in a court of equity to enjoin infringement of a patent, and collect damages and profits for the infringement already suffered, is not a penal action. Nor does the possibility that the court may, in its discretion, award treble damages, convert such proceedings into a "penal" action, within the primary signification of that term. So the cases cited by plaintiff and referred to hereinabove directed to that point may be passed over as being entirely inapplicable herein.

The interrogatories herein were filed pursuant to federal equity rule No. 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), which makes detailed provision for the filing and enforced answering of interrogatories to be propounded by either or both of the parties. These interrogatories, in the language of the rule, are intended to result in "the discovery by the opposite party or parties of the facts or documents material to the support or defense of the cause." All parties herein seem to concede that the procedure for the discovery referred to in the rule is but a modern application of the proceeding known to the English Court of Chancery as a bill of discovery. Therefore, unless changed by statute or by the equity rule itself, it would seem most fitting and proper that, in taking advantage of this modern practice, the rules applied to the procedure formulated and adhered to by the Court of Chancery, which gave rise to the proceeding originally, should be adhered to.

Hare, in his work on *Discovery* (2d American Ed.) p. 131, says that, if an answer to the proposed discovery will subject the defendant to "any penalty or forfeiture or disability in the nature of a penalty," no discovery will be ordered. Mr. Justice Story's discerning treatise on *Equity Pleadings* (7th Ed.) § 575 et seq., has this to say:

"Another objection, which may be taken by way of demurrer to a bill of discovery, is that it may expose the defendant to a penalty or a forfeiture, or that it may compel him to criminate himself. The rule is that the defendant shall not be obliged to discover, what *may* subject him to a penalty or for-

felture, or criminal accusation, and not what *must* only. * * * This doctrine seems founded on the great principles of constitutional right, settled in early times in England, and brought by our ancestors to America, by which it is established that no man is bound to accuse himself of any crime, or to furnish any evidence to convict himself of any crime. The maxim of the common law is, 'Nemo tenetur seipsum prodere.' It constituted one of the just objections to the Court of Star Chamber that, in criminal informations, it compelled the party accused to answer upon oath to the accusation, and thus, in arbitrary times, became an instrument of gross oppression and injustice. But the Court of Chancery has always steadily refused to compel any man to criminate himself, *and, by analogy to disclose any fact which will subject him to a penalty or forfeiture*; and it has thus assisted in carrying into complete effect the benign maxim of the common law above alluded to. So that it is the just boast of Lord Hardwicke that the general rule, established with great justice and tenderness in the law of England, is fully recognized and acted on in courts of equity, that no person shall be obliged to discover what may tend to subject him to a penalty or punishment, *or to that which is in the nature of a penalty or punishment.*" (Italics supplied.)

In section 521 of the same work he announces that, unless a waiver of such penalty or forfeiture be made by the plaintiff, a demurrer to the discovery would lie. In a note to that section he cites many authorities pertinent to the question, including the statement of Lord Redesdale respecting treble tithes hereinafter referred to.

Mr. Daniell, in his Pleading and Practice of the High Court of Chancery (5th American Ed.) p. 387, in adverting to a discovery which might subject the defendant to a penalty or forfeiture, says:

"It is a rule in equity that no person can be compelled to make a discovery which may expose him to a penalty, or to anything in the nature of a forfeiture. As, however, the plaintiff is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks. The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed, upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture) to come to a court of equity for an injunction, which he could not do without such an express waiver. It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer."

This disposes of plaintiff's contention that it is only a "penalty" payable to, or inuring to the benefit of, *the public*, which will justify a court of equity in declining to compel a defendant to discover. A given plaintiff may not effectually waive a penalty or payment to be made to the public; the procedure based upon an effective and acceptable waiver demonstrates that a penalty going to an individual was as much the subject of protection as one going to the public.

Quoting Lord Redesdale, Mr. Daniell continues:

"Upon this same principle, if a rector or impropriator, or a vicar, file a bill for tithes, he must waive the penalty of the treble value, to which he is entitled by the statute of 2 & 3 Edward VI.: otherwise, his bill will be liable to demurrer. It seems, however, that if the bill pray an account of the single value of the tithes only, such a prayer will amount to an implied waiver of the treble value, and that an injunction may be granted against suing for the penalty of the treble value, as well upon this implied waiver as upon the most express."

In *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 432, 8 Am. Dec. 598, it was said:

"There are numerous cases establishing the rule that no one is bound to answer, so as to subject himself, either directly or eventually, to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty."

These authoritative expressions of practice obtaining in the Court of Chancery are clearly to the point that no discovery will be enforced against a defendant, if the immediate or eventual result thereof may operate to subject him to anything in the nature of a forfeiture or penalty.

The only other question to be determined herein, then, is: Are the treble damages to which a defendant, decreed guilty of infringing a patent, may be subjected, "anything in the nature of a forfeiture or penalty"? That they are seems to me to be too clear for argument. In the language of the day, they are normally imposed as "smart money" or punishment. As I understand the rulings of the courts, although awarded in the discretion of the court, they are intended primarily to furnish "punitive" or "vindictive" damages, damages in excess of the actual compensation to be awarded to a plaintiff in virtue of a wrong suffered by him, and to operate as a punishment upon the defendant for either a wanton or willful or aggravated infringement of, or trespass upon, the rights of the plaintiff, accruing to him in virtue of his patent. That they are so considered, it seems to me, is well settled by numerous decisions of the federal courts. See cases cited in 8 U. S. Comp. Stats. 1916, pp. 10452, 10591, 10592.

Treble damages were considered by Lord Redesdale in the instances cited by him to constitute a penalty, and therefore to be within the protection of the rule of practice of the High Court of Chancery. Added damages for failure to deliver a telegram, has been held to be a penalty. *Kirby v. Western Union Telegraph Co.*, 4 S. D. 463, 57 N. W. 202. A similar ruling was announced in *Langdon v. New York, etc.* (Sup.) 9 N. Y. Supp. 245. In *State v. Warner*, 197 Mo. 650, 94 S. W. 962, the Supreme Court of Missouri held that, in the municipal law of England and America, the word "penalty" is used in various senses. Strictly speaking, it denotes punishment. It is also, however, it was said, commonly used as including any extraordinary liability to which the laws subject wrongdoers in favor of the persons wronged and not limited to the actual damage suffered. In 17 C. J. 997, it is said that multiple damages are provided for by statute in some (many) jurisdictions. "These statutes are penal or punitive in character." In *Consolidated Rubber Tire Co. v. Diamond Rubber Co.* (D. C.) 226 Fed. 455, Judge Learned Hand, in making an award in the way of treble damages in the sum of \$50,000, designated them as "punitive damages." In 22 *American & English Encyc. of Law*, p. 499, it is said that the court will increase damages in patent infringement, when the infringement is "deliberate and intentional, or wanton and persistent, but ordinarily not otherwise." See, also, *Missouri Pac. R. Co. v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. —, decided June 1, 1921.

These authorities, it seems to me, justify the conclusion that treble damages, which may be awarded by a court of equity pursuant to the provisions of section 4921 of the Revised Statutes (Comp. St. § 9467),

are so "in the nature of a penalty" as to justify a court of equity in declining to compel a defendant to furnish the evidence by his own answers whereby such damages may be inflicted. The same conclusion was reached by Judge Betts in *Finch v. Rikeman*, Fed. Cas. No. 4,788, in which, construing section 14 of the Act of July 4, 1836 (5 Stats. at Large, 123), which is similar in all respects to section 4921 of the Revised Statutes in so far as the provision for treble damages is concerned, he held that he would make no order for the production of books to show the amount and extent of defendant's alleged infringement, "in the absence of a relinquishment of all claim to the penalty of three times the amount of the damages" proven.

The petition for a rehearing of the objections to the proposed interrogatories is denied.

REPUBLIC ACCEPTANCE CORPORATION v. DE LAND et al.

(District Court, E. D. Michigan, S. D. October 1, 1921.)

No. 420.

1. Equity ⇨363—Allegations of complaint treated as true on motion to dismiss.

On motion to dismiss a bill of complaint, allegations thereof must be accepted as true.

2. Courts ⇨282 (1)—Bill to enjoin enforcement of state statute as violative of federal Constitution arises under Constitution and laws of United States.

A bill to restrain enforcement of a statute alleged to be in violation of the United States Constitution states a cause of action arising under the Constitution and laws of the United States.

3. Courts ⇨303 (2)—Federal court has jurisdiction to restrain state officers from enforcing unconstitutional statute.

A federal court has jurisdiction to restrain officers of a state from enforcing as officers an unconstitutional statute of such state.

4. Courts ⇨102 (1)—District Court may pass on motion to dismiss bill to restrain state officers from enforcing statute.

While the federal District Court is prohibited by Judicial Code, § 266 (Comp. St. § 1243), from granting an interlocutory injunction to restrain enforcement of a state statute, on ground that it is unconstitutional, without calling to its aid two other federal judges, nevertheless a District Judge has power to dispose of a motion to dismiss such a bill.

5. Courts ⇨264 (1)—Federal court has jurisdiction of all questions, where federal question involved.

Where jurisdiction of federal court has been invoked by the presence of a substantial federal question, it extends to the determination of every question presented in the case, whether the decision of such question depends on federal or on state law.

6. Corporations ⇨648—Compliance with statute and receipt of certificate by foreign corporation constituted contract.

When a corporation from another state complied with Comp. Laws Mich. 1915, § 9066, and received certificate of authority to do business in the state in accordance with such provisions, the transaction constituted a contract between it and the state of Michigan, entitling it to carry on business in such state on the terms and conditions prescribed by such statute.

7. Constitutional law ⇨126—Taxation ⇨13—State may levy license tax on corporation previously granted permission to carry on business.

So long as a state has not deprived itself by contract or otherwise of the power to impose taxes on corporations subject to its laws, it may, consistently with the provision of the federal Constitution forbidding it to impair the obligations of contracts, levy on a corporation, domestic or foreign, previously granted permission to carry on business within such state, an excise tax on the privilege of exercising its corporate franchise and transacting its business there, and the state of Michigan did not impair obligation of contract in enacting Pub. Acts Mich. 1921, Nos. 84, 85, especially in view of Const. Mich. art. 12, § 1, permitting amendment, alteration, repeal, and abrogation of privileges conferred on corporations.

8. Constitutional law ⇨70(3)—No judicial interference with classification of corporations for taxation, unless purely arbitrary.

Unless there is such an entire absence of any reasonable basis for such a classification that it must be held purely arbitrary, and therefore discriminatory, a federal court cannot interfere with the exercise by a state Legislature of its judgment and discretion in grading the amount of excise tax which corporations must pay according to the amount of paid-up capital and surplus; correctness and wisdom of legislative judgment not being reviewable.

9. Constitutional law ⇨229(1), 283—State statute, imposing excise tax on corporations according to capital and surplus, held not to lack uniformity.

Pub. Acts, Mich. 1921, No. 85, § 4, imposing an excise tax on corporations of a certain per cent. of capital and surplus, but providing that the tax should in no case be less than \$50 nor more than \$10,000, is not unconstitutional, as violating the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

10. Taxation ⇨40(5)—Specific tax on corporations held not to violate uniformity clause of state Constitution; "class."

Pub. Acts Mich. 1921, No. 85, § 4, levying on corporations a specific excise tax of a certain per cent. of capital and surplus, with a minimum tax of \$50 and a maximum of \$10,000, does not violate Const. Mich. art. 10, § 4, providing that specific taxes shall be uniform on the classes on which they operate; corporations not constituting a "class" on which the tax operates, within the meaning of such provision.

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

11. Taxation ⇨40(2)—Tax on corporations held not "property tax."

Pub. Acts Mich. 1921, No. 85, § 4, levying on corporations a tax of a certain per cent. of their capital and surplus, with a minimum tax of \$50 and a maximum tax of \$10,000, is not a "property tax," within the meaning of Const. Mich. art. 10, § 3, providing for a uniform rule of taxation, except on property paying specific taxes; the tax being an excise tax.

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

12. Taxation ⇨37—Michigan statute levying tax on corporations held invalid, as providing for payment into general fund, instead of into school fund.

Pub. Acts, Mich. 1921, No. 85, providing for payment of a graduated tax by corporations for the privilege of doing business within the state, is unconstitutional, because it provides for the payment of the taxes into the general fund of the state, instead of into the primary school interest fund, as required by Const. Mich. art. 10, §§ 1, 6, in view of Comp. Laws Mich. 1915, § 11,354.

In Equity. Suit by the Republic Acceptance Corporation against Charles J. De Land and another. On motion to dismiss bill of complaint. Motion denied.

Beaumont, Smith & Harris, of Detroit, Mich., for plaintiff.

Merlin Wiley, Atty. Gen., and Samuel Pepper and Clare Retan, Asst. Atty. Gen., for defendants.

TUTTLE, District Judge. This cause is before the court on a motion to dismiss the bill of complaint. The grounds on which such motion is based are stated therein as follows:

"(1) That plaintiff has an adequate remedy at law. (2) That this court is without jurisdiction to entertain the same: (a) Because said bill of complaint does not state a cause of action arising under the Constitution and laws of the United States; (b) because this court is without jurisdiction to restrain the officers of the state of Michigan from enforcing the penal laws of the state; (c) because this court, under section 266 of the Judicial Code of the United States, is without jurisdiction to enjoin the enforcement of Acts Nos. 84 and 85 of the Public Acts of 1921 of the state of Michigan, on the ground that such acts, or any parts thereof, are in conflict with the Constitution of the United States and of the state of Michigan; (d) because plaintiff is not entitled to the relief prayed therein."

[1] 1. The bill, by appropriate allegations, clearly presents a situation showing that plaintiff will suffer irreparable injury unless the equitable relief therein prayed be granted, and as these allegations must, of course, be accepted as true for the purposes of this motion, it certainly cannot be said that it appears from the bill that plaintiff has an adequate remedy at law.

[2] 2. (a) As the bill alleges, on grounds hereinafter mentioned, that the statutes in question are in violation of the United States Constitution, it is clear that such bill states a cause of action arising under the Constitution and laws of the United States.

[3] (b) That a federal court has jurisdiction to restrain individuals who are officers of a state from enforcing, as such officers, an unconstitutional statute of such state, is too well settled to require discussion. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Looney v. Crane Co.*, 245 U. S. 178, 38 Sup. Ct. 85, 62 L. Ed. 230.

[4] (c) While it is true that this court is prohibited by section 266 of the Judicial Code (Comp. St. § 1243) from granting an interlocutory injunction to restrain the enforcement of the statutes involved, on the ground that they are unconstitutional, without calling to its aid two other federal judges pursuant to, and in accordance with, the provisions of such section, yet it is equally true that this court has jurisdiction to grant a permanent injunction restraining the enforcement of such statutes on the grounds alleged in the bill, as it has the power to dispose of the motion to dismiss such bill.

(d) The contention that the bill of complaint should be dismissed, for the reason that it appears on its face that this court is without jurisdiction to entertain the same, "because plaintiff is not entitled to the relief prayed," requires a consideration of the various grounds upon which the prayer for such relief is based.

[5] It is alleged, with much particularity of detail, that the statutes referred to, Act No. 84 and Act No. 85 of the Michigan Public Acts of 1921, violate both the United States Constitution and the Constitution of the state of Michigan. It is, of course, well established that when, as here, the jurisdiction of this court has been invoked by the presence of a substantial federal question, such jurisdiction extends to the determination of every question presented in the case, whether the decision of such question depends upon federal or upon state law. *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97.

The objections urged in the bill against the constitutionality of the Michigan statutes involved may be summarized as follows:

(1) That said statutes impair, contrary to section 10 of article 1 of the federal Constitution, the obligations of the contract entered into between the state of Michigan and the plaintiff when and whereby the latter was admitted to do business in Michigan.

(2) That Act 85 violates the Fourteenth Amendment to the federal Constitution, in that such act levies an arbitrary, unjust, and capricious charge against the plaintiff, which operates, not only to deprive it of its property without due process of law, but also to deprive it of the equal protection of the laws.

(3) That, if the charge prescribed by said Act 85 be a specific tax, it violates section 4 of article 10 of the Michigan Constitution, as such tax is not uniform upon the classes upon which it operates.

(4) That said charge is in reality a property tax, which is not uniform, and which, therefore, is contrary to section 3 of article 10 of the Michigan Constitution.

(5) That Act 85 is in violation of the Michigan Constitution, because such act provides for the payment of the taxes therein prescribed into the general fund of the state, instead of into the primary school interest fund, as required by such Constitution.

These objections will be considered in the order named.

1. It is contended by plaintiff that these statutes would, if enforced, deprive plaintiff of rights previously acquired by it under its contract with the state of Michigan, admitting it to do business in such state, and that therefore such statutes impair the obligations of a contract, in violation of the first article of the federal Constitution.

Act 206 of the Michigan Public Acts of 1901 prescribed terms and conditions on which foreign corporations might be admitted to do business in Michigan. By that act it was made unlawful for any such corporation to carry on its business in Michigan until it had procured from the secretary of state a certificate of authority for that purpose, and in order to procure such certificate every such corporation was required to file certain papers as provided in such act and to pay to the secretary of state what was denominated a franchise fee of one-half a mill on each dollar of the proportion of its authorized capital stock represented by the tangible property owned and used in Michigan. Section 4 of that statute, being section 9066 of the Michigan Compiled Laws of 1915, provided, among other things, as follows:

"When such corporation has fully complied with the provisions of this act, the secretary of state may issue to such corporation a certificate of authority to carry on such business in this state during the period of its corporate existence, but not exceeding thirty years: Provided, that no such foreign corporation shall be permitted to transact business in this state, unless it be incorporated in whole or in part for the purpose or object for which a corporation may be formed under the laws of Michigan, and then only for such purpose or object. The secretary of state shall in the certificate which he issues state under what act such corporation is to carry on business in this state, and such corporation shall have all the powers, rights and privileges and be subject to all the restrictions, requirements and duties granted to or imposed upon corporations organized under such act."

[6] When plaintiff complied with the provisions of said statute, and received the certificate of authority issued to it in accordance with such provisions, as alleged in the bill, the transaction constituted a contract between it and the state of Michigan, entitling it to carry on business in such state on the terms and conditions prescribed by such statute. *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978. It will be noted, however, that by the terms of such contract, as expressed in the provisions of the state statute just quoted, plaintiff was made "subject to all the restrictions, requirements and duties granted to or imposed upon" the domestic corporations therein mentioned.

[7] It is well settled that, so long as a state has not expressly and unequivocally deprived itself, by contract or otherwise, of the power to impose taxes upon corporations subject to its laws, it may, consistently with the provision of the federal Constitution forbidding it to impair the obligations of contracts, levy upon a corporation, domestic or foreign, previously granted permission to carry on business within such state, an excise tax in the nature of a license tax upon the privilege of exercising its corporate franchise and transacting its business there. *Memphis Gaslight Co. v. Taxing District*, 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976; *New Orleans City & Lake R. R. Co. v. New Orleans*, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; *St. Louis v. United Railways Co.*, 210 U. S. 266, 28 Sup. Ct. 630, 52 L. Ed. 1054.

Section 4 of Act 85, prescribing the tax complained of, provides as follows:

"Every corporation organized or doing business under the laws of this state, excepting those hereinafter expressly exempted therefrom, shall, at the time of filing its annual report with the secretary of state of this state, as required by section seven hereof, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state, an annual fee of three and one-half mills upon each dollar of its paid-up capital and surplus, but such privilege fee shall in no case be less than fifty dollars nor more than ten thousand dollars."

As the tax thus imposed (which, for reasons hereinafter expressed, is, in my opinion, an excise tax, within the power of the state to impose) is applied equally to domestic and foreign corporations, and as neither of the acts under consideration attempts to discriminate between domestic and foreign corporations, it is manifest that in levying such tax the state of Michigan has not impaired the obligation of any contract between it and the plaintiff. It follows that the contract re-

lied on by plaintiff was not impaired by the portion of Act 84 providing that:

"When such corporation has fully complied with the provisions of this act, the secretary of state may issue to such corporation a certificate of authority to carry on such business in this state for one year, and from year to year thereafter during the period of its corporate existence so long as the said corporation continues to pay its franchise fee and to otherwise comply with the laws of this state" (part 5, c. 1, § 2)

—notwithstanding the contention of plaintiff that the statutory provision just quoted violates the clause of its said contract entitling it to carry on its business in Michigan during the period of its corporate existence.

Aside from, and in addition to, the considerations just pointed out in this connection, the extent of the power of the state of Michigan to legislate with respect to the plaintiff corporation is indicated by section 1 of article 12 of the present Michigan Constitution, in force at the time of the admission of the plaintiff into said state, and therefore forming a part of the contract relative to such admission, which constitutional provision is as follows:

"All laws heretofore or hereafter passed by the Legislature for the formation of, or conferring rights, privileges or franchises upon corporations and all rights, privileges or franchises conferred by such laws may be amended, altered, repealed or abrogated."

In so far, therefore, as this contention is concerned, it appears on the face of the bill that plaintiff is not entitled to the relief thus prayed.

2. It is urged by plaintiff in its bill that it is deprived of property without due process of law and deprived of the equal protection of the laws, contrary to the Fourteenth Amendment to the federal Constitution, by the provision in section 4 of Act 85 that the tax thereby imposed "shall in no case be less than fifty dollars nor more than ten thousand dollars"; it being argued by plaintiff, in substance, that the effect of such proviso is to arbitrarily discriminate between corporations belonging to the same class, and to apply a different method of computing this tax upon different members of such class, determined solely by the amount of paid-up capital stock and surplus, and that this legislation is so arbitrary in character and unequal in application as to constitute class legislation, contrary to the Fourteenth Amendment.

[8] The constitutional power of a state to divide the persons upon whom legislation is to operate into classes, and to vary the nature and effect of such legislation according to the difference between such classes, is undoubted, provided that any lack of exact uniformity as between classes be based upon reasonable classification, and not upon arbitrary discrimination. I am satisfied that the effect of the proviso just quoted, prescribing a minimum and maximum amount of franchise tax, is to divide all of the corporations subject to such tax into three classes—the first containing those corporations whose paid-up capital and surplus together does not exceed the sum upon which the tax, computed at the rate prescribed in this section, amounts to \$50; the second class containing those corporations whose paid-up capital and

surplus amounts to such a sum that the tax computed thereon at the same rate is not less than \$50 nor more than \$10,000; and the third class containing those corporations whose paid-up capital and surplus is not less than the sum which, when used as a measure for computing the tax at the same rate thereon, will produce a tax of \$10,000. In other words, in determining the basis for the computation of the tax levied, it has adopted, for the first and third classes, the lump sum method of measuring the amount of the tax, such sum being \$50 for the first and \$10,000 for the third class; and for the second class it has adopted the rate or percentage method, the rate being 3½ mills on each dollar of paid-up capital and surplus. Unless there is such an entire absence of any reasonable basis for such a classification that it must be held to be purely arbitrary, and therefore discriminatory, this court cannot interfere with the exercise, by the Michigan Legislature, of its judgment and discretion in thus grading the amount of such tax according to the amount of paid-up capital and surplus. With the question whether the judgment of the Legislature upon this subject was correct or wise this court is, of course, not concerned.

[9] It cannot, in my opinion, be held that the method of classification used in measuring the amount of the tax to be levied under this statute is wholly arbitrary and without any reasonable basis. The mere fact that the amount of an excise tax is graduated according to the amount or size of property or business adopted as the standard of measurement for the purpose of computation does not render such a tax so lacking in uniformity or equality that its enforcement operates as a denial of due process of law or of the equal protection of the laws. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414. I am satisfied that the imposition of these minimum and maximum amounts constitutes a reasonable classification of the corporations involved into classes, and that as to the members of each of such classes the tax prescribed is equal and uniform. The contention of the plaintiff in this connection must be overruled, and that of the defendant sustained.

[10] 3. The conclusions reached and expressed with respect to the contention of plaintiff just considered apply with equal force to the argument presented by plaintiff to the effect that the tax in question, regarded as a specific tax (which, as hereinafter indicated, it must be held to be), is not uniform upon the classes upon which it operates, and that therefore it violates section 4 of article 10 of the Michigan Constitution. That section provides that:

"The Legislature may by law impose specific taxes, which shall be uniform upon the classes upon which they operate."

As, for reasons stated, the "classes" upon which this tax operates are the three classes of corporations referred to, upon the members

of each of which classes such tax operates uniformly, the contention of plaintiff that corporations as a class, in contradistinction to individuals or other legal entities, constitute the "class" upon which this tax operates, within the meaning of this constitutional provision, must be overruled. *Union Trust Co. v. Detroit Common Council*, 170 Mich. 692, 137 N. W. 122; *Jasnowski v. Board of Assessors*, 191 Mich. 287, 157 N. W. 891.

[11] 4. It is urged by plaintiff that the charge prescribed by section 4 of Act 85 is in reality a property tax, which, not being uniform, is in violation of section 3 of article 10 of the Michigan Constitution, requiring that:

"The Legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes."

With the contention that the charge prescribed by this statute is a property tax I am wholly unable to agree. As already appears, it is expressly recited in section 4 of Act 85 that the denominated "privilege fee" therein prescribed shall be paid by each of the corporations subject thereto "for the privilege of exercising its franchise and of transacting its business within this state." It cannot be doubted that this express declaration by the Legislature of the purpose for which this annual "privilege fee" was levied stamps it as an excise, rather than a property tax, *Kansas City, Ft. Scott & Memphis Railway Co. v. Botkin*, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617; *Lusk v. Botkin*, 240 U. S. 236, 36 Sup. Ct. 263, 60 L. Ed. 621; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176; *Illinois Central R. R. Co. v. Mississippi Railroad Commission (D. C.)* 229 Fed. 248; *Coit & Co. v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *Pingree v. Auditor General*, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679; *Union Trust Co. v. Probate Judge*, 125 Mich. 487, 84 N. W. 1101; *Union Trust Co. v. Detroit Common Council*, *supra*; 26 Ruling Case Law, p. 35.

Nor does the fact that the amount of the tax to be levied in any particular case is measured and determined by the sliding scale used as the basis for the computation thereof render it any the less an excise tax, or operate to give it the character of a property tax. *Clark v. Titusville*, *supra*; *Kansas City, Ft. Scott & Memphis Railway Co. v. Botkin*, *supra*; *Union Trust Co. v. Probate Judge*, *supra*.

As, therefore, the premise of this argument, that the tax is a property tax, is clearly unsound, the contention based thereon, to the effect that such tax lacks the uniformity required by the Michigan Constitution, is equally without merit. It follows that, so far as such contention is concerned, the claim of the defendants that it appears upon the face of the bill of complaint that the plaintiff is not entitled to the relief prayed must be sustained.

[12] 5. It is necessary to consider one remaining ground upon which plaintiff challenges the constitutionality of Act 85, and bases its prayer for an injunction restraining the enforcement thereof; all of the other grounds upon which the prayer for such relief is rested having been

thus disposed of adversely to the claims of plaintiff. Whether, then, the motion to dismiss the bill, for the reason that it appears from the face of such bill that plaintiff is not entitled to the relief prayed therein, should be granted, necessarily depends upon, and involves, a determination of the merits of this remaining objection to the constitutionality of said act. This objection rests upon the contention urged by plaintiff in its bill that the statute in question is unconstitutional because it provides for the payment of the taxes to be collected thereunder into the general fund of the state, instead of into the primary school interest fund, as required by the Michigan Constitution.

Section 1 of article 10 of the present Michigan Constitution, which took effect January 1, 1909, provides as follows:

"All subjects of taxation now contributing to the primary school interest fund under present laws shall continue to contribute to that fund, and all taxes from such subjects shall be first applied in paying the interest upon the primary school, university and other educational funds in the order herein named, after which the surplus of such moneys shall be added to and become a part of the primary school interest fund."

Section 6 of article 10 of said Constitution provides as follows:

"Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

It is therefore clear that, if the tax imposed by Act 85 belongs to the "subjects of taxation" which, under the laws in force at the time of the taking effect of the present Constitution of the state, contributed to the primary school interest fund, such tax must now "continue to contribute to that fund," in accordance with the constitutional provisions just quoted. It is equally clear that the statute under consideration must "distinctly state the tax, and the objects to which it is to be applied".

Does this statute conform to these constitutional requirements? If not, it is, of course, unconstitutional and void, and in that event the motion to dismiss the bill must be denied. Section 8 of Act 85 contains the following provision:

"All fees of every nature paid to the secretary of state under the provisions of this act shall be covered into the state treasury and shall there be credited to the general fund of the state, and shall be available for any purpose for which such general fund is made available by law."

Whether the subject of the taxation imposed by this statute was a subject which contributed to the primary school interest fund of the state of Michigan under the laws in force at the time of the adoption of the present state Constitution, and which therefore must continue to contribute to such fund, depends upon the question whether it belongs to a class of subjects contributing to that fund at that time. *Jasnowski v. Board of Assessors*, supra. The tax, then, imposed by Act 85 being an excise tax levied upon each of the designated corporations "for the privilege of exercising its franchise and of transacting its business within this state," did the taxes, from the class of subjects of taxation to which the subject of this excise tax—that is, the "privi-

lege" in question—belongs, contribute, under the Michigan laws in force on January 1, 1909, to the primary school interest fund?

On the date mentioned there was in effect Act 182 of the Michigan Public Acts of 1891, entitled "An act to provide for the payment of a franchise fee by corporations," as amended. Section 1 of that act provided that every domestic corporation required to file articles of association with the secretary of state and every foreign corporation permitted to transact business in Michigan should pay to the secretary of state a "franchise fee of one-half of one mill upon each dollar" of the authorized capital stock of such corporation. Section 3 of said act, being section 11,354 of the Michigan Compiled Laws of 1915, as amended prior to January 1, 1909, and as in force at that time, provided as follows:

"The fees collected under the provisions of this act shall be paid into the state treasury, and shall be applied in paying the interest upon the primary school, university and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the primary school interest fund, as provided in section 1 of article XLV of the Constitution of Michigan."

The taxes imposed by the statute just referred to, thus expressly designated therein as "specific taxes," constituted, in my opinion, an excise tax, levied upon the corporations subject thereto for the privilege of transacting their business in Michigan, as was distinctly held by the Michigan Supreme Court in its decision in *Coit & Co. v. Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819, cited and relied on by defendants in their brief as authority to the effect that such tax "was a tax upon the privilege of doing business in Michigan." As was said by the court in that case, by which this court is bound in construing said statute:

"The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid."

It is therefore plain that the excise tax prescribed by the present statute was the same kind of a tax as the excise tax prescribed by the former statute just considered, and that the subject of the present tax belongs to the same class of subjects of taxation as did the subject of the tax imposed by said former statute, which latter contributed to the primary school interest fund under a state law in force at the time of the adoption of the present Michigan Constitution. It necessarily follows that this present excise tax also must contribute to that fund, and that the Michigan Legislature was without the power to provide for the payment of such tax into the general fund, and its attempt to do so is unconstitutional and void. *Chambe v. Probate Judge*, 100 Mich. 112, 58 N. W. 661; *Union Trust Co. v. Probate Judge*, supra.

This act, therefore, does not correctly state the tax thereby imposed and "the objects to which it is to be applied," as required by the Michigan Constitution, and the act is plainly in violation thereof and invalid.

Chambe v. Probate Judge, supra. As was said by the Michigan Supreme Court in its decision in the case just cited, which, as already observed, is binding upon this court as a construction of the constitutional and statutory provisions involved:

"Our Constitution, as is seen, provides that every law which imposes a tax must state the object to which it is to be applied. In this law the object was stated, and it is found that, within the express terms of the Constitution, the moneys arising from it cannot be so applied. This must defeat the whole act, for it is impossible for this court to say that any part of the act would have met the approval of the Legislature, had the moneys arising from the tax been appropriated in the act as provided by the Constitution. It is safe to say that, if the Legislature had supposed these moneys arising from the tax could not be appropriated to the general state fund, and made applicable to the general expenses of the state government, the act would not have met with the legislators' approval. For these reasons, we think the whole act must be held void."

It is true that in the early case of *Walcott v. People*, 17 Mich. 68 (not cited in the briefs of either party hereto), it was held, under a provision of the Michigan Constitution of 1850, identical in terms with section 6 of article 10 of the present Constitution, now being considered, that a statute imposing what was therein designated as a specific tax was not unconstitutional in failing to state the fund to which such tax should be credited. That case, however, is clearly distinguishable from the instant case, in that the state Constitution of 1850, then in force (article 14, § 1), expressly provided that "all specific state taxes" (with certain immaterial exceptions) should be applied to the primary school interest fund; and it was therefore unnecessary, and would serve no useful purpose, to require the Legislature, after it has designated the tax there involved as a "specific state tax," to repeat the provision for the proper application of such tax already expressly prescribed in the state Constitution. As was pointed out by the Michigan Supreme Court in its opinion in that case:

"It is apparent that the fundamental law has irrevocably prescribed the application of all such specific state taxes as that imposed by the act in question, and that the Legislature could in no manner change the purpose or alter the destination of the tax. The application is not only unalterably fixed, but is specifically defined, and nothing could be added by legislation but an idle repetition of the language of the constitution. The statute distinctly describes the tax, and directs its payment into the state treasury, and the Constitution then takes the subject from the sphere of legislative discretion, and decrees the uses to which the money must be appropriated. It inevitably follows that, by the conjoint operation of the statute and Constitution, the object to which the tax would be applied is made most distinct and certain, and no language in the act could make it more so. I think it may well be doubted whether the men who framed the Constitution, or the people who adopted it, proposed to require a thing so vain and fruitless as the re-enactment of the constitutional provision in every law imposing a tax like that in question."

Under the present Michigan Constitution, a wholly different situation is presented in this respect. The application of the tax imposed by Act 85 was not "specifically defined" in such Constitution, and it was impossible for the Legislature, by reference to the Constitution, or, indeed, otherwise, to ascertain or determine whether the subject of this

tax belonged to a class of subjects of taxation which contributed to the primary school interest fund under the laws in force at the time of the adoption of the present Constitution. The reasons, therefore, for the conclusion reached in *Walcott v. People*, supra, as expressly stated in the opinion therein, do not apply to the present case, which is not controlled by the decision cited. Moreover, the statute there involved was entirely silent as to the application of the tax imposed, while here, as in *Chambe v. Probate Judge*, supra, to quote the language of the Michigan Supreme Court in *Union Trust Co. v. Probate Judge*, supra:

"Instead of omitting to state the application to be made of the fund, the law stated it with fatal accuracy."

It results that Act 85 must be held unconstitutional and void, and hence the contention of defendants that the bill should be dismissed, because its allegations show that plaintiff is not entitled to the relief prayed, must be overruled.

It necessarily follows that the motion to dismiss the bill must be denied.

GAVIT v. IRWIN, Internal Revenue Collector.

(District Court, N. D. New York. August 22, 1921.)

Internal revenue ⇨7—Bequests held not taxable income.

By his will a testator bequeathed a share of his estate in trust for a granddaughter, who was an infant, directing the trustees to apply so much of the income therefrom as they thought necessary to her support and maintenance, and to pay one-half of the remaining income to plaintiff, who was the father of the granddaughter, during his life, but not longer than the infancy of his daughter, and not longer than her natural life, should she die before attaining the age of 21 years. *Held* that, under Income Tax Act, § II, subd. B, providing that "the net income of a taxable person shall include * * * gains or profits and income derived from any source whatever, including the income from, but not the value of, property acquired by gift, bequest, devise, or descent," the sums received by plaintiff from the trustees were not income as to him, but capital bequests, since he had no interest, and never could have any, in the capital of the trust fund, and were not taxable under the act.

At Law. Action by E. Palmer Gavit against Roscoe Irwin, Collector of Internal Revenue. On demurrer to complaint. Overruled.

Neile F. Towner, of Albany, N. Y., for plaintiff.

Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant.

COOPER, District Judge. By the will of Anthony N. Brady, deceased, he divided his estate into six equal parts, and devised one-sixth of his estate in trust to his executors, who were thereby made trustees. The trustees were directed to apply so much of the income and profits from such one-sixth as in their discretion they thought necessary for the support and maintenance of decedent's granddaughter, Marcia Ann Gavit, daughter of the plaintiff herein, and to

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

divide the remainder of the income of such one-sixth, not necessary for the support of the granddaughter, into two parts, one of said parts to be paid to the plaintiff during his life, but not longer than the infancy of the daughter, Marcia Ann Gavit, and not longer than her natural life, should she die before attaining the age of 21 years.

During the tax years of 1913, 1914, and 1915, the plaintiff received certain sums of money under the provisions of the Brady will, upon which he has been required to pay, as normal tax, additional tax, and penalties, the sum of \$21,602.16. He paid this under protest, and appealed to the Commissioner of Internal Revenue, who decided against him, and the plaintiff has now brought this action to recover such amount of taxes, with interest.

The question before the court, arising upon a demurrer to the complaint, is whether or not the moneys so received by the plaintiff under the aforesaid provisions of the Brady will are taxable as income, within the meaning of the Income Tax Act of October 3, 1913 (38 Stat. 114). The provisions of this act, so far as applicable, are as follows:

"Section II.

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to *every citizen* of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income. * * *

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds \$20,000 and does not exceed \$50,000. [Here follows percentages of additional tax.] * * * All the provisions of this section relating to individuals who are chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A. shall apply to the levy, assessment, and collection of the additional tax imposed under this section."

"B. That * * * the net income of a taxable person shall include * * * gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent."

"D. * * * Guardians, trustees, * * * and all persons, * * * acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals. * * *

"E. * * * All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person exceeding \$3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. * * *

The plaintiff contends that the moneys thus received by him are not income, under the provisions of the act of 1913, especially in view of the provisions of subdivision B of such act, and that, even if they come under the act of 1913, they are not income within the meaning of the Sixteenth Amendment to the Constitution of the United States, and that the statute is unconstitutional.

The courts have held that income, within the meaning of the Constitution and the Income Tax Act passed pursuant to the Sixteenth Amendment, must be taken in the common understanding of the term. *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. Income, as laid down by the United States Supreme Court, within the purview of the Constitution, is defined as:

"* * * The gain derived from capital, from labor, or from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets." *Eisner v. Macomber*, 252 U. S. 189, citing *Stratton Ind. v. Howbert*, 231 U. S. 399, 415, and *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 185.

In the same case (*Eisner v. Macomber*) the relation of capital to income is expressed as follows:

"The fundamental relation of 'capital' to 'income' has been much discussed by the economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time."

Since the moneys received by plaintiff were not income from labor, nor from labor and capital combined, nor from the sale or conversion of capital assets, we have only to do with income received from capital. Income, as now considered, is, after the severance, separate and apart from the capital; it is as separate and apart from the capital as the fruit from the tree, the crops from the land after severance, or the waters in the outlet stream after passing out of the reservoir. It is something which has grown out of or issued from capital, leaving the capital unimpaired and intact. Having these considerations in mind, it cannot be said that these moneys received by the plaintiff arose from any capital of his. So far as appears from the pleadings in this case, he had no land, trees, or reservoir to produce crops, fruit, or outlet water—no capital of any kind whatever.

If the Income Tax Law of 1913, therefore, is intended only to tax the income, which is the fruit of the taxpayer's labor, or the income from the taxpayer's capital, in which he has a present ownership (or at least a vested future interest, meantime receiving the income or the gain from the sale or conversion of the taxpayer's capital assets), then the money received by the plaintiff is not income as to him, because he has not and never will have the slightest ownership, present or future, vested or contingent, in the capital producing this income. If this is income, therefore, it is the income, not of the capital of the plaintiff, but of the capital of a portion of the Brady estate, which capital will never be that of the plaintiff.

There is nothing in the act of 1913 which taxes income which is not the income of the citizen or the individual sought to be taxed. The

levy, assessment, and payment is upon the net income of a "citizen." Section A, subdivision 1. "*Individuals*" are chargeable with the normal and the additional income tax. Section A, subdivision 2. The return required by section A, subdivision 2, is a *personal* return. An estate is not a "citizen" nor a "person." There is nothing in the act of 1913 which shows any intent to tax the income of estates, as distinguished from the income of a citizen or individual resident of the country. There is in the act no definition of citizen or individual which makes either of these terms include estates.

It is true that section A, subdivision 1, speaks of "income arising or accruing from all sources * * * to every citizen" and section A, subdivision 2, used the language, "income derived from any source whatever." This must, however, be held to mean moneys which are essentially income, and which are income received from the labor or capital, or both, or the sale or conversion of the capital assets, of the person sought to be taxed, and to be limited by the provisions of subdivision B.

The act of 1913 in section II, subdivision B, purports to define the income of a taxable person liable to tax. There is no suggestion in subdivision B of any tax upon the income of estates, as distinguished from the income of individuals. This subdivision B, in defining what shall be deemed to be income of a "*taxable person*," provides that the net income of a "*taxable person*," shall include "*income from*, but *not the value of property* acquired by gift, bequest, devise or descent." This means that there shall be included, within the taxable income of a person liable to tax, the income which he shall receive from property acquired by gift, bequest, devise, or descent. It should be construed as if the statute read:

"The income of a taxable person shall include the income from property acquired by gift, bequest, devise or descent, but not the value of the property itself."

The transfer of possession and the beneficial use of property acquired by a person by gift, bequest, devise, or descent is usually delayed by reason of the necessity for operating the legal machinery required to execute the provisions of the law of trusts, probate, and intestacy. Oftimes the property which the person thus receives is withheld for a period of time, and he does not get the corpus or capital of the property which he receives by gift, bequest, devise, or descent until a long time after the right thereto is created. During all this suspension of absolute ownership and possession of the property thus acquired, interest or income accrues. The intent of subdivision B is to tax to the person the income which accrued and is received by him from the property acquired by gift, bequest, devise, or descent, and which property has been withheld from him. There is no suggestion in subdivision B that the income of estates as such, regardless of what disposition is made of the income, shall be taxable, and the tax thereon paid by any person, either in his individual right or as fiduciary.

The other provisions of the act relating to fiduciaries are in entire harmony with this construction. Subdivision 2, paragraph D, re-

quires the guardians, trustees, etc., of persons *who are subject to an income tax because of the amount of income received* from such property, acquired by gift, bequest, devise, or descent, to make a return of the net income of such persons, subject to this tax, for whom such guardians or trustees act. Subdivision 2, paragraph E, provides that, where the income of any person subject to tax shall exceed \$3,000 for any taxable year, the guardian, trustee, etc., of such person shall withhold and deduct from the income paid to such person the amount of the income tax on such income so paid to such person. The last provisions relating to fiduciaries are machinery to safeguard the government's obtaining the income tax on the income of persons from property which they acquire by gift, bequest, devise, or descent, which property and the income therefrom is temporarily in possession and custody of fiduciaries.

To make these fiduciary provisions and subdivision B applicable, and to bring a person thereunder, there must be both income of the property received by gift, bequest, devise, or descent, and also the property or capital itself. Unless there is both, there is no income within the meaning of these provisions of the Income Tax Law, and no income tax to be paid; nor is there any return to be made by the fiduciaries, nor any tax to be withheld from the moneys paid to the beneficiary.

Applying this to the case at bar, we must find as to the plaintiff both the income from the property acquired by gift, bequest, devise, or descent, and the property itself, within the meaning of the Income Tax Law of 1913. If these moneys received by the plaintiff from the trustees from this one-sixth portion of the Brady estate are income as to him, where is the property acquired by the plaintiff from the Brady estate—in other words his capital, either in present possession or right of future possession, from which the income arose? Clearly there is none. He never gets the property which produces the income. So as to him there is not both the property acquired by gift, bequest, devise, or descent and the income thereof.

The learned district attorney recognizes and concedes that "income" must be something separate, apart, and distinct from "capital," both belonging to the plaintiff. He argues in his brief that the *right* to receive the moneys must, of necessity, be the *capital* or corpus from which the moneys received by the plaintiff accrued. This contention does not carry conviction. Heirs have a *right* to inherit. That does not make the inheritance income. So, too, an instrument providing for the future transfer of property would give the transferee the *right* to it, but would not thereby make the transferred property income.

Moreover, there is nothing fixed, absolute, or certain about the plaintiff's right to receive any moneys in any year under the provisions of the will. If the trustees elect that the whole amount of the income of the one-sixth is necessary for the support of the testator's granddaughter as she grows older and as her expenses increase, the plaintiff gets nothing. His *right* is extinguished. To call such a *right* property or capital, or the equivalent thereof, within the provisions of the act of 1913, would be unreasonable.

Further consideration of the character or legal status of the moneys received by plaintiff may be helpful. If the will had provided that the income of this one-sixth of the Brady estate, during the first year after his death, should be paid to the plaintiff, and the income thereafter appropriated to the support of his granddaughter so far as necessary, and the balance accumulated for her benefit, would any one contend that the payment to the plaintiff in the one year was income within the meaning of the act of 1913? If the testator in his will had provided for such payment during the first two years after his death, would any one contend that the moneys paid to the plaintiff during the two years was income within the meaning of the act of 1913?

Would it not be clear that this was property acquired by bequest or devise by the plaintiff, the *value* of which is provided by subdivision B of the act of 1913 to be not taxable as income? Does the fact that the plaintiff received a portion of the income of this one-sixth for 3 years under the act of 1913, and may receive it longer, change its character from capital to income under this act? Under no circumstances can it last longer than 15 years, the granddaughter being 6 years of age. It may cease immediately.

From the foregoing it must be determined that there is no provision of the Income Tax Law of 1913 by which it can be held that the moneys received by plaintiff during these years 1913, 1914, and 1915 are income and taxable. While the moneys received by plaintiff are income as to the estate, they are not income as to the plaintiff. As to him, they are the property acquired by bequest or devise, and therefore not taxable. It was not until 1916 that any provision was made in the income tax act for a tax upon the income of estates, as well as a tax upon the income of persons. By the amendment of 1916 (Act Sept. 8, 1916, c. 463 [Comp. St. § 6336a et seq.]) it was provided for the first time that the income of estates or of any kind of property held in trust should be taxed to the estates. *Merchants' Loan & Trust Co. v. Smietanka*, 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. — (March 28, 1921). The Congress, while making this amendment, also eliminated from the Income Tax Law that provision of subdivision B in the act of 1913, which provided that an income tax should be levied upon the income received by persons from property acquired by gift, bequest, devise, or descent, but not upon the property itself.

It may then be presumed, in the light of this amendment, that the legislative intent in 1916 was to cover the defect, if it may be termed such, and to change the statute to include cases similar to the one in question not before included. Its insertion indicates that Congress at least was doubtful whether the previous act included income of estates. *United States v. Field*, 255 U. S. 257, 41 Sup. Ct. 256, 65 L. Ed. — (February 28, 1921); *United States v. Bashaw*, 50 Fed. 749, 754, 1 C. C. A. 653.

In view of this holding that the moneys received by the plaintiff are not income within the meaning of the act of 1913, it is not necessary to pass upon its constitutionality.

The demurrer is overruled.

MENZER v. KENWORTHY.

(District Court, D. Connecticut. August 31, 1921.)

No. 1514.

1. Patents \Leftrightarrow 118—Combination may be claimed which does not do useful work separately.

A part or a combination may be claimed in a patent, though it cannot do useful work separate from the rest of the machine or apparatus of which it constitutes a part.

2. Patents \Leftrightarrow 172—Claim not strictly interpreted.

Where an invention is substantial and meritorious, a claim should not be strictly interpreted and limited.

3. Patents \Leftrightarrow 328—1,230,750, for strip metal blocker, held valid and infringed.

Claim 1 of letters patent No. 1,230,750, for improvements in strip metal blockers, held valid and infringed.

In Equity. Suit by Joseph C. Menzer against Charles F. Kenworthy. Decree for plaintiff.

Munn, Anderson & Munn and T. Hart Anderson, all of New York City, for plaintiff.

George E. Hall, of New Haven, Conn., for defendant.

THOMAS, District Judge. This is the usual suit alleging infringement of letters patent No. 1,230,750, issued to the plaintiff June 19, 1917, for improvements in strip metal blockers. The defenses are invalidity and noninfringement.

By stipulation only the first claim is in suit. It reads:

"The combination, with a rotary block, of a base movable with respect to the block, a pair of standards carried by the base and extending therefrom so as to embrace one side of the block, a yoke pivoted to the free ends of the standards and adapted to loosely embrace the opposite side of the block, means to throw the yoke outwardly so as to clear the block when the base is moved as aforesaid, and an endless gripping member operated over said standards and yoke and including a loop or bight carried by the yoke outwardly to clear the block during movement of the base."

The patentee says in the specification that the invention "relates to metal-handling machinery and has particular reference to rolling mill appliances," and that the primary object of the invention is:

"To provide a device automatic or practically automatic in its nature for initiating the rolling or winding of a sheet or strip of metal or the like upon a block as such sheet or strip is received from the rolls of a rolling mill or their equivalent."

The specification further sets forth:

"The purpose of the invention is to eliminate the dangers incident to an operator pursuing the usual practice of initiating the winding of the sheet or strip of metal or the like upon the block" and "to provide a device having the capability of facilitating the winding action and providing for the operation of the mill and the output of the plant at a greatly increased speed."

It will thus be seen that the patent is for a "strip metal blocker" generally referred to in the art as a "blocking machine" or "blocker."

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

Its purpose is to act upon the end of a very thin strip of sheet metal as it comes from the rolling machine, and to guide and wrap the end of the strip about the wooden block of the winding machine. The block is a cylindrical member from 8 to 10 inches in diameter and from 12 to 18 inches in length and is mounted on the end of a rotary shaft.

The surface of the block and the shaft upon which it is carried is positioned in front of the rolls and extends parallel thereto. In other words, the surface of the block is parallel to the surface of the rolls. It is positioned at any point along the rolls at which the strip or sheet of metal emerges from between the rolls and as the rolls are generally 5 or 6 feet in length, while the block is generally from 12 to 18 inches in length, in order to take care of the sheet or strip of metal at different points along the length of the rolls, the block and its supporting shaft and operating devices are generally arranged so that the block may be adjusted, or so as to be parallel to the surface of the rolls at any point along the length of the rolls.

This block, or winding or blocking machine, is usually set so that it will be opposite the bight or point of contact of the rolls and 2 or 3 feet in front of the rolls at the point where the metal subjected to the action of the rolls emerges. A strip or sheet of metal approximately 250 feet in length emerges from the rolls each minute and the blocking machine is designed to take care of this strip of sheet metal as it comes from the rolls.

Before the introduction of blocking machines this work was done by hand. It was a dangerous operation. A workman, called a "blocker," stood in front of the rolls and took hold of the outcoming strip with his hands, directed the end of the strip to the revolving block, laid it thereon, and followed it around the block with his hand, tucking the free end of the strip inward between the oncoming strip and the surface of the roll. During this operation the block is revolving at a speed sufficient to take care of the strip delivered by the rolls and to hold the same taut between the blocking machine and the rolls. Having tucked the end of the strip between the surface of the block and the oncoming strip, it was thus held to the block by pressure, and the subsequent winding of the strip on the block is accomplished by the action of the machine and without further manipulation by the workman. During this dangerous operation the blocker was liable to catch his fingers between the oncoming strip of metal and the block, resulting in serious injury.

Many attempts have been made to substitute a mechanical device for the hand operation in directing the end of the strip of metal to the block of the blocking machine. Among others who sought to solve the problem and design a machine for taking care of this work was the plaintiff.

The record shows that devices of this type were old and well known before plaintiff's invention and had been in common use prior to it.

The plaintiff's machine comprises a base, which is intended to rest upon some suitable support, although such support is not shown in the drawings or described in the specification. The base is designed to

move freely on the support (not shown) both toward and from the block. The block is part of the winding machine, and is supported upon a driven shaft revolving to the left and toward the mill rolls, and this construction is part of the well-known winding machines generally used in rolling mills.

Rising from the base is a pair of standards which curve forwardly at their upper ends, arranged in parallel vertical planes, the general form of which is a semicircle viewed in side elevation with the upper ends directed forwardly. In the upper and front end of the standards there is pivoted a yoke, consisting of two arms, which are parallel to each other and lie in vertical planes parallel to the planes of the standards. Supported by the standards and carried by the yoke are the rollers or pulleys, which support an endless belt, which passes down and through the base and over a tension pulley, the bearings of which have a sliding movement in slotted brackets of sufficient weight to apply tension to the belt. The members of the yoke extending upward are connected at their upper ends by a crosspiece, to which is attached a handle whereby the yoke may be rocked about its pivot, thus causing the belt to either surround and have contact with the block, or to be raised so as to release the block. There is a device for holding the yoke in a raised position, and projecting upwardly from the base at the rear or right hand is a handle, the function of which is described in the specification at page 2, lines 108-111, as follows:

"The blocker or other attendant may then by grasping a handle 33' or its equivalent draw the apparatus bodily rearwardly away from the block until it is to be used again."

In the operation of the device, the base is moved forward towards the block. This causes the belt to contact with the block, and when moved forwardly a sufficient distance, the yoke is released and permitted to drop. This causes the belt to partially surround the block, and the lower pulley, at the forward end of the yoke is beneath the axis of the block and presses the belt close to the surface of the block a slight distance within the periphery of the block below a point coinciding with a horizontal line drawn through the axis of the block. In this position the free end of the strip of metal, as it comes from the rolls, will be guided upwardly between the belt and the surface of the block and will pass over and about the block, and will be deflected rearwardly by the belt and pulley, so that the free end will be caught between the incoming strip and the surface of the block and locked thereto. After one or two winds, the strip will be caught and held by the block whereupon the yoke will be raised upwardly and the base moved to the right of the machine, removing the belt entirely from contact with the block or the metal which is being wound thereon, and the winding continues until the entire strip is discharged from the rolls. Thus it appears that the belt is driven by contact with the block, so that the belt and the block and the incoming strip of metal all move at the same relative speed, and that the pressure of the belt against the block tends to draw the lower end of the yoke and the pulley, and the belts surrounding the pulley, in close contact with the block beneath the axis thereof, and within

the periphery below a horizontal line cutting the axis. Thus the belt performs the function of a deflector, which properly guides the free end of the strip as it passes downwardly about the block, so as to tuck it inwardly between the incoming strip of metal and the surface of the block.

The claim is alleged to be invalid for a number of reasons, of which only three need be here discussed. The defendant claims:

- (1) That the invention is not sufficiently disclosed in the patent.
- (2) That the claim does not define a complete operative structure.
- (3) That the claim lacks patentable novelty and is an aggregation of old elements.

1. Respecting the first claim, it is my opinion that the specification, when read in the light of the drawings of the patent, is specific enough to teach any one versed in the art how to make the base movable with respect to the block of the machine. It is also specific enough as to the direction of the movement, as it points out clearly that this movement is to be toward and from the block.

[1] 2. The charge that the claim does not define a complete and operative structure lacks merit. It is a well-settled rule that a part or a combination may be claimed in a patent, though it cannot do useful work separately from the rest of the machine or apparatus of which it constitutes a part. *Holloway v. Dow* (C. C.) 54 Fed. 511, at page 516. In *Brammer v. Schroeder*, 106 Fed. 918, on page 930, 46 C. C. A. 41, 52, Judge Sanborn said:

"A claim for a machine or for a combination of mechanical devices is not insufficient or invalid because it does not include mechanical devices for uniting and operating the elements of the machine or combination which would readily suggest themselves to mechanics skilled in the art, or which are described in the specification and drawings"—citing *Loom Co. v. Higgins*, 105 U. S. 580, 585, 591, 26 L. Ed. 1177, and *Deering v. Harvester Works*, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153.

In the *Loom Co. Case*, Mr. Justice Bradley (105 U. S. on page 591, 26 L. Ed. 1177) said:

"Nothing further is necessary to be said in order to dispose of the defense which was strenuously urged, and to which the court below attached much importance, that the specification was insufficient in its description of the invention sought to be patented, and failed to show any means of applying it to existing looms, and that independent invention would have to be exercised to make it a practical working apparatus as an attachment of such looms. We shall therefore dismiss that branch of the argument."

[2] I cannot find that the prior art, as it appears in this record, anticipates the claim, even though the extreme view is taken that the several elements of the claim, when taken separately, may be old. There is no question in my mind, however, but that the plaintiff was the first to disclose an endless blocking belt, which, in addition to an embracing movement about the block, has also a positioning movement toward and away from the block. Moreover, I fail to find in the patents introduced in evidence an endless blocking belt which is mounted upon a frame including a relatively stationary member and a pivoted member. Such

being the case, I am constrained to hold that the combination called for in the claim is new and the claim is valid.

The next question is: What scope is the claim to be given in construing it? And, more particularly: Is there any room left for the doctrine of equivalents, in view of the prior state of the same or other arts, as well as the proceedings had in the Patent Office in connection with the patent in suit? I am satisfied that the patentee, whether properly or not, limited claim 1 to a construction in which the base, carrying the belt-supporting members, is movable toward and from the block; the belt in its operative position embracing partly the block, and a section of the belt being capable of being moved outwardly to clear the block when the base is being shifted. A further limitation of the claim resides in the fact that it calls for a pair of standards carried by the base and extending therefrom so to embrace one side of the block, the yoke pivoted to the free ends of the standard loosely embracing the opposite side of the block in its operative position. Inasmuch as the block is cylindrical, it follows that the standards and the yoke must be on diametrically opposite portions thereof.

The Supreme Court of the United States, in *Winans v. Denmead*, 56 U. S. (15 How.) 329, page 340, 14 L. Ed. 717, speaking by Mr. Justice Curtis, said:

"While it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise."

And then follow the reasons. Being satisfied that the invention is substantial and meritorious, the strict interpretation insisted upon should not be put upon the claim. It is immaterial, in view of the state of the art, whether one or more standards are used, or whether a yoke or its equivalent—a rigid frame member—is pivoted to one or more standards, the same operations and the same functions result. Neither need the height of the standard or standards be considered, as long as the standard or standards and the yoke or its equivalent are located on diametrically opposite portions of the block.

Thus concluding, I find that any machine built in accordance with plaintiff's Exhibit 7, the Kenworthy patent, infringes claim 1 of the patent in suit.

[3] It is conceded by the plaintiff, in accordance with the provisions of a stipulation entered into by the parties hereto on April 6, 1920, that a machine in which the belt-carrying member is mounted on a fixed pivot, which is immovable with relation to the block, does not infringe the patent in suit. Plaintiff thereby conceded that Exhibit F, one form of defendant's machine, is free from infringement. I am not prepared, however, to hold that the Waclark machines come under this heading. A careful examination of the Waclark machines satisfies me that its belt-carrying member is movable with relation to the block. The extent of the possible movement is immaterial, and the facility with

which the movement may be executed is irrelevant, so far as the issue is concerned. The Wacark machines must thus be held to infringe claim 1 just as much as any machine built in accordance with the Kenworthy patent. Decree accordingly.

So ordered.

WORDEN v. GILLETT et al.

(District Court, S. D. Florida. August 26, 1921.)

No. 805.

1. Set-off and counterclaim ⇨49 (3)—Set-off against principal not available in suit by agent; "defense;" "equity."

Proof of agency of plaintiff only results in permitting defendant to avail himself of any defense against the principal which he may have, and the right of set-off is neither a "defense" nor an "equity"; hence, under the Florida statute of set-off (Rev. Gen. St. Fla. 1920, § 2660), which permits an affirmative judgment for defendant if any balance be found due him, where the plaintiff, in a suit on a note payable to a corporation, was the agent and acting in the suit for the corporation, to which the note was indorsed and delivered by the makers, the latter could not interpose a plea of set-off for a claim against the corporation for breach of a separate contract.

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

2. Bills and notes ⇨320—Set-off not defense against "holder not in due course"; "defense."

Rev. Gen. St. Fla. 1920, § 4731, subjecting negotiable paper in the hands of a "holder not in due course," as defined in section 4725, to the same defenses as if nonnegotiable, does not enlarge the scope of the statute of set-off (section 2660), for the right of set-off is not a "defense."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

At Law. Action by Beverly L. Worden against M. E. Gillett and D. C. Gillett, trading as M. E. Gillett & Son. On motion to strike and demurrer to plea. Demurrer sustained.

Knight, Thompson & Turner, of Tampa, Fla., for plaintiff.

Gibbons & Gibbons and Raney & Morris, all of Tampa, Fla., for defendants.

CALL, District Judge. This is a suit by the transferee of an overdue promissory note against makers. The plea, to which both a motion to strike and a demurrer have been filed, alleges, in short, facts as follows:

In August of 1919 the defendants, being owners of certain patents, entered into certain agreements with the Submarine Boat Corporation for an agreed price to give an option to it to acquire 51 per cent. of the capital stock of a corporation to be formed at the agreed price of \$500,000, and to which was to be transferred the exclusive license under such patents, and which was to provide for the manufacture and mar-

keting of machines to be built under such patents. The Submarine Boat Corporation was to install, at a plant owned and controlled by it, machinery for and to manufacture such machines, and consideration for same was stated in such agreement, and was to advance the sum of \$250,000 to plaintiff, for which the promissory note of plaintiff, payable in January, 1921, was to be given. On the maturity of this note, two notes, for \$125,000 each, payable in three and six months from date, could be given in renewal. The note in suit is one of these notes. The present holder and plaintiff was an agent of said Submarine Boat Corporation, and took same with full knowledge of all the circumstances, and without any valuable consideration passing from him, but was acting for and on behalf of the corporation, and for the purpose of preventing the defendants from interposing the defense set up by the plea.

The plea further shows that by a subsequent contract between the parties, until the exercise of the option by the Submarine Boat Corporation, the defendants would do certain things on their part, and the Submarine Boat Corporation during this period would manufacture within a reasonable time all such machines as might be ordered from it by the defendants for a certain agreed consideration. It is this last contract which is alleged to have been breached, and for which the damage thereby suffered is claimed, and offered to be offset.

A motion to strike said plea, as well as a demurrer to same, was duly filed by the plaintiff. Section 2660 of the Revised General Statutes is as follows:

"All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set off, and may be pleaded accordingly."

The section further requires the filing of a true copy of the subject-matter with the plea, and provides, that if the jury find a balance in favor of the defendant, that judgment may be claimed therefor.

Section 4725 provides who shall be a holder of negotiable paper in due course. Four things are necessary to constitute a holder in due course: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Section 4731 provides that a negotiable instrument in the hands of any holder, other than a holder in due course, is subject to the same defenses as if it were nonnegotiable.

The demurrer admits the facts well pleaded to be true; therefore the right of the defendants to plead set-off in this suit must be tested as though the instrument sued on was nonnegotiable. The question, under the facts admitted by the demurrer, resolves itself into this: The plaintiff being the agent and acting for the Submarine Boat Corporation in this suit, to which the note in suit was indorsed and delivered by the makers, can the defendants interpose a plea of set-off for a claim against said Boat Corporation?

[1] The case of *Adams v. Bliss*, 16 Vt. 39, holds, under the statute of Vermont, that the plea of set-off was not permissible. Other cases, among them *Chandler v. Drew*, 6 N. H. 469, 26 Am. Dec. 704, and *Bowen v. Snell*, 9 Ala. 481, hold the contrary doctrine, although in the Alabama case the suit was by the plaintiff for the use of the party against whom the offset was pleaded. And the Alabama statute of set-off provided for a judgment in favor of the defendant for a balance. This provision is not present in the New Hampshire case above referred to.

Coming to the decisions in Florida bearing on this subject, the case of *Birmingham T. & B. Co. v. Jackson County Mill Co.*, reported in 41 Fla. 498, 27 South. 43, Justice Mabry discusses the decisions, and while the exact point here involved was not before the court—that is, that plaintiff was the agent of the person against whom the set-off was pleaded—yet the construction of our statute of set-off seems to lead to the conclusion that the debts to be mutual must be between the parties to the record. He calls attention to the fact, in discussing the English statute, that there was no provision for a judgment in favor of the defendant for any balance which might be shown in his favor.

In the case of *Gregory v. McNealy*, 12 Fla. 578, Justice Westcott uses this language:

“Proof of agency only results in permitting the defendant to avail himself of any defense against the principal which he may have.”

[2] Under an unbroken line of decisions, in so far as I am informed, it has been held that the right of set-off of an independent claim is neither a defense nor an equity, and was unknown at common law. It is purely a statutory right, to satisfy one demand by another, and thus prevent several suits between the same parties, when the whole controversy could be settled in one suit. Section 4731, above referred to, subjects negotiable paper in the hands of a holder, other than in due course, to the same defenses as nonnegotiable paper. This does not enlarge the scope of the statute of set-off, which is not a defense.

The demurrer to the plea will therefore be sustained.

BRADLEY v. NEW YORK LIFE INS. CO.

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

No. 5588.

1. Insurance ⇨136(4), 137(4)—Policy held not delivered and first premium held not paid.

A life insurance application provided that the insurance was not to take effect unless the first premium was paid and the policy delivered and received during insured's lifetime and good health. The policy was written and mailed to the local agent, but he was informed of insured's death before delivering it, and thereupon returned it to the company. There was no payment of the first premium, except by insured's giving his note therefor to the agent individually, under a secret agreement that the agent would personally pay the premium and look to the note, and the agent canceled and returned the note to insured's representative after his death. *Held*, that the first premium was not paid and that the policy was not delivered.

2. Insurance ⇨136(4)—Insured's local agent held not agent of insured to receive delivery of policy.

Where application for life insurance policy provided that the policy should not take effect unless delivered and received during insured's lifetime and good health, *held*, that the local agent of the insurance company was not insured's agent to receive the policy, and delivery to him was not delivery to insured.

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

Action by Bertha Z. Bradley against the New York Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. B. Quarton, of Algona, Iowa, and C. A. Robbins, of Winterset, Iowa, for plaintiff in error.

Harley H. Stipp, Eugene D. Perry, Robert J. Bannister, and Vincent Starzinger, all of Des Moines, Iowa, and James H. McIntosh, of New York City, for defendant in error.

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

CARLAND, Circuit Judge. Action by Bertha Z. Bradley, as plaintiff and beneficiary, to recover upon a policy of life insurance alleged to have been issued by the New York Life Insurance Company, defendant, on the life of her husband, James M. Bradley. At the trial of the action a verdict was directed for the defendant. Plaintiff has brought the case here for review. The facts are as follows:

On October 16, 1918, James M. Bradley, then a farmer living near the town of Ruthven, in Palo Alto county, Iowa, signed an application for a \$5,000 policy of insurance on his life in defendant company. The application was solicited by one E. H. Reaser, who was a special agent of the company, and whose residence and office were in the city of Algona, in Kossuth county, Iowa. On the same day the applicant was examined by the company's local medical examiner, and pro-

nounced an insurable risk. In said application James M. Bradley covenanted over his signature as follows:

"I agree as follows: (1) That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that, unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; (2) that any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid, shall be binding on the company only in accordance with the terms of the company's receipt therefor on the receipt form which is attached to this application, and contains the terms of the agreement under which said payment has been made, and is the only receipt the agent is authorized to give for such payment; (3) that only the president, a vice president, a second vice president, a secretary, or the treasurer of the company can make, modify, or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts can be done by the agent taking this application."

The application and answers made to the defendant's local medical examiner and the medical examiner's report were forwarded in due course to the home office of the company at New York City, N. Y., where they were received October 19, 1918. On October 23, 1918, a policy was written up as applied for and forwarded from the home office of defendant in New York City to the defendant's branch office in the city of Des Moines, Iowa, to be handled in accordance with the defendant company's established rules. On October 28, 1918, the defendant's branch office at Des Moines mailed the policy as written up to the special agent, E. H. Reaser, at Algona, Iowa. The policy reached Algona, Iowa, sometime during the day of October 29, 1918, and from then on the special agent, E. H. Reaser, never parted with the physical possession of the policy until he returned it to the company as hereinafter stated. On October 29, 1918, defendant's special agent, E. H. Reaser, was ill at his home at Algona, in Kossuth county, Iowa, and so thereafter continued for a period of several days. It is approximately 36 miles from Algona, Iowa, to Ruthven, Iowa. It does not appear that after taking the application on October 16, 1918, there was ever any communication between Reaser and Bradley. On November 1, 1918, the applicant, James M. Bradley, became ill from the "flu," and so continued ill until November 4, 1918, when he died from the "flu." Neither the company nor its special agent, E. H. Reaser, knew of the illness or death of said applicant. After the death of Bradley the special agent, Reaser, went to Ruthven with the intention of delivering the policy, in accordance with his instructions and the company's said rules, and upon arriving at Ruthven was informed of Bradley's death, and he thereupon refused to and never did deliver the policy, but returned the same forthwith to the company's branch office in Des Moines in accordance with the company's rules, and the said branch office in turn returned the policy to defendant's home office in New York City.

At the time of making his application James M. Bradley gave his personal promissory note, in a sum equal to the annual premium required to be paid on the kind and amount of policy applied for, to said E. H. Reaser in the latter's personal and individual capacity, of which the defendant company had no knowledge. The secret agreement be-

tween Bradley and Reaser was that Reaser would himself personally pay the premium due the company and would look to the note Bradley had given him for indemnity. Of this the company was without knowledge. The matter was not noted in the application, and such procedure was forbidden by Reaser's agency contract. The note was never paid, and after the death of James M. Bradley was canceled, surrendered, and returned by the payee therein named, the said E. H. Reaser, to the deceased's widow, Bertha Z. Bradley, the plaintiff. It is conceded that plaintiff made due proof of the death of her husband, the said James M. Bradley. The defendant company refused to pay, for the reason, as it contends, that no contract of insurance was ever made or entered into. It is also conceded that upon his death Bertha M. Bradley, the plaintiff, was appointed as administratrix of the estate of James M. Bradley, and that on November 20, 1918, she duly qualified thereunder, and at the time of the trial was acting as such.

[1, 2] Under the express agreement of Bradley the insurance was not to take effect unless the first premium was paid and the policy delivered to and received by him during his lifetime and good health. The evidence, about which there is no dispute, does not show, in our opinion, either the payment of the first premium or the delivery of the policy. The transaction between Bradley and the agent, Reaser, whereby a note was given for the premium, must be held to have been a private arrangement between Reaser and Bradley, concerning which the company had no knowledge, and which was in direct violation of the rules of the company and the instructions given to the agent. So far as the company is concerned, the record shows no arrangement whereby anything but cash should constitute a valid payment of the first premium. It must be conceded that there was no actual manual delivery of the policy to Bradley in his lifetime or good health, or at all. Reaser was not the agent of Bradley to receive the policy, and delivery to him was not a delivery to Bradley. *Smith v. Commonwealth Life Ins. Co.*, 157 Ky. 146, 162 S. W. 779; *Heiman v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 153 (Gil. 127) 10 Am. Rep. 154. The making out of the policy in New York City on October 23, 1918, and the mailing thereof to the company's branch office at Des Moines, or the mailing at Des Moines to Reaser at Algona, did not constitute a delivery of the policy, as the contract otherwise provided.

Section 1812 of the Iowa Code and the claimed construction of it by the Supreme Court of Iowa in *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743, is not applicable to this case. The section referred to relates wholly to misrepresentation by the insured in securing insurance. There is no claim of misrepresentation in this case. It is conceded that Bradley was in good health and an insurable risk when he made application for insurance, and that he continued so up to the morning of November 1, 1918, when he became fatally ill. There is no claim made that the policy was not delivered because Bradley was not in good health, but because he was dead. The following Iowa cases illustrate the purpose of the statute: *Boulting v. New York Life Ins. Co.* (1918) 182 Iowa, 797, 802, 166 N. W. 278; *Weimer v. Association*, 108 Iowa,

451, 79 N. W. 123; *Stewart v. Association*, 110 Iowa, 528, 81 N. W. 782; *Nelson v. Insurance Co.*, 110 Iowa, 600, 81 N. W. 807; *Peterson v. Association*, 115 Iowa, 668, 87 N. W. 397; *Welch v. Insurance Co.*, 117 Iowa, 394, 90 N. W. 828; *Roe v. Association*, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144.

No insurance was effected under the facts. *Rushing v. Manhattan Life Ins. Co.* (1915) 224 Fed. 74, 139 C. C. A. 520; *John Hancock Mutual Life Ins. Co. v. McClure* (1914) 218 Fed. 597, 134 C. C. A. 355; *Kennedy v. Mutual Life Ins. Co.* (D. C. 1913) 205 Fed. 677; *Cable v. United States Life Ins. Co.* (1901) 111 Fed. 19, 49 C. C. A. 216; *Equitable Life Assurance Society v. McElroy* (1897) 83 Fed. 631, 28 C. C. A. 365; *Piedmont & Arlington Life Ins. Co. v. Ewing* (1875) 92 U. S. 377, 23 L. Ed. 610; *Paine v. Pacific Mutual Life Ins. Co.* (1892) 51 Fed. 689, 2 C. C. A. 459; *Misselhorn v. Mutual Reserve Fund Life Ass'n* (C. C. 1887) 30 Fed. 545; *Kohen v. Mutual Reserve Fund Life Ass'n* (C. C. 1886) 28 Fed. 705; *McKenzie v. N. W. Mutual Life Ins. Co.* (Ga. 1921) 105 S. E. 720; 1 *Joyce, Ins.* (2d Ed.) §§ 97a, 98, and cases there collected; 25 *Cyc.* pp. 718, 719.

The other assignments of error have been considered and found to be without merit.

Judgment affirmed.

WOOD v. W. E. SEXTON CO.

(Circuit Court of Appeals, Third Circuit. September 10, 1921.)

No. 2686.

1. Trial ⇨284—Failure to call attention to error in instructions waives the error.

Where it is obvious from the remarks of the trial judge at the close of his charge that he believes he has substantially covered the requests to the satisfaction of the litigants, though in fact he has inadvertently overlooked some of them, and an opportunity is given to bring to his attention the omissions or dissatisfaction, failure to take advantage of this opportunity waives the error.

2. Trial ⇨278—Objections to charge must be specific.

Objections to the charge of the trial judge must be specifically made, in order that he may be given an opportunity to correct errors and omissions, before the same are made the basis of proceedings in error.

3. Sales ⇨416 (2)—Evidence held immaterial in action for breach of contract.

In an action for breach of contract for delivery of iron pipe, evidence to show that when the contract was made the market price was higher than the contract price held immaterial on the question of the measure of damages.

4. Sales ⇨174—Refusal of seller to perform held not justified by delay of buyer in making payments.

Where plaintiff had been buying goods from defendant for a number of years, and making payments from time to time on its general account, which had never been settled or stated, failure to make payments within the time required by the terms of a contract did not justify defendant in refusing to make further shipments thereunder without previous notice to plaintiff.

5. Sales ⇐418(7)—Offer by seller to fill contract at advanced price held not to limit buyer's damages for breach.

In an action for breach of contract to sell and deliver iron pipe, an offer by defendant to fill the contract at an advanced price could not limit plaintiff's damages to the difference between the contract price and the price named in such offer, where such offer was not made unconditionally, but required, expressly or impliedly, that plaintiff relinquish its rights to damages under the contract in accepting the offer.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by the W. E. Sexton Company against Walter Wood, trading as R. D. Wood & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles B. Finley, of Philadelphia, Pa., for plaintiff in error.
Ralph B. Evans, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This suit arose out of an alleged breach of a contract for 1,000 tons of pipe. On October 21, 1916, the W. E. Sexton Company, of Mineola, N. Y., placed an "order for one thousand tons 'class B' pipe immediate and winter shipments, price twenty-nine dollars six-inch and larger; four-inch, thirty-two dollars"—with Walter Wood, trading as R. D. Wood & Co., of Philadelphia. Two days later the defendant accepted the order. In January, 1917, the plaintiff ordered approximately 353 tons of the 1,000, which was eventually delivered; but the rest had not been delivered on March 14, 1917, when a telephone conversation was held between the parties, and Wood asked the Sexton Company to send the specifications for the remaining tonnage. They were sent on that day, but at this time the market price had risen to about \$20 a ton above the contract price. Then passed between them a number of letters. In these the plaintiff sought to enforce, and the defendant to avoid, the contract. They were diplomatically maneuvering for the best terms of adjustment, and, if that failed, then for an advantageous position for the coming litigation. Finally, on May 30, 1917, the defendant definitely refused to fill the balance of the contract. Thereupon the plaintiff went into the open market and purchased the pipe, and brought suit for \$15,527.38, with interest, which was the difference of \$24 per ton between the market price at that time and the contract price, on the 646.97 tons still undelivered.

The jury rendered a verdict for the full amount of the demand, and the defendant sued out a writ of error to this court, based upon 12 assignments. The first, second, and twelfth assignments are general and formal, and do not require consideration. The other nine may be reduced to the following propositions:

I. The court erred in sustaining objections to questions designed to establish the market price of pipe in October, 1916, when the contract was made.

II. The court erred in refusing to affirm the defendant's "points" for charge, which were in substance as follows:

1. The defendant was justified in his refusal to ship the remaining pipe because the plaintiff failed (1) to make payment on time of other bills past due; (2) to furnish in time specifications in compliance with the requirement of the trade meaning of the words "winter shipments."

2. The measure of damages adopted was illegal, because the plaintiff did not avail itself of the lowest price offered, but instead bought in the open market at a higher price.

3. The contract was breached, if at all, on March 16, 1917, and the market price of pipe must be fixed as of that date, and not at the higher price on May 30, 1917.

[1] These propositions, with the exception of the first, might be disposed of upon technical grounds. At the conclusion of the charge the trial judge said:

"There have been a number of points submitted to me. So far as affirmed in the general charge, they are affirmed; so far as not affirmed in the general charge, they are denied."

The defendant did not take an exception to the refusal to take up his points seriatim and affirm them, but left the trial judge under the impression that he had satisfactorily covered the points. Where it is obvious from the remarks of the trial judge at the close of his charge that he believes he has substantially covered the requests or "points" to the satisfaction of the litigants, though as a matter of fact he has inadvertently overlooked some of them, and an opportunity is given to bring to his attention the omissions or dissatisfaction, failure to take advantage of this opportunity waives the error. *Pennsylvania Railroad Co. v. Minds et al.*, trading as *Bulsh Coal Co.*, 250 U. S. 368, 373, 39 Sup. Ct. 531, 63 L. Ed. 1039.

[2] Objections to the charge of the trial judge must be specifically made, in order that he may be given an opportunity to correct errors and omissions before the same are made the basis of proceedings in error. This is the only course fair to the court. *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Jacobs v. Southern Railway Co.*, 241 U. S. 229, 239, 36 Sup. Ct. 588, 60 L. Ed. 970; *Guerini Stone Co. v. Carlin Construction Co.*, 248 U. S. 334, 338, 39 Sup. Ct. 102, 63 L. Ed. 275. Under the rules of this court, however, notwithstanding the failure of counsel to take advantage of the opportunity to have the trial judge pass on his points individually, a case involving a substantial amount should perhaps be considered upon its merits.

[3] The defendant sought to establish that the actual market price in October, 1916, was higher than the contract price, in order to show that there were special inducements or reasons which he had for entering into the contract. But, whatever his motives or reasons for entering into the contract were, they have no bearing upon the issue. Whether the market price was higher or lower than the contract price is immaterial. The parties fixed the price, and if the defendant is liable for damages the measure thereof is the difference between the contract price and the market price at the time of the breach. The establishment, therefore, of the market price at the time of the execu-

tion of the contract, and the reasons of the defendant for entering into it, were properly excluded.

[4] The defendant contends that, if there was a breach of the contract, it occurred on March 16, 1916, when he "fully, definitely, and clearly" refused to ship the balance of the pipe, and that his reason for so doing was the failure of the plaintiff to make long overdue payments. However, the defendant's letters of the 16th and 19th of March do not contain a statement or hint that he had refused or would refuse to ship the balance of the pipe because of payments then past due on pipe already shipped. The contract does not fix the time of payment, but the plaintiff admits that in the absence of a definite time fixed in the contract it is understood in the trade that payment will be made within 30 days after delivery. The defendant could have insisted on payment within that time, unless he had waived his rights as to the time of payment by his course of dealing with the plaintiff. If he had done so, it was necessary for him to notify plaintiff that thereafter payments must be made in accordance with the terms of the contract and the law, before he could terminate the contract and refuse to ship the remainder of the pipe on the ground of nonpayment of overdue bills. *Portland Ice Co. v. Connor*, 32 Pa. Super. Ct. 428; *Honesdale Ice Co. v. Lake Lodore Improvement Co.*, 232 Pa. 293, 81 Atl. 306; *Hebron Manufacturing Co. v. Powell Knitting Co.*, 171 Fed. 817, 96 C. C. A. 489; *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. Ed. 693. There was no evidence that the defendant had given such notice. The learned trial judge fully charged the jury on this point.

The plaintiff, however, had been dealing with the defendant for several years, and the account between them had never been definitely stated and a balance struck. Defendant made shipments to the plaintiff, on which payments had been made from time to time, which defendant credited to the general account of the plaintiff. Over some of these shipments, however, there were controversies as to the exact amount due. Deductions were demanded by the plaintiff. This was the case on March 14, 1916. The plaintiff had asked a number of times that there disputes be adjusted, and adjustment was finally made on April 17, 1916, and the account was paid in full. The evidence cannot be read without reaching the conclusion that the failure of the defendant to ship the balance of the pipe upon receiving the specifications on or about March 14, 1917, was due to the increase in the price of pipe of about \$20 per ton at that time, and that the refusal to ship pipe because payments then due had not been made was an afterthought.

The main defense upon which defendant principally relied is the meaning to be given to the words "winter shipments" in the trade. The defendant contended in his affidavit of defense that "winter shipments" in the trade meant while the ground was frozen too deep for digging, and not the calendar ending of winter on March 21st. He sought to show at the trial, however, that specifications on orders must be given in time for the seller to manufacture and ship the pipe while the ground was frozen; that it would require some four or five weeks to manufacture the balance of this pipe, and, as the specifications were not sent in

by plaintiff until March 14, 1917, there was not sufficient time to manufacture and ship the pipe within the time required by the contract. On the other hand, the plaintiff testified that it was given to understand by the defendant that he had on hand large quantities of the kinds of pipe ordered. Plaintiff, therefore, charged as a fact that defendant did have more than enough of such pipe on hand and that it was not necessary to manufacture any whatever to fill the order. This was nowhere denied. The court went into this particular phase of the case at length in his charge, which clearly covered the "points," and it was not error thereafter to refuse to charge them in the language of the defendant.

[5] On March 16, 1917, the defendant wrote the plaintiff in reply to the letter of March 14, in which he alleged that he would fill the balance of the order, the six-inch and the eight-inch pipe at \$39 per ton, and the four-inch at \$42 per ton, which was \$10 above the contract price, but \$10 lower than the market price at that time. Defendant contends that, even if liable, the measure of damages is the difference between the contract price and the above-quoted price, which would be \$10, and not \$24, per ton, which plaintiff paid on May 30, 1917. When a defendant has failed to perform his contract, it is the duty of the plaintiff to use all reasonable diligence to reduce the damages, and to buy the goods, to have been furnished under the contract, at the lowest possible price. If he does not do so, and purchases at a higher price, the measure of damages will be the difference between the contract price and the lower price for which he could have bought with reasonable diligence. *The Oregon*, 55 Fed. 668, 673, 5 C. C. A. 229; 2 Sedg. Dam. (8th Ed.) § 482.

The facts of the instant case, however, do not bring it within this rule. If the offer had been made unconditionally, and did not require, expressly or impliedly, that plaintiff relinquish its rights to damages under the contract in accepting the offer, it would be limited to the difference of \$10 per ton between the contract price and the price offered. But the very ground on which this reduction in price was offered involved the surrender by the plaintiff of its rights under the contract. It was not compelled to give up anything it had under the contract, and the measure of damages is therefore not limited to the difference between the contract price and the price offered on March 16. There is no evidence that the price paid by the plaintiff was not then the market price. Therefore, as charged by the court, the measure of damages for which the defendant is liable, if liable for any, was the difference between the market price at the time of the breach and the contract price.

Defendant claims that the contract was breached by him, if at all, on March 16, 1917, when he definitely refused to deliver the balance of the pipe under the contract, and that under any view of the case the measure of damages is the difference between the contract price and the market price of that date, and not the higher market price of May 30, 1917. There was, however, not a definite refusal, as above noted, of the defendant to ship the iron covered by the contract until May

30, 1917. Both parties presented their evidence as to the time of the breach to the court and jury. The court charged that the plaintiff is entitled to the difference, if entitled to anything, between the contract price and the market price at the time of the breach, or within such a reasonable time thereafter as the plaintiff could have gone into the open market and have supplied itself. In reaching the verdict upon the evidence and instructions of the court, the jury determined the time of the breach, and there was evidence to support its finding. Consequently the defendant is bound thereby.

The judgment of the District Court will therefore be affirmed

KINNEY-ROME CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Seventh Circuit. September 8, 1921.)

No. 2874.

Trade-marks and trade-names and unfair competition ⇨68—Giving by manufacturer of premiums to salesmen of retailers not "unlawful or unfair competition."

Giving of premiums by manufacturer to salesmen of retailers, with the knowledge and consent of such retailers, to induce the salesmen to push the sale of the manufacturer's goods, was not "unlawful or unfair competition," within the meaning of Federal Trade Commission Act (Comp. St. §§ 8836a-8836k), making unlawful unfair methods of competition in commerce; such conduct of the manufacturer not constituting fraud nor unfairness to the public.

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

Petition to Review an Order of the Federal Trade Commission.

Petition by the Kinney-Rome Company to review an order made by the Federal Trade Commission. Order annulled.

Colvin C. H. Fyffe, of Chicago, Ill., for petitioner.

Marshall B. Clarke, of Washington, D. C., for respondent.

Before EVANS and PAGE, Circuit Judges, and CARPENTER, District Judge.

PAGE, Circuit Judge. This is an original petition filed by petitioner to review an order made by the Federal Trade Commission, respondent, in a proceeding wherein respondent had filed its complaint, charging that petitioner was engaged in manufacturing and selling bed springs in interstate commerce in direct competition with other corporations similarly engaged, and that—

"Respondent [petitioner] for more than one year last past, with the intent, purpose, and effect of stifling and suppressing competition in the manufacture and sale of bed springs and kindred products, in interstate commerce, has given and offered to give premiums, consisting of necktie sets, * * * to the salesmen of merchants handling the products of the respondent [petitioner] and those of its competitors, as an inducement to influence them to push the sales of respondent's [petitioner's] products, to the exclusion of the products of its competitors."

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

The matter was submitted to the respondent upon an agreed state of facts, in substance as follows:

"That the respondent, the Kinney-Rome Company, in the course of its business of manufacturing and selling 'De Luxe' bed springs, has * * * given and offered to give premiums, such as necktie sets, etc., * * * to the salesmen of merchants handling the products of the respondent and those of its competitors, when such salesmen have been instrumental in making a sale of respondent's 'De Luxe' bed springs; these premiums being given with the knowledge and consent and through arrangements with the merchants who are the employers of said salesmen. * * * Salesmen of respondent's said customers do not explain the above-described system of premiums to persons to whom they sell the said 'De Luxe' bed springs, so far as is known to respondent."

The findings of fact followed the stipulation of facts, and stated this conclusion:

"That the methods of competition set forth in the foregoing findings, as to the facts under the circumstances set forth, are unfair methods of competition in interstate commerce in violation of the provisions of section 5" of the Federal Trade Commission Act of September 26, 1914. 38 Stats. L. 717 (Comp. St. § 8836e).

Thereupon respondent entered the order here complained of, which is in part:

"It is ordered that the respondent * * * cease and desist from directly or indirectly giving * * * premiums, such as necktie sets, * * * to salesmen or employees of merchants handling the products of the respondent and those of one or more of its competitors, where such salesmen or employees have been instrumental in making a sale of the respondent's products."

Section 5 provides that—

"Unfair methods of competition in commerce are hereby declared unlawful," and "the commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect."

1. In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993, it is said:

"The words 'unfair methods of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."

While the exact words "unfair methods of competition" have not been frequently, if at all, used in the decisions, yet "unfair competition" and "unfair trade," have been repeatedly the subject of consideration and discussion by federal and state courts, and several times in this circuit. In *Pillsbury v. Pillsbury-Washburn, etc., Co.*, 64 Fed. 841, 845, 12 C. C. A. 432, 436, this court said:

"The right of appellees to relief is * * * rested upon principles applied by courts of equity in cases analogous to cases of trade-marks, where the relief is afforded upon the ground of fraud."

In *Cole Co. v. Am. Cement & Oil Co.*, 130 Fed. 703, 65 C. C. A. 105, it was stated by this court:

"The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods of trade, as well as upon the right of a complainant to enjoy the good will of a trade built up by his efforts, and sought to be taken from him by unfair methods."

In *Goodyear, etc., Co. v. Goodyear Rubber Co.*, 128 U. S. 598, at page 604, 9 Sup. Ct. 166, 168 (32 L. Ed. 535), it was said:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff."

In *Howe Scale Co. v. Wyckoff, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, the court stated:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *International News Service v. Associated Press*, 248 U. S. 215, at page 241, 39 Sup. Ct. 68, 73 (63 L. Ed. 211, 2 A. L. R. 293), it was said:

"It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition [citing *Howe Case*, supra]. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business, because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own."

See, also, *Keystone Type Foundry v. Portland Pub. Co.*, 186 Fed. 690, 108 C. C. A. 508; *Sterling Remedy Co. v. Eureka Chem. & Mfg. Co.*, 80 Fed. 105, 25 C. C. A. 314; *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26, 30, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; *Bates Mfg. Co. v. Bates, etc., Co.* (C. C.) 172 Fed. 892; *West Pub. Co. v. Ed. Thompson Co.* (C. C.) 169 Fed. 833; *Manitowoc Malting Co. v. Milwaukee Malting Co.*, 119 Wis. 543, 97 N. W. 389; *Sartor v. Schaden*, 125 Iowa, 696, 101 N. W. 511; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. (N. S.) 447; *Rocky Mountain Bell Tel. Co. v. Utah Independent Tel. Co.*, 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153; *Bissell Chilled Plow Wks. v. T. M. Bissell Plow Co.* (C. C.) 121 Fed. 357; *Am. Brewing Co. v. Bienville Brewery* (C. C.) 153 Fed. 615.

There are many other cases in the federal courts which cite the *Howe* and *Goodyear* Cases.

2. It is not conceived that Congress, which laid down no definition whatever, intended to either limit or extend the matters which constitut-

ed unfair methods of competition prior to the passage of the Clayton Act (*Curtis Pub. Co. v. Federal Trade Com.* [C. C. A.] 270 Fed. 881, 908), but that its object was the creation of a board of commissioners, who, as stated in the *Sears-Roebuck Case*, 258 Fed. 307, 311, 169 C. C. A. 323, 327 (6 A. L. R. 358)—

"are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases."

We conclude, from the discussion of the term "unfair competition" by the courts, and we are of opinion, that there must be some fraud in trade that injures a competitor, or lessens competition, before it can be said that there has been used an "unfair method of competition."

3. Without, perhaps, admitting petitioner's conclusions, even if its premises are true, respondent vigorously assails those premises, saying:

"Petitioner's whole brief is based on this false assumption—that the manufacturer is justified in doing whatever the dealer may do."

We are of opinion that the assumption is not false, but is fully justified. The stipulated facts show:

"These premiums being given with the knowledge and consent and through arrangements with the merchants who are employers of said salesmen."

It cannot be that a merchant may personally do a thing touching his business that is legal, but that it becomes illegal when done by another through his procurement. When petitioner did the things complained of through arrangement with the merchants, the merchants became parties to the act. As it effected sales of their property, presumably they profited by the arrangement. If it was lawful as to one, it was lawful as to the other.

4. In determining whether there was used "an unfair method of competition," it must always be kept in mind that the thing complained of was done in the merchant's business through an arrangement with him. What, then, may the merchant do? In *United States v. Freight Ass'n*, 166 U. S. 290, at page 320, 17 Sup. Ct. 540, 551 (41 L. Ed. 1007), the Supreme Court said:

"The trader or manufacturer * * * carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

That case has been repeatedly approved, and a portion of that language was used in *United States v. Colgate*, 250 U. S. at page 307, 39 Sup. Ct. 468, 63 L. Ed. 992, 7 A. L. R. 443. In respondent's brief is asserted a self-evident truth, viz.:

"The manufacturer has no such relation to the goods after he has sold them as entitles him to control their resale by the dealer."

This means that not only petitioner, but every manufacturer, is excluded from all right to control the merchant in his resale of his goods.

No one, then, having any right to interfere in his business, or to control in any way the resale of his goods, the merchant may do and permit to be done anything in connection with his business that he may see fit, and those he permits to participate in his business may do anything in that business permitted by him, and no one has any right to complain, unless that which is done amounts to a fraud upon his rights. If such right did not belong to the merchant, then he would not have the ordinary rights of contract that belong to every man, and he would be compelled to carry the burdens, risks, and hazards of a business, subject, without his consent, to the control of every manufacturer who might have sold him a bill of goods.

5. The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered. It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame, and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with the other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public. It needs no discussion to show that that was wholly his competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to any one who does not own the goods.

Likewise the public, if it has an interest in competition has such interest only in the competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

6. We are of opinion that there can be nothing in the contention that some special interest in a clerk which is undisclosed to the buying public represents an unfair method of competition, because of an incentive and opportunity of the clerk to deceive the public. Undoubtedly the clerk, with the master's consent, may discriminate between the master's goods. All of the buying public, with at least ordinary knowledge and intelligence, knows that a salesman is representing the merchant's interest, and that every merchant may and very frequently does have reason for pushing the sale of one kind of goods more than another; but, if that were not true, it would be little less than an absurdity to

say that a salesman, who often is the merchant himself, in order to escape the charge of unfairness, must disclose to every would-be buyer his interest in the transaction in hand. That is just what the contention, if allowed, would lead to.

Nor is it conceived that there is any danger from falsehood or misrepresentation. A salesman, with the master's consent, may discriminate all he pleases between the goods he has to sell. Neither a salesman having a special interest in one article, where he has many to sell, nor a salesman with a single article to sell, has any right to indulge in falsehood and misrepresentation; but there is here no evidence of falsehood or misrepresentation.

The order to cease and desist is annulled and set aside.

UNITED STATES v. COOKSEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1921. Rehearing Denied Dec. 5, 1921.)

No. 3551.

1. Public lands ⇨120—**Burden on owner of land to establish defense of bona fide purchaser.**

In a proceeding by the United States to cancel a patent for land fraudulently obtained in violation of the provisions of Timber and Stone Act June 3, 1878, as amended by Act Aug. 4, 1892 (Comp. St. §§ 4671-4673, 4988, 10216), defendants had the burden of proof to establish their defense of bona fide purchasers.

2. Public lands ⇨138—**Person having knowledge of fraudulent seeking of public lands held agent of defendants, claiming as bona fide purchasers.**

In a suit by the United States to cancel a patent for lands fraudulently obtained in violation of the provisions of Timber and Stone Act June 3, 1878, as amended by Act Aug. 4, 1892 (Comp. St. §§ 4671-4673, 4988, 10216), a contract reciting that person obtaining the land fraudulently, or having knowledge that it was being obtained fraudulently, agreed to sell the land described, *held* an agreement whereby defendants engaged the services of such person as their agent to procure for them the title to the lands, so as to bring them within the rule that knowledge of agent is knowledge of principal.

3. Principal and agent ⇨177(1)—**Notice to agent notice to principal.**

Notice to or knowledge of an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to or knowledge of the principal.

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 the United States against Edward L. Cooksey and others. Judgment for defendants, and the United States appeals. Reversed and remanded, with instructions.

This appeal, together with appeals in 23 companion cases, was taken from a decree dismissing a suit to cancel a patent for lands alleged to have been fraudulently obtained in violation of the provisions of the Timber and Stone Act (Act of Congress June 3, 1878, amended by Act of August 4, 1892 [Comp. St. §§ 4671-4673, 4988, 10216]). Cooksey's Case is taken as representative.

The complaint alleges that the entryman swore falsely, in that he swore that he applied for land named in the application for his own benefit, whereas, before making his application, he had agreed to convey the land to the Curtis, Collins & Holbrook Company; that that company knew of the fraud and procured Cooksey to make the entry for its benefit. The defense of bona fide purchaser is relied upon. Upon reference, the master found that the entries had been made under prior illegal agreements between the entrymen and one Tuman, but that the Curtis, Collins & Holbrook Company had no notice of such illegal arrangements and was an innocent purchaser. The substance of the findings is:

In 1901, Tuman endeavored to interest C. H. Holbrook, Sr., in certain timber land in California. At that time persons owning lands within the limits of the national forests could reconvey them to the United States and select in lieu other lands of equal area outside of the national forests. In December, 1901, Holbrook, as party of the first part, and J. G. Curtis and T. D. Collins, as parties of the second part, agreed among themselves in writing as follows:

For a consideration of \$1 from each of the parties to the other, and the promises contained, Holbrook agreed to sell Curtis and Collins 42,380 acres of timber land in California, and to have title vested in Collins and Curtis as in the manner set forth in the contract at \$7.50 per acre. The timber lands were described in a schedule. Holbrook was to obtain title to the 42,380 acres of forest reserve land for which he was to receive from the United States a like quantity of the timber lands, title to be secured to Curtis and Collins in the following manner:

The forest reserve lands were to be deeded to Thompson, trustee, to be held in trust by him in pursuance of the terms of the agreement. Curtis and Collins were to deposit \$200,000 in bank to be used in purchasing forest reserve land at not exceeding \$5 per acre. Payments were to be made by the bank to the owner of the forest reserve lands upon proper certificate of a designated attorney and the trustee, upon the written request of Holbrook, was to deed the forest reserve lands to the United States and to make application for the timber land, and when title had been acquired to the timber land and upon notice from Holbrook that he had been fully paid, the trustee was to convey to Curtis and Collins, or to whomsoever they might direct. When title was acquired to the 42,380 acres, Holbrook was to be paid the balance of the purchase price named as \$115,600, and should receive 789 shares of the stock of a corporation to be formed and certain sums in cash and the balance in interest-bearing promissory notes of Curtis and Collins. The corporation was to have a capital stock of \$500,000, divided into 5,000 shares of \$100 each, and Curtis and Collins were to deed the lands to the corporation, and 3,156 shares were to be issued to Curtis and Collins, 1,844 shares to remain in the treasury. Holbrook was to be a director and was vice president and general manager. It was further provided that, if Holbrook could not secure title to the whole of the 42,380 acres of land by forest reserve, he might secure such titles through any other legal means or source, but in no event should he or the persons deeding the same be paid for the lands thus acquired until the title thereto was certified to be good by the attorney and deeded to the trustee, and when so certified the bank should pay for the land.

Holbrook and his son acquired the necessary scrip, paying therefor from \$3 to \$5.50 per acre. Tuman was interested with Holbrook, but this was not generally known. When Holbrook reported that it was difficult to obtain forest reserve scrip, he advised Curtis and Collins that there were other valuable public lands, title to which could be secured under the Timber and Stone Law. Curtis and Collins were satisfied, provided good title would be obtained, and pursuant to oral agreement title was acquired under the Timber and Stone Law to about 30,000 acres, including the lands involved in these suits. The timber and stone entries were made through agents of Tuman. One of the agents was told by Tuman that money would be advanced, if necessary, to pay for the land, and that thereafter the entrymen could sell at a profit of \$100 above all expenses, and the agent would receive a location fee of \$25 for each claim that Tuman purchased. Such agreements were carried out, the money was furnished by Tuman, and when the land was en-

tered and the entryman was paid \$100 above all expenses deeds were taken in the name of Charles E. Gregory, who was not known to the entryman, and whose name was used by Tuman and Holbrook. Nearly all the timber and stone entries were made in the last half of 1902, and the deeds to Gregory were made soon after proof by the entrymen, but were not recorded until June, 1904. Gregory deeded to the corporation, Curtis, Collins & Holbrook Company, but knew nothing about the lands and merely permitted his name to be used. The Curtis, Collins & Holbrook Company was organized August 14, 1902, the incorporators being J. G. Curtis and his son, D. G. Curtis, T. D. Collins and his son, E. S. Collins, Charles H. Holbrook and his son, Charles H. Holbrook, Jr., and Irving F. Moulton. Gregory assigned the contracts involved to the company at different times up to 1904, but none of the deeds were recorded until October, 1909, and some were not recorded until 1910 and 1911. By direction of Holbrook, on May 2, 1903, Gregory conveyed the land involved in the Cooksey entry to Curtis, Collins & Holbrook Company, conveyance being made in pursuance of the contract already referred to between Holbrook and Collins and Curtis. The master found that about May 2, 1903, the corporation, in consideration of the conveyance to it, issued to Curtis and Collins its stock at the rate of \$7.50 or \$10 per acre conveyed; that Curtis and Collins paid to Holbrook a valuable consideration for the conveyance to the corporation; that on May 2, 1903, neither Collins nor Curtis nor the corporation knew or were charged with knowledge of the fraud, or of any fraud, and none of them knew or was charged with knowledge of fraud in the obtaining of the patent until 1908, and that therefore the Curtis, Collins & Holbrook Company at the time of the acquisition of the land conveyed by the patent was a bona fide purchaser for a valuable consideration, and without knowledge of any fraud against the United States.

S. W. Williams, Sp. Asst. Atty. Gen., of Pawhuska, Okl., for the United States.

Charles A. Shurtleff and J. G. De Forest, both of San Francisco, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The evidence sustains the finding that Cooksey, entryman, acquired the tract involved by unlawful practices, in that he swore falsely when he made affidavit that prior to his entry he had not made an agreement whereby title to be acquired was to be conveyed to another person. Cooksey made final proof in October, 1903, and a few days afterwards conveyed to Gregory. The deed to Gregory was recorded September 10, 1904. Gregory, in May, 1903, conveyed to the corporation, and the deed was recorded in October, 1909. Gregory was ignorant of any fraud, though he was a trustee for Holbrook and Tuman; and, speaking generally of all the cases like Cooksey's, clearly Gregory as a grantee was a trustee for Holbrook and Tuman. But when we inquire into the attitude of Holbrook and Collins and Curtis, our conclusion is against that of the District Court.

Holbrook was vice president and general manager of the corporation from the time of its organization in August, 1902, until 1904 when he sold his stock to Collins. Holbrook drew checks of the corporation and signed them. Tuman said that Holbrook talked with him, was advised of what was going on, and knew that he was lending money to applicants for entries. The circumstances show that he did. Holbrook established a bank account at Susanville, Cal., and Tuman was au-

thorized to draw against the account. In October, 1902, \$1,728 was drawn from an account in the name of Collins and Holbrook in a San Francisco bank, and like amount was put to the credit of Holbrook in Susanville a few days afterwards. Later in the same year other withdrawals from the same account in a San Francisco bank were made, and substantially equal sums put to Holbrook's credit in the Lassen County Bank. It is but a reasonable inference that this money was used by Tuman to make payments for entries.

. Although Collins and Curtis lived in Pennsylvania, they, together with Holbrook and Tuman, looked at the lands and timber in 1902 after the contract was made. D. G. Curtis, Jr., who was treasurer of the company also frequently went upon the lands. Because of Tuman's claim that he was entitled to an equal interest with Holbrook in the enterprise, a quarrel arose which resulted in a suit by Tuman against Holbrook, filed in 1904, for half of the stock interest that Holbrook had received. T. D. Collins was instrumental in effecting a compromise of the suit whereby Tuman accepted 200 shares of stock in the company and \$10,000 in money.

After the present suit was instituted Collins bought 200 shares of stock from Tuman, paying him \$750 per share, a sum which Collins himself testified was much more than the stock was worth. The explanation given by Collins for paying such a high price for the stock was that he understood an outsider in whose integrity he had no confidence wished to buy the shares. When considered with the other circumstances, the transaction is suspicious. It is in evidence, too, that in 1904 and 1906 officials of the General Land Office were actively investigating entries of lands not involved in this case, but in the same vicinity, and which it was alleged by the officials had been sold to the Curtis, Collins & Holbrook Company. Tuman discussed the matter with Holbrook and testified that Holbrook was opposed to defending the entries. He also talked over the matter with E. S. Collins and T. D. Collins. T. D. Collins admitted that he had talked about these lands, but they were lost, and "that was all there was to it." Holbrook owned about 900 out of 5,000 shares of the capital stock of the corporation, and there are so many circumstances which go to show that he knew what Tuman was doing that it must be held that he had notice, actual or constructive, of fraud committed by Tuman, in the agreements made with the entrymen as to the titles, and that his knowledge is imputable to the corporation. Moreover, we cannot avoid the conclusion that T. D. Collins and J. G. Curtis, and their sons, were sufficiently informed of facts and circumstances to have put them upon inquiry.

[1-3] Appellees had the burden of proof to establish the defense of bona fide purchasers. *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637. There the court distinctly held that one who pleads that he is an innocent purchaser without notice must establish affirmatively his defense, in order to defeat the right of the government to cancellation of a conveyance which fraud alone is shown to have induced. The same doctrine is laid down in *Cooper v. United States*, 220 Fed. 871, 136 C. C. A. 501; *No. Colo. Coal Co. v.*

United States, 234 Fed. 34, 148 C. C. A. 50. And in our judgment it was error on the part of the master and of the District Court to consider the case as one where the burden was on the government to prove that the purchaser had notice of the fraud. The evidence is undisputed that the purchases of lands were made in pursuance of the contract between Holbrook, party of the first part, and Collins and Curtis, parties of the second part. By the terms of the contract there was an obligation upon the parties of the second part to deposit a large sum to be used, not by Holbrook, but by the bank, in payment for forest reserve lands, the lands to be deeded by the owners to the trustee and to be paid for by the bank upon Holbrook's certificate that the vendors were entitled to payment and the certificate of the attorney that the title was good.

While the contract in its first part recites that Holbrook promises and agrees to sell the land described in the manner set forth thereafter in the contract in reality the contract is one, and was carried out as one, whereby the parties of the second part engaged the services of Holbrook as their agent to procure for them the title to the lands referred to, the purchase price of the lands to be paid by the parties of the second part out of their own funds and to be paid, not to Holbrook, but directly to the vendors of the lands. The corporation took deeds from Gregory, but paid him no consideration whatever for the land. The purchase was not made from Holbrook and from Curtis and Collins individually, because neither Holbrook nor Curtis nor Collins had the title to the land and none of them were in possession thereof. In its real aspect the case is brought within the familiar rule that notice to, or knowledge of, an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to or knowledge of the principal. *Mechem on Agency*, § 1803.

We can find no substantial ground upon which to conclude that the case is excepted from the general rule. It follows that Holbrook's knowledge is imputable to his principals, and they must be held to have known of the method by which the title to the lands was acquired. *No. Colo. Coal Co. v. United States*, 234 Fed. 34, 148 C. C. A. 50.

The decree is reversed, and the cause is remanded, with instructions to enter a decree canceling the patent.

Reversed.

UNITED STATES v. HUNTINGTON et al.
and twenty-two other cases.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1921. Rehearing Denied December 5, 1921.)

Nos. 3554-3576.

Public lands ⇌ 120—Evidence held to show fraud in obtaining patents.

In actions by the United States to cancel patents to land for fraudulent representations of entrymen, evidence held to show fraud and knowledge thereof on the part of defendants.

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

Appeals from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suits by the United States against John Huntington and others, against Reuben J. Mitchell and others, against Henrietta Tuman and others, against Gertie Terrell and others, against Rebecca H. Heppe and others, against Jacob S. Aid and others, against Thomas L. Aid and others, against Henry Morley and others, against Elijah Taylor and others, against Robert Charles Taylor and others, against Carrie M. Allen and others, against James D. Baker and others, against Mayme H. Baker and others, against John L. Gray and others, against Margaret J. Baker and others, against M. Jackson Self and others, against John Vanornum and others, against George D. Gardenhire and others, against James D. Aid and others, against John W. Aid and others, against Charles J. Allen and others, against Charles J. Monroe and others, and against William J. Gardenhire and others, to cancel patents to land. From decrees in each case for defendants, the United States appeals. Reversed and remanded, with directions.

S. W. Williams, Sp. Asst. Atty. Gen., of Pawhuska, Okl., for the United States.

Charles A. Shurtleff and J. G. De Forest, both of San Francisco, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In each of the above-entitled cases the essential facts are similar to those found in the Cooksey Case, 275 Fed. 670.

In Huntington's Case entry was made October 16, 1902. Deed to Gregory was executed nine days thereafter, but not recorded for about two years, and after patent was issued. The land was conveyed to the Curtis, Collins & Holbrook Company May 2, 1903, but the deed was not recorded until several years later.

In Mitchell's Case the entry was made November 18, 1902, and on that day he executed a deed of conveyance to Gregory, which was not recorded until September 14, 1904. Gregory conveyed on May 2, 1903, to the corporation, but the deed was not recorded until several years had passed.

Henrietta Tuman's Case disclosed that the entry was made September 20, 1902, the land conveyed to Gregory January 20, 1903, but the deed not recorded until September 10, 1904. Gregory conveyed to the corporation October 15, 1904, but the deed was not recorded until more than five years thereafter.

Gertie Terrell made entry September 3, 1902, deeded to Gregory on September 11, 1902, but the deed was not recorded for about two years, and until after patent issued. Gregory conveyed to the corporation in December, 1902, but the deed was not recorded until more than seven years had passed.

The case of Rebecca H. Heppe shows that the entry-woman conveyed to Gregory about a week after she made entry, but the deed was not re-

corded until two years afterwards, and until several months had passed after patent was issued. Gregory conveyed to the corporation in December, 1902, but the deed was not recorded until years afterwards.

Jacob S. Aid made entry November 21, 1902, and deeded to Gregory December 9, 1902, but the deed was not recorded until about two years afterwards. Patent issued June 8, 1904, and Gregory deeded to the company May 2, 1903, but the deed was not recorded until six or seven years afterwards.

Thomas L. Aid and James D. Aid made entries November 21, 1902, conveyed to Gregory December 9, 1902, but the deeds were not recorded until two years later. Gregory conveyed to the corporation May 2, 1903, and patents were issued in 1904, but the Gregory deeds were not recorded for several years afterwards.

In Henry Morley's case entry was made December 24, 1902. Conveyance to Gregory was made December 19, 1902, but the deed was not put on record for two years, and until after patent was issued. Gregory's conveyance to the corporation was dated May 2, 1903, but it was not recorded for several years afterwards.

Elijah Taylor made entry November 29, 1902, conveyed to Gregory December 1, 1902, but the deed was not recorded until December 14, 1904. Patent issued June 8, 1904, and Gregory conveyed to the company May 2, 1903, but the deed was not recorded until more than five years later.

Robert C. Taylor's entry was made November 29, 1902, and on December 1st thereafter Taylor conveyed to Gregory, and the deed was recorded September 23, 1904. Patent to Taylor issued June 8, 1904, and Gregory conveyed to the company May 2, 1903, but Gregory's deed to the company was not recorded until about seven years thereafter.

Carrie M. Allen made entry October 3, 1902, deeded to Gregory October 14, 1902, but the deed was not recorded until March 28, 1910. Patent was issued September 15, 1904, and Gregory conveyed to the corporation December, 1902, but the deed was not recorded until more than six years thereafter.

James D. Baker made entry August 23, 1902, and very shortly afterwards conveyed to Gregory, but the deed to Gregory was not recorded until September, 1904, and after patent had issued. Gregory conveyed to the corporation in December, 1902, but there is no record of the deed until years thereafter.

Mayme H. Baker made entry July 30, 1902, conveyed to Gregory September 6, 1902, and her deed was recorded November 12, 1904, after patent had been issued. Gregory conveyed to the corporation December 2, 1902, but the deed was not recorded until several years thereafter.

John L. Gray made entry November 29, 1902, and deeded to Gregory two days thereafter, but no deed was recorded until 1909. Patent issued in April, 1905, and in 1903 Gregory had conveyed to the corporation, but the deed was not recorded until 1910.

Margaret J. Baker made entry August 29, 1902, and conveyed to Gregory September 6, 1902, but no deed was recorded until April, 1910,

long after patent had issued. Gregory conveyed to the company December 2, 1902, but the deed was not put on record until more than six years afterwards.

M. J. Self made entry February 6, 1903, conveyed to Gregory March, 1903, but there is no record of the deed until May, 1905. Gregory conveyed to the corporation in May, 1903, but the deed was not recorded until more than five years afterwards.

John Vanorum made his entry January 26, 1903, and on February 24, 1903, deeded to Gregory. The deed was recorded October 29, 1904, shortly after patent issued. Gregory deeded to the corporation in May, 1903, but his deed was not recorded for several years.

George D. Gardenhire made entry September 22, 1902, soon thereafter conveyed to Gregory, but the deed was not recorded until March, 1911. Patent issued in December, 1904, and Gregory conveyed to the corporation in 1902, but the deed from Gregory was not recorded for more than six years afterwards.

John W. Aid made entry in November, 1902, conveyed to Gregory in December, 1902, and his deed was recorded in February, 1911. Patent issued in 1906 and Gregory conveyed to the company in 1903, but the deed was not recorded for several years thereafter.

Charles J. Allen made entry October, 1902, conveyed to Gregory about ten days afterwards, and the deed was recorded in March, 1910. Gregory deeded to the corporation in November, 1902. Patent was issued in January, 1905, but the deed to the company was not recorded for several years afterwards.

Charles J. Monroe made entry in September, 1902, and conveyed the land two days afterwards to Gregory, but the deed was not recorded until March, 1911, about five years after patent had issued. Gregory conveyed to the company in December, 1902, but the deed was not recorded until about seven years thereafter.

W. J. Gardenhire made entry September, 1902, conveyed to Gregory in the same month, but the deed was not recorded until 1910, or six years after issuance of patent. Gregory deeded to the company in December, 1902, but the deed was not recorded until years afterwards.

Upon the authority of *United States v. Cooksey et al.*, just heretofore decided, in each of the above-entitled cases, the decree of the lower court is reversed, and the cause is remanded, with directions to enter a decree canceling the patent.

Reversed.

J. C. TURNER LUMBER CO. et al. v. TOOMER.

(Circuit Court of Appeals, Fifth Circuit. October 18, 1921.)

No. 3750.

1. Receivers ⇨199—Final consent decree held to provide for attorney's fees.

Where original order appointing receiver authorized him to employ counsel, a final consent decree, expressly reserving the jurisdiction of the court to "ascertain, fix, and order payment of the costs of administration," held to include ascertainment, fixing, and payment of receiver's counsel fees.

2. Attorney and client ⇨20—Attorney for party may act as attorney for receiver.

Although generally attorneys for a party should not act as attorneys for a receiver without permission of the court, there is no rule that under no circumstances should an attorney for a party act as attorney for the receiver, for in some cases an attorney for one of the parties can give the most efficient service to a receiver without conflict of duty.

3. Receivers ⇨113—Order of court awarding compensation to receiver's counsel is an approval of counsel's employment.

Where the court could have authorized the employment of counsel for the receiver, he could approve such employment made under a general authority, and the court's order awarding compensation is such an approval.

4. Receivers ⇨199—Evidence not necessary in fixing receiver's counsel's compensation.

Where the record did not show that the court was not fully advised as to the services rendered by receiver's counsel and of their value, the introduction of evidence was not essential to a decree fixing such compensation.

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

Suit by Frank N. Snell and another against J. C. Turner Lumber Company and another, in which a receiver was appointed. 271 Fed. 696. From an allowance of attorney's fee to W. M. Toomer, the J. C. Turner Lumber Company and others appeal. Affirmed.

E. K. Wilcox, of Valdosta, Ga., and Samuel Silbiger, of Brooklyn, N. Y., for appellants.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This appeal assails a decree of the District Court awarding a fee of \$750 to the appellee for professional services as an attorney for the receiver in the case of Frank N. Snell and Jay E. Rice v. J. C. Turner Lumber Company and Frank Snell Lumber Company, 271 Fed. 696. The appellants are said Lumber Company and the Council Lumber Company, the purchaser at the judicial sale of the assets of said Frank Snell Lumber Company. The original suit was filed in the superior court of Clinch county, Ga., which appointed a receiver. It was subsequently removed into the United States District Court for the Southern District of Georgia. The order of appointment provided that—

"For his assistance in the discharge of his duties as receiver, the said receiver is authorized to employ and retain such agents, servants, and attorneys as he may deem necessary."

The receiver employed as his attorneys W. M. Toomer and W. T. Dickerson, who represented the plaintiffs in filing the original petition in said case. In the final consent decree, finding certain debts and ordering a sale of the property of the Frank Snell Lumber Company, it is provided:

"That the court hereby retains jurisdiction over this cause for further direction of the receiver, action upon any sale as herein provided, and the ascertainment and fixing and payment of costs of administration, and any other matter essential or material to the administration of said properties."

Said sale was made and the property realized \$390,958. The receiver filed his report of such sale, and therein prayed that his compensation and that of his attorneys, W. M. Toomer and W. T. Dickerson, be fixed and paid.

On the filing of said report, the purchaser, Council Lumber Company, moved the confirmation of said sale, which was ordered. Said order provided that the purchaser file in said court a good bond in the sum of \$2,000, conditioned to pay any sums the court should thereafter direct to be paid to the receiver or his attorneys as compensation, or in favor of any intervener, and that judgment might be rendered on said bond on summary motion. The purchaser filed a bond, so conditioned, with the United States Fidelity & Guaranty Company as surety.

The court awarded compensation of \$750 to said Toomer as receiver's counsel, for services rendered the receiver in both the state and federal courts. This decree is attacked on the grounds:

First. That the original final decree was rendered by consent; that it contained no provision for the payment of receiver's counsel fees, and hence none could be ordered paid.

Second. That Toomer was an attorney for the original complainants, and hence not a proper person to be employed by the receiver as counsel.

Third. That no proof of services appears in the record and hence a decree fixing and awarding compensation was improper.

[1] 1. We disagree with appellant that the final consent decree made no provision for the fixing and payment of compensation for receiver's counsel. The original order appointing the receiver authorized him to employ counsel. There is nothing in this record to suggest that the employment of this counsel by the receiver was not known to the court at all times. The compensation of receiver's counsel is one of the expenses of administration, and the consent decree expressly reserved the jurisdiction of the court to "ascertain, fix, and order payment of the costs of administration." There is nothing in the decree which excluded the receiver's counsel fees from such ascertainment, fixing, and payment.

[2] 2. The record does not disclose any conflict of interest between parties to this cause which would present a legal reason why a judge should refuse to permit attorneys for a party to act as attorneys for the receiver. Conceding the rule that generally such dual representation

should not be allowed, without permission of the court, there is no rule that under no circumstances should an attorney for a party act as attorney for the receiver. In some cases an attorney for one of the parties can give the most efficient service to a receiver without any conflict of duty. *Shainwald v. Lewis* (D. C.) 8 Fed. 878.

[3] This record does not show but that the employment of these attorneys by the receiver was actually known by the court. Where the court could have authorized this employment, he could approve such employment, made under a general authority, and the order of the court awarding compensation is such an approval. *Stuart v. Boulware*, 133 U. S. 78, 81, 10 Sup. Ct. 242, 33 L. Ed. 568.

[4] 3. The record does not show but that the court was fully advised as to the services rendered by receiver's counsel and of their value. The introduction of evidence was not essential to a decree fixing such compensation. 34 Cyc. 466.

The record discloses no error in the decree, and it is affirmed.

BERRY et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 29, 1921.)

No. 2873.

1. **Criminal law** ⇐493—**Intoxicating liquors** ⇐134—**Opinion that liquid was beer held no basis for conviction, as liquid must be beer as defined by Volstead Act.**

To constitute a violation of the Volstead Act by selling beer, the liquid must be "beer" as defined in the act, and the opinion of government agents, who were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it, would afford no basis for a judgment of conviction.

2. **Criminal law** ⇐395—**Liquor taken from ice box without search warrant inadmissible.**

Bottles of beer taken from an ice box in defendant's place without a search warrant, in violation of the Fourth Amendment to the federal Constitution, were inadmissible in evidence in a prosecution for a violation of the Volstead Act; and such was true as to testimony of the chemist who analyzed such beer.

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

Thomas Berry and another were convicted of selling beer, and they bring error. Reversed, with direction to grant new trial.

Kevin Kane, of East St. Louis, Ill., for plaintiffs in error.

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

Before BAKER, EVANS, and PAGE, Circuit Judges.

BAKER, Circuit Judge. [1] Plaintiffs in error were convicted of selling beer in violation of the Volstead Act (41 Stat. 305). Government agents purchased two bottles containing some sort of liquid and drank the contents. They were permitted, over objection, to say that

what they drank was beer. To constitute a violation, the drink would have had to be "beer" as defined in the act. These government agents were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it. Their testimony that the liquid was the "beer" denounced by the act was therefore merely the opinion of unqualified witnesses, and affords no basis for the judgment.

[2] These same agents took two other and similar bottles from the ice chest in defendants' place. They had no search warrant. One of the bottles was marked by one of the agents at the time and later was sent to a government chemist, who made an analysis and at the trial testified, over objection, that the liquid was beer containing alcohol in excess of the amount permitted by the act; and the bottle and contents were admitted, over objection, as exhibits in evidence. So the conviction is plainly bottomed on the exhibit and the chemist's testimony; that is, on evidence which never would have had any existence, but for the government's violation of the restraint put upon it by the Fourth Amendment. Cases of this kind must be judged as if the illegal seizure had never been made.

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. — (Feb. 28, 1921).

The judgment is reversed, with direction to grant a new trial.

In re PITTMAN.

(District Court, E. D. North Carolina. September 26, 1921.)

1. Pledges ⇔11—Possession by pledgee essential to valid pledge.

To constitute a valid pledge it is requisite that the pledgee have possession of the subject-matter of the pledge either actually or constructively.

2. Bankruptcy ⇔161(2)—"Chattel mortgage" held invalid as preference; "pledge."

When bankrupt, a merchant, borrowed money from claimant, it was agreed that claimant should have certain fixtures as security with the right to a chattel mortgage thereon at any time. The fixtures were not removed, but remained in the store, and were used as before. Some two months later, a short time before the bankrupt was insolvent and known to be so by claimant, the note for the loan was renewed and claimant took a mortgage on the fixtures and recorded it. *Held*, that the original transaction did not constitute a pledge, but merely an agreement to give a mortgage, and that the mortgage, when given, secured an antecedent debt, and was invalid as a preference as against the trustee.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Chattel Mortgage*; *Pledge*.]

In Bankruptcy. In the matter of S. B. Pittman, bankrupt. On review of referee's order denying claim of D. F. Bridgers to priority as to certain store fixtures. Affirmed.

See, also, 275 Fed. 686.

Lyn Bond, of Tarboro, N. C., for trustee.
W. O. Howard, of Tarboro, N. C., for bankrupt.

CONNOR, District Judge. Heard upon petition for review and certificate of Marshall C. Staton, Esq., referee. The record discloses that D. F. Bridgers filed a proof of debt based upon note executed by the bankrupt, January 21, 1921, for \$500, due on demand, with interest from date. The consideration upon which the note was executed was the loan of \$500 made by Bridgers to Pittman on the date of the note. Bridgers claimed a priority in respect to certain articles of personal property consisting of store fixtures, etc. The trustee filed objection to the priority and, after hearing the evidence, the referee found the following facts:

S. B. Pittman was on, and for some time prior to, January 21, 1921, engaged in the mercantile business in Tarboro. D. F. Bridgers loaned him \$500, taking note due on demand. When Pittman applied to Bridgers for the loan, he said:

"I would like to borrow \$500 from you. I will give you these items here.' Went around and put my hand on them all and said: 'They are in your possession until you have the mortgage drawn up. * * * These things are yours.' Went around and mentioned all the things. Told him he could have the mortgage drawn up at any time he wanted to. I was to pay the money on demand until he had the paper recorded and then on the 1st of November. I wanted the man to have security for his money and I wanted possession of the things at the time I got the money."

Bridgers testified:

"When I loaned him the money I asked him how long he wanted it. He said, 'December or January,' but he said, 'I will write it on demand.' That's the way he gave it to me. He knew he could keep it as long as he wanted it, but he wrote the duebill on demand. He told me to go and have the mortgage drawn and fixed up, and I carelessly let it go on and on until one day I got to thinking about it and went and had it done."

To the question, "What agreement did you and Sol have about it at the time you took the note, January 21st?" he replied:

"He told me he would give me a mortgage on those things, and I said, 'They are all paid for, are they?' And I also said, I wanted something stationary and named these five articles, and I said I could have them until they were paid for. He showed them to me. He told me that it was my stuff and I let him keep it as my property, as my agent."

On March 16, 1921, the bankrupt executed to Bridgers a chattel mortgage on the same articles referred to in the testimony relating to the transaction of January 21, 1921, executing a new note payable November 1, 1921. The mortgage was recorded on the _____ day of March, 1921. Pittman was adjudged a bankrupt April 12, 1921.

Counsel for Bridgers contend that, at the date of the execution of the note, Pittman pledged the store fixtures to him as security for the loan; that the pledge was for a present consideration; and that Pittman was not, at that time, insolvent and, if found to be so, Bridgers had no knowledge of or reasonable ground to believe him insolvent.

The trustee contends that the transaction did not constitute a pledge, but was an executory promise by Pittman to execute a mortgage when Bridgers should have it prepared.

If what was said and done by Pittman and Bridgers on January 21st constituted a verbal or parol mortgage, as was held by the court in *McCoy v. Lassiter*, 95 N. C. 88, it was valid as between the parties, but was not so against creditors who secured a lien for want of registration. The trustee is in the position of a lien creditor. Section 47(2). Counsel for Bridgers in his brief contends that "the original transaction really constituted a pledge."

[1] There is a well-settled distinction between a pledge and a chattel mortgage. In the first, the title to the property remains in the pledgor, the possession is given to the pledgee. A "pledge" is defined to be:

"A bailment of goods by his debtor to his creditor to be kept by him until his debt is discharged or a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor."

Whereas, in the case of a mortgage the title to the property passes to the mortgagee with the right to redeem upon payment of the debt, the mortgagor remaining in possession. 22 Am. & Eng. Enc. 844.

"Possession is of the essence of a pledge; and, without it, no privilege can exist as against third persons." *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

A promise to execute a mortgage on personal property to secure a debt, then contracted or in consideration of the present loan of money, or other valuable consideration, may, as between the parties, be enforced, in a court of equity, but does not create a valid lien as against purchasers for value and creditors.

While, to constitute a pledge, it is requisite that the pledgee have possession of the subject-matter of the pledge, "the possession need not be actual; it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. * * * In such a case, there is a union of two distinct forms of security: That of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession." *Casey v. Cavaroc*, supra. The line of distinction between acts which will constitute a delivery of possession of goods, essential to constitute a valid pledge, is not always clear as is illustrated in the review of the decided cases and authoritative text-books made by Judge Bradley in the case cited.

It is said:

"Preference is accorded to a pledgee on the thing pledged, because he has it in his own hands. This possession ought to be certain and not equivocal. If it is ambiguous, if the things pledged have been so placed as to deceive the other creditors, and to lead them to believe that the debtor always continued the possessor, the pledge would be endangered. * * * Bad faith, it is true, would defeat the pledge though the creditor had possession. But want

of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." *Casey v. Cavaroc, supra*.

In *Philadelphia Warehouse Co. v. Winchester (C. C.) 156 Fed. 601*, Judge Bradford laid down a rule which is easily complied with by the parties and protects creditors of the pledgor. He said:

"Due and reasonable care should be observed by the pledgee to negative the existence of ostensible ownership in the pledgor, and to this end such means should be resorted to as fairly to inform or put third persons on inquiry."

In that case the pledgee, in whose possession the property was left, placed cards upon it in conspicuous positions, plainly indicating that the pledgee claimed or was interested in it.

In *Bush v. Export Storage Co. (C. C.) 136 Fed. 918*, will be found an interesting discussion and review of decided cases, in regard to the requisites essential to constitute a pledge of personal property which will be valid as against the trustee in bankruptcy of the pledgor.

In *Am. Can Co. v. Erie Preserving Co. (C. C.) 171 Fed. 540*, Hazel, Judge, said:

"It is quite well settled that the requirements of the general law oblige the pledgee to give reasonable notice to third parties that the ostensible ownership of the property pledged is in him; and, moreover, to obey its legal requirements he must resort to such reasonable means as the circumstances demand in order to give to third parties such information." *Security Warehousing Co. v. Hand, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789*.

In *re Peacock, 178 Fed. 851 (C. C. East. Dist. N. C.)*, the cotton claimed by the pledgee was shipped to and in the actual possession of the pledgee.

[2] Here the articles claimed to have been pledged were never, at any time, in the possession or under the control of Bridgers, nor was there any separation from the other property in the store, nor any custodian appointed to hold possession for the pledgee, nor any mark, card, or other notice placed upon the articles to give notice to creditors of the claim of the pledgee. In the cases which I have examined, or to which reference is made, in which the pledge was sustained as against the trustee in bankruptcy, one or more of these indicia of a bailment or change of possession are found to have been resorted to.

I am unable to find in the evidence any sufficient delivery of possession either actual or constructive, to constitute a valid pledge of the property claimed by Bridgers.

It is not clear whether the minds of Pittman and Bridgers came to an agreement as to what they intended to do in respect to the form of the security. Their testimony rather tends to show that Pittman agreed to give Bridgers a mortgage on the articles, whenever the latter had it written. It was a promise to execute a mortgage rather than a present pledge of the goods. If this view be adopted, it is clear that no lien attached to the goods as against creditors until the mortgage was

executed March 15, 1921, one month before Pittman was adjudged a bankrupt.

In *Re Klingaman*, 101 Fed. 691, Judge Shiras, dealing with a state of facts presenting a question somewhat analogous, said:

"In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors, by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors."

In *Lathrop Bank v. Holland*, 205 Fed. 143, 123 C. C. A. 375, the bank advanced money to a customer with which to buy horses, under an oral agreement not to dispose of the horses purchased without the bank's consent and to give a chattel mortgage on the horses at the end of the venture. No mortgage was given until the day before the petition in bankruptcy was filed. The bank then knew that the customer was insolvent. In a contest between the bank and the trustee, Hook, Circuit Judge, after stating the terms of the dealing, said:

"No present lien was reserved by the bank; it did not take title in itself, or possession, either actual or constructive. They remained under the control of the bankrupt, with full apparent power of disposition. They were bought in the name of the bankrupt, not in that of the bank, and continued his property with no visible evidence of limitation by physical custody or in the public records. If the bank had taken mortgages as the purchases were made, but had refrained from recording them, it could not have prevailed against the trustee in bankruptcy. The oral agreement for a mortgage can give no greater right. The equity claimed by the bank is not different from that of any ordinary creditor who relies on his debtor's promise to do or not to do certain things in the future and refrains from adopting one of the various methods of protecting it. A purpose of the bankruptcy acts and of state recording statutes is to discourage secret equities."

The mortgage was executed to secure an existing debt. The note of January 21, 1921, due on demand, was canceled, and a new note due November 1, 1921, executed.

This being done within four months of the adjudication of Pittman, it was clearly a preference, and if Bridgers knew or had reasonable cause to believe that Pittman was, at the date of the mortgage, insolvent, it is voidable as against the trustee. In that respect, I concur with the conclusion of the referee. There is ample evidence to sustain his finding of the fact.

Without doubting the good faith of Pittman or Bridgers in the transaction and regretting that the latter must lose his debt, or a large proportion of it, I am constrained to hold that the referee was, in all respects, correct in his judgment.

In re PITTMAN.

(District Court, E. D. North Carolina. September 26, 1921.)

1. Bankruptcy ⇨396 (3)—Trustee held to have no interest in insurance policy payable to wife.

Under Const. N. C. art. 10, § 7, providing that a husband may insure his life for the benefit of his wife and that the amount of the policy on his death shall be paid over to the wife and children free from all claims of his creditors, a trustee has no interest in a policy on the life of the bankrupt payable to his wife, though it reserves to the bankrupt the right to change the beneficiary, which right he had not exercised at the time of the bankruptcy.

2. Bankruptcy ⇨143 (12)—Insured's right to change beneficiary not "property" capable of transfer.

The right of a bankrupt to change the beneficiary in an insurance policy is a personal privilege, and not "property" which he may transfer within the meaning of the Bankruptcy Act (Comp. St. §§ 9585-9656).

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

In Bankruptcy. In the matter of S. B. Pittman, bankrupt. On petition of trustee for review of order of referee. Affirmed.

See, also, 275 Fed. 681.

W. O. Howard and James Pender, both of Tarboro, N. C., for Bridgers.

Lyn Bond, of Tarboro, N. C., for trustee.

CONNOR, District Judge. This cause came on for hearing upon the petition for review filed by the trustee in regard to the policies of insurance on the life of the bankrupt and the findings of fact by the referee, and was argued by counsel for the trustee and the bankrupt.

[1] It is conceded that, under the provisions of article 10, § 7, of the Constitution of North Carolina, the husband may insure his life for the benefit of his wife and that the amount of the policy, upon his death, shall be paid over to the wife and children free from all claims of his creditors. The trustee contends that because of the provision contained in the policy by which the husband may, at any time during his life, change the beneficiary, the wife's right is contingent upon his failing to do so, and that this reserved right or privilege retained by the husband deprives her, as against his creditors, of the protection conferred by the Constitution.

[2] If it be conceded, as held in *Lanier v. Insurance Co.*, 142 N. C. 14, 54 S. E. 786, that the wife's right is contingent upon the failure of the husband to exercise the option, it is manifest that until he does so the wife's interest is fixed by the terms of the policy. The right to change the beneficiary is a personal privilege and not subject to be controlled by any other person or by any court. It is difficult to perceive what power this court has to make, or enforce, an order controlling the exercise of the option, which is reserved to the bankrupt to change the beneficiary from his wife to the trustee. The right is not "property" which he may transfer within the meaning of the Bankruptcy Act (Comp. St. §§ 9585-9656). Unless the beneficiary is changed the in-

insurance company would not be justified, or protected, in paying the surrender value of the policies to the trustee. Neither the wife nor the company would be bound by an order made in this cause.

It is well settled that the Bankrupt Act secures to the bankrupt the exemptions allowed him by the state Constitution and statutes, and this provision has been held to apply to policies of insurance on the life of the bankrupt for the benefit of his wife. *Holden v. Stratton*, 198 U. S. 203, 25 Sup. Ct. 656, 49 L. Ed. 1018.

In the absence of any decided case in which the question presented here is involved, resort must be had to the reason of the thing and such decisions as have been made in other jurisdictions.

The industrious counsel for the trustee cites, for the purpose of maintaining his contention, *In re Diack* (D. C.) 100 Fed. 770. It will be observed that there the bankrupt had an interest in the proceeds of the policy. It was an endowment policy, payable at maturity to the bankrupt if living, and, if dead, to his wife and children. The court held that he should be compelled to transfer to the trustee his interest in the policy. District Judge Brown, in his "Additional Opinion" (100 Fed. 774), notes the distinction between the instant case and those cited in which "the policy was in express terms for the sole benefit of the wife and her children, * * * whereas in the present case the policy by its terms is mainly for the individual benefit of the bankrupt." The question presented here was not involved in that case.

In Re Herr (D. C.) 182 Fed. 716, the facts were in substantial respects different from those found here. The district judge, conceding that the decisions of the federal courts were not uniform, held that the trustee was entitled to the surrender value of the policy. *In Re Booss* (D. C.) 154 Fed. 494, the court held that the trustee was not entitled to the surrender value.

In Re Johnson (D. C. Minn.) 176 Fed. 591, the relevant facts are, in all respects, the same as here. The Minnesota statute is the same as the Constitution of North Carolina in respect to the right of the husband to insure his life for the benefit of his wife. The trustee claimed the surrender value, the husband not having exercised the right reserved in the policy to change the beneficiary.

Willard, Judge, said:

"If it were not for the provision contained in the policy giving the insured a right to change the beneficiary, there could be no doubt that it would come within the terms of section 1691. The doubt, if there be any, arises from the existence of this right on the part of the bankrupt."

After noting that there had been no decision of the question by the Supreme Court of Minnesota, the learned judge said:

"The rights of the trustee are fixed as of the date of the adjudication. When the rights of the trustee in this proceeding were thus fixed, the beneficiary named in this policy was the wife. The insurance was then for her benefit, and in my opinion it should be held exempt from the claims of the bankrupt's creditors by virtue of the provisions of section 1691."

This case is on "all fours" with the instant case. In *Allen v. Central Wis. Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, 25 Am. Bankr. Rep. 126, the court said: .

"It is further claimed that, inasmuch as the insured reserved the right to change the beneficiary, he may yet do so, and convert the policy into property which may pass to the trustee. Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what ground it can be claimed that the trustee is at all concerned with what may afterwards become of exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt."

I concur in the reasoning upon which these decisions are made. In the cases to which my attention is called, or which I find, there are differentiating facts, as in *Re White*, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, the policy was for the benefit of the wife, if she survived the husband, otherwise to the husband or any beneficiary named by him.

The court, after quoting the New York statute, said:

"It is quite plain that the policies referred to are such as are the absolute property of a married woman or her children."

An examination of the statute discloses an essential difference from the provisions of the Constitution of this state. The different results reached in decided cases may be explained by the difference in the state statutes, or the facts in the cases.

The constitutional provision securing to the wife the benefit of a policy of insurance upon the life of her husband, free from the claims of his creditors, is found in the article of the Constitution providing for "Homesteads and Exemptions," which in all of its provisions has uniformly been construed, by the Supreme Court, liberally for the purpose of effectuating the beneficent purpose and wise policy of the people, to secure to the husband while living, and his widow when he dies, a reasonable provision against misfortune, resulting in insolvency. The husband, in paying the premium, did no wrong to his creditors and, not having exercised his right to change the beneficiary, must be assumed to intend that in the event of his death, his widow shall have the protection which the Constitution secures to her by receiving the proceeds of the policies.

The judgment of the referee is affirmed.

LIEBMAN v. FONTENOT, Collector of Internal Revenue.

(District Court, W. D. Louisiana. July 1, 1921.)

No. 1257.

Internal revenue — 8—Widow's usufruct of husband's share of community property not deductible for purpose of estate tax.

The federal estate tax imposed by Act Sept. 8, 1916, § 201 (Comp. St. § 6336½b), is an excise tax on the transfer of the estate of a decedent, without regard to the manner of descent or the persons who receive it, and the fact that the widow of an intestate, under Civ. Code La. art. 916, has a usufruct of the decedent's half of the community property, does not diminish the value of the taxable estate by the value of such usufruct.

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

At Law. Action by Mrs. Henrietta W. Liebman, administratrix, against Rufus W. Fontenot, Collector of Internal Revenue. On exception to petition. Exception sustained.

Plaintiff, administratrix of the succession of her deceased husband, Louis Liebman, brings this suit at law to recover the sum of \$1,468.95, alleged to have been erroneously collected on the estate of Louis Liebman, under Act of Congress of September 8, 1916 (Comp. St. §§ 6336½b-6336½m). The case is now before the court on the exception of no cause of action.

The facts as set forth in the petition are that all of the property acquired by the said Liebman was after his marriage with plaintiff, and is therefore, under the Louisiana law, community property, she owning one-half thereof in her own right, and being entitled to the usufruct of the remaining half, inherited by the heirs of Liebman, he not having by will deprived her of such usufruct; that the total community property is \$324,218.02, and that plaintiff, in her return to the collector of the half owned by the estate of Liebman, deducted therefrom the value of the usufruct of such half, to which usufruct she was entitled, basing its value on her life expectancy, capitalized at the legal rate of interest, 5 per cent.; that the estate tax on such half interest, after such deduction, amounted to \$574.06, which she paid to the collector, but that, subsequently, an additional tax, with penalties and interest, was assessed in the sum of \$1,468.95, the collector figuring the tax on the value of the half interest as shown by the inventory, \$162,109.01, as against the value fixed by the administratrix after deducting the value of the usufruct, \$105,433.16. The additional tax was paid under protest, and plaintiff's claim for refund of the amount, \$1,468.95, having been denied, this suit was instituted for the recovery of such sum thus alleged to have been erroneously demanded and collected.

Thus the issue is whether or not there should first be deducted from the half of the community property going to the heirs of the deceased spouse the value of the life usufruct in favor of the wife, with which it is encumbered, before calculating the estate tax thereon. The contention of the plaintiff is that the statute does not contemplate the inclusion of the value of such usufruct in the estate, but that, if it does, it is unconstitutional, as an imposition of a direct tax upon property without apportionment.

Blanchard, Goldstein & Walker, of Shreveport, La., for plaintiff.

Joseph Moore, U. S. Atty., and Yandell Boatner, Asst. U. S. Atty., both of Shreveport, La., for exceptor.

JACK, District Judge (after stating the facts as above). Article 916 of the Civil Code, relative to community property, reads as follows:

"In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage."

There is this difference in the rights of the wife to her community half of the property and her right to the usufruct of her deceased husband's community half: The former is absolute; it belongs to her from the time it is acquired by the community. The husband, as head of the community, has the administration of all of the community property; but, nevertheless, the ownership rests equally in the two spouses. Whenever the marriage relation is terminated, whether by death or divorce, the wife may demand her half of the community property in full ownership. The putting in possession is merely the

legal recognition of an existing right. The wife's usufruct of the community half interest of the deceased husband is not an absolute right, inherent in her. She takes such usufruct only where the husband has not, by will or testament, disposed of his half of the community. Her half of the community is hers by reason of the partnership of acquêts and gains; the community property is the joint production of the toil and efforts of the two. The usufruct of the property of the deceased spouse, however, is a thing not acquired jointly by the two, but a right transmitted from the husband to the wife, by reason of the law, where there is no adverse disposition by deceased of his community interest.

The federal inheritance tax is an excise tax, levied on the estate transmitted from the living to the dead. The estate so transmitted, in this instance, is Liebman's undivided half interest in the community. The property itself goes to his heirs, subject, however, to the usufruct of his widow. The federal law, unlike that of the state, makes no distinction in the rate between certain heirs. It is a fixed tax on the transmission of the estate without regard to whom it descends. It is to be paid out of the estate, and so the court is not concerned with the proper division of the tax as between the heirs and the widow.

The exception will be sustained, and plaintiff's demand dismissed, at her cost.

THE WALTER D. NOYES.

THE BARRANCA.

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

1. **Collision** ⇨100(2)—**Ship navigated by unlicensed master down narrow channel in fog, at full speed, without proper lookout, without stopping engine on hearing fog signal of approaching vessel, held at fault.**

Master, who navigated heavily laden vessel without a license, in violation of Rev. St. § 4401 (Comp. St. § 8153), down a narrow channel, without a proper lookout, in a dense fog, at full speed, and who failed to stop the engine and navigate with caution when he heard fog signal of approaching vessel, as required by 26 Stat. 320, art. 16 (Comp. St. § 7854), *held* negligent, rendering the vessel at fault for collision with the approaching vessel.

2. **Collision** ⇨100(2)—**Ship navigated in narrow channel, in dense fog, held at fault for collision caused by its failure to stop engine and proceed with caution, on hearing fog signal of other vessel.**

Vessel navigated parallel with and within 50 feet of narrow dredged channel, used, according to the custom of a port, by vessels going in opposite direction, after being warned of approaching fog, and which, on finding itself within the channel after dense fog had set in, proceeded up the middle of the channel, and did not stop its engines and proceed with caution on hearing fog signals of approaching vessel, as required by 26 Stat. 320, art. 16 (Comp. St. § 7854), *held* at fault for collision with approaching vessel.

3. **Collision** ⇨82(2)—**Difficulty of navigating without sufficient headway not excuse for failure to stop engines and navigate with caution on hearing fog signal of other vessel.**

Under 26 Stat. 320, art. 16 (Comp. St. § 7854), requiring a vessel, on hearing fog signal of other vessel, to stop its engine and navigate with

(275 F.)

caution until danger of collision is over so far as the circumstances of the case admit, a vessel is not excused from complying with rule under normal conditions, merely because of the difficulty of navigating without sufficient headway, since the loss of steerageway must have been contemplated in adoption of rule.

4. Collision ⇄144—Rule as to division of damages applied, where negligence on both vessels operating to moment of collision.

Where the negligence of both vessels continued to operate up to the moment of collision under circumstances making both vessels equally culpable, the rule as to division of damages must be applied.

In Admiralty. Cross-libels by R. B. Drake, master of the steamship *Barranca*, against the steamship *Walter D. Noyes*, and by the *Crowell & Thurlow Steamship Company* against the steamship *Barranca*. Decree applying rule as to division of damages ordered.

Baird, White & Lanning and E. R. Baird, Jr., all of Norfolk, Va., for libelant Drake and the *Barranca*.

Blodgett, Jones, Burnham & Bingham and Edward E. Blodgett, all of Boston, Mass., and Hughes, Vandeventer & Eggleston and Floyd Hughes, all of Norfolk, Va., for the *Walter D. Noyes* and *Crowell & Thurlow S. S. Co.*

GRONER, District Judge. Cross-libels were filed on behalf of the *Barranca* and the *Noyes*, growing out of a collision between them which occurred near the *Thimble Shoal* dredged channel in lower Chesapeake Bay on April 27, 1920. Both vessels were badly damaged. The *Barranca*, a freight and passenger vessel, 4,124 tons gross, 372 feet long, was at the time of the collision on a voyage from Liverpool to Jamaica, via Norfolk for bunkers. The *Noyes*, also a large vessel, 4,387 tons gross, 354 feet long, was on a voyage from Norfolk (*Sewell's Point*) to Boston, loaded with coal. At 1:32 p. m. of April 27th the *Barranca*, having stood in the Virginia Capes, took on a licensed pilot and immediately proceeded full speed (12 miles an hour) for Norfolk. On the bridge with the pilot were the master and second officer, with a quartermaster at the wheel.

In the neighborhood of 7 miles northwestwardly from the point where the pilot boarded the *Barranca* the government had cut a channel 600 feet wide and about $3\frac{1}{2}$ miles long, extending from a point southerly from the tail of the *Horseshoe* northwestwardly to *Thimble Shoal*. This narrow channel was marked with, black buoys on the south side and with red buoys on the north side; the buoys on each side being approximately a mile and a quarter to a mile and a third apart. The depth of this channel was 35 feet, and for over a mile on each side for its entire length there was a depth of from 25 to 30 feet of water. The purpose of the pilot of the *Barranca* was to run outside of and to the south of the cut channel; the custom of the port being to leave the same largely for the use of loaded vessels going out.

Both the pilot and master of the vessel testify that the course taken brought them, at about 1:55, opposite and on the south side of the bell buoy marking the southeastern prolongation of this dredged channel, and that they passed this buoy on the ship's starboard side, about 50

feet away, the course of the vessel being then parallel with the southern line of the channel; that in consequence of this they picked up and passed 50 feet to starboard, a thick fog having then set in, the two succeeding black buoys, numbered 3 and 5, and intended to pass No. 7 on the same course, but that just before reaching No. 7 the lookout reported to the pilot that this buoy was close under the port bow of the vessel, in consequence of which the course was altered half a point to starboard to enable the ship to pass the buoy without fouling. The result of this maneuver was to bring the buoy on the port side, about 50 feet away, and to bring the course of the ship diagonally across the narrow channel, so that when she reached the other side she would pass out at a point a little easterly of red buoy No. 8, and about a mile and a quarter below the point of entrance.

Both the pilot and the master of the Barranca testify that it was not until the steamer was about midway the channel, and three or four minutes after passing buoy 7, that the first fog signal from a vessel approaching in the opposite direction—which afterwards turned out to be the Noyes—was heard. The evidence of the master of the Barranca is that between the first signal heard and the collision just three minutes elapsed; the pilot, that the time between the first signal and the collision was five or six minutes. The vessels at the time were approaching one another at the rate of about a mile in four minutes, so that, if the testimony of the master of the Barranca be correct, the distance between the two vessels when the first signal was heard was three-fourths of a mile, and if the testimony of the pilot be correct the distance was a mile to a mile and a quarter. At the time the first signal was heard the engines of the Barranca were rung down to dead slow (4 to 5 miles), and a minute later, when another signal from the approaching vessel was heard, were stopped. A moment later the Noyes was discovered on the Barranca's port bow, coming out of the fog apparently at full speed.

The collision occurred within a few seconds thereafter, in spite of the fact that both vessels, as soon as the danger was discovered, went full speed astern; the bow of the Barranca striking the starboard side of the Noyes abreast the bridge. The stem of the Barranca was badly twisted to port, the bridge and a good deal of the upper works of the Noyes carried away, and a considerable indentation made at the point of contact. The pilot of the Barranca places the position of the vessels at the time of the collision just on the northern edge of the dredged channel, between buoys 6 and 8; the master of the Barranca, to the north and entirely out of the channel. But inasmuch as, in the dense fog then prevailing, there were no physical objects by which a verification of the position of the vessel could be made, and inasmuch, also, as she materially changed her position before the lifting of the fog, so that no subsequent confirmation could be had, the evidence in respect to her position at the moment of impact is of necessity based on no other evidence than her course and speed from the time she passed buoy 7 to the time of the collision.

On the part of the Noyes, the evidence is she left the Sewell's Point dock at 12:50, at 1 o'clock straightened out in the channel, and that

thereafter she maintained full speed ahead up to the moment the vessels came in sight; that the fog set in when she arrived about off, or a little below, Thimble Shoal light; and that thereafter and until the moment of the collision she sounded fog signals every minute. The master, the second officer, and the quartermaster were on the bridge, which was uninclosed and approximately 100 feet from the bow or the vessel. Apparently there was no lookout-man on the fo'castle head, and it is admitted that the navigator of the Noyes, although holding a master mariner's license, had failed to obtain a pilot's license covering the navigation of Hampton Roads and Chesapeake Bay.

All of the witnesses for the Noyes testify that their vessel passed into the dredged channel about midway between the two entrance buoys, and that the course steered from that point on was the exact course of the channel; that black buoy 11, on her starboard or southern side, was passed from 150 to 300 feet away, and the next buoy, which was No. 9, from 100 to 150 feet. All the witnesses for the Noyes likewise agree that practically from the moment of entering the cut channel they heard the fog whistles of the Barranca; that their ship was on the starboard or right-hand side of the channel, where it should have been, and where the law required it to be, and so continued up to the moment when the Barranca came in sight; that they first observed the Barranca when at a point distant between one-half and two-thirds of the way between buoys 9 and 7; that she was then to the south of and about 1,000 feet away from the line of the dredged channel, standing, according to the diagram and drawing of the captain of the Noyes, in a direction almost at right angles with the channel, and about four points on the Noyes' starboard bow. The wheel of the Noyes was immediately put to starboard, and her engines put full speed astern in an unsuccessful effort to avoid the collision which occurred immediately thereafter. The vessels separated in the fog, and the Noyes came to anchor to the southward of the channel, with No. 7 buoy bearing northeast by east.

Precisely the same criticism of the evidence for the Noyes of the point of impact may be made as was made in the case of the Barranca—that is to say, that there were no visible physical objects to definitely establish the point of collision, and that the evidence as to her then position is predicated wholly upon the course and speed of the ship with regard to objects which she had passed prior to the collision. The evidence shows that both ships at the moment of discovering the peril maneuvered to avoid the collision, and it is insisted on behalf of each that the maneuver of the other was unwise and contributed to the collision. Whether this be true or not is, in my opinion, unnecessary to determine, since the occasion was one of emergency, in which the law does not require the same deliberate judgment demanded under normal conditions.

Inaccuracies in the evidence of each side affecting the place of collision may be found without difficulty. For instance, it may be pointed out that, according to the testimony of the pilot of the Barranca, conceding as accurate the point at which he says he boarded the ship, the course laid out by him, viz. northwest by west one-half west, would

have taken the Barranca to the northward of the dredged channel at or near the eastern entrance to the same, a course which, it may be suggested in passing, would have been the safer and better from every point of view. Or if the course of the Barranca as given by the helmsman of that vessel is correct, and the point where the pilot boarded the ship again be conceded, the Barranca would at all times have been considerably south of the line of black buoys; and the collision could only have occurred at all upon the theory that the Noyes was entirely out of and far to the southward of the channel at the time of the impact. On the other hand, the positions of the ships just before the collision and when they first became visible to one another—as shown on the diagram made by the captain of the Noyes—if correct, would have made a collision impossible; for this clearly shows that the Barranca was then at least four points on the starboard bow of the Noyes, 1,000 feet away, and the time required by her to steam this 1,000 feet, with the Noyes wheel to starboard, even with her engines then reversed, would have carried the latter well beyond the danger point before the Barranca had reached and crossed her course.

[1] Under these circumstances it becomes necessary, by a process of elimination and reconstruction, to determine, from such facts as are definitely ascertainable, what the actual circumstances and conditions were. In the case of the Noyes, no particular difficulty obtains in this respect, for the reason that her negligence was patent and inexcusable. She was being navigated, in violation of law (section 4401, R. S. [Comp. St. § 8153]), by a master who, whether or not he possessed the necessary qualifications, was unsupplied with the necessary license. His utter disregard of this law is inexcusable from any point of view, and perhaps as much so from the fact that carelessness, rather than necessity, is his only excuse. None of his officers, either, were better off than himself in this respect. In addition to this dereliction, he was navigating a heavily laden vessel down a narrow channel, without a proper lookout, in a dense fog, and at full speed.

His attempted excuse of his conduct in the latter regard, namely, that to have reduced his speed would have so diminished his control of his vessel as to have made navigation dangerous, requires no other comment than to recall that it is the invariable, if futile, effort at justification when misfortune occurs. It was in the teeth of good seamanship and safe navigation, and to this, of course, should be added his further disregard of the rule, absolute in its terms (26 Stat. 320, art. 16 [Comp. St. § 7854]), in failing to “stop her engines, and then navigate with caution” when he heard the approaching fog signals of the Barranca, until he should have ascertained definitely the position of that vessel. All of these acts of negligence being admitted, and no question being made that they directly and proximately contributed to the happening of the collision, it follows that the Noyes must be held at fault.

[2] In the case of the Barranca, although the circumstances tending to show either negligence in navigation or violation of the rules are perhaps less patent, enough is shown, if the evidence on behalf of that vessel alone be considered, to justify the conclusion that, but for the

failure in both respects of those in charge of her navigation, the collision would have been avoided. At the moment when she started from a point opposite Cape Henry a light haze gave warning of a possible fog further up. She was light, and for 10 miles of her course, at least, could have been safely navigated for at least a mile to the northward or southward of the cut channel without danger. By a custom well known to the Virginia pilot in charge of her navigation, the duty was imposed on her of avoiding this channel. Her course might have been laid with equal safety to the north or south of it. The pilot chose, he says, although his compass course indicates otherwise, the southern route, and if he had continued on that course, giving, as he should, ample room to outcoming vessels, no collision would have occurred; but instead he so navigated his vessel as to bring her course within 50 feet of the southern line of the channel, apparently making no allowances for the currents or the slightest deviation of his helm, which might put him in the channel and directly in the path of outward bound ships.

When he came abreast the first buoy a dense fog set in. Prudent navigation, it seems to me, under the circumstances, would then have impelled him to a more southerly course, and one at least to some extent more removed from the danger zone. Regardless of this caution, he continued, at a speed of approximately 7 miles an hour, on a course parallel with the dredged channel and not 50 feet away, and when opposite buoy No. 7 found himself actually inside the channel, faced with the necessity either of stopping and backing out, crossing over to the other side, or starboarding his helm, and, as he expresses it, again crossing the danger line. It is true that up to this time he claims not to have heard any of the fog signals of the Noyes, although the evidence of the crew of that vessel is that their fog signals had been sounded from the moment of their entrance into the channel 2 miles or more below, and their admission that from that time on they heard without difficulty the fog signals of the Barranca.

But, conceding that those on board the Barranca for some reason failed at first to hear the answering signals of the Noyes, which I think the evidence establishes undoubtedly were sounded, the navigation of the Barranca was, in my opinion, unjustifiable in the maneuver that then was made. For even though, to avoid fouling buoy No. 7, it may have been necessary to change her course slightly, the obligation, as soon as this danger was passed, which at most was less than half a minute, was again to change her course and put her back again outside the channel, a movement which might easily have been accomplished as soon as her bow had passed the given point; and particularly is this true if the evidence be accepted that up to that time no approaching signals had been heard. Or if, finding himself, by a miscalculation, in the channel, as was the case, her navigator had hard ported his helm and gone entirely across and out of the channel on the northern side, he would have required less than a minute to put his ship beyond the point of danger, for he had just come from the Capes, and knew and could properly guard against such dangers, if any, approaching from that direction. He did neither of these things, but continued up and

diagonally across the channel, and over a course which kept his vessel in or near the middle of the channel for a mile and a quarter, and for at least eight minutes of time, before she was again in a position where she had a right to be.

The failure of the *Barranca* to adopt one or the other of these alternatives was, in my opinion, a cause contributing directly to the collision; but, unfortunately, this is not all. There was sea space for the safe passage of the approaching vessel, and the danger might yet have been avoided, had either vessel observed the rules binding on both under the conditions then obtaining. The negligence of the *Noyes* has already been pointed out. The *Barranca* heard the *Noyes'* signal while in mid-channel, according to her master three minutes, and according to her pilot five or six minutes, before the vessels came in sight. The fog was thick. Both officers knew that the signal was from a vessel approaching in the narrow channel, and both likewise knew that under these conditions the law imposed upon them the absolute duty (*The Selja*, 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726), immediately of stopping the engines and navigating the vessel with caution until the danger of collision was passed, and this they failed to do. Instead they took a chance—a chance which, perhaps, in a majority of cases would have availed to avoid the collision, but which, unluckily, turned out to be the wrong thing in the circumstances which prevailed. They heard the signal and changed the ship's speed to dead slow ahead (4 or 5 miles) and ported her helm; a moment later they heard another signal and stopped her engines; but a moment later the damage was done.

Giving full credence to the evidence on behalf of the *Barranca* as to the exact periods elapsing between the several changes in the operation of that vessel, it is nevertheless not possible to avoid the conclusion that the effect of her disobedience of the rule of law (26 Stats. 320) requiring her, at the moment of first hearing, forward of her beam, the fog signal of a vessel, the position of which was not then ascertained, to stop her engines until the danger of the collision, by the disclosure of the position of the approaching vessel, had passed, was contributory to the accident. And not only does the rule impose this positive duty, but it further requires that they should remain stopped until the position of the other vessel is ascertained. Had this been done, who can say that the *Noyes* would not have safely passed, and the collision been avoided.

[3] But it is insisted that the rule is not absolute; that the language, "so far as circumstances of the case admit," should be so construed as to relax the rigor of the rule under some conditions, and that such an interpretation would bring the "circumstances" here within its terms. I think not, for here the difficulty of navigating without sufficient headway, which alone is offered as a reason for the failure to obey the rule, can hardly be so classed. Conditions here were normal, and the loss of steerageway, inevitable under the circumstances, must have been in contemplation in the adoption of the rule, for otherwise it would be meaningless and a contradiction in terms.

Good seamanship and cautious navigation, regardless of the rule, it seems to me, should, in the circumstances here detailed, at once have

suggested to a prudent navigator the necessity of overcoming as far as possible the momentum of his vessel, lest he run into, rather than out of, danger, and then by constant, continued, and repeated blasts of the whistle, not a minute apart, but every three or four seconds, indicating to the approaching vessel the danger of further proceeding on her course. That the collision would have been avoided had this been done, is hardly to be doubted, for it would have accomplished the double purpose (a) of stopping the headway of the Barranca, except for which the collision would not have occurred; and (b) of warning the approaching vessel, so that even her heedless navigator would have been admonished of his folly.

It follows, therefore, from what has been said, that the Barranca was where she should not have been in the first place, and in the second place was, after the danger of the collision became imminent, navigated in disregard of the statutory rule, and was therefore a contributing cause of the collision.

[4] The negligence of each vessel continuing, as it did, to operate up to the moment of collision, and being under the circumstances stated equally culpable, the rule as to division of damages must be applied, and a decree will be entered accordingly.

GARDINER et al. v. AUTOMATIC ARMS CO. et al.

(District Court, N. D. New York. September 19, 1921.)

1. Corporations ⇨617 (2)—On dissolution property vests in stockholders.

On dissolution the legal title to the property of a corporation passes to the stockholders subject to payment of the debts of the corporation.

2. Corporations ⇨630 (3½)—Dissolved corporation not indispensable party to suit by stockholders.

To a suit by stockholders of a corporation dissolved more than 10 years before suit the corporation *held* not an indispensable, though perhaps a proper, party.

3. Corporations ⇨623—Directors of dissolved corporation held not necessary parties to suit by stockholders to recover property.

In a suit in a federal court by stockholders of a dissolved corporation to recover from the transferee property alleged to have been fraudulently transferred by the directors to a new corporation organized by them, and of which they are stockholders and directors, the directors *held* not necessary parties, especially where they are nonresidents of the state of the corporation defendant.

4. Corporations ⇨623—Stockholders of dissolved corporation may sue to recover property fraudulently transferred by directors.

Corporation Law N. J. §§ 53-60, providing that on dissolution of a corporation its directors shall be trustees for winding up its affairs with authority to sue for and recover property in its name, *held* not to preclude a suit by stockholders to recover property of the corporation alleged to have been fraudulently transferred by the directors for their own benefit, and no preliminary demand on the directors is necessary before such a suit may be maintained in a federal court.

5. Patents ⇨285—Where diversity of citizenship exists suit for infringement of patents may be joined with other equitable cause of action.

Where the necessary diversity of citizenship exists, a suit in equity may be maintained in a federal court for infringement of patents and for other equitable relief.

6. Courts ⇨318—Party not indispensable may be dismissed from suit by amendment.

A party complainant, whose presence is not indispensable and would destroy the diversity of citizenship, may be dismissed from the suit by amendment.

In Equity. Suit by F. A. Gardiner and others against the Automatic Arms Company and the Savage Arms Company. On motion to dismiss bill and to strike out certain allegations. Motion to dismiss denied, on conditions, and motion to strike sustained in part.

Gilbert H. Baker, of Penn Yan, N. Y. (Elijah H. Zoline, of New York City, Arthur P. Greeley, of Washington, D. C., Edwin G. Guthrey, and James Hamilton Lewis, of Chicago, Ill., of counsel), for complainants.

Warnick J. Kernan, of Utica, N. Y., and Pendleton, Anderson, Iselin & Riggs, of New York City (Francis K. Pendleton, John H. Iselin, and Lawrason Riggs, Jr., all of New York City, of counsel), for defendant Savage Arms Co.

COOPER, District Judge. This is a motion by one of the defendants, the Savage Arms Corporation, to dismiss the bill of complaint and also to strike out certain allegations. The plaintiffs are stockholders of the McClean Arms & Ordnance Company, which company is not a party to this suit. The plaintiffs bring the suit on behalf of themselves and all other stockholders of the McClean Company who may join in this action as parties complainant and share the expenses. The defendants are the Automatic Arms Company and the Savage Arms Corporation, New York State corporations.

The bill of complaint alleges that one Samuel N. McClean was the inventor of a number of different improvements in firearms; that he applied for and received patents on these inventions, or some of them, and assigned the patents and applications for patents, as the case might be, to the McClean Arms and Ordnance Company, a New Jersey corporation; that on or about May 13, 1910, certain Messrs. Calfee, Bradley, Brown, Cowles, Babcock, and Ward, being all the directors and officers of the company, except one director, who was merely a nominal director, by various means, devices, acts, and proceedings such as, among others, foreclosure of mortgage defaulting on loans and written instruments of assignments, wrongfully and fraudulently, for the purpose of diverting all the property and profits of the company to themselves and their associates, caused or procured all the patents and patent rights belonging to said McClean Arms & Ordnance Company, save two patents, to be transferred to and record title to be vested in the defendant the Automatic Arms Company, a corporation organized by them for the purpose and in which they

were large stockholders; substantially all the stock being held by them and a conspirator.

It is also averred that the directors purchased at the expense of McClean Arms Company patents of North and Cochrane, and assigned them to Cowles and Calfee, who in turn assigned them to the Automatic Arms Company, all in fraud of the stockholders; also, that the Automatic Arms Company in 1914 issued and gave to defendant the Savage Arms Company a license to manufacture under the patents transferred to it, or some of them, the said last-named defendant having full knowledge of all the facts alleged, and that a large number of arms were manufactured thereunder by said last-named defendant and others having license or right from the Automatic Arms Company, on royalties or otherwise, and large profits were made by both defendants herein.

In addition to manufacturing the firearms under the patents assigned to it, it is alleged that the defendants manufactured and infringed the two patents, title to which is still in the McClean Arms Company, and intend and threaten to continue such manufacture.

The complaint also avers that the McClean Arms & Ordnance Company was dissolved in January, 1911, by the Governor of New Jersey for nonpayment of franchise taxes, pursuant to statutory requirement.

The prayer for relief is: (1) That the assignment of patents to defendant the Automatic Arms Company be adjudged void, and that said patents are the property of said McClean Arms & Ordnance Company; (2) for ad interim and permanent injunctions, restraining defendants from manufacturing under such patents or infringing them; (3) that the defendants account for and pay over to a receiver to be appointed by the court the gains and profits by way of sales, royalties, dividends on stock or otherwise received by or accrued to them, or either of them, for the manufacture or sale of guns, or parts of guns, embodying inventions covered by letters patent owned by McClean Arms & Ordnance Company on May 13, 1910, or issued on application owned by said company on said date, including those assigned and the two not assigned, and for damages sustained by complainants and other stockholders by reason of the unlawful doings of said defendants.

At the threshold of the proceedings we are met with the objection which is the main ground of this motion, that the McClean Arms & Ordnance Company is not made a party to the litigation, and it is conceded that if it is an indispensable party, an amendment to the pleadings, adding the company, would oust the court of jurisdiction, because the company is a resident of New Jersey.

If the McClean Company were a corporation in the full enjoyment of all its corporate powers and were the owner of the patents alleged to have been infringed, or would be the legal or equitable owner of the patents alleged to have been fraudulently assigned to the defendant Automatic Company, if the assignments were set aside there would be little question but that the McClean Company would be an indispensable party, and that the complaint should be dismissed. The reason for this is that the undissolved corporation is the owner of the legal title of the corporate property, and an action by stockholders con-

cerning the corporate property in which the corporation is not a party would not be *res adjudicata* as to the corporation, the owner of the legal title. In *Davenport v. Dows*, 85 U. S. (18 Wall.) 626, 21 L. Ed. 938, the court said on this point:

"Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

But the McClean Company was dissolved in 1911 pursuant to the provisions of the New Jersey statute. Upon such dissolution, the dissolved corporation has corporate power only for the purpose of winding up its affairs and the distribution of assets after ascertainment and payment of its debts. This is so by the statutes of New Jersey Corporation Law (2 Comp. St. 1910, pp. 1634-1637), §§ 53-60, and also probably by the doctrines of equity irrespective of statute. *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; 14A Corpus Juris, § 3807.

[1] Upon dissolution, the legal title of the property of the corporation passes to the stockholders subject to the payment of the debts of the corporation. *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *Stearns Coal Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314; *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197; 14A Corpus Juris; *Doherty v. Rice* (C. C.) 186 Fed. 204, 212, affirmed 184 Fed. 878, 107 C. C. A. 202; *Greenwood v. Union Freight R. R. Co.*, *supra*; sections 54 and 84, Corporation Law of New Jersey.

In view of the 10 years since dissolution, the creditors, if any, may be deemed barred by statute of limitations, and have no claim on the property of the corporation. If the dissolved corporation, by reason of its dissolution, is no longer the owner of the legal title to the corporate property, and that title is, after dissolution, in the stockholders, in the absence of creditors, then a judgment in an action by the stockholders for injury to property formerly belonging to the corporation would be *res adjudicata*, and the reason for holding that the nondissolved corporation is an indispensable party, because holder of the legal title, no longer exists.

Authorities, therefore, holding that an undissolved corporation is an indispensable party to an action involving the corporate property, are not applicable after the dissolution of the corporation.

[2] In actions by the stockholders of a dissolved corporation, the corporation is not an indispensable, though perhaps a proper, party. *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197; *Stearns Coal Co. v. Van Winkle*, 221 Fed. 590, 137 C. C. A. 314; *Southern Pacific Co. v. Bogert*, 250 U. S. 485, 39 Sup. Ct. 533, 63 L. Ed. 1099; *Ervin v. Oregon Ry. & Nav. Co.* (C. C.) 20 Fed. 577, 581; *Davenport v. Dows*, 85

U. S. (18 Wall.) 626, 21 L. Ed. 938; *Morshead v. Southern Pac. Co.* (C. C.) 123 Fed. 350; *Lawrence v. So. Pac. Co.* (C. C.) 180 Fed. 822; *Kendig v. Dean*, 97 U. S. 423, 425, 24 L. Ed. 1061; *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499; *Hyams v. Old Dominion Co.* (D. C.) 204 Fed. 681.

That a dissolved corporation is not a necessary party defendant to a suit involving the property or affairs of the dissolved corporation, and adverse to the corporation, is established as to a New Jersey corporation governed by the same New Jersey statutes, by *Gen'l Ry. Signal Co. v. Cade*, 122 App. Div. 106, 106 N. Y. Supp. 729, and as to a West Virginia corporation endowed with certain limited corporate powers under a statute very similar to the New Jersey statute in *Atlantic Dredging Co. v. Beard et al.*, 203 N. Y. 584, 96 N. E. 415, affirming 145 App. Div. 342, 130 N. Y. Supp. 4.

In the latter case the action was brought by creditors against the directors who had transferred to themselves the corporate property, without having paid or provided for the corporate debts.

[3] In the case at bar the directors had transferred the corporate property to themselves under the entity of another corporation of which they and a conspirator were the sole stockholders and directors.

It is but a step from a suit against directors who have transferred the property to themselves as individuals or as partnership, as in the *Beard Case*, supra, to a suit in which they transferred the property to themselves under their new corporate entity, as here. Having divested themselves of the property as individuals, they are not necessary parties to an action against the transferees.

Where the first transferee, in this case the directorate of the *Mc-Clean Company*, had parted with the property consisting mostly of the patents, and no longer held it, and no relief was asked against them, or any of them, but only against the second transferee, it was held that the first transferee was not a necessary party. *Smith v. Lee et al.* (C. C.) 77 Fed. 779. And especially is this so where the first transferees are nonresidents of the state, which is the residence of the second transferee, as in the case at bar. *Krouse v. Brevard Tannin Co.*, 249 Fed. 538, 545, 161 C. C. A. 464.

[4] But the New Jersey statute in section 55 provides:

"The directors, constituted trustees as aforesaid, shall have authority to sue for and recover the aforesaid debts and property, by the name of the corporation. * * *"

This is part of the statutory scheme to wind up the affairs of the corporation. Assuming that this would include an action to set aside transfers made after the dissolution and to prevent infringements of patents after the dissolution, it is not by express terms nor by any cited interpretation made exclusive nor prohibitive of actions by stockholders, especially as here, where the director trustees are the malefactors and have caused the corporate property to be transferred to themselves under another corporate entity, and have caused patents of the dissolved corporation to be used for their own benefit. *Weidenfeld*

v. Sugar Run R. Co. (C. C.) 48 Fed. 615; Boyd v. Hankinson, 92 Fed. 49, 34 C. C. A. 197; Ervin v. Oregon Ry. & Nav. Co. (C. C.) 20 Fed. 577. See, also, Hawes v. Contra Costa Water Co., 104 U. S. 450, 460, 26 L. Ed. 827; Pendleton v. Russell, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574.

Moreover, the McClean Company must be deemed to have knowledge of its own acts, and may be estopped by elapsed time or barred by statute of limitations from maintaining such action, and so would its trustee directors who also must be deemed to have full knowledge of their own acts.

The stockholders are the legal owners of the corporate property, and as such more directly interested than the director trustees. In the view of the statute and in equity also, the latter act in the interest of others, the beneficiaries of the trust, not in their individual interests. To deny stockholders the right in equity to move for the protection of their property and rights where the statutory trustees are the wrongdoers would be most inequitable, and should be so decided only upon the highest authority. None such has been cited to this court. Equity has jurisdiction to make partition between stockholders, if necessary for the purpose. Boyd v. Hankinson, 92 Fed. 49, 34 C. C. A. 197; Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524.

Even if it were necessary in the first instance to demand action on the part of such trustees as it is on the directorate of a nondissolved corporation before action can be brought by a shareholder no such demand is necessary here where the trustees are the very persons whose interest it is to prevent action and resist judgment. Krouse v. Brevard Tannin Co., 249 Fed. 538, 161 C. C. A. 464; Delaware & Hudson Co. v. A. & S. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862.

So on the proposition that the McClean Company is an indispensable party, the decision must be adverse to the moving defendant.

[5] The complainants also assert that this is a patent suit brought for the infringement of the two patents 749,214 and 783,127, record title of which is alleged to have remained in the McClean Arms & Ordnance Company, and that the setting aside of the alleged fraudulent assignments of the other 10 patents and for injunction against infringement thereof and accounting is incidental to the main suit.

There are apparently sufficient allegations in the bill of complaint to satisfy the requirements of a suit brought for the infringement of the two patents, though involved in the more extended statements of the alleged fraudulent transfer of the 10 patents from the McClean Company to the Automatic Company and the licensing of all to the Savage Company. The question of absence of an indispensable party, the McClean Company, to the suit, viewed as a patent suit brought for infringement of the two McClean patents, is raised by the moving defendant as applicable equally. For the same reason given above the McClean Company is not an indispensable party to this as a patent suit as it is a dissolved corporation, and after the lapse of these years title has passed to the stockholders represented by the plaintiffs. Which-

ever is the main action, equity has jurisdiction of the subject-matter of each, viewed as a separate action, and both will be disposed of in the same action, one as incidental to the other, since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits. *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445.

[6] The fact that one of the plaintiffs, Ethel M. Baker, is a resident of this state, is of no moment, viewing this as a patent suit; and she may be eliminated as a party plaintiff to prevent destroying that diversity of citizenship necessary to maintain the action as one to set aside fraudulent transfers. The action may proceed as class action without the present of plaintiff Baker or any other particular stockholder whose presence would destroy the necessary diversity of citizenship. *Victor Talking Machine Co. v. Am. Graph. Co.* (C. C.) 118 Fed. 50.

With reference to the contention that Calfee and Rudd, and the representatives of Cowles, deceased, are indispensable parties to the action: This ground was practically abandoned upon the argument. No relief of any kind with reference to the North and Cochrane patents, the record title of which is held by them, can be given in this action against Calfee and the representatives of Cowles; they not being parties to this suit. If the complaint does not sufficiently aver that they be not within the jurisdiction of this court and cannot be made parties, the same may be cured by amendment. No relief is asked against Rudd, and he is only the medium by which the transfer of the 10 patents was made. He is not an indispensable party, and may be shown by amendment to be incapable of being made a party defendant. *Smith v. Lee*, supra.

No relief can be given the plaintiffs in this action with reference to the stock of the San Francisco Arms Company, as the persons holding the stock are not parties to this action. The allegations relating to the transferees should be deemed merely evidentiary, as disclosing the alleged fraudulent practices by which wrongdoing directors of the McClean Company deprived that company of its corporate property, including these patents. The allegations as to the San Francisco Arms Company may be stricken out by amendment or disclaimer. *Hastings v. Douglas* (D. C.) 249 Fed. 378, 384.

The motion to strike out portions of the bill of complaint is denied, except as to the following, as to which it is granted:

Paragraph 1. The words to be stricken out are those referring to full and exclusive right of making, using and mending the improvement commencing with the word "whereby" and ending with the word "produced," and the same words may be stricken out in each and every subsequent paragraph in which the same words occur.

Paragraph 39. There may be stricken out the words set forth in the motion papers relating to officers of the United States army and the making of a contract by them commencing with the word "notwithstanding" and ending with the words "at all."

Paragraph 41. There may be stricken out the words relating to returning of royalties to the United States government, commencing with the words "as clearly" and ending with "said company."

The bill of complaint is dismissed unless the complainant makes the amendments and disclaimer herein referred to within 20 days after service of copy of order granted on this motion.

An order may be entered in conformity herewith.

UNITED STATES v. BEINER et al

(District Court, W. D. Pennsylvania. September 7, 1921.)

No. 5187.

1. **Criminal law** ⇨242 (4)—**Indictment must charge offense to authorize removal of prisoner to another district.**
To authorize a judge to order a federal prisoner to be removed to another district to answer to an indictment therein under Rev. St. § 1014 (Comp. St. § 1674), he must determine that the indictment is sufficient, and charges an offense.
2. **Conspiracy** ⇨43 (5)—**Charge in indictment cannot be aided by statement of overt acts.**
An insufficient charge of conspiracy in an indictment cannot be aided by allegations of overt acts.
3. **Conspiracy** ⇨43 (6)—**Indictment held insufficient.**
An indictment under Criminal Code, § 37 (Comp. St. § 10201), charging that defendants conspired to violate the National Prohibition Act, "in that they would unlawfully, willfully, and knowingly sell, barter, transport, deliver, furnish, and possess distilled spirits and intoxicating liquors otherwise than as authorized in the aforesaid act, * * * particularly title 2 thereof," held insufficient, as too indefinite to charge any offense.

At Law. On application by the United States for an order for the removal of Joseph Beiner and Max Srolowitz to another district to answer to an indictment therein. Denied.

The United States Attorney, for the United States.

William J. Brennen, of Pittsburgh, Pa., for defendant Beiner.

James Francis Burke, of Pittsburgh, Pa., for defendant Srolowitz.

ORR, District Judge. The United States attorney has asked for an order for the removal of the defendants above named from this district to the Northern district of Ohio, in order that they may there plead to an indictment found in that district. The proceedings were instituted under section 1014 of the Revised Statutes (Comp. St. § 1674), relating to the removal of persons charged with crime from one district to another for trial. The defendants were apprehended in this district and given a hearing before a United States commissioner, which was supplemented by a further hearing in this court upon the application for their removal.

[1] We recognize that under the law the function of the judge upon an application such as has been made in this case is not merely ministerial, but is judicial. *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689; *Beavers v. Henkel*, 194 U. S. 73-83, 24 Sup. Ct. 605, 606, 48 L. Ed. 882. And we have in mind what the learned Justice

Brewer said in the case last cited, that we should never forget "that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection." The duty then rests upon us to determine whether or not there is an offense properly charged against the defendants, and whether or not there is probable cause to believe them guilty. In this case, if it should be found that an offense against the law is properly charged in the indictment found in the federal court for the Northern district of Ohio, we must find, under the evidence, that there is probable cause to believe the defendants guilty of the offense under the evidence taken before the commissioner and before this court. But as it will appear that no offense is properly charged against the defendants, it will necessarily follow that they should be discharged in this district, and not be required to answer the indictment in the Northern district of Ohio, where in no crime is charged.

This brings us to the consideration of the indictment. The defendants Beiner and Srolovitz, together with 15 or more other persons, were charged with conspiracy to violate the National Prohibition Act (41 Stat. 305). The indictment was drawn under section 37 of the Criminal Code (Comp. St. § 10201) which provides that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy," shall be punished. There is no doubt that every conspiracy to violate a criminal law of the United States is a crime within said section, and little doubt that a conspiracy to violate any law of the United States, criminal or not, is likewise within said section. In order, however, that men should be punished for crime, the indictment should give them information of the specific offense charged against them. If such information be not given defendants in an indictment, they do not know what evidence they must meet at the trial, and their plight is indeed bad, if they shall have prepared to meet the case of the government, as they understand it, and find that they are called upon to meet an entirely different case.

The indictment in this case charges that the defendants, through a period of time extending from January 16, 1920, to April 1, 1921, at Pittsburgh, in this district, and at several places in the Eastern division of the Northern district of Ohio, did "unlawfully, willfully, knowingly, and feloniously conspire," etc., "to commit an offense against the United States, to wit, to unlawfully, willfully, and knowingly violate the act of Congress," particularly title 2 thereof; said act being identified in detail, not only by its long title, but by its short title, "National Prohibition Act," and by its common title, "Volstead Act," "in that they would unlawfully, willfully, and knowingly sell, barter, transport, deliver, furnish, and possess distilled spirits and intoxicating liquor otherwise than as authorized in the aforesaid act of Congress, known as the 'National Prohibition Act,' and in violation of the provisions of the said 'National Prohibition Act.'" Thus is the conspiracy charge

set forth in the indictment. Following the conspiracy charge in the said indictment, 29 separate, overt acts are charged to have been committed, each by one or more of the defendants.

[2, 3] It is not necessary or proper, perhaps, that we should refer to the averments with respect to the overt acts as they appear in the indictment, because they cannot aid in support of the indictment, if conspiracy be not sufficiently charged. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; *Pettibone v. United States*, 148 U. S. 197-202, 13 Sup. Ct. 542, 37 L. Ed. 419. There is a foundation in reason for such rule, because, after a conspiracy is formed, an overt act may be committed by one or more of the conspirators without the knowledge of the others. We must leave out of consideration, therefore, the offenses severally set forth in the overt acts, and confine ourselves to the conspiracy as charged, with particular attention to the manner in which it is charged the defendants intended to violate the act of Congress. The manner of violation intended by them, as set forth in the indictment, is "that they would unlawfully, willfully, and knowingly sell, barter, transport, deliver, furnish, and possess distilled spirits and intoxicating liquor otherwise than as authorized" in the said act of Congress, in violation of said act. The word "unlawfully" is a conclusion of the pleader, clearly, and the words "otherwise than as authorized" are a conclusion of the pleader. Between those conclusions may be found averments of fact.

A careful reading of the National Prohibition Act shows that the said act contemplates the sale, barter, transportation, delivery, furnishing, and possessing distilled spirits and intoxicating liquors. It is, of course, true that the act intends to surround such transactions with limitations and restraints affecting time, place, person, record, identification marks, and perhaps restrictions. Of course the rule must be recognized that, when the conspiracy charge is one to commit an offense, and that offense is clearly defined by statute, no high degree of particularity is required in describing it; but, where the statute describes many offenses, the particular offense denounced by the statute, and which defendants conspired to commit, ought to be particularly designated. The long title to the Volstead Act, as set forth in the indictment, is:

"An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote the use in scientific research and in the development of fuel, dye, and other lawful industries."

There is no suggestion in that title of a specific, particular offense denounced by Congress. It is true that the indictment, while charging the conspiracy to violate the act, contains a qualification, "particularly title 2 thereof," yet the charge is not limited to violations of title 2, and without such limitations proof of conspiracy to violate other portions of the act would sustain the indictment, provided that the violations related to the sale, barter, transportation, delivery, furnishing, and possessing distilled spirits and intoxicating liquor otherwise than as authorized in the act.

By reference to title 3 of the act, which relates to industrial alcohol, we find several offenses denounced therein, for which various punishments might be inflicted.

Title 2 of the act, which is particularly mentioned in the indictment, contains many prohibitions for which penalties may be inflicted. There is contained in section 4, title 2, a prohibition against the sale of flavoring extracts and other preparations for intoxicating beverage purposes. That section authorizes the manufacture of such preparations, but provides that the manufacturer shall procure permits, give bonds, keep records, and make reports. Section 6 in said title prohibits the manufacture, sale, purchase, transportation, or prescription of any liquor without obtaining a permit, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician, and except that any person who is conducting a hospital, etc., may, under prescribed rules, purchase and use in such institution liquor. Said section also prohibits the person, to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes, from selling, bartering, exchanging, or furnishing any such to any person not duly authorized, nor to any such except upon an application subscribed by him. Section 7 prohibits a physician from prescribing liquor in excess of a pint to be taken internally for use by the same person within any period of ten days. Said section also requires the druggist to mark the prescription canceled and make the same part of a record which he is required to keep. It also requires the physician who issues a prescription to keep a record in a book, which shall show certain prescribed facts. Section 10 provides that no person shall manufacture, purchase for sale, sell, or transport without making at the time a permanent record of a certain kind described in said section. Section 12 provides that all persons manufacturing liquor for sale under the provisions of title 2 should attach to every container of such liquor a label containing certain statements. It further provides that all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth certain facts. It provides, also, that the label shall be kept and maintained thereon until the liquor is used for the purpose for which said sale was authorized. Section 14 makes it unlawful for any person to use or induce any carrier to carry any package containing liquor without notifying the carrier of the character of the shipment, and further prohibits the carrier from transporting, and the consignee from receiving from the carrier, liquor, unless the package contains, on the outside, certain information. Section 15 makes it unlawful for any consignee to receive a package containing liquor, upon which appears a statement known to him to be false, and also for a carrier or other person to consign, ship, transport or deliver any such package knowing such statement to be false. Section 16 provides that it shall be unlawful to give a carrier an order requiring the delivery to any person, of any liquor when the purpose of the order is to enable any person, not the actual bona fide consignee, to obtain such liquor. Section 29 sets forth the penalties for the first and second offense of manufacturing or selling liquor in violation of the title, and further provides that any person violating the provisions of

any permit, or who makes any false report or affidavit required, or violates any of the provisions of title 2, for which offense a special penalty is not prescribed, shall be fined, etc.

It is unnecessary to consider other sections of title 2 of the act, for enough has been referred to to show that there are many separate offenses denounced thereby. Indeed, section 32 of the act itself, which provides that separate offenses may be united in separate counts, and the defendant may be tried on all at one trial, aids in the conclusion that Congress intended the said act to cover many offenses.

Now turning to the indictment, it seems as if the defendants could not know, from the conspiracy charge alone, which one of the various offenses the government charged them with conspiring to violate. For example, did they intend to sell, barter, transport, deliver, furnish, and possess liquors without permits, or, if they had permits, did they intend to sell, barter, transport, deliver, furnish, and possess liquors without the proper marks or labels on the packages? The conspiracy charge is specially indefinite, in that it does not charge that the spirits and intoxicating liquor which the defendants intended to sell, barter, transport, deliver, furnish, and possess was "*intended for beverage purposes.*"

In Standard Encyclopædia of Procedure, vol. 5, p. 282, sub nom. "Conspiracy," we find the following statement:

"In accordance with the general rule, an indictment or information for conspiracy must set forth the essential elements of the offense with sufficient clearness and particularity to enable the accused to understand the nature of the charge against him, to prepare intelligently to meet it, and to plead the result, whether as conviction or acquittal, in bar of another prosecution for the same offense."

Many cases, including one or two that have been already cited, are to be found in the footnotes in that work. There is also found in the footnotes, the following quotation, there said to be from *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495:

"No offense is so easily charged and so difficult to be met, unless the defendants are fully informed of the facts upon which the state will rely to sustain the indictment. While technical objections to indictments are not to be sustained, substantive and substantial facts should be alleged. General and undefined charges of crime, especially those involving mental conditions and attitudes, should not be encouraged. They are not in harmony with the genius of a free people, living under a written constitution. We can see no good reason why an exception to the general rules of criminal pleading should be made in favor of this crime."

Inasmuch as section 37 of the Criminal Code denounces a conspiracy to commit any offense against the United States, and inasmuch as the indictment drawn under that section, and now under consideration, does not set forth which of many offenses denounced by the Volstead Act the accused had conspired to commit, the indictment must be deemed to be insufficient to require the said Beiner and Srolowitz to plead thereto.

It therefore follows that they should be discharged.

STEPHAN v. UNION PAC. RY. CO.

(District Court, D. Minnesota, Fourth Division. August, 1921.)

1. Courts ⇨344—Validity of service on foreign corporation dependent on its doing business in the state.

A federal court is required to determine independently of state statute whether valid service has been made on a foreign corporation in a personal action commenced against it in that court, and it is a material inquiry whether defendant is doing business in the state in such sense that it may be served therein.

2. Railroads ⇨33 (2)—Service on soliciting agent of foreign railroad company held invalid; "doing business within the state."

In a personal action in a federal court on a cause of action arising in another state against a foreign railroad corporation operating no lines within the state, the fact that it maintained an office in the state with an agent for soliciting business over its lines, but without authority to make contracts, issue bills of lading or passenger tickets, or to collect freight charges, held not to constitute doing of business by defendant in the state, which made valid the service of the summons on such agent.

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

At Law. Action by Alice Stephan against the Union Pacific Railway Company. On motion to quash and set aside service of summons. Motion granted.

The above-entitled action came regularly on for hearing upon a motion made on behalf of the defendant for an order quashing and setting aside the alleged service of the summons upon the defendant; the grounds of said motion being as follows:

(1) That at the time of the pretended service of the summons and complaint herein the defendant was a foreign corporation, and did not operate any railroad in the state of Minnesota, or have any lines of railroad whatsoever therein.

(2) That E. H. Hawley, upon whom the pretended service of the summons and complaint herein was made, was not a ticket or freight agent of said defendant, but was engaged solely in soliciting freight and traffic for transportation in interstate commerce over the lines of said defendant, which are wholly without the state of Minnesota.

(3) That chapter 218, Laws Minn. 1913 (G. S. 1913, § 7735), under which the pretended service aforesaid was made, is void, and is (a) in contravention of article 1, § 7, of the Constitution of the state of Minnesota; (b) in contravention of article 1, § 8, subd. 3, of the Constitution of the United States; (c) in contravention of article 14, § 1, Amendments to the Constitution of the United States.

Sanborn, Graves & Ordway, of St. Paul, Minn., for the motion.
Olof L. Bruce, of Minneapolis, Minn., opposed.

BOOTH, District Judge. [1] The attempted service in this action was made by delivering a copy of the summons to E. H. Hawley, described in the return of service as "general agent of the defendant company." It is conceded that he was the soliciting freight and passenger agent of the defendant, stationed at Minneapolis, Minn. Section 7735, Gen. St. Minn. 1913, reads in part as follows:

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

"If the defendant be a foreign corporation the summons may be served by delivering a copy to any of its officers or agents within the state, provided that any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of the state, may be served with summons by delivering a copy thereof to such agent."

Doubtless such service as was made in the instant case would be held sufficient to give the state court jurisdiction, if the case were in the state court. *Armstrong v. Railroad Co.*, 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335; *Rishmiller v. Railroad Co.*, 134 Minn. 261, 159 N. W. 272; *Merchants Elev. Co. v. Railroad Co.* (Minn.) 179 N. W. 734. But the federal courts are obliged to pass upon the sufficiency of the service of summons as an independent question, in cases originally brought in those courts. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 18 Sup. Ct. 526, 42 L. Ed. 964; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *West v. Railway Co.* (C. C.) 170 Fed. 349; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272. .

The requisites for obtaining jurisdiction over foreign corporations in actions originally brought in the federal courts are stated in the case of *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. The court in its opinion said:

"In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state, * * * and, if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation. An express authority to receive process is not always necessary."

On the facts shown service was held good.

What constitutes "doing business within the state," so that liability to service is incurred, is perhaps not susceptible of an exact definition. Various statements in reference to this phrase have been made by the Supreme Court of the United States. In *Green v. Railway Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, the court in its opinion, referring to service upon the corporation, said:

"Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there."

On the facts shown service was set aside.

In *St. Louis, etc., Ry. Co. v. Alexander*, 227 U. S. 218, 227, 33 Sup. Ct. 245, 248 (57 L. Ed. 486, Ann. Cas. 1915B, 77), the court said:

"This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way, it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served, and in which it is bound to appear when a proper agent has been served with process."

On the facts shown service was held good.

In *International Harvester Co. v. Kentucky*, 234 U. S. 579, 589, 34 Sup. Ct. 944, 947 (58 L. Ed. 1479), the court said:

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown, when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state."

On the facts shown service was held good.

In *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, the court said:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."

On the facts shown service was set aside.

In *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 87, 38 Sup. Ct. 233, 235 (62 L. Ed. 587, Ann. Cas. 1918C, 537), the court said:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted."

On the facts shown service was set aside.

[2] It appears from the record in the case at bar that the defendant railway company has no line of railway in the state of Minnesota, and operates no line therein; that the cause of action did not arise in the state of Minnesota. It appears, further, that Hawley, upon whom the alleged service was made, was a soliciting freight and passenger agent, having an office in the city of Minneapolis; that his duties were to solicit freight and passenger traffic over the lines of the defendant railway company, and as incidental to such solicitation that he quoted rates established by the Interstate Commerce Commission, and received directions for diverting shipments in transit, and transmitted such directions to officers outside of the state; that he collected no freight charges, issued no bills of lading, and issued no passenger tickets; that on request he procured passenger tickets involving transportation partly over the Union Pacific lines from local ticket offices, turning the money received from the prospective passenger over to the local ticket office issuing the ticket; that he was authorized to do no other business than such as mentioned above, and does no other business, and that the defendant transacts no other business in the state. It appeared, further, that in the city directory of the city of Minneapolis appears the following advertisement:

Union Pacific System. Union Pacific Railroad Company, Oregon Short Line Railroad Company, Oregon-Washington Railroad & Navigation Company, St. Joseph & Grand Island Railway Company—Traffic Dept. Gen. Agent's Office, 618 Met. Life Bldg. Tel. Main 9456."

And that in the telephone directory of the city of Minneapolis appears the following advertisement:

"*Union Pacific System.* General Agent—freight and passenger dept. 618 Met. Life Bldg. Main 9456."

And that in the time-tables issued by the defendant company appears the following advertisement:

"*Representatives of the Traffic Department.* Minneapolis, Minnesota.—618 Met. Life Bldg. 135 So. Third St.—E. H. Hawley, General Agent. R. E. Drummy, Traveling Freight and Passenger Agent. Wm. H. Brennan, Traveling Freight and Passenger Agent."

As stated by the Supreme Court, each case must stand upon its own facts. After consideration of all the facts disclosed by the record in the instant case, I have reached the conclusion that they are more nearly similar to the facts in *Green v. Railway Co.*, supra, than to the facts disclosed in any of the other cases. As was said by the court in that case:

"The business shown in this case was in substance nothing more than that of solicitation."


In my judgment the case is controlled by the decision in the *Green Case*. It may be urged that the case at bar should be distinguished from the *Green Case* by reason of the fact that a state statute is one of the elements in the present controversy, and that this element was absent in the *Green Case*. In my judgment this fact is not sufficient to distinguish it from the decision in that case. *West v. Railway Co.* (C. C.) 170 Fed. 349, 355.

Further, the Minnesota statute does not attempt to define "doing business within the state," but simply designates the agent upon whom service may be made. The question whether the corporation is "doing business within the state" still remains to be determined in each case upon the facts therein appearing.

THE ROMAN PRINCE.


KEENAN v. PRINCE LINE, Limited, et al.

(District Court, S. D. New York. June 28, 1921.)

Collision 127—Held not proximate cause of a personal injury occurring 30 minutes later.

Libelant was in the cabin of a moored barge when she was struck by a steamship passing out of the slip and so injured that she sank half an hour later. Libelant noticed that the boat was settling and thought she was sinking, but accepting the opinion of another that she was not, remained on board for 15 or 20 minutes longer, and until the water was coming over the deck, and then, in attempting to climb on board an adjoining barge, in her excitement fell and was injured. *Held*, that the collision was not the proximate cause of her injury.

In Admiralty. Suit by Evelyn Keenan against the steamship Roman Prince and the Prince Line, Limited. Decree for respondents.

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

Edward J. McCrossin, of New York City (William F. Purdy, of New York City, of counsel), for libelant.

Kirlin, Woolsey & Hickox, of New York City (W. H. McGrann, of New York City, of counsel), for claimant and respondent.

AUGUSTUS N. HAND, District Judge. This libel was filed to recover damages for personal injuries alleged to have been caused to the libelant by a collision between the steamship Roman Prince and a grain barge known as the C. W. Crane, lying at the Bush Docks, Pier 5, Brooklyn. I have read the testimony in the case of Philip B. Kenny against the steamship Roman Prince tried before Judge Chatfield, together with the proofs and his opinion in that case (270 Fed. 988), and considered this testimony, as well as such evidence as was offered before me on the first question involved in the present case, namely, whether the steamship Roman Prince collided with the barge C. W. Crane.

Mrs. Keenan testified that she was sitting in the cabin of the C. W. Crane, and saw and felt the impact of the Roman Prince as it backed out of the slip. Her story was supported by Jensen, a bargeman of the Jersey Central Barge No. 321, Maddlone, a tugmaster, McGovern, checker for Luckenbach, Larson, bargeman on Jersey Central No. 109, and Callahan, bargeman on army barge No. 308. These witnesses may have been friends of the libelant, or her husband, who was the bargeman of the C. W. Crane, but it does not appear that they were not disinterested witnesses.

The respondent called many more witnesses than the libelant, who testified that there was no collision. However, many of them were either officers of the Roman Prince, or were engaged in handling her lines as she was warped out of the slip between Piers 4 and 5, Bush Docks, without the customary aid of tugs, which were lacking owing to a harbor strike. The Roman Prince was a vessel 420 feet long, with 54 feet beam. She was moored bow on, and had to be backed out and finally around the outer or westerly end of Pier 5, so that she could proceed to the southward towards Staten Island and on her ultimate course. Her chief officer, Reid, standing on the port wing of the bridge, said that she did not touch the C. W. Crane, but he estimated the clearance at only 6 or 8 feet. The radio man, Hughes, said that she did not touch, and that the clearance was about 10 feet. Shooks, her pilot, estimated that she was not within 5 to 10 feet, but he had previously stated that she was not within 50 feet of anything. Dawson, the chief steward, said there was a clearance of 20 feet. Learmouth, an apprentice, who was attending to lines and fenders on the Roman Prince, said that there was a clearance of 100 feet on each side. Rickman, another apprentice, and Hodge, an apprentice on the bridge, who took telegraph orders, said there was no collision. The second officer, Pallister, said that he was in a position to see if the Roman Prince struck any lighter, and that he saw no collision.

It is evident, however, from the admitted testimony of those on board the Roman Prince that she had to pass between steamships on

the northerly side of Pier 4, and the two lighters, the Crane and Jersey Central No. 321, on the southerly side of Pier 5. She was also using her engines somewhat when about half way out of the slip, and the weight of the testimony indicates that the starboard line which held her away from these lighters was slackened while she passed out near the end of the slip, before the port line was let go. All this indisputably would tend to draw the steamship towards the C. W. Crane, and the testimony of her own officers indicates that she was very close to the latter vessel. Her owner, Kenny, testified that the Crane prior to the collision was in good condition, and the diver, who went to examine her shortly after the collision, found that a number of planks had started.

Testimony was offered by the respondent to show that the curve of the hull of the Roman Prince was such that a collision would have carried away the cabin on the C. W. Crane, and otherwise have injured her before any part of the Roman Prince, whether hull, propeller, or rudder, could have touched the barge. The fact, remains, however, that the Roman Prince was passing out of the slip, admittedly came extremely close to the barge, that five witnesses besides the libelant testified that they saw the collision, and no other explanation than that of a collision seems reasonable to account for the sinking of the Crane.

Judge Chatfield, moreover, heard a great number of witnesses called by both sides, and believed the story of the libelant. Under all the circumstances, I also am inclined to accept their story as a whole, and to find that the C. W. Crane was sunk by reason of the negligent navigation of the Roman Prince.

The second question is whether the injuries to the libelant were the result of this collision. Mrs. Keenan testified that 20 or 30 minutes after the collision, when the boat was sinking, she attempted to get off and climb on the Jersey Central barge No. 321, and injured her stomach and kneecap by falling between the two boats. She was asked in her examination before Judge Chatfield (Minutes, p. 9, in the case of *Kenny v. Roman Prince*—Eastern District):

"Q. After the steamer struck your boat and slid along and went off, did you notice whether or not your boat started to leak? A. Well, it went right down. It was settling all the time.

"Q. Had your boat been leaky before? A. Never. * * *

"Q. How long did your boat remain afloat? A. Well, about half an hour.

"Q. Did you get off your boat? A. Well, I did. I had some help. I fell when I got off.

"Q. How did you get off? A. I went on the Jersey Central barge; they pulled me up. I fell in between the boats, and him and another fellow pulled me up.

"Q. You fell between the 321 and your boat? A. Yes.

"By the Court: Q. What made you fall? A. I got excited. The water was coming up on the boat when I got off.

"Q. Where was the water? A. It was coming up on the deck and was way up.

"Q. The boat had sunk far enough so that the water was coming over the deck? A. Yes. * * *

"Q. As I understand, it was about half an hour from the time of the collision up to the time that you left the boat? A. It was about half an hour; yes.

"Q. Where were you during that half an hour? Just tell us what you did?

A. I didn't realize the boat was sinking at the time. I knew there was some damage done; but I didn't realize that the boat was sinking just then. That was the reason I stayed on the boat.

"Q. You said you came out of the cabin and came out on deck. Did you come out on deck? A. I came out on deck and spoke to the man on the ship.

"Q. Then did you go right back into your cabin? A. Yes, sir; I went right back, and then I went out on deck again, and called the man on barge 321, and told him the boat was sinking, and he didn't think it was; but she was settling all the time, from the time the ship struck her.

"Q. How long was that after you say the barge was struck, which you have placed at 1:15, was it that you called the captain of the 321? A. It was about 10 or 15 minutes after that, and then I went back in the cabin again, after I called him.

"Q. How did you know that your vessel was sinking? A. I seen it sink.

"Q. Well, what did you see? A. I saw the boat settling down. The boat started to fill; that was the first of my knowledge of the boat sinking.

"Q. When did you see that? A. Shortly after the ship struck her.

"Q. And how much, do you think? A. About 5 inches afterwards." (This apparently is a stenographic error for "5 minutes".)

The testimony taken in the Brooklyn trial indicates that, very shortly after the collision, a tugboat went to the assistance of the C. W. Crane and tried to siphon her out, and Mrs. Keenan said, in answer to the question whether there was any tugboat trying to siphon out the C. W. Crane at the time she left the latter: "A. Yes."

The situation is therefore this: Mrs. Keenan saw the C. W. Crane settling shortly after the collision, took the assurance of the bargeman on No. 321 that he did not think the Crane was going to sink, stayed on her, and finally, after waiting until the water was coming in through the scuppers, started to climb off the boat and in her excitement was injured. Under such circumstances, I think the collision of the Roman Prince with the Crane cannot be regarded in a legal sense as the cause of the injuries to Mrs. Keenan. She had 15 to 25 minutes to get off the boat when she knew it was settling. She chose, because of a somewhat natural desire to stay by the vessel, to take the risk for a time of the sinking, and finally, from 20 to 30 minutes after the collision, suffered injuries because she stumbled between the two boats. If she would have avoided stumbling by leaving the C. W. Crane before it had settled, so that there was a long climb to the deck of the Jersey Central lighter, I think she should have left earlier; but, at any rate, I can see no reason why stumbling on her part can be reasonably attributed to the collision. If there had not been time to deliberate, and take care in leaving the C. W. Crane—in other words, if the facts had come within the "squib" case—we would have a different situation. Scott v. Shepherd, 2 W. Bl. 892.

Here I think the collision was not a proximate cause of the injuries to the libellant, and the libel is accordingly dismissed, but without costs.

THE S. A. CARPENTER.**THE TUXEDO.**

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

Collision Ⓒ102—**Passing schooner and ferryboat leaving slip.**

A collision between a schooner drifting down the Hudson with the tide near the ends of the piers and a ferryboat leaving her slip *held* due to faults of both vessels; the schooner which had lost steerageway because of the failure of the wind being in fault for not working further offshore while the wind held, and the ferryboat being in fault for starting from her slip at excessive speed, in view of the fact that her view was obstructed by the shed on an adjoining pier.

In Admiralty. Suit for collision by the Erie Railroad Company against the schooner *S. A. Carpenter*, George A. Colgan, Jr., claimant, and cross-libel by George A. Colgan, Jr., against the ferryboat *Tuxedo*. Decree dividing damages.

Park & Mattison, of New York City, for Erie R. Co.

Macklin, Brown, Purdy & Van Wyck, of New York City, for George A. Colgan, Jr., and the *S. A. Carpenter*.

CHATFIELD, District Judge. On the morning of April 14, 1917, the two-masted schooner *S. A. Carpenter* took a deckload of coal on board at the Delaware, Lackawanna & Western pier just south of the Hoboken ferry on the west side of the Hudson river. The *Carpenter* was intending to take this coal around the Battery and up the East River to one of the bays on the north side of Long Island. A strong ebb tide was running, and whatever wind was blowing came from the northwest. The *Carpenter* was under a reefed mainsail, foresail, and jib, and worked out into the river sufficiently to turn downstream, but as the wind failed and ultimately died out almost entirely under the lea of the shore, the tide carried the *Carpenter* downstream and in toward the pier heads. She thus could not maintain steerageway, even so as to work further out in the river.

Her captain testifies that he was unable to do anything by which he could get away from the shore. He had an anchor in readiness to drop if danger arose, but, relying upon the right of way of a sailing vessel, he did not deem himself under any obligation to anchor in the stream. The weather was clear, and no rule or sense of duty suggested to him the blowing of a horn or other warning. Evidently, with the equanimity, patience, or indifference commonly shown by sailing craft, he made the best of a situation where he could proceed no faster than the tide, but where the tide was helping him in the direction in which he wished to go.

Several hundred feet down the river the *Carpenter* passed the Wells Fargo covered pier immediately adjoining the Erie Ferry racks on the north side, at a distance of some 25 feet, when the *Tuxedo*, a double-decked ferryboat, blew her departure whistle and came out from the

third slip on a trip up and across the Hudson river to Twenty-Third street, New York.

The captain of the Tuxedo was in the pilot house and at the wheel. His mate or assistant pilot had come from the pilot house at the shore end as the ferryboat left the bridge, and the deckhand, having closed the gates, had also proceeded to the front, and reached a point in front of the gates at the forward end, as the bow of the ferryboat came to the point where the Carpenter became visible beyond the Wells Fargo shed. The sails of the Carpenter and her masts extended up to a height of some 50 or 60 feet, but were evidently invisible to any one upon the ferryboat until the lookout reported the Carpenter and warned the captain of the ferryboat to go back. The engines of the ferryboat had been started full speed ahead as the boat left the bridge, then slowed down to moderate speed until the boat was out of the slip, and the wheel of the ferryboat had been held neutral up to the point where the Carpenter was reported, as no tide had yet been met which required the use of the helm.

According to the testimony of the captain of the Tuxedo, he had not yet begun to shape his course for Twenty-Third street when the warning, followed by the reversal of his engines, came from the deckhand. Before stopping, the vessel covered a little more than the distance between herself and the Carpenter, which, coming down with the tide, poked her bowsprit through the guard rail of the ferryboat close to the bow, barely missing some of the passengers, who were warned or pushed back by the lookout.

The Carpenter suffered damage from the carrying away of her forward rigging and has brought action therefor. The Tuxedo suffered damage through the breaking of her rail and some of the forward superstructure, and has filed a cross-libel. The Carpenter alleges fault on the part of the ferryboat in leaving the slip at such speed and under such circumstances that she was unable to respect the rights of a sailing vessel, on a course across her path. The ferryboat alleges that the Carpenter was at fault in maintaining a course so close to the pier heads as to be dangerous to vessels coming out of the slips, and therefore to have been negligently navigated, and also that if the wind had died, so that the Carpenter was helpless and uncontrollable, she should have anchored at some time previous to the accident.

It is apparent that the Carpenter could not be at fault for having failed to drop her anchor after seeing the ferryboat, for sufficient time did not elapse, and the distance was not sufficient, to have stopped the Carpenter's headway, while, if the Carpenter had anchored directly in front of a ferryboat slip, she would have swung around to her anchor and been a more dangerous obstacle to the egress of the ferryboats than when floating.

The provisions of the New York Charter, to the effect that no boat shall navigate close to the pier heads in the North and East Rivers, is not specifically applicable to the present case, but it has been recognized as a rule of admiralty that vessels must not pursue a course close to the pier heads of ferry slips, so as to cause danger to vessels

coming out when observing reasonable caution and compliance with the general rules of navigation. *The Breakwater*, 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139.

It is obvious that a boat may become disabled, or through unavoidable circumstances may be forced into a situation where no warning is possible, and where a vessel navigating negligently may suddenly come upon it and cause injury or even death. The rule is mutual. A vessel with power, finding it necessary to proceed alongside or close to a pier end, must so keep herself under control as not to put into sudden danger an unexpected vessel coming out of the slip. A ferryboat leaving a slip may encounter a disabled gasoline craft or a rowboat. The ordinary rules of navigation control such a situation.

It has been recently held, in the case of *The Bouker No. 2*, 254 Fed. 579, 166 C. C. A. 137, and *The M. Moran*, 254 Fed. 766, 166 C. C. A. 212, that the starboard hand rule does not apply to vessels backing out of a slip to get on their course, but is applicable even to a ferryboat proceeding out of a slip and passing by a pier shed over which a lookout could see the flagpole of a boat at the end of the pier. *The Columbia*, 205 Fed. 898, 124 C. C. A. 230.

The *Carpenter* had the *Tuxedo* on her starboard hand, but was a sailing vessel, and the *Tuxedo*, therefore, could not rely upon the starboard hand rule. If the *Wells Fargo* shed had not intervened, the ferryboat could have easily seen the *Carpenter* while some distance inside the end of her slip. The express shed, therefore, forms an element of the situation which must be taken into account by ferryboats leaving this particular slip. If reasonable care interferes with the speed of the ferryboat, then the management and practice of the ferryboats must give way or be changed in some manner, so that the pilot may exercise that reasonable care which has always been in mind when ferry slips have been so constructed that the ferryboats can observe from their pilothouses passing traffic.

On the testimony of the case at bar, the court will find that the captain of the *Carpenter* was negligent in assuming a course downstream, too close to the pier heads, and in not working further offshore while he had sufficient wind so to do. On the other hand, the court will find that the ferryboat, owing to the presence of the express shed, left her pier at such a rate of speed, and allowed such time to elapse before the lookout reached the forward end of the ferryboat, as to be responsible in part for the collision.

Each libellant may recover one-half of the damage incurred, with costs.

**THE JANE PALMER. THE SINGLETON PALMER. FRANCE & CANADA
S. S. CORPORATION v. FRENCH REPUBLIC.**

(District Court, S. D. New York. August 30, 1921.)

Admiralty ⇨36—Counterclaim must be based on same contract, or arise out of same cause of action, as original libel.

New admiralty rule 50, permitting the filing of a cross-libel on a counterclaim "arising out of the same contract or cause of action for which the original libel was filed," does not authorize a counterclaim based on a contract between claimant and libelant in a suit in rem to enforce a maritime lien on a specific vessel, arising out of the ordinary relationship of ship and cargo and not founded on contract.

In Admiralty. Suits by the French Republic against the schooner Jane Palmer and against the schooner Singleton Palmer, the France & Canada Steamship Corporation, Claimant, with cross-libel by the France & Canada Steamship Corporation against the French Republic. On motion by cross-libelant for stay, and exceptions to cross-libel. Motion for stay denied, and exceptions sustained.

See, also, 270 Fed. 609.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (William H. McGrann, of New York City, of counsel), for the French Republic.

Patterson, Eagle, Greenough & Day, of New York City (J. Culbert Palmer and C. D. Francis, both of New York City, of counsel), for claimant and cross-libelant.

MAYER, District Judge. Under date of December 28, 1920, the court filed its opinion herein. At that time the admiralty rule No. 53 was in existence. Orders, however, were not submitted until after the present admiralty rule 50 was promulgated by the Supreme Court. The new rule made certain changes or additions, which are noted by underlining; said rule 50 being as follows:

"Whenever a cross-libel is filed upon any counterclaim arising out of the same *contract* or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages (to the claims set forth) in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs."

In the court's opinion of December 28, 1920,¹ it was thought advisable to consider the broader aspect of the question of set-off and counterclaim. Now, however, it becomes necessary to examine the original libels, with a view of ascertaining the status of the claimants and the cross-libelant. The original libels plead actions in rem which are not founded on the contract pleaded by the France & Canada Steamship Corporation, but which are founded on a maritime lien on the specific vessels arising out of the ordinary relationship of ship and cargo. It

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
¹ 270 Fed. 609.

is the law that the libelant may assert its liens independently of any ulterior contractual relationship. The New York (D. C.) 93 Fed. 495, and cases cited therein.

Rule 50 undoubtedly extends the scope of a counterclaim, so as to comprehend any counterclaim arising out of the same contract for which the original libel was filed. But from the wording of the rule and the contiguity of the words "for which the original libel was filed," it is apparent that, if the original libel did not set up nor rely upon contract A, but set up or relied on contract B, then that the counterclaim must arise out of contract B, even though the parties had entered into contract A. Even in its present and amended form, rule 50 is nowhere near as broad as equity rule 30 (201 Fed. v, 118 C. C. A. v). In equity rule 30 it is permissible to "set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him." It must be assumed, as matter of law, that, if the Supreme Court had intended to enlarge the right to counterclaim in admiralty to an extent analogous with that which it allowed in equity, the new rule would have been thus worded. But, so far as the text of the rule is concerned, it would seem that a counterclaim may go no further than to set up facts which arise either out of the same contract for which the original libel was filed or out of the same cause of action. As libelant has so framed its pleadings as to confine itself solely to the ordinary relationship of ship and cargo, the matters of which the claimants and cross-libelant complain cannot be said to arise out of the same contract for which the libels were filed.

Counsel have endeavored to assist the court in ascertaining the reasons which induced the committee of admiralty lawyers to propose the rule to the Supreme Court, but no serviceable information was obtained, and this court necessarily must construe the rule as a matter of statutory or rule construction in accordance with usual principles. The result of the foregoing is the same as that which followed the determination of the original motions.

Submit orders on three days' notice.

ATLANTIC CORPORATION v. HARRIS.

(Circuit Court of Appeals, First Circuit. November 7, 1921.)

No. 1516.

1. Master and servant ⇨287 (1)—Negligence in directing servant to operate dangerous machine alone held for jury.

Where it was dangerous for a servant, operating a machine for reaming holes in plates in shipbuilding, to attempt to ream holes upward without a helper, the question whether the master was negligent in directing the servant to undertake such work pursuant to the master's custom until a helper could be sent *held* for the jury.

2. Master and servant ⇨289 (27)—Contributory negligence in operating machine alone held for jury.

Where servant and master knew that it was dangerous for the servant, operating a machine for reaming holes in plates in shipbuilding, to operate such machine in drilling holes upward, without a helper, and it was customary when that stage of the work was reached requiring a helper to request one, and continue work until one was sent, the questions whether the servant was negligent in continuing work alone, and whether he had so continued for more than a reasonable time when injured, *held* for the jury.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by William M. Harris against the Atlantic Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Jonathan Piper, of Concord, N. H. (Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., on the brief), for plaintiff in error. Alexander Murchie, of Concord, N. H. (Murchie & Murchie, of Concord, N. H., on the brief), for defendant in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an action at common law to recover damages for personal injuries alleged to have been sustained by the plaintiff while engaged in the defendant's service by reason of its negligence. There was a trial by jury in the United States District Court for New Hampshire, and a verdict was rendered, upon which judgment was entered for the plaintiff. The case is here on writ of error, and the errors assigned are that the court erred in denying the defendant's motion for a directed verdict: (1) In that there was no evidence of the violation of any duty on the part of the defendant; (2) in that it conclusively appeared that the plaintiff assumed the risk of injury; and (3) in that it conclusively appeared that the plaintiff's own negligence contributed to cause his injury.

The evidence tended to prove that the defendant was engaged in building ships at Portsmouth, N. H.; that the plaintiff entered its employ in the month of August, 1919, and received his injury in the afternoon of February 13, 1920; that for the first three weeks he "bolted up"—that is, put bolts through holes in the ship's plates, pulling the plates together, preparatory to reaming; that for the balance of the

time he was engaged in reaming holes in the plates, and was so engaged at the time he was injured; that the machine he was using at the time was known as a "corner reamer," which was run by compressed air with a pressure of 100 pounds to the square inch, the air being supplied through a hose; that the machine was heavy, weighing about 30 pounds, and not only difficult, but dangerous, for one man to operate in reaming holes upwards; that the drill which the machine operated would catch at times, if a portion of the material being reamed chanced to be hard, or the drill varied in its alignment with the hole, but would not catch in every hole; that in reaming upwards two men were necessary to prevent a kick, should the drill catch in the hole; that one man could not prevent the kick; that on the day of the accident the plaintiff was using a corner reamer to ream holes up through the steel plates of a deck support or pillar of a steel ship, standing on a staging between the decks of the ship, the distance between the decks being about 8 feet and the staging being about 3½ to 4 feet high; that he was supporting the main part of the machine with his left hand, and grasping its handle, where the tube connected, with his right hand; that the drill caught in the hole, causing the machine to kick, and its handle to strike the plaintiff over the heart, causing the injury complained of; that prior to undertaking this particular overhead reaming, and just before finishing reaming downwards or horizontally (which latter class of work he could do alone), the plaintiff requested the boss in charge of the work to furnish a helper to assist in reaming the overhead plates, and was directed by the boss to go ahead with the work, with the assurance that a helper would be furnished right away; that he soon completed the work of reaming downwards or horizontally, and, having disconnected and reconnected the hose, placed the corner reamer upon the staging and began reaming upwards in the overhead plates, standing upon the platform; that when he had been thus engaged for a brief period the drill caught and the machine kicked, causing the injury complained of; that two methods prevailed in the defendant's plant for doing the work of reaming upwards—one was to have two men on the machine all the time; the other was to direct the employee to start in on the work alone, with an assurance or promise that a helper would be presently supplied, and for the employee to start in on the work, the helper being supplied shortly afterwards.

Previous to the accident the plaintiff had, at the direction of the boss, entered upon the work of reaming overhead alone, having first requested a helper, and been assured that a helper would be supplied, and such was the custom or method prevailing in the defendant's plant. He knew it was dangerous to ream overhead without a helper, and had always been supplied with one by the boss, as had the other reamers, either before entering upon the work or soon after. The plaintiff received his injury after he had been at work about six minutes, and before he had finished the first hole and a helper had been furnished.

The danger that the machine would kick without warning and the necessity of a helper in reaming upwards were facts well known, both to the plaintiff and the defendant.

[1] As it was customary in the defendant's plant for the boss to set the men at work reaming upwards without a helper, promising that one would be shortly supplied, and as it could not be known when a kick would occur in the prosecution of such work, there was evidence from which reasonable men might find that the defendant had provided a method of doing this work that was not reasonably suitable, and that it was negligent in directing it to be done in this manner. This method of doing the work was known to the defendant, or at least the jury could find from the evidence that it knew of it and sanctioned it.

[2] It is further contended by the defendant that, inasmuch as the plaintiff knew of the dangers of reaming upwards without a helper, he was guilty of contributory negligence in entering upon the work before a helper was provided, and also assumed the risk.

The plaintiff, on the other hand, says that, under the decisions of this circuit and of the Supreme Court, a servant may properly enter upon the performance of work known to be dangerous because of a deficiency in the instrumentalities furnished or a lack of a sufficient number of workmen, in reliance upon the master's promise to supply the deficiency, and may continue at the work for a reasonable time, without assuming the risk of injury from such deficiency, and without being guilty of contributory negligence, provided the risk is not so imminent that no reasonable man would enter upon or continue in the work.

There is no claim that the machine was defective, or that the plaintiff, after he entered upon the particular work, was careless in his method of operating the machine. The claim is that he was negligent in undertaking to operate the machine at all without a helper, notwithstanding the custom prevailing in the defendant's plant of setting men at work reaming upwards without a helper, and in reliance upon a promise that one would be shortly furnished.

Neither is there any question here as to whether the interval of time during which the plaintiff was engaged in the particular work of reaming upwards without a helper before he received his injury was or was not reasonable. That question was clearly one for the jury, and was submitted to them by the trial judge under instructions to which no exception was taken.

In *Odell Mfg. Co. v. Tibbetts*, 212 Fed. 652, 129 C. C. A. 188, decided by this court March 12, 1914, it appeared that the defendant was negligent, in that it failed to have a guard in place to protect its employees against the risk of injury from certain dangerous machinery, and that the accident in question would not have happened had it been in place. A few days before the accident the plaintiff notified the defendant's master mechanic that he would cease work if the guard was not put back, and the master mechanic said to him: "You keep your hat on. I will have that guard put right back there." The court in its opinion regarded the statement of the master mechanic as "an absolute promise on the part of the defendant in engaging Tibbetts [the plaintiff] to remain at work, and in agreeing to safeguard the place in case he did." In that case, notwithstanding it appeared that the plaintiff knew full well what the dangers were because of the absence of the guard, the jury were instructed:

"If you find that this inducement was held out to him by the company or its agents, and you find it was a reasonable thing for him to go forward there as he did, and he was injured by reason of the defect, then he would be entitled to recover, and there would be no arbitrary rule of law which would hold him to an assumption of the risk"

—and the instruction was held to be correct.

In *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458, the plaintiff, an engineer, was injured through an explosion of a water gauge on his engine. In order to protect him from injury in case of the bursting of the gauge, a thick piece of plain glass, known as a guard-glass, should have been in position in slots arranged for the purpose in front of the gauge. When the plaintiff took charge of the engine he noticed that the glass-guard was missing and reported it to the foreman of the round house, and asked him for a new one. The foreman replied that he had none, but would send for one, and that the plaintiff in the meantime should run the engine without it. He did so for a time, and until the explosion of the water gauge, causing the injury complained of. In that case the defendants, as here, claimed that upon all the evidence the plaintiff, as a matter of law, assumed the risk of injury from the absence of the guard glass. Its contention stated more specifically was:

"That although plaintiff reported the absence of the guard glass to defendant's foreman, and received a promise of repair, yet the danger was so imminent that no ordinarily prudent man under the circumstances would have relied upon the promise, and hence plaintiff, as matter of law, assumed the risk of injury."

It was also insisted in that case that the plaintiff was guilty of contributory negligence as a matter of law. This contention, like that in regard to assumed risk, was based upon the ground of the obvious and imminent nature of the danger to the plaintiff arising out of the absence of the guard glass; but it was held that reasonable reliance of an employee upon the employer's promise to repair a defect was as good an answer to the charge of contributory negligence as to the contention that he assumed the risk, and that as to both matters the question was whether it could be said, as a matter of law, that the danger was so imminent that no ordinarily prudent man, under the circumstances, would continue in the employment in reliance upon the promise; that—

"To relieve the employer from responsibility for injuries that may befall the employee, while remaining at his work in reliance upon a promise of reparation there must be something more than knowledge by the employee that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise."

We do not think it can be said, as a matter of law, that the danger encountered by the plaintiff was so imminent that no ordinarily prudent man, under the circumstances, would undertake the work for a brief period in reliance upon the promise. To do so would in effect necessitate our saying that the established custom and practice of the defendant in directing its employees to undertake such work for a brief length of time was such reckless disregard of human safety that no

employer would think of maintaining such a course of business. This method of doing the work was not only invoked by the defendant with reference to the plaintiff, but with reference to its other reamers, who, no doubt, were as much aware of the dangers attending it as the plaintiff, and who, notwithstanding this knowledge, were accustomed to enter upon the work in the manner the plaintiff did. The plaintiff, also, at previous times, in pursuance of the custom, entered upon this class of work without a helper and without sustaining any injury, and it would be going far for us to say that, under the circumstances, no reasonable man would do as the plaintiff did. The question is rather one of fact for the jury, and this question, as a question of fact, was submitted to the jury, and no exception was taken.

The judgment of the District Court is affirmed, with costs to the defendant in error.

WESTERN SUGAR REFINERY CO. et al. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1921.)

Nos. 3446, 3447, 3452-3455, 3458, 3463, 3464, 3486.

1. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Evidence to sustain Federal Trade Commission's order must be sufficient to sustain finding as to each respondent.

Order of Federal Trade Commission against food manufacturers, jobbers, and brokers, charged to have conspired and confederated together to deal with a wholesale grocery company on terms and conditions constituting unfair methods of competition in interstate commerce, in violation of Federal Trade Commission Act, § 5 (Comp. St. § 8836e), to be sustained as to a respondent seeking a review of the order, must be supported by evidence sufficient to warrant a finding and conclusion as to such respondent, notwithstanding sufficiency as to other respondents.

2. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Order of Federal Trade Commission must conform to charges.

The order of the Federal Trade Commission on charges of unfair methods of competition in interstate commerce, under Federal Trade Commission Act, § 5 (Comp. St. § 8836e), must conform to the charges.

3. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Evidence held sustaining finding of Federal Trade Commission that a concern was engaged in the wholesale grocery business.

In proceeding to review orders of Federal Trade Commission requiring food manufacturers, jobbers, and brokers to discontinue alleged unfair methods of competition in dealings with alleged wholesale grocery concern, evidence that such concern had from 250 to 275 retail grocers as customers, of which only 75 or 80 were stockholders, and that it had no interest in any retail grocery business, *held* sufficient to sustain finding of the commission that the concern was engaged in the wholesale grocery business, and was not merely a buyers' exchange for retail dealers.

4. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Federal Trade Commission's finding, supported by legal testimony, conclusive.

In proceeding to review orders of Federal Trade Commission, under Federal Trade Commission Act, § 5 (Comp. St. § 8836e), the finding of the commission, if supported by legal testimony, is conclusive.

5. **Trade-marks and trade-names and unfair competition** ⇨68—Dealer may refuse to trade with customer, but cannot agree to so do with others.
A dealer may select his own customers for reasons sufficient to himself, and may refuse to deal with a proposed customer who, he thinks, is acting unfairly and is trying to undermine his trade, but cannot combine and agree with others not to trade with particular customers.
6. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Evidence held not to sustain findings of Federal Trade Commission as to conspiracy of sugar refiners against wholesale grocer.
Evidence held insufficient to sustain finding of Federal Trade Commission that sugar refiners entered into a conspiracy to refuse to sell to a particular wholesale grocery company on the same terms and at the same price charged competitors of such company, in violation of Federal Trade Commission Act, § 5 (Comp. St. § 8836e), prohibiting unfair methods of competition in interstate commerce.
7. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Evidence held to sustain finding of Federal Trade Commission as to conspiracy to compel refusal to sell fairly to wholesale grocer.
Evidence held to sustain finding of Federal Trade Commission that jobbers entered into a conspiracy to induce, coerce, and compel manufacturers and distributors to refuse to sell directly to wholesale grocery concern on the terms and prices charged competitors of such concern, in violation of Federal Trade Commission Act, § 5 (Comp. St. § 8836e), prohibiting unfair methods of competition in interstate commerce.
8. **Trade-marks and trade-names and unfair competition** ⇨80½, New, vol. 8A Key-No. Series—Evidence held not to sustain finding of Federal Trade Commission as to brokers conspiring to compel refusal to sell fairly to wholesale grocer.
Evidence held not to sustain finding of Federal Trade Commission that brokers conspired with others to induce food manufacturers and distributors, by coercion, persuasion, boycott, or threats, to refuse to sell merchandise directly to wholesale grocery concern at the same prices and on same terms as to its competitors, in violation of Federal Trade Commission Act, § 5 (Comp. St. § 8836e), prohibiting unfair methods of competition in interstate commerce.

Ross, Circuit Judge, dissenting in part.

Petitions to Review Certain Orders of the Federal Trade Commission.

Petitions by the Western Sugar Refinery Company, by Haas, Baruch & Co., by the United Wholesale Grocery Company, by M. A. Newmark & Co., by Mailliard & Schmiedell, by R. L. Craig & Co., by Stetson-Barret Company, by the California Wholesale Grocery Company, by the Channel Commercial Company, and by the California & Hawaiian Sugar Refining Company to review orders of the Federal Trade Commission requiring petitioners to cease and desist from certain alleged unfair methods of competition in interstate commerce, in dealings with the Los Angeles Grocery Company. Affirmed as to Haas, Baruch & Co., the Stetson-Barret Company, R. L. Craig & Co., M. A. Newmark & Co., the United Wholesale Grocery Company, the Channel Commercial Company, and the California Wholesale Grocery Company, and reversed as to the Western Sugar Refinery Company, the California & Hawaiian Sugar Refining Company, and Mailliard & Schmiedell.

Morrison, Dunne & Brobeck and Herbert W. Clark, all of San Francisco, Cal., for Western Sugar Refinery.

Lawler & Degnan and James E. Degnan, all of Los Angeles, Cal., for Haas, Baruch & Co.

Loeb, Walker & Loeb and Irving M. Walker, all of Los Angeles, Cal., for United Wholesale Grocery Co. and M. A. Newmark & Co.

Edward J. McCutchen, A. Crawford Greene and McCutchen, Willard, Mannon & Greene, all of San Francisco, Cal., for Mailliard & Schmiedell.

O'Melveny, Millikin & Tuller and Sayre Macneil, all of Los Angeles, Cal., for R. L. Craig & Co.

Mattison B. Jones, of Los Angeles, Cal., for Stetson-Barret Co.

Harry W. Hanson, of Los Angeles, Cal., for California Wholesale Grocery Co.

Edward M. Selby, of Los Angeles, Cal., for Channel Commercial Co.

Donald Y. Campbell, of San Francisco, Cal., for California & Hawaiian Sugar Refining Co.

Adrien F. Busick and Marvin Farrington, both of Washington, D. C., Joseph A. Burdeau, of New York City, and D. N. Dougherty, of San Francisco, Cal., for Federal Trade Commission.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The above-named petitioners have petitioned this court to review certain orders of the Federal Trade Commission, requiring them and their co-respondents to cease and desist from certain alleged unfair methods of competition in interstate commerce in dealings with the Los Angeles Grocery Company, in violation of the provisions of section 5 of the Federal Trade Commission Act approved September 26, 1914 (38 Stat. 717 [Comp. St. § 8836e]).

It appears from the record that the Southern California Grocers' Exchange was incorporated under the laws of the state of California in July, 1911. By its certificate of incorporation it was authorized, among other things, "to conduct a general merchandise business, buy and sell foodstuffs, hardware, drugs, chemicals, tobacco, and other merchandise." The stockholders of the corporation were retail grocers exclusively, and the corporation acted as a buying exchange for its stockholders. The name of the corporation was changed by the superior court of Los Angeles county on March 6, 1913, to "Los Angeles Grocery Company." The business of the corporation was continued on a buying exchange basis until January 2, 1918. During this time goods were bought and afterwards sold or distributed to the stockholders of the corporation at approximately the purchase price. At the end of the month the expense of doing business was divided equally among those having purchased or received goods. On December 27, 1917, the board of directors of the corporation adopted a resolution providing that, commencing January 2, 1918, the corporation would discontinue its plan of selling merchandise at cost coupled with an expense assessment, and in the future all merchandise would be sold at a jobbing profit and the business conducted as a jobbing business.

On January 4, 1918, the corporation published in the Commercial Bulletin, a trade paper published in Los Angeles, the following notice:

"L. A. Grocery Company Now Jobbing House.

"Beginning January 2, the Los Angeles Grocery Company ceased to operate as a buying exchange and became an out-and-out jobbing house.

"The company has been pricing all sales to members at cost, plus a percentage to cover expenses of operation. This plan has not been favored by manufacturers generally for obvious reasons. It also has made it confusing for the members to compute their costs accurately. Under the new plan, straight list prices will be charged, though naturally on a basis which will enable the company to compete. An annual accounting will be had, as in any regular business, and earnings, if any, will be distributed in the form of dividends.

"The fact that the company long has enjoyed the option of selling to anybody—not necessarily a member—plus this change, puts it in the same position as the Girard Grocery Company, Philadelphia, which is grocer-owned and which has been very successful. Its sales have grown from some \$15,000 to \$18,000 monthly two years ago to \$160,000 to \$175,000 at the present time.

The Southern California Grocers' Exchange was incorporated with a capital stock of \$50,000. The capital stock of its successor, the Los Angeles Grocery Company, on August 1, 1919, was \$250,000, of which \$90,000 had been paid up. In the proceedings before the Federal Trade Commission Flavel Shurtleff, the manager of the latter corporation, testified that on July 1, 1919, the corporation carried a stock of goods valued at \$280,000, and did business during the year 1919 estimated at \$1,750,000; that the corporation sold only to retail grocers, having approximately 250 to 275 customers; that of this number 75 or 80 were stockholders of the corporation; the remaining number were not.

It appears from the record that prior to 1918 the Los Angeles Grocery Company had been purchasing from approximately 125 manufacturers and producers direct on regular wholesale terms and rates; that after January 2, 1918, this number gradually increased during the year 1918, but there still remained at the end of the year many standard articles of grocery merchandise, such as sugar, condensed milk, corn products, shredded wheat biscuits, Quaker Oats, baking powder, and other similar products always in demand, and which the wholesale grocer is expected to have for sale to retail dealers. The manufacturers and producers and their brokers, dealing in some of these standard products, did not sell such articles to the Los Angeles Grocery Company direct, upon wholesale rates and terms, even in carload lots, for the reason, as stated, that they did not consider the Los Angeles Grocery Company a regular wholesale dealer in groceries.

This situation was brought to the attention of the Federal Trade Commission, which proceeded to investigate the charge that certain of the manufacturers and producers, their brokers, wholesalers, and jobbers, were violating the statute in using unfair methods of competition in commerce in dealing with the Los Angeles Grocery Company. On Friday, February 20, 1919, the Federal Trade Commission issued its complaint against the petitioners and their co-respondents charging them with a violation of the Federal Trade Commission Act (Comp. St. §§ 8836a-8836k). To this complaint all the respondents cited before the

commission made answer, with such denials and averments as placed in issue the material allegations of the complaint. Testimony was thereupon taken upon said issues, and the commission made its findings of fact and its conclusions and order thereon.

Its findings are in substance that the Los Angeles Grocery Company since January 2, 1918, had been and then was engaged in the business of purchasing in wholesale quantities goods and commodities, such as are generally carried by those engaged in business as a wholesale grocer, and selling the same in wholesale quantities for profit to its customers; that said company sells the goods and commodities dealt in by it to the retail grocery trade only, and does not sell to consumers; that there are about 80 stockholders of said company, most of whom are retail grocers; that said company sells to a large number of retail grocers who are not stockholders; that the business of said Los Angeles Grocery Company is separate and distinct from the business of any of its stockholders, and said company has never owned, controlled, or had an interest in any retail grocery or groceries, and has never conducted a retail business; that the said Los Angeles Grocery Company and the respondent jobbers, namely, Haas, Baruch & Co., Stetson-Barret Company, R. L. Craig & Co., M. A. Newmark & Co., United Wholesale Grocery Company, Channel Commercial Company, and California Wholesale Grocery Company, are competitors in the business of buying and selling in wholesale quantities, in the usual course of wholesale trade, groceries, and food products, such as are bought and sold generally by persons, firms, and corporations engaged in the business generally known as that of a wholesale grocer; that the Los Angeles Grocery Company, in the course of its said business, purchases the goods and commodities dealt in by it in the various states and territories of the United States, and said goods and commodities are transported to the said Los Angeles Grocery Company in the state of California, where such goods and commodities are resold in the course of wholesale trade, and there is continuously, and has been at all times mentioned in the complaint, a constant current of trade and commerce in the goods and commodities so purchased by the Los Angeles Grocery Company between the states and territories of the United States; that since January 2, 1918, all of the respondents, with the purpose and intent of stifling, suppressing, and preventing competition in commerce between the Los Angeles Grocery Company and the respondent jobbers, and with the purpose and intent of preventing the said Los Angeles Grocery Company from obtaining the goods and commodities dealt in by it from manufacturers and manufacturers' agents and other usual sources from which a wholesale dealer in groceries must obtain such commodities, have secretly agreed and conspired among themselves, and have had secret understandings with each other that the said Los Angeles Grocery Company was and is not conducting its business in accordance with certain tests or standards fixed and established by said respondent jobbers, and have agreed and conspired among themselves to state and represent to various manufacturers and their agents that the Los Angeles Grocery Company was not conducting its business in accordance with such tests and standards, and have fur-

ther agreed and conspired among themselves to induce, coerce, and compel, by means of boycott and threats of boycott, manufacturers of grocery and food products and their agents to refuse to deal with or sell to the Los Angeles Grocery Company, in interstate commerce, upon the terms, and at the prices offered and charged to its competitors, including the respondent jobbers and others engaged in similar business, and to compel said company to purchase its supplies from and through the respondent jobbers, all of whom are competitors of said company; that the respondent brokers, namely, the C. E. Cumberson Company, the Colbert Company, Flint & Boynton, Franz, Cunningham & Co., Hamilton & Menderson, Henderson & Osborn, Holmes-Danforth-Creighton Company, Johnson, Carvel & Murphy, Kelley-Clarke Company, Laukota-Garriott Company, D. A. MacNeil & Son Company, Mailliard & Schmiedell, Cosmo Morgan Company, Parrott & Co., Bradley-Kuhl Company, Spohn-Cook Company, J. H. Stewart Company, the J. K. Armsby Company, and Schiff Lang Company, induced by coercion, persuasion, boycott, and threats of boycott on the part of the respondent jobbers, have agreed and conspired among themselves, and with the other respondents mentioned, to refuse to sell to the Los Angeles Grocery Company the products manufactured by their respective principals upon the terms and at the prices offered and charged to the competitors of said company, including the respondent jobbers, and others engaged in similar business, and to recommend to their respective principals that they should not sell to said Los Angeles Grocery Company upon such terms and at such prices, and have further agreed and conspired to compel the Los Angeles Grocery Company to purchase said products from and through the respondent jobbers, who are competitors of said company, at prices higher than those charged to such competitors and others engaged in similar business; that the respondent refiners, namely, Western Sugar Refinery and California & Hawaiian Sugar Refining Company, have agreed and conspired between themselves and with each other, and with the other respondents mentioned in the complaint, with the purpose of stifling, suppressing, and preventing competition between the Los Angeles Grocery Company and the respondent jobbers, to refuse to sell sugar to the Los Angeles Grocery Company upon the terms and at the prices offered and charged to its competitors, and to compel the Los Angeles Grocery Company to pay for sugar purchased by it prices higher than those charged to its competitors and others engaged in similar business.

The commission also found other facts in detail supporting and elaborating the facts stated, and as conclusions that, under the conditions and circumstances set out in the findings of fact, the agreements, understandings, policies, and practices of the respondents, as described in the findings of fact, constituted a conspiracy or combination as alleged in the complaint; that under the conditions and circumstances set forth in the findings of fact, the acts, agreements, understandings, and practices of the respondents constituted an interference with the right of the Los Angeles Grocery Company and other persons, firms, and corporations, to buy and sell commodities in interstate commerce,

wherever, from and to whomsoever, and at whatsoever price such persons, firms, or corporations may agree upon among themselves, and that under the conditions and circumstances set forth in the findings of fact the acts, agreements, understandings, policies, and practices of the respondents, the respondent jobbers, the respondent brokers, and respondent refiners, and each and all of them, constituted unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

Thereupon the commission entered an order against the 28 parties named in the complaint, requiring them to cease and desist from directly or indirectly combining and conspiring among themselves to induce, coerce, or compel manufacturers or manufacturers' agents to refuse to sell to the Los Angeles Grocery Company, or to refuse to sell to said company upon the terms and at the prices offered and charged to competitors of said company and others engaged in similar business. The order of the commission is also elaborated in detail with respect to the acts of each of the respondents. The matters in detail in the findings and in the conclusions and order of the commission need not be set out in determining the questions involved in this review of the order of the Commission.

The jurisdiction of this court is provided for in section 5 of the Act of September 26, 1914 (38 Stat. 717), as follows:

"Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive."

In a previous part of this section it was provided that:

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive."

Ten of the 28 respondents before the commission have petitioned the court for a review. The remaining 18 are described as brokers. These

accepted the order of the commission, either because they believed they had not violated the statute and had no intention of doing so, and the order imposed no restraint upon them that they cared to resist, or, having violated the statute, they would accept the order as directed.

In *St. Louis, I. M. & S. Ry. Co. v. United States* (D. C.) 217 Fed. 80, a score of railroads attacked an order of the Interstate Commerce Commission finding that there was undue preference in railroad rates in favor of Cairo, Ill., and undue discrimination in such rates against Metropolis. Two of the roads applied for an injunction against the order of the commission. The other roads acquiesced in the order. The application was heard by three judges under the provisions of the Act of October 22, 1913 (38 Stat. 220). In the course of his opinion, Circuit Judge Baker, speaking for the court, said:

"All of the respondent railroads, except these two complainants, have apparently acquiesced in the order; and we are of the opinion that the evidence before the commission was sufficient on which legally to base a finding that discrimination against Metropolis was exercised by some of the railroads which were respondents in the proceeding before the commission. It is now argued by the defendants in this case that, because there was evidence before the commission to justify a finding of discrimination by some, the order must stand as against all the railroads which were parties to the hearing. In our opinion this is erroneous. In a civil case against a number of defendants, or in a criminal indictment against numerous defendants, a judgment cannot be permitted to stand against a certain defendant, if there is no evidence against him, merely because there may be evidence which would support the judgment against other defendants. And so we believe that, as a matter of law, an order of the Interstate Commerce Commission must be supported by evidence which is sufficient to warrant a finding separately against each railroad named in the order."

[1, 2] We are of the opinion that this law is applicable to the statute in this case, and particularly in view of the charge against the respondents that they conspired and confederated together and with each other to deal with the Los Angeles Grocery Company upon terms and conditions which the commission has found and concluded constituted unfair methods of competition in interstate commerce. Manifestly the order of the commission, based upon such a charge of conspiracy and upon the findings and conclusions sustaining the charge, must be supported by evidence which is sufficient to warrant a finding and conclusion separately against each respondent seeking a review of this order of the commission.

In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427, 40 Sup. Ct. 572, 574 (64 L. Ed. 993), the Supreme Court, referring to the proceedings and order under section 5 of the Federal Trade Commission Act, said:

"Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court."

It follows that the order of the commission must follow the charge in the complaint and that the charge in the complaint must be supported by evidence.

We have, then, before us the petitions of the two sugar refiners in San Francisco, the petitions of seven wholesalers or jobbers in Los

Angeles, and the petition of one broker engaged in business in Los Angeles. These petitions raise substantially the same issues as were raised by their answers to the complaint before the commission, but our inquiry is limited by the statute to the question whether there is testimony in the record supporting the findings and conclusions of the commission, and to questions of law.

(1) Is there evidence in the record supporting the finding that the Los Angeles Grocery Company was engaged in wholesale grocery business in Los Angeles after January 2, 1918?

(2) Is there evidence in the record supporting the finding of the commission that the respondents, or any of them, agreed and conspired among themselves and with each other for the purpose of using any unfair method of competition in commerce in dealing with the Los Angeles Grocery Company?

[3, 4] With respect to the business of the Los Angeles Grocery Company since January 2, 1918, there is evidence tending to establish the character of its business as that of a wholesale dealer or jobber. We have already referred to the testimony of Flavel Shurtleff, the manager of the company, on that subject. There is other testimony in the record to the same effect; but it is not necessary to pursue this question further, for, while respondents do not admit that the Los Angeles Grocery Company has become a wholesale dealer or jobber, they do not directly or specifically deny it either by their petition or other specification of error. They contend that the company continued after January 2, 1918, to have such characteristics of a buyers' exchange for retail dealers that respondents were justified, acting separately and individually, in believing that the company was not a wholesale dealer in the sense in which that term is generally understood. If the finding of the commission upon this issue is supported by legal testimony, it is by the statute made conclusive, and we can go no further in this review.

The important question is the conduct of the respondents in dealing with the Los Angeles Grocery Company, and the first element to be considered in that question is the charge of a conspiracy on the part of the respondents in using unfair methods of competition in commerce in such dealings.

[5] It is the settled law that the individual dealer may select his own customers for reasons sufficient to himself, and he may refuse to deal with a proposed customer who he thinks is acting unfairly and is trying to undermine his trade. *Eastern States Lumber Ass'n v. United States*, 234 U. S. 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. But, as was said by the Supreme Court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 30 Sup. Ct. 535, 538 (54 L. Ed. 826) :

"When the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

The evidence before the court was the evidence before the commission. Flavel Shurtleff, the manager of the Los Angeles Grocery Company, whose testimony has heretofore been referred to, testified that he had a telephone conversation with S. F. Brown about January 1, 1918. Brown was a member and manager of the brokerage firm of Parrott & Co., located in Los Angeles, engaged in selling sugar and other grocery commodities. This conversation Mr. Shurtleff reduced to writing at the time in the form of a memorandum, and when called as a witness he produced this memorandum and recalled the conversation he had with Mr. Brown as follows:

"I called Mr. Brown on the phone and told him that I wanted to give him an order for a carload of 600 bags of sugar; and he says, 'How is that? To be shipped direct to you fellows?' 'Yes, sir.' 'It could not be done; out of the question; inconsistent; entirely out of line with our methods of doing business; would get us in trouble with the other jobbers.' I told him that it was necessary for us to have sugar direct, or we would be put out of business. He said that our people could get sugar through the regular channels, and he thought that was the proper way for them to get it. He said that it was against their policy of doing business; that they had well-defined lines of going through the old-line jobbers, and that that policy he would have to follow. I told him that I had called Mr. Strodoﬀ, and Mr. Strodoﬀ had referred me to him as the sales department, and I was now making application to him. He says: 'Shurtleff, it cannot be done. Personally I would just as soon sell a car of sugar to you as I would to Haas Baruch, or any of the other jobbers, but it would get us in trouble, disturb our business relations here, and it can't be done.'"

The witness testified that later on, after this telephone conversation, he called by appointment at the office of Parrott & Co. and spent an hour and a half with Mr. Brown going over the different lines that they had, and asking him to sell the Los Angeles Grocery Company the different lines direct. Shurtleff testified that it would be impossible for him to give the entire conversation, but he recalled it as follows:

"I recalled to him that at one time I represented Parrott & Co. on some of the lines that he was representing them on, and that I had sold those lines to the trade here, and had gotten them a volume of business that was satisfactory, and that Parrott & Co. headquarters in San Francisco agreed to that policy, and I could not understand why they gave me that privilege as a broker and that they did not give him that privilege. He said to me in answer, 'Shurtleff, the same proposition holds good on this line that it does on the sugar. We cannot sell you these goods direct without interfering with our business relations with the other jobbers, and until you can get on the direct list on sugar it is absolutely impossible for us to do business with you on the other lines.'"

Mr. Shurtleff testified further that he made application to the C. & H. Sugar Refining Company (California & Hawaiian Sugar Refining Company); that he had a conversation with Mr. W. R. K. Young, the assistant general manager of that company, as follows:

"I said to Mr. Young, 'I am simply asking of you personally what I have sent a number of—at least two representatives to ask you for before; that is, to put the Los Angeles Grocery Company on direct for C. & H. sugar. And in order that you may realize that we can buy a quantity of sugar that would justify your giving us an affirmative answer, I will now place with you an order, if you will put us on the direct list, for 25,000 bags to be shipped to the Los Angeles Grocery Company at specified periods and during the next few

months. I will also give you an order for 20,000 bags to be shipped to certain canneries whose business I can give you. We will accept the sugar sight draft attached to bill of lading and take care of the payments.' Mr. Young says, 'That is a nice piece of business you are offering us, Shurtleff, and we want the business; we need the business. I am sorry Mr. Brown is not here, so that you can talk to him personally. I will report the matter to Mr. Brown, and I see no reason why we can't do business with you.'"

Mr. Shurtleff testified that he saw Mr. Young within 90 days in Los Angeles at the office of the Los Angeles Grocery Company, where he had a conversation with him; that he took Mr. Young around the place and Mr. Young said to him:

"Mr. Shurtleff, Mr. Brown has sent me down to look you over. I will be glad to have you show me over your house and tell me how you are conducting your business."

Shurtleff testified further:

"I took Mr. Young over the house, showed him our place of business, how we were conducting business, and he says: 'It looks to me like you had a wholesale house here. I don't see why we can't sell you sugar. I will so report to Mr. Brown.' The Los Angeles Grocery Company was never put on the direct list. We buy sugar from that company through Louis Seroni. We get the regular terms on it plus 5 per cent. brokerage. We bought \$20,000 worth last week."

Mr. S. F. Brown was called as a witness on behalf of the respondents. His attention was called to the testimony of Mr. Shurtleff, wherein he testified that Brown had said it would get them into trouble with the jobbers, referring to the matter of selling to the Los Angeles Grocery Company; that it was his policy to do business with the old-line jobbers, and that it would get them into trouble to disturb their business relations, and could not be done. He was asked if he ever made such a statement. His reply was: "I would say no." On cross-examination Brown was asked about a telephone conversation with Shurtleff concerning placing an order for 600 bags of sugar in a car, to which Brown replied:

"'A car? Well, how do you mean about that, to be shipped to you folks? Well, we couldn't do that anyhow. It would be absolutely, inconsistent and unfair, and would lead us into trouble.' Mr. Shurtleff asked him. 'How?' to which Brown replied, 'Because it would lead us into trouble in the general business here'."

—and Mr. Brown testified that that was the substance of the conversation.

W. R. K. Young was also called as a witness for respondents. He contradicted Mr. Shurtleff's testimony in the main, but admitted that the California & Hawaiian Sugar Refining Company declined to sell directly to the Los Angeles Grocery Company. On cross-examination he testified that the California & Hawaiian Sugar Refining Company had always distributed its products through the wholesale grocers of the United States and the manufacturers.

Mr. Shurtleff testified with respect to an application to the Western Sugar Refinery Company for sugar to be sold to the Los Angeles Grocery Company direct. He said he had negotiated with Cosmo Morgan during the first four months of 1918 in his office about being put on the

direct list on Western Sugar Refinery Company sugar. The witness testified:

"I told Mr. Morgan that I had come with the idea of asking him to put us on the direct list on sugar, and that the reason for coming was that we had changed our plan of doing business and were now conducting our business as a wholesale grocery, and that our representative in San Francisco had called on the San Francisco representative, Mr. Jennings, and we had been referred to him, and that I felt we were entitled to be put on the list, and asked him what he could do for us. He answered, 'Who are your stockholders?' I told him practically the same stockholders that we had had previously, with myself and Mr. Dole and one or two others, but aside from that they were the same. He asked me how we were conducting the business. I told him. He said, 'Mr. Shurtleff, it would be absolutely out of the question from my point of view, as it would be revolutionary. It would disturb conditions in Los Angeles, and you are not entitled to it. It cannot be done.'"

A letter was introduced in evidence, dated at Los Angeles, January 7, 1918, addressed to the Western Sugar Refining Company, San Francisco, Cal., and signed by Cosmo Morgan Company. The letter reads as follows:

"The Los Angeles Grocery Company, of this city, which was formerly a buying exchange for 88 retail groceries of Southern California, have now applied to us to sell them direct. They claim that they have ceased being a buyers' exchange, and now sell their members on a profit basis, just as any wholesale grocery company does. They also intend to sell to other retailers in Southern California, and do a general jobbing business. They base their claim on the fact of manufacturers selling direct to Girard of Philadelphia, who they claim buys from all manufacturers.

"We beg to inform you that we have interviewed all of the wholesale grocers of Southern California, and they very much object to us selling them. We also called on the Los Angeles Grocery Company to ask for particulars of how they made their claim of being wholesale grocers, and they stated that their former members, consisting of 88 retail grocers, furnished the capital for their wholesale grocery house. In other words, it is nothing else but a buying exchange, just as it always has been, except for the difference as stated above. If we do sell the Los Angeles Grocery Company, it will have the effect of revolutionizing the entire grocery business of Southern California, from the fact that there are other chain stores operating here. H. G. Chaffee Company, of Pasadena, have 26 stores. Ralph Grocery Company and Albert Cohn have chain stores doing a larger business than the Los Angeles Grocery Company have done with their 88 stores. These concerns would be fully justified in applying for the same buying privileges as the Los Angeles Grocery Company.

"This contention to buy direct is something new with us, and we feel that it is entirely up to our principals to decide the matter. We therefore ask you to kindly instruct us whether or not we shall sell them direct."

Mr. Morgan was called as a witness for the respondents. In the course of his testimony he said that he had been in the place of business of the Los Angeles Grocery Company; that he found it had an excellent establishment, most excellently conducted, fair in size, with a fair stock on hand. He did not know what they buy, because he did not sell to them; but, looking at their stock, he would say that in some cases they did buy in wholesale quantities. They tendered an order to one of his principals for what he would regard as a wholesale order, but the order was declined. He understood that all of their members were retail grocers, but could not say that the company limited its sales

to its stockholders. He understood that the corporation sold to anybody who came in to buy, providing he was a retailer, but he never heard of the company owning or controlling a retail grocery.

A. A. Brown, the sales manager of the California & Hawaiian Sugar Refining Company, was called as a witness by the commission upon a subpoena to produce certain records. He produced a telegram dated July 2, 1918, addressed to the California & Hawaiian Sugar Refining Company at San Francisco, as follows:

"Morning Times, Washington dispatch, states Food Administration rules Los Angeles Grocery Company regarded a jobber under new sugar regulation. Local jobbers meet this morning to enter protest. D. A. MacNeil & Son Co."

To this telegram was attached a newspaper clipping, which was also introduced in evidence without objection. The clipping reads as follows:

"Los Angeles Grocery Company a Jobber. Is Given That Classification in Connection with All Sugar Regulation. (Exclusive Dispatch.) Washington, July 1.—Herbert Hoover, Food Administrator, to-day ruled that the Los Angeles Grocery Company, the buying department for 250 retail stores in Los Angeles and vicinity, should be regarded as a jobber in the new sugar regulations. Accompanied by Congressmen Osborne and Kettner, F. M. Clark and J. B. McPheran, representing the grocery company, called on Mr. Hoover by appointment and were able to convince him that they are entitled to the jobbers' classification in connection with all sugar regulation of the present and future. Later in the day further conferences were held to work out the details of the proposition."

A telegram dated at San Francisco, July 2, 1918, signed by the California & Hawaiian Sugar Refining Co., and addressed to Andrew A. Brown, Washington, D. C., was also introduced in evidence, as follows:

"Newspaper telegraphic dispatch from Washington this morning states Food Administration rules Los Angeles Grocery Company be classified as a jobber under new sugar regulation. Can you verify?"

Mr. Brown testified that he received this telegram at Washington; that he was the direct representative of the California & Hawaiian Sugar Refining Company upon the American Finance Committee, and was representing general cane and beet arrangements. He testified that he went to the legal department of the Food Administration and found that the ruling did not apply to cane sugar at all.

Rollin W. Dole, a buyer for the Los Angeles Grocery Company, called as a witness for the commission, testified to a conversation with Mr. Brown, of the California & Hawaiian Sugar Refining Company, wherein Dole made application to have the Los Angeles Grocery Company put on the direct list for sugar; that Mr. Brown, in denying the application, said:

"Well, if we put you people on the direct list, we will have to put on a whole lot of people up and down this coast. There are several organizations here in San Francisco, and a lot of big retailers who would claim to be in the same position you are in, * * * and if we open up all these extra accounts, this building would not hold the office force that I would have to have."

Dole testified that during this conversation he said to Brown:

"Our Los Angeles Grocery Company is exactly like the Franklin and Girard Grocery Companies in Philadelphia. They are buying of the Franklin Sugar Refining Company in Philadelphia, and I know that because I have investigated it personally, and I cannot see upon what ground you can base a refusal to sell our company, if our plan of operation is the same."

To which Brown answered:

"Yes, in the East that is probably true. There are lots of people upon the sugar refining companies' direct list, but back East the sugar refiners have a lot of business men with whom they are dealing. They are not interested in whether Tom Brown, at the corner, buys a case of some kind of cereals, or a bag of salt, or a bag of sugar direct or not, or to whom he sells it. They are too busy attending to their own business; but out on this coast we have a lot of jobbers who are damned babies."

Dole further testified to a conversation with Cosmo Morgan; that Morgan came down to look over the Los Angeles Grocery Company, with a view to considering their application to get upon the direct list on sugar and other commodities represented by Morgan; that Morgan stated that he could not see any difference between the Los Angeles Grocery Company and Ralph's Grocery Company, or Albert Cohn, or Sam Seelig Company, or any of the big chain stores; that they were retailers, and that he did not believe they were entitled to buy sugar direct; that Morgan said:

"Well, if you can bring about the result that you desire, namely, getting on the direct list, it certainly will revolutionize conditions up and down this coast in a business way."

On February 20, 1919, Schiff-Lang Company, of Los Angeles, one of the original respondents in this case before the Federal Trade Commission, addressed a letter to F. E. Booth Company, San Francisco, as follows:

"We beg to acknowledge receipt of your favor of February 19th, in reference to the Los Angeles Grocery Company, and, in reply, wish to say that these people are not legitimate jobbers, but are virtually a buying exchange for about 88 retailers. For your information, wish to say that we do not sell these people for any of our principals, and that none of the leading manufacturers of the country recognize them as jobbers. It is possible for the Los Angeles Grocery Company to buy, as they have been in the past, through any of the jobbers in this city.

"The status of this company was clearly established by the Sugar Administration Board, who refused to recognize them as jobbers, according to the best information we have been able to obtain. And, further, the Southern California Association of Manufacturers' Representatives, as a body, are on record as against soliciting business from this firm. For your further information, would advise that, if sales were made direct to this concern, it would undoubtedly very seriously affect your present pleasant relations with all our Los Angeles jobbers."

On March 3, 1919, Schiff-Lang Company wrote F. E. Booth Company, correcting their former letter, as follows:

"We have for acknowledgment your favor of the 1st and are returning herewith communication, as requested. In looking over ours of the 20th, in order to answer your letter, we note that we made a statement that 'the Southern California Association of Manufacturers' Representatives, as a body, are on record as against soliciting business from this firm.' We wish to ad-

wise that this statement is not a fact, and was made, on our part, entirely without authorization or full knowledge. To the best of our knowledge, this Association is not on record in any way as affects the Los Angeles Grocery Company. We further, though, repeat our statement that, to the best of our knowledge and belief, there is not a jobber in this city but that will sell the Los Angeles Grocery Company.

"As it is evident that our original letter to you was forwarded to this company, we would ask that you forward this letter to them, in order to correct the wrong statement as contained in ours of the 20th."

John J. Wartman, vice president of Johnson, Carvell & Murphy, one of the original respondents before the Federal Trade Commission, was called as a witness for the respondents. He testified that his house sold to the jobber and manufacturing trade, but that it did not sell the Los Angeles Grocery Company; that whenever the question came up between him and his principals, he recommended practically in all instances that no sale be made direct to the Los Angeles Grocery Company.

C. M. Gair, secretary and treasurer of Johnson, Carvell & Murphy, was called as a witness by the commission upon a subpoena to produce certain records. He produced a letter to the Royal Baking Powder Company, New York, dated January 17, 1918, and signed by Johnson, Carvell & Murphy, which reads in part as follows:

"We inclose herewith copy of a letter which was received from the Los Angeles Grocery Company, and desire to say that this letter was sent to us with the request that we put before our different principals the question of selling this concern their products direct. * * * While we do not desire to offer any particular recommendation, it does not seem as though an additional wholesale distributor of groceries was a necessity in this market at this time, and it would occur also to us, from the manner in which the Los Angeles Grocery Company has been, and is now, acting as a buyers' exchange for this chain of retailers, that putting them on the direct buying list might be looked upon as rather an unfriendly act by both the regularly qualified jobbers now covering this territory, and also by many of the large retailers, who have no connection with the Los Angeles Grocery Company, and who might feel they were equally entitled to the same consideration."

It appears from the evidence that Fred Fear & Co., of New York, produced an article known as "My Wife's Salad Dressing." Their agent in Los Angeles about August 1, 1918, was Mr. Crawford. He called upon Mr. Arthur Lee, a buyer for the Los Angeles Grocery Company, and informed the latter that Fred Fear & Co. had placed the Los Angeles Grocery Company on the direct list. The Los Angeles Grocery Company had a letter from Fred Fear & Co. at that time to the same effect. Crawford and Lee proceeded in the matter of price and quantity of the commodity to be purchased. The matter was continued until the next day, when Crawford informed Lee that the order from Fear & Co. had placed him in a peculiar predicament; that it was absolutely necessary for him to protect or take off the hands of the jobbers who had "My Wife's Salad Dressing" all of that commodity they had on hand. Those who had the goods gave as reason that, inasmuch as the Los Angeles Grocery Company was to receive that article direct, it would be impossible for them to handle the goods, and they would expect Crawford, as a broker, to relieve them of such goods. The negotiations resulted in the taking over by the Los Angeles Grocery Com-

pany of all the cases of this article in the hands of the jobbers in Los Angeles—from Haas, Baruch & Co. 5 cases of small, 2 cases of medium, and 2 cases of large; from Stetson-Barret Company 10 cases of small, 10 of medium, and 5 of large; from the United Wholesale Grocery Company 10 cases of small, 10 of medium, and 5 of large—making a total of 25 small, 23 medium, and 12 large, or a total of 60 cases.

It further appears from the testimony of Arthur Lee that the Channel Commercial Company objected to "My Wife's Salad Dressing" being sold direct to the Los Angeles Grocery Company. Mr. Lee testified:

"On Friday, August 2d, when Mr. Crawford came in, he says, 'Mr. Lee, I thought that this matter that we had yesterday regarding My Wife's Salad deal was in confidence.' I said, 'I assure you, Mr. Crawford, it was, so far as I am concerned.' I says, 'What is the trouble now? Has somebody caught you at it?' He said, 'Yes; as I told you, I was going to explain to all the jobbers what my principals had instructed me to do, in order to clear my skirts for future transactions, but I had intended only to confess to those whom I knew had merchandise.' I said, 'If anybody else knows of that, I can't imagine who it is, Mr. Crawford, unless it be the Channel Commercial Company. * * *' 'Well,' he says, 'when I went into the office of the Channel, either that afternoon or that morning, Mr. R. J. Porter immediately jumped on me,' as Mr. Crawford expressed it, 'and said, "I understand you have changed your policy from that of selling to wholesale grocers to that of selling to retailers."'"

Flavel Shurtleff testified that the Los Angeles Grocery Company bought direct certain cereal products sold by Colbert & Co. William Russell Walters, connected with Colbert & Co. from April, 1917, to June, 1917, as salesman, and until November, 1918, as manager, called as a witness by the commission, testified that he was the agent of Colbert & Co. at Los Angeles, and that while he was such agent and representative of Colbert & Co. he told Shurtleff that he was afraid he was going to lose his job if he did not discontinue selling to the Grocery Company direct. Walters further testified to a conversation with Hunt, of Stetson-Barret Company, wherein Hunt said that he (Walters) would get in bad if he sold direct to the Los Angeles Grocery Company.

Arthur C. Chase, manufacturers' agent, selling breakfast food, health food, and canned goods, a witness for the commission, testified that Hunt said to him:

"If you sell the Los Angeles Grocery Company, you will be dropped by the jobbers like a hot potato."

Walters also testified to a conversation with a representative of the Stetson-Barret Company, Mr. Gough; that Gough asked him if he sold the Los Angeles Grocery Company direct, and he denied doing so. The denial he said was untrue. He gave as a reason for the denial that he did not want the jobbers to know that he was selling the Los Angeles Grocery Company direct. He (Walters) said his company could not afford to incur the jobbers' displeasure.

Verne M. Osborne, a merchandise broker residing in Los Angeles, a witness for the respondents, testified to a conversation with Mr. Tuttle, of R. L. Craig & Co.; that Tuttle asked him if he sold the Los Angeles Grocery Company, and that he replied he would sell, if he had anything to sell them.

Harry A. Pierce, representing Bixby & Co., of Los Angeles, a witness for the commission, testified that he sold the Los Angeles Grocery Company direct, and that he had received a letter from R. L. Craig & Co., asking if he had sold the Grocery Company direct; that later he had a conversation with Mr. Hartford, of R. L. Craig & Co., wherein Mr. Hartford explained to him that the Los Angeles Grocery Company were retailers, and not wholesalers, and that he did not think retailers ought to buy on the wholesale list.

Arthur C. Chase also testified to a conversation with Mr. Robert Newmark, of M. A. Newmark & Company, one of the original respondents, and that Mr. Newmark inquired of him if he were selling the Los Angeles Grocery Company direct. That was the end of the conversation.

C. H. Snead, a merchandise broker residing at Alhambra, representing Kelley Clarke Company, testified that Mr. Robert Newmark inquired of him if he were selling the Los Angeles Grocery Company direct.

Henry A. Sloss, salesman for Woodman Packing Company and their agent, a witness for the commission, testified that he sold the Los Angeles Grocery Company direct, and that Mr. Sprouse, of the California Wholesale Grocery Company, said to him he had heard—the rumor had been spread—that he (Mr. Sloss) was selling the Los Angeles Grocery Company direct.

The Western Sugar Refinery Company and the California & Hawaiian Sugar Refining Company sold their sugar to the Los Angeles jobbers, and they, in turn, sold or would sell to the Los Angeles Grocery Company as to a retail dealer, but the refiners would not sell direct to the Los Angeles Grocery Company at the usual rates and terms to jobbers, for the reason, as stated by them, that they did not regard the Los Angeles Grocery Company as a wholesale dealer or jobber. There is no testimony in the record that this course of action on the part of the two sugar refiners arose from any actual understanding or agreement between them or with the Los Angeles jobbers. The testimony proves that it was a concurrence of opinion as to the classification to be given to the Los Angeles Grocery Company, but we do not find anything more in the testimony. This classification appears from the testimony to have been erroneous, but as long as it was the individual opinion and action of the refiners, it could not be made the basis of a finding of conspiracy or combination between the two refiners, or between them and the jobbers, or between them and the brokers.

[6] The difficulty has long been recognized of drawing a definite line between the innocent act of an individual and the same act made unlawful by reason of its being the joint or combined act of two or more; but whenever this question arises there must be some legal evidence to establish the unlawful combination or conspiracy, or facts from which that inference may be legally drawn, or the charge must fail. We do not find such evidence in this record with respect to the two sugar refiners.

[7] With respect to the Los Angeles jobbers, we think the testimony is more definite and clear, and does tend to support the finding of a

combination or conspiracy between them to prevent manufacturers and producers from selling directly to the Los Angeles Grocery Company as to a wholesale dealer or jobber. This conclusion relates to the respondents Haas, Baruch & Co., Stetson-Barret Company, R. L. Craig & Co., M. A. Newmark & Co., United Wholesale Grocery Company, Channel Commercial Company, and California Wholesale Grocery Company.

[8] With respect to the acts of Mailliard & Schmiedell, the only brokers seeking a review of the order of the Commission, we do not find that the testimony supports the finding that they combined or conspired with other brokers, or with the refiners, or with the jobbers, or that they were induced by coercion, persuasion, boycott, or threats, to prevent the Los Angeles Grocery Company from purchasing direct from the manufacturers and producers at jobbers' rates and terms.

The order of the court will be to affirm the order of the Federal Trade Commission with respect to the finding and conclusion that the Los Angeles Grocery Company has been a wholesale dealer or jobber since January 2, 1918. The order will also provide for the affirmance of the order of the Federal Trade Commission with respect to the seven jobbers, namely, Haas, Baruch & Co., Stetson-Barret Company, R. L. Craig & Co., M. A. Newmark & Co., United Wholesale Grocery Company, Channel Commercial Company, and California Wholesale Grocery Company, and to reverse it as to the Western Sugar Refinery Company, the California & Hawaiian Sugar Refining Company, and Mailliard & Schmiedell.

ROSS, Circuit Judge (dissenting in part). I dissent from that portion of the order of this court affirming that of the Federal Trade Commission in any respect, for the reason that, in my opinion, the record shows that the true status of the Los Angeles Grocery Company was that of a buying exchange, and cannot be properly regarded as a wholesale dealer, and, that being so, that the petitioning wholesale dealers, whose legitimate business mainly, if not entirely, depends upon the custom of retailers, were justified in combining to protect such legitimate business. The witness Shurtleff, who had charge of the business of the Los Angeles Grocery Company, having admitted in his testimony that it was that of a buying exchange until January 1, 1918, said:

"We bought the goods at a given price, turned around, and sold those goods to our stockholders at approximately the same price that we bought them at, and at the end of the month the expense of doing business was divided equally among those having purchased. That was continued until January 1, 1918. Just prior to January 1, 1918, action was taken by the directors and confirmed by the stockholders that on and after that date we would discontinue buying goods and selling them without a profit, and assessing the expense of doing business at the end of the month, but that the business would be conducted for profit. We would buy those goods in the regular jobbing way, as many of them as we could, direct, and what we could not buy direct, wherever we could get the best price, and in turn would sell these goods for profit, as any wholesale grocer would, taking into consideration the expense of doing business, and at the time figuring on having a 1 per cent. net above the cost of doing business, in which to justify the investment of our stockholders."

This testimony itself shows, it seems to me, that the change so made, arranging for a nominal 1 per cent, net above the cost of doing business, was a mere incident in the main business for which the corporation was organized and carried on, namely, the buying for its large number of retail stockholders, and was so arranged in the endeavor to make it appear that the company was a wholesale dealer. Moreover, in the cross-examination of the witness Morgan, that witness, in answer to a question by counsel for the Trade Commission as to what he meant by "members" of the Grocery Company, having answered:

"I mean that the members of the Los Angeles Grocery Company and the stockholders are nothing else but retailers"

—the counsel for the commission said:

"That is quite true. *We admit that* (italics mine). The stockholders are for the most part retail grocers. Have you any information by which you can say now that the Los Angeles Grocery Company refuses to sell to others than their stockholders?"

The qualification thus added to the admission by the counsel for the commission should, in my opinion, be read in connection with the endeavor shown by the above-quoted testimony of the man at the head of the Grocery Company in question to make it appear that it was a wholesale dealer, by arranging for a nominal 1 per cent. net above the cost of doing business.

CARTER v. WHISLER.

In re FLAHERTY et al.

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

Nos. 210 and 5744.

1. Bankruptcy ⇨440—Order held not subject to appeal.

The order in this case is not appealable, under Bankruptcy Act, § 25a (Comp. St. § 9609).

2. Bankruptcy ⇨100(1)—Adjudication not specifying particular act of bankruptcy not completely conclusive.

Where an involuntary petition against a partner alleged three different acts of bankruptcy, but the order of the adjudication did not show upon which one it was made, the order was not res judicata as to any particular act against another partner, in ancillary proceedings in another district.

3. Bankruptcy ⇨149—Trustee vested with partnership property, wherever situated.

On involuntary proceedings served on a partner, trustee in bankruptcy became vested by the adjudication with the title to the bankrupt's property, wherever situated in the United States, and with title to the property of the individual partners, as well as the firm property, notwithstanding some members were not adjudicated bankrupt.

4. Bankruptcy ⇨293(1)—Court may seek other court out of jurisdiction.

While the federal District Court could not act outside of its territorial jurisdiction, it might seek the aid of any court of bankruptcy beyond its territorial limits.

5. Bankruptcy ⇐136(1)—Partner not served held subject to jurisdiction in ancillary proceedings in other district, but entitled to be heard as to partnership and acts of bankruptcy.

Where a federal District Court in Montana, having jurisdiction of a partnership and its assets by service on a partner in involuntary bankruptcy proceedings, authorized the trustee to institute ancillary proceedings in a federal District Court in Iowa, an alleged partner there, not served in the proceedings in Montana, might be subjected to the jurisdiction of the court in such ancillary proceedings, but with the right to be heard as to partnership and acts of bankruptcy before schedule of assets was required.

On Petition to Revise and Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

In the matter of the alleged bankruptcy of George L. Flaherty and Clara R. Carter as copartners. Ancillary proceedings by Frederick D. Whisler, trustee in bankruptcy, in which he asked for an order that Clara R. Carter be required to file schedule with referee. Order to show cause on objection to the jurisdiction was sustained, and the petition of the trustee denied, and on the order of the District Court, vacating the order of the referee deciding that petitioner must appear (265 Fed. 741), she appeals and petitions to revise. Remanded, with instructions.

Denis M. Kelleher, of Ft. Dodge, Iowa (Clarence M. Hanson, Richard F. Mitchell, M. F. Healy, Seth Thomas, and Thomas M. Healy, all of Ft. Dodge, Iowa, on the brief), for appellant and petitioner.

Charles A. Russell, of Missoula, Mont., and Robert J. Healy (Charles N. Madeen, of Missoula, Mont., and M. J. Breen, of Ft. Dodge, Iowa, on the brief, and Russell, Madeen & Barron, of Missoula, Mont., and Healy & Breen, of counsel), for appellee and respondent.

Before SANBORN and CARLAND, Circuit Judges, and MUNG-ER, District Judge.

CARLAND, Circuit Judge. [1] This case is before us on petition to revise and on appeal. The order sought to be revised in matter of law was made in a bankruptcy proceeding, and no appeal is allowed from such an order. Section 25a, 30 Stat. 553 (Comp. St. § 9609); *Henkin v. Fousek* (C. C. A.) 267 Fed. 557, and cases cited. No. 5744 is therefore dismissed.

The record on the petition to revise shows that on or about August 28, 1917, three creditors filed in the District Court of the United States for the District of Montana an involuntary petition in bankruptcy against George L. Flaherty, of Missoula, Mont., and Clara R. Carter, of Ft. Dodge, Iowa, as copartners doing business under the firm name and style of George L. Flaherty. The petition alleged that the firm had had its principal place of business at said Missoula for the greater portion of the six months next preceding the date of the filing of the petition, that the firm was insolvent and owed debts to the amount of \$1,000, and contained other allegations showing that petitioners were duly qualified to file the same. The petition set forth the indebtedness

of the several creditors and how the same arose; that while insolvent, and within four months prior to the filing of the petition, the copartnership had transferred to Strauss & Strauss, of Newark, N. J., a part of its goods, wares, and merchandise, of the value of \$175 and upwards, in satisfaction of a debt then and theretofore owing by the alleged bankrupt to said Strauss & Strauss; that said transfer was made with intent to prefer said creditor over the other creditors of the alleged bankrupt. Another transfer of property of the value of \$187.50 to Eisenstadt Manufacturing Company, of St. Louis, Mo., was alleged to have been made under similar circumstances and for a like purpose. It was also alleged that the copartnership within four months next preceding the date of the filing of the petition had committed an act of bankruptcy, in that within said time it admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt upon that ground.

The petition was duly verified, and a subpoena, directed to George L. Flaherty and Clara R. Carter as copartners doing business under the firm name and style of George L. Flaherty, was issued on said petition. Personal service of the subpoena, as shown by the return of the marshal, was made upon the firm by handing to and leaving a true and correct copy thereof with George L. Flaherty. On September 26, upon the petition so filed, the firm composed of George L. Flaherty and Clara R. Carter, as copartners under the firm name and style of George L. Flaherty, was adjudged a bankrupt. The case was referred to a referee. After said adjudication George L. Flaherty individually filed his voluntary petition in bankruptcy in the court aforesaid, and pursuant to said petition he was on the 18th of January, 1918, adjudged a bankrupt. Subsequent to the adjudication of the partnership as a bankrupt, it duly filed schedules of assets and liabilities. George L. Flaherty individually made and filed schedules of his assets and liabilities, which disclosed that Flaherty had no property of his own, other than that belonging to the partnership, and that he owed debts individually to the amount of \$3,920. Frederick D. Whisler was appointed a trustee in bankruptcy of the estate of the partnership. The firm assets were sold by authority of the court in Montana for the sum of \$7,710.15. The indebtedness of the firm, as allowed by said court, amounted in the aggregate to \$22,135.34.

The court in Montana authorized the trustee to institute ancillary proceedings in the District Court of the United States for the Northern District of Iowa. Upon application of the trustee said court ordered that ancillary proceedings and matters arising in connection therewith be referred to C. A. Bryant, Esq., at Ft. Dodge, Iowa, a referee in bankruptcy, to take such action and make such orders as might be proper in the premises. Subsequently the trustee filed a petition with the referee in bankruptcy in Iowa, setting out the proceedings had in Montana, and praying for an order that petitioner be required to file with the referee a complete and itemized schedule as required by law of her assets and liabilities as a member of the firm of George L. Flaherty. A show cause order was issued, and on the return day petitioner filed what is called in the record a "plea in abatement and to

the jurisdiction." The plea was sustained by the referee, and the prayer of the petition of the trustee denied. The trustee thereupon had the case certified to the United States District Court for review. The District Court, after due consideration of the matter, vacated the order of the referee, and decided that petitioner must appear before the referee and submit to an examination by the trustee or his counsel as to her alleged copartnership with George L. Flaherty and her business transactions with him, upon the application of the trustee therefor, if such an application should be made. The order last mentioned is the one that we are asked to revise.

[2] There was no service of process in the bankruptcy proceeding in Montana upon petitioner. On this record, what are her rights with reference to said proceeding? The allegations of the involuntary petition gave the United States District Court in Montana jurisdiction over the subject-matter. Personal service of subpoena upon Flaherty, one of the alleged partners, gave the court jurisdiction of all the partners, and of the administration of the partnership and individual property. Section 5, subd. (c), 30 Stat. 547, 548 (Comp. St. § 9589). The District Court in Montana therefore had jurisdiction to adjudicate the firm of George L. Flaherty a bankrupt, and in order to do this it had authority to determine the existence of the matters necessary to warrant such an adjudication. The involuntary petition, however, in bankruptcy, alleged three different acts of bankruptcy; but the order of adjudication did not show upon which one the adjudication was made. In such a case the order of adjudication is not res judicata of either as against petitioner. In *re Letson*, 157 Fed. 78, 84 C. C. A. 582; In *re Julius Bros.*, 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89.

[3] The trustee in bankruptcy by the adjudication became vested with the title to the bankrupt's property, wherever situated in the United States. In *re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316 (8th Circuit); *Ward v. Hargett*, 151 N. C. 365, 66 S. E. 340; *Koger v. Clark* (Tex. Civ. App.) 216 S. W. 434. The adjudication of the firm a bankrupt vested in the trustee title to the property of the individual partners, as well as the firm property, notwithstanding the fact that some members of the firm were not adjudicated bankrupt. *Francis v. McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706, affirming 186 Fed. 481, 108 C. C. A. 459; *Menke v. Sunderman*, 186 Fed. 486, 108 C. C. A. 464; *Abbott v. Anderson*, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741; *New Orleans Acid, etc., Co. v. Guillory*, 117 La. 821, 42 South. 329; In *re Latimer*, (D. C.) 174 Fed. 824; *Vaccaro v. Security Bank of Memphis*, 103 Fed. 436, 43 C. C. A. 279; In *re Samuels* (D. C.) 207 Fed. 195.

[4] The District Court in Montana could not act outside of its territorial jurisdiction, but might ask the aid of any court of bankruptcy beyond its territorial limits. *Babbitt, Trustee, v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Elkus, Petitioner, In re Madison Steel Co.*, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; *Francis v. McNeal*, supra; *Armstrong v. Fisher*, 224 Fed. 97, 139 C. C. A. 653; *Armstrong v. Norris*, 247 Fed. 253, 159 C. C. A. 347.

The petitioner has never been heard upon the question of whether

she was ever a member of the firm of George L. Flaherty. She is also entitled to contest the alleged acts of bankruptcy, and as to these acts she is entitled to a jury trial under section 19a, 30 Stat. 551 (Comp. St. § 9603), if she demands one. The petition to revise is granted in part as follows:

(1) The petitioner, before she is required to schedule firm or individual assets, is entitled to be heard upon the question as to whether she was ever a member of the firm of George L. Flaherty of Missoula, Mont.

(2) She is also entitled to be heard as to the existence of the alleged acts of bankruptcy mentioned in the involuntary petition, and upon this question she is entitled to a trial by jury under section 19 supra. If these issues are found against her, she will then be required to schedule any firm or individual assets in her possession in the manner provided by law for the purpose of ascertaining whether she has any property liable for the satisfaction of the debts of the firm.

The case will be remanded, with instructions to the District Court to proceed therein, not inconsistent with the views herein expressed.

MOORE, County Treasurer, v. OTIS et al.

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

No. 5661.

1. Constitutional law ⇨143—Municipal corporations ⇨955(1)—Law providing for diversion of funds and discharge of existing assessments held unconstitutional, warranting injunction against enforcement at suit of holders of municipal bonds.

Holders of municipal bonds issued for payment of street improvements under Sess. Laws Okl. 1907-08, c. 10, art. 1, payable in 10 annual installments from a fund created from assessments against improvement district property, made a lien on the property continuing until assessments and interest were paid, *held* entitled to injunction against the enforcement of Rev. Laws Okl. 1910, §§ 7411, 7412, as amended by House Bill 29 (Laws Okl. 1919, c. 130), approved April 5, 1919, providing in effect that such portions of the moneys received, upon resale by the county of property bid in at previous sale, as represented special assessment taxes, should be appropriated to the county common school fund, and that the issuance of a deed at the resale should have the effect of canceling existing assessments; such change in the law impairing the obligations of the bondholders' contract, and depriving them of valuable contract rights.

2. Constitutional law ⇨47—Validity of statute tested by what may be done under it.

The constitutionality of a law is to be tested, not by what has been done, but by what may be done, under it.

3. Constitutional law ⇨143—Existing laws part of municipal bond contract.

The laws existing at the time of the issuance of municipal bonds, and under the authority of which they are issued, enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired, or its fulfillment hampered or obstructed, by a change in the law.

4. Courts $\text{\textcircled{C}}$ 369 (3)—**In protecting contract rights, decisions of state courts not necessarily followed.**

In protecting contract rights, such as rights of holders of municipal bonds, the federal courts do not follow state court decisions, if they impair vested rights guaranteed by the federal Constitution.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; R. L. Williams, Judge.

Suit by Charles A. Otis and others, doing business under the firm name and style of Otis & Co., against Cecil Moore, County Treasurer of Muskogee County, Okl. From a decree for complainants, respondent appeals. Affirmed.

Robert E. Jackson, of Muskogee, Okl., P. E. Gumm, of Boynton, Okl., and W. A. Green, of Muskogee, Okl., for appellant.

D. M. Tibbetts, of New York City, and Fred W. Green, of Guthrie, Okl., for appellees.

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

CARLAND, Circuit Judge. Action by appellees to enjoin appellant from enforcing sections 7411 and 7412 of the Revised Laws of Oklahoma, 1910, as amended by sections 5 and 6 of House Bill 29 of the Oklahoma Legislature approved April 5, 1919 (Laws 1919, c. 130). The trial court granted the relief prayed for. The appellees are holders of bonds issued by the city of Muskogee, Okl., to pay the cost of street improvements. Chapter 10, art. 1, Session Laws Okl. 1907-08.

This act provided that the bonds as issued should bear interest at the rate of 6 per cent. per annum, should be payable in 10 annual installments on the 1st day of September of each year, and should be payable out of the fund to be created by levying assessments against property within improvement districts required to be created; the property being assessed according to the benefits. The assessments for the payment of bonds were required to be made by ordinance upon the completion of the work and ascertainment of the cost thereof. If the assessments so made were not paid in full within a limited time, the act provided that they should be payable, together with interest, in 10 annual installments, maturing on the 1st day of September each year. The guaranties which surrounded the holders of the bonds by virtue of the law in force at the time the bonds were issued were as follows: Chapter 10 of the Session Laws of 1907-08, provided in section 5 thereof that:

"Such special assessments and each installment thereof and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed from the dates of the ordinances levying the same, coequal with the lien of other taxes, and prior and superior to all other liens against such lots or tracts, and such lien shall continue until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant or warranty."

It was further provided in section 6 that it should be the duty of the city clerk of the municipality to collect the installments as they fell due, and as to the disposition of such funds it was provided:

$\text{\textcircled{C}}$ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"It shall be the duty of the city clerk to keep an accurate account of all such collections by him made, and to pay to the city treasurer daily the amounts of such assessments collected by him, and the amounts so collected and paid to the city treasurer shall constitute a separate special fund to be used and applied to the payment of such bonds and the interest thereon and for no other purpose."

Section 6 also provided that, in the event of any installments becoming delinquent, the city clerk should, on or before September 15th of each year—

"certify said installment and interest then due to the county treasurer of the county in which said city is located, which installment of assessment and interest shall be by said county treasurer placed upon the delinquent tax list of said county for the current year and collected as other delinquent taxes are collected, and thereupon pay to the city treasurer for disbursement in accordance with the provisions of this act."

The tax sale law in force at that time was substantially the same as that contained in article 9, c. 72, Revised Laws of Oklahoma, of 1910. By virtue of the provisions of article 9, c. 72, of the Revised Laws 1910, and section 6, c. 10, of the Session Laws 1907-08, it was the duty of the county treasurer in November each year to hold a tax sale, at which properties upon which there existed delinquent special assessment taxes for the current year, and delinquent ad valorem taxes for the previous year, should be offered for sale, and the property affected sold for both classes of taxes at such sale. At the annual sale, the property was required to be sold to the person who offered to pay the amount due on any parcel of land, for the smallest portion of the same. Section 7399. It was then provided by section 7406 that the county treasurer might bid off all property at such sale for the amount of taxes, penalty, interest, and costs due and unpaid thereon in the name of the county, in the event no other bidders offered the amount due, the county thereupon acquiring all the rights, both legal and equitable, that any other purchaser could acquire by reason of such purchase. There was no provision, however, that the county should pay anything for the property so taken over. By section 7407, a redemption period of two years was provided for, during which any person having an interest in the property, had the privilege of making redemption, by paying the county treasurer the amount of all taxes, penalty, interest, and cost of sale up to the date of redemption. By virtue of section 7408 any person was permitted to purchase the interest of the county and take an assignment of that interest upon paying to the county treasurer the amount of the taxes, penalty, interest, and cost of sale and transfer up to the date of the transfer. It was also provided that any person holding a tax sale certificate, either by purchase at the original sale, or by taking the assignment of the county's interest, might, after a period of two years, upon proper notice as specified by the statute, acquire a tax deed to the property.

This deed in terms conveyed to the purchaser of the property "in as full and ample manner as said treasurer of said county is empowered to sell the same." The same act provided that in cases where the county had taken over the property and held it for a period of two years or more, a resale might be had at which the property so offered

should be sold to the highest bidder for cash. At such resale, the property was disposed of to the highest bidder for cash, and this, no doubt, had the effect, upon a valid sale, of cutting off the interest of the owner of the property and any liens junior to the tax for which the property was sold, and such title was passed to the highest cash bidder as the purchaser, but the amount so realized was subject to distribution as has been indicated. Under this act, there were no express provisions as to what liens or rights in the property should be cancelled. This was the situation when the bonds were purchased. House Bill 29 provides:

"Section 5. That section 7411, of chapter 72, of article 9, of the Revised Laws of the State of Oklahoma, 1910, be and the same is hereby amended to read as follows:

"Section 7411. On the day said real estate is advertised for resale the county treasurer shall, between the hours of 1 o'clock and 4 o'clock p. m. at his office, where, by law, the taxes are made payable, sell at public auction to the highest bidder for cash each tract or lot of land so advertised, and then in case there be no other bidder for any real estate so offered for sale, the county treasurer shall bid off the same in the name of the county for the amount of taxes, penalty and costs due thereon and shall issue deed therefor in the name of the chairman of the board of county commissioners and his successors in office for the use and benefit of the county, and thereafter said property shall be exempt from assessment for ad valorem taxes so long as title is held for the county: Provided that in no event shall the county be liable to the state or any taxing district thereof or to any special assessment lien holder for any part of the amount for which any such property may be sold. Any property acquired by the county under the provisions of this section may be sold by the treasurer at such price as may after notice by publication be approved by the board of county commissioners. Said notice of publication shall be given by the treasurer in the official county paper and shall embrace a description of the property, the price and to whom proposed to be sold, and stating that he will on a given date to be stated in the notice apply to the board of county commissioners for its approval of said sale and for an order directing that deed for said property be executed by the chairman of said board. The proceeds of sale of any property acquired by the county under the provisions hereof shall accrue to the common school fund of the county."

"Section 6. That section 7412, of chapter 72, of article 9, of Revised Laws of the State of Oklahoma, 1910, as amended by section 1, of chapter 47, Session Laws 1915, be and the same is hereby amended to read as follows:

"Section 7412. Within ten (10) days after such resale the county treasurer shall file in the office of the county clerk a return of his resale of such real estate, and retain a copy thereof in his office, which return must show the real estate so sold, the name of the purchaser and the price paid by him therefor, also a copy of the notice of such resale with an affidavit of its publication or posting, and such notice and return shall be presumptive evidence of the regularity, legality, and validity of all the official acts leading up to such resale. And within said ten (10) days the county treasurer shall execute, acknowledge and deliver to the purchaser or his assigns a deed conveying the real estate thus resold, which deed shall expressly cancel and set aside all taxes, penalties, and interest and costs previously assessed or existing against said real estate, including paving taxes and outstanding tax sale certificates, and such deed shall vest in the purchaser and grantee of said real estate an absolute and perfect title in fee simple to said land, and that where there are both ad valorem and special taxes due, the county treasurer must advertise and sell for all taxes in the same sale, and such deed shall contain a summary statement of the matters and proceeding of such resale, and six (6) months after said deed shall have been filed for record in the county clerk's office, no action shall be commenced to avoid or set said deed aside.

"Any number of lots or tracts of land may be included in one deed for which deed the treasurer shall collect from the purchaser one dollar (\$1.00) for the first tract and ten (10) cents for each additional tract included there-

in. The treasurer shall also charge and collect from the purchaser at such sale the sum of twenty-five (25) cents on each tract of real property and fifteen (15) cents on each town lot so advertised and sold for the cost of publishing said notice of sale, which sum shall be paid into the county treasury and the county shall pay the cost of publishing such notice of resale.

“And any tract or lot of land sells for more than the taxes, penalties, interest and costs due thereon, the excess shall be turned into the county treasury and there be held for the prior owner of such land to be withdrawn any time within two (2) years, and at the end of two (2) years if the same is not withdrawn or collected from the county treasurer the same shall be turned into the county sinking fund.”

[1, 2] We do not notice the provision fixing the time within which the sale must be held as perhaps that is subject to regulation but we call attention to the provisions of section 5 by which it is evident that the Legislature intended to appropriate such portions of the moneys received upon the proposed resale as represented special assessment taxes for the benefit of the county of the common school fund. It would seem that there is no way by which the bondholder could protect himself against such disposition of the sale money if the law is to be enforced. Under the provisions of section 6, it is provided that the issuance of a deed to the purchaser at the resale shall have the effect to cancel all assessments previously existing against the property sold, which would cancel the assessment provided for and levied at the time the bonds in question were issued. To pay the bonds there is only one assessment payable in ten annual installments and this deed if the later law shall be enforced would cancel not only delinquent installments but installments thereafter accruing.

In this connection it is proper to say that the constitutional validity of a law has to be tested not by what has been done under it but what may by its authority be done. *Montana Co. v. St. Louis, etc., Co.*, 152 U. S. 170, 14 Sup. Ct. 506, 38 L. Ed. 398. One public official may construe the law a certain way and another in a different way, but the courts only look to what may be done by any public official under a fair construction of the law. The law under which appellees obtained the bonds expressly guaranteed to them in our opinion an equality of liens with other taxes and also that such liens should continue to exist until the bonds were fully paid. We agree that the rights thus guaranteed to the holders of the bonds by the laws under which they were issued are valuable rights and that sections 5 and 6 of the act of 1919 would deprive the holders of the benefits thereof.

[3] The laws existing at the time of the issuance of the bonds and under the authority of which they were issued, enter into and become a part of the contract in such way that the obligation of the contract cannot thereafter be in any way impaired or its fulfillment hampered or obstructed by a change in the law. *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214, 67 C. C. A. 142; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 429; *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Louisiana v. New Orleans*, 102 U. S. 203, 206, 26 L. Ed. 132; *Rolls Co. Court v. U. S.*,

105 U. S. 733, 26 L. Ed. 1220; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. Ed. 1090; *Gibbons v. Hood River Irr. Dist.*, 66 Or. 208, 133 Pac. 772; *Oatman v. Bond*, 15 Wis. 22; *Barker v. Muchlin*, 55 Wash. 411, 104 Pac. 637; *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321; *Ogden v. Saunders*, 12 Wheat. 213-302, 6 L. Ed. 606; *McCracken v. Hayward*, 2 How. 608, 11 L. Ed. 397; *Curran v. State of Arkansas*, 15 How. (U. S.) 304, 14 L. Ed. 705; *Planters' Bank v. Sharp*, 6 How. 327, 12 L. Ed. 447; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Mobile v. Watson*, 116 U. S. 305, 6 Sup. Ct. 398, 29 L. Ed. 620.

[4] We are referred to the cases of *Ledegar v. Bockoven*, 77 Okl. 58, 185 Pac. 1097, and *State ex rel. Gulager v. Cecil Moore*, County Treasurer, 78 Okl. 164, 189 Pac. 511. We do not think the law complained of is susceptible of the construction placed upon it in the case first cited, nor do we think the bondholder can be forced to the remedy by mandamus to maintain his rights. The *Gulager* Case related to delinquent ad valorem taxes and is not in point. Appellant has cited many cases involving the power of taxation by the states, but in the case at bar it is contract rights which are involved, not those of taxation. In protecting contract rights in cases like the present the federal courts do not follow the decisions of the state courts if they impair vested rights guaranteed by the federal Constitution. *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. Ed. 1008; *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228; *U. S. ex rel. Pierce v. Cargill (C. C. A.)* 263 Fed. 857.

The decree below enjoined appellant from selling under said sections 5 and 6 any of the lots or tracts upon which unpaid special assessments for street improvements constituted all or a component part of the taxes due and upon which appellees had a lien. We think the pleadings and proofs clearly authorized this relief.

Affirmed.

ELI LILLY & CO. v. WM. R. WARNER & CO.

(Circuit Court of Appeals, Third Circuit. September 30, 1921. Rehearing Denied January 16, 1922.)

No. 2633.

1. Trade-marks and trade-names and unfair competition ⇨3(4)—“**Coco-Quinine**” held descriptive, and not valid as trade-mark.

“Coco-Quinine,” used as the name of a liquid medicinal preparation having quinine sulphate as its therapeutic agent, with an ingredient to disguise its bitter taste and chocolate syrup used as a coloring and flavoring medium, held not subject to exclusive appropriation as a trade-mark, being merely descriptive of the contents of the mixture.

2. Trade-marks and trade-names and unfair competition ⇨70(1)—Simulation of another's product held unfair competition.

Complainant made a liquid preparation of quinine with the bitter taste disguised and colored and flavored with chocolate. Through salesmen it was submitted to physicians, who came to prescribe it, and their pre-

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

scriptions were filled by pharmacists to whom it was sold by complainant. Later defendant began to make the same preparation, as it had the right to do, and though it did not sell its preparation as complainant's, it carefully selected a chocolate which gave it the same flavor and color, and by representing that it could be used in filling prescriptions for complainant's "coco-quinine," and selling at a lower price, it induced pharmacists to buy and use it for that purpose. *Held*, that by such conduct defendant made itself a party to the deception of ultimate purchasers, and was chargeable with unfair competition, and that to prevent such deception it should be enjoined from using chocolate in its preparation.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Eli Lilly & Co. against Wm. R. Warner & Co. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 268 Fed. 156.

E. W. Bradford, of Washington, D. C., for appellant.

Francis Rawle and Joseph W. Henderson, both of Philadelphia, Pa., and Roger S. Baldwin, of New York City, for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The issues in this case are unfair competition and infringement of a common-law trade-mark. We shall give just enough of the facts to disclose the controversy and make clear our decision, referring to the opinion of the trial court reported at 268 Fed. 156 for a statement in detail.

[1] The plaintiff, Eli Lilly & Company, a corporation of Indiana engaged in the manufacture and sale of pharmaceutical products, put upon the market in 1899 a compound called Coco-Quinine. It is a liquid preparation containing quinine as its therapeutic agent; yerba-santa, used to disguise the bitter taste of quinine; and chocolate syrup, used as a coloring and flavoring medium. The plaintiff built up a large trade in the product by having its salesmen first call upon prescribing physicians and explain its merits, and then by selling it to druggists, who retailed it to customers on physicians' prescriptions and on their own demand. The formula is not patented.

The defendant, Wm. R. Warner & Company, a Pennsylvania corporation, was organized in 1908 to take over the long established business of William R. Warner & Company, pharmaceutical and chemical manufacturers. The defendant corporation, Pfeiffer Chemical Company and Searle & Hereth Company are under one ownership and control. In 1906 the Pfeiffer Chemical Company put on the market a compound which it called Quin-Coco, being identical in color, taste and composition with the Coco-Quinine of the plaintiff. Later, Quin-Coco was manufactured by the Searle & Hereth Company and distributed by Wm. R. Warner & Company, the defendant. In competing for the trade of retail druggists the defendant did not pass off its Quin-Coco as Coco-Quinine but offered it on the representation that it is the same as Coco-Quinine and could be used as a substitute for it.

By its bill of complaint, the plaintiff avers that its Coco-Quinine was the first liquid preparation of quinine sulphate with the taste of qui-

nine disguised, and the first of many similar preparations (afterward put out) to be colored and flavored with chocolate, and prays an injunction against infringement of its common-law trade-mark and against the defendant's practices of unfair competition, claiming in effect the sole right to use chocolate as the distinguishing agent of its product. The court resolved the issue of unfair competition against the plaintiff on the ground that, as that concern does not manufacture its product under a patent, and as it has no exclusive right to the use of its formula or to any of its ingredients, the preparation may be made by anyone who, in good faith, acquires knowledge of its composition, and may be sold in open commerce on his representation that it is the same as the plaintiff's preparation. *Hostetter v. Fries* (C. C.) 17 Fed. 620. Thereupon, the court held that the defendant did not engage in unfair competition in using chocolate for the color and flavor of its preparation. It also held that the plaintiff had acquired no common-law trade-mark in the words *Coco-Quinine*, they being merely descriptive of the contents of the mixture, and that, in consequence, it could not complain when the defendant used practically the same words transposed to describe the same things. On the dismissal of the bill the plaintiff took this appeal, raising here the same questions that were tried below.

We find ourselves in accord with the learned trial judge on the issue of trade-mark infringement. Although the plaintiff conceived the name *Coco-Quinine* and gave it a substantial commercial value (as evidenced by the large trade built upon it as well as by its almost literal appropriation by the defendant), the name is, nevertheless, but descriptive of the ingredients in the compound and, therefore, cannot become the subject of trade-mark. Nor do we find ourselves at variance with the learned trial judge on the law of unfair competition, argued by counsel with great elaboration. We are constrained, however, to differ with him on the application of the law to what we regard as the controlling facts of the case. While these facts are many, they go to a matter that greatly narrows the area of the controversy and calls into operation but one principle of law. They are briefly as follows:

[2] The defendant, realizing that the plaintiff had no exclusive right to the formula of its preparation, duplicated it by a preparation of its own and offered it to the trade in competition, as it had a right to do. But the trouble is with the manner in which it did it. The defendant first procured samples of the plaintiff's preparation. Learning its ingredients, it then proceeded to make the same preparation. Its efforts were expended not so much in making a compound that would act like that of the plaintiff as they were in making a compound that would look like it and taste like it. It did not show the concern for the use of chocolate as a medium of color and taste that it showed in finding a chocolate that would give to its mixture the color and taste of the plaintiff's. In its laboratory it conducted experiments with chocolates of different kinds in an effort to get the precise color and taste derived from the chocolate used by the plaintiff. For a time it was not successful, but eventually it succeeded. It then placed the product on the market. It did not send its salesmen to prescribing physicians, presenting to them the merits of the preparation and soliciting their favor

in prescribing its use as did the plaintiff, but it sent its salesmen directly to druggists, the retail dealers, and represented to them that its new product, Quin-Coco, is the same as the plaintiff's Coco-Quinine (referring to the latter by trade-name and maker's name); that when Coco-Quinine is prescribed by a physician or asked for over the counter by a customer, Quin-Coco could be "substituted without detection" and "without anyone being the wiser." Salesmen would at times pour both mixtures on paper to demonstrate the identity of colors. To induce druggists to make purchases, the defendant represented that substitution of Quin-Coco for Coco-Quinine was not only practicable but profitable because Quin-Coco was cheaper.

We find this practice of the defendant's salesmen fully established by the evidence of an unusual number of witnesses, and that the practice, followed by its salesmen with the sanction of their superiors, was so general that the defendant is charged with knowledge of it and is, accordingly, answerable for it in the measure prescribed by law. This measure turns on two questions:

The first question is one of fact,—whether it is fraud for a druggist to substitute a drug for the one called for by a physician's prescription or by a customer directly. That substitution of drugs is fraud upon the consumer, who, from the very nature of the transaction, is helpless to protect himself, is so obvious as to require no discussion. For the protection of those who are exposed to the dangers of such fraud, courts will exercise to the utmost all the resources of the law. We have no doubt that the substitution of Quin-Coco for Coco-Quinine extensively practiced by druggists amounted to fraud and of the same opinion were a number of the very druggists who practiced the deception. This then was fraud, but it was the fraud of druggists.

The next question is one of law,—whether in counseling such fraud and in supplying the means with which to effect it (that means being in itself quite innocent) the defendant also was guilty of fraud. Put in this way the question is not whether the defendant can be held responsible for the fraud of third parties, the ultimate sellers (*Hostetter v. Fries* [C. C.] 17 Fed. 620), but it is whether in counseling fraud and in supplying an innocent means with which to bring it about the defendant has itself committed fraud. This question turns not alone on the character of the means. Admittedly the plaintiff has no monopoly in its formula nor has it an exclusive right to the use of any of its ingredients. This leaves the defendant and everyone else free to duplicate the plaintiff's preparation and enter the trade in competition, if, in so doing, they do not infringe the right of consumers not to have passed off on them the product of one maker as the product of another. This right resides in the public without regard to whether the party for whose goods another product is passed off has or has not a monopoly in them or an exclusive right to use certain of their distinguishing ingredients. A customer has a right to get what he calls for and pays for. If the effect of a practice is to deceive an unwary customer and lull him into the belief that he is getting what he asked for when in fact he is getting something else, the practice is illegal because a fraud upon him. And this is so (certainly where, as in this case, the purpose

as well as the effect was to deceive the consumer) even when the dress or get-up of the substituted preparation is open to use by everyone. Thus in the case of *Lever v. Goodwin*, 57 Law Times Reports, 583, 4 R. P. C. 492, the plaintiffs put their soap into wrappers of imitation parchment paper (which was then not a common thing), and printed (which was unusual) some letterpress on it in spaced or broken type. The defendants put up their soap in wrappers of imitation parchment paper, and they also printed on the wrappers letterpress in spaced or broken type. Their letterpress was quite different from the plaintiffs', and the defendants' name appeared in capitals four times among the letterpress, but the court found that though the printing was wholly different, the effect of the get-up was to mislead the customer, and held the practice unlawful notwithstanding the plaintiffs had no monopoly either in the kind of paper used as a wrapper or in the style of printing appearing upon it. Of like opinion was the court in *Coco-Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 119 C. C. A. 164 (C. C. A. 6th.), where the defendant used the free agent of caramel to simulate the color of the preparation it was imitating. These English and American decisions are authority not only for the law that the innocence of the instrument of fraud does not per se avoid unfair competition but also for the law that in supplying the instrument (with similarities which singly would not be unlawful) the defendant cannot avoid responsibility for the part it took in the fraud committed—or completed—by the other. In the *Lever Case* the retail dealer was not deceived in purchasing the product. Neither was he deceived in the *Coca-Cola case*; nor in this case. The dress of the product in each case as it went to the dealer was entirely distinctive. The evident purpose in each case was to deceive, not the retail dealer, but the ultimate consumer. For the consumer in this case the preparation was rebottled. To him it came, not in the distinctive dress in which it reached the retail dealer, but naked. The only mark it had was that of color, which (as in the *Coca-Cola case*) the defendant labored to make non-distinctive. Having counseled fraud upon the ultimate consumer and having put in the hands of the retail dealer the means of committing the fraud, there is no room for the defendant to shift the blame to the retail dealer and no ground for the defendant to say that it is not answerable for the part which it itself played in the deception of the consumer. Certainly the defendant was an accomplice, if not the principal, in the practice. *Lever v. Goodwin*, 57 Law Times Reports (N. S.) 583, 4 R. P. C. 492; *Coca-Cola Co. v. Gay-Ola Co.*, 119 C. C. A. 164, 200 Fed. 720; *Garrett v. Garrett*, 24 C. C. A. 173, 78 Fed. 472, 476 (C. C. A. 6th.); *Royal Co. v. Royal*, 122 Fed. 337, 345, 58 C. C. A. 499; *Kalem v. Harper*, 222 U. S. 55, 63, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, 38 Cyc. 778, notes; *Cutler on "Passing Off."*

With unfair competition thus established, we think an injunction should issue restraining the defendant, directly or indirectly, from inducing and enabling retail drug dealers to substitute *Quin-Coco* for *Coco-Quinine*. But it is said that such an injunction would deprive the defendant of using, as a coloring agent, an ingredient admittedly free to everyone. That is true, but, as we are deciding this case on

conduct rather than on chocolate, we think the defendant has forfeited its right to the use of chocolate as a coloring agent because of its misuse; namely, the double fraud upon the public and a competing producer. That the defendant may no longer derive advantage from its own fraud by resort to an ingredient the use of which otherwise is lawful, we direct the court below to award an injunction restraining it hereafter from using chocolate as a coloring matter in its preparation named Quin-Coco. The only practical way of protecting the public and the plaintiff from a continuance of its unfair practices is to deprive the defendant of the ingredient by which alone it made those practices effective.

It should be noted that by this decision the plaintiff is not given a monopoly in the use of chocolate. Therefore the injunction restraining the use of chocolate in a liquid preparation where the taste of quinine is masked will extend only to the defendant whose practices with reference to it have been unlawful. We are not adjudicating the acts and responsibility of other makers of similar preparations, for with respect to them we have not been informed of wrongdoing.

The decree below is reversed with costs.

Petition for Rehearing.

PER CURIAM. This action, vigorously contested, resulted in an immense record. The testimony was directed to various aspects of the case arising from the rather technical law of trade-marks and the much broader law of unfair competition. In analyzing the testimony and distinguishing the law we have been greatly aided by counsel for both parties. Their industry in collecting the evidence and their thoroughness in discussing the law were of such high order and so equally balanced that our labors have been lightened. That our decision finally turned on an aspect of the case which caused others to pass out of view was due to no fault or omission of counsel for the respondent, but to the controlling importance which the court gave the testimony in this regard. By the respondent's petition for a rehearing, we have not been shown that we have mistaken this testimony or misinterpreted its imputations, nor have we been persuaded that we have erred in our deductions. We believe that a rehearing would produce nothing more than a repetition of the able argument already made. We are constrained, therefore, to deny the petition for rehearing.

NORTHWESTERN MUT. LIFE INS. CO. v. JOHNSON.

NATIONAL LIFE INS. CO. OF MONTPELIER, VT., v. MILLER.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1921.)

Nos. 5160, 5251.

1. Insurance — 400—Policy incontestable for suicide after two years.

Provision in life insurance policy that policy shall be void if insured within two years shall die by his own hand, whether sane or insane, prevents the insurer, after two years, from denying liability, if insured came to his death by his own hand, in the absence of a showing he was insane at the time.

2. Insurance \Leftrightarrow 659 (2)—**Letters of insured held admissible to show intent, as bearing on issue of death.**

In an action on a life insurance policy, where circumstantial evidence had to be relied on to establish assured's death, as his body had never been found, letters written by him, found in a safe deposit box after his disappearance, and also testimony of witness in relation to a conversation he had with assured shortly before his disappearance, *held* admissible to show his intent to commit suicide.

3. Evidence \Leftrightarrow 100—**When plaintiff's case depends on circumstantial evidence, evidence liberally admitted.**

When plaintiff has to rely solely on circumstantial evidence, the law is liberal in admitting any evidence which will aid in establishing the facts necessary to a recovery.

4. Executors and administrators \Leftrightarrow 29 (2)—**Appointment of administrator not subject to collateral attack.**

Since Iowa district courts are courts of record, with power to appoint administrators of the estates of deceased persons, their judgments in making such appointments are not subject to collateral attack.

5. Executors and administrators \Leftrightarrow 524 (1)—**Foreign administrator cannot sue in Iowa.**

Under Code Iowa, § 3306, a foreign administrator cannot sue in its courts, but must take out letters of administration in that state in order to sue.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade and Page Morris, Judges.

Actions by Isabel H. Johnson against the Northwestern Mutual Life Insurance Company, and by A. M. Miller, administrator of the estate of George P. Johnson, intervener, against the National Life Insurance Company of Montpelier, Vt. Judgments for plaintiff in each case, and defendants bring error. Affirmed.

Eugene D. Perry, of Des Moines, Iowa (Harley H. Stipp, Robert J. Bannister and Vincent Starzinger, all of Des Moines, Iowa, George B. Young, of Montpelier, Vt., John Barnes, of Milwaukee, Wis., and James H. McIntosh, of New York City, on the brief), for plaintiffs in error.

S. F. Prouty, of Des Moines, Iowa, for defendants in error.

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

TRIEBER, District Judge. These were actions upon policies issued by each of the defendants upon the life of George P. Johnson, payable in the first case to his wife, and in the second to his executors or administrators. The complainants, after alleging the issuance of the policies sued on, proofs of death, demand, and refusal to pay, stated that the assured died on February 28, 1911, by his own hand.

The answers in both cases denied that the assured was dead, and further pleaded that, if dead, he died by his own hand, while not insane, and there could be no recovery upon the policies, even if they made no such exceptions; it being against public policy to permit such policies to be issued. In the second case, that against the National Life Insurance Company, there was an additional plea that, if the assured is dead, the district court of Polk county, state of Iowa, which appointed Mr. Miller as administrator of the estate of the deceased, was without jurisdiction, as, at the time the policy was issued and at the time of Johnson's disappearance and alleged suicide, the assured

was domiciled in the city of Baltimore, Md.; that he never resided in the state of Iowa, and had no property whatever in that state; that, after the supposed death of the assured, his widow and children removed from the city of Baltimore to the City of Chicago, in the state of Illinois, where they resided until 1913, when they removed to the city of Des Moines, in the state of Iowa; that the assured owed a great many debts in the state of Maryland, although no letters of administration were ever taken out in that state; that he owed no debts to citizens of the state of Iowa; and that there was no other property in the state of Iowa, except the policies sued on, and some little furniture of small value.

[1] There was a trial to a jury, and verdicts in favor of the plaintiffs, which it is sought to reverse by the writs of error from this court. Whether a contract of life insurance, if construed to make the company liable in case of a suicide of the assured, it not appearing that he was insane at the time, is against public policy, and therefore void, was certified by us to the Supreme Court.

The first question certified was whether the provision in the policies that "if within two years from the date hereof the said insured shall * * * die in consequence of a duel, or shall, whether sane or insane, die by his own hand, then, and in every such case, this policy shall be void," prevents the insurer from denying liability, if the insured came to his death by his own hand, in the absence of a showing that he was insane at the time. The Supreme Court answered this question that under that provision of the policy the insurer could not deny liability. The opinion is published in 254 U. S. 96, 41 Sup. Ct. 47, 65 L. Ed. —. This disposes of the main issue of law.

[2] Objections were made to the introduction of certain evidence. After his disappearance the following letter was found in his safe deposit box:

"2—28—11.

"Dear Enie: There is nothing to say to you and the children, except that I have made a fearful mess of things and you all will be better off without me. I might write until doomsday and not make it a bit better. I despise myself so much there is only one thing to do, but it is mighty rotten on you and the kids. I just can't write any more. George."

Other letters written on the same date were as follows:

"Dear Scull: This is the last time I will bother you, and I thank you very much for all your kindness. The end has come, and I have given up. Inclosed are my keys to a box in the Safe Deposit & Trust Company, to whom I have written inclosed note, which will be your authority to open the box in which you will find further explanation. Please attend to this at once.

"George P. Johnson."

"Safe Deposit & Trust Co., Baltimore, Maryland: Please permit Mr. Charles O. Scull, vice president of the United States Guaranty Company, to open my box and remove the contents. I have given him the key.

"George P. Johnson."

Another letter found in the same deposit box was as follows:

"Dear Scull: Attached is a complete statement of the situation so far as I can think of it. The premiums on the 1911 policy is due 3—2. It is barely possible I may be found in a hospital to-morrow. In such case you will be notified, and I know you will protect the premium under the circumstances. If no hospital report reaches you by noon, there should be some from the morgue. The money you gave me last week, with what I got by pawning my watch, paid my board bill and some personal debts. The inclosed \$7 is what is

left. I don't think my wife has more than a dollar, and I feel sure you will help her out temporarily, until she gets her part of the insurance money. she knows nothing of this wretched business. George P. Johnson.

"Assets:		
Life insurance,	Northwestern Mutual.....	\$ 4,000.00
" "	New York Life	3,000.00
" "	National \$5,000.00, minus \$439.26 and interest; balance	4,560.74
		\$11,450.74

"At some future time my heirs will receive \$4,000, which is my one-third of \$10,000, and \$4,000 in trust. I have not left a will. One left a few years ago was destroyed. G. P. J."

Objections to the introduction of these letters by the defendants were by the court overruled and proper exceptions saved.

[3] To establish the death of the assured plaintiffs had to rely entirely on circumstantial evidence, as the body had never been found. The law is well settled that, when a plaintiff in a case has to rely solely upon circumstantial evidence that it is very liberal in admitting any evidence which will aid in establishing the facts necessary to a recovery. Evidence of this nature is always admissible to show intent.

"The intention of a person, when material, may be proved by contemporaneous declarations in his letters, written under circumstances precluding a suspicion of misrepresentation." *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285, 295, 12 Sup. Ct. 909, 36 L. Ed. 706; *Connecticut Mutual Life Ins. Co. v. Hillman*, 188 U. S. 208, 219, 23 Sup. Ct. 294, 47 L. Ed. 446; *Wigmore on Evidence*, vol. 1, §§ 102 and 237.

This has been frequently recognized and approved in actions on life policies, when death was self-inflicted. *Sharland v. Washington Life Ins. Co.*, 101 Fed. 206, 41 C. C. A. 307; *Rogers v. Manhattan Life Ins. Co.*, 138 Cal. 285, 71 Pac. 348; *Rens v. Relief Ass'n*, 100 Wis. 266, 75 N. W. 991; *Weld v. Mutual Life Ins. Co.*, 61 Ill. App. 187. The court committed no error in admitting the letters. This also applies to the testimony of Mr. Scull in relation to the conversation he had with the assured shortly before his disappearance.

It is also claimed that the court committed error in refusing to direct a verdict for the defendants. Without setting out the evidence in the case, a careful reading of it satisfies that there was sufficient evidence to require the submission of the fact whether the assured was dead, and the finding of the jury is conclusive in this court.

[4] The attack upon the appointment of the administrator by the district court of Polk county, state of Iowa, in the action against the National Life Insurance Company, is without merit. The district courts of the state of Iowa are courts of record, with power to appoint administrators of the estates of deceased persons, and the judgments of these courts, in making such appointments, are not subject to collateral attack. That is well settled by an unbroken line of decisions of the Supreme Court of Iowa. *Murphy v. Creighton*, 45 Iowa, 179, 182; *Morris v. Chicago, etc., R. R. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *In re Barrett Estate*, 149 N. W. 247, 167 Iowa, 218; *In re Stone Estate*, 173 Iowa, 371, 373, 155 N. W. 812, and on rehearing 173 Iowa, 371, 155 N. W. 812. In the last-cited case the court said:

"It would hardly seem necessary to take time for argument or citation of authorities upon a proposition so elementary; but we may say that the precise question was before this court in *Murphy v. Creighton*, 45 Iowa, 179. It was there decided that a showing of property of the deceased in the county where application is made is not necessary to the jurisdiction of the court to appoint an administrator, and that, such appointment having been made, it is not open to collateral attack. The same question of jurisdiction was again decided in *Morris v. Chicago, R. I. & P. Ry. Co.*, 65 Iowa, 727, and the appointment of an administrator by an Iowa court was upheld, although the estate had no property in Iowa, nor any property right therein except a claim for damages for causing the death of the intestate, upon which claim suit might be brought in this jurisdiction."

This rule of law is recognized by all the courts. *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379; *White v. Spaulding*, 50 Mich. 22, 14 N. W. 684; *Jones v. Smith*, 120 Ga. 642, 48 S. E. 134; *Railroad Co. v. Bennett*, 58 Kan. 499, 49 Pac. 606; *Railroad Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67; *Railroad Co. v. Andrews*, 36 Conn. 214; *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 562, 40 N. E. 242, 28 L. R. A. 379.

[5] Under the statutes of Iowa (Code, § 3306), a foreign administrator cannot maintain an action in its courts, but must take out letters of administration in that state in order to maintain it. *Knight v. Railroad Co.*, 160 Iowa, 160, 140 N. W. 839.

There were other assignments of error, which have been carefully examined, but are not of sufficient importance to make it necessary to refer to them in this opinion.

The trial court committed no error in the trial of these cases and the judgments are affirmed.

Judge HOOK, who was to write the opinions in these cases, died without having done so, but concurred in the result and in consultation expressed the same views set forth in this opinion.

RAJAH AUTO SUPPLY CO. v. BELVIDERE SCREW & MACHINE CO. et al.
(Circuit Court of Appeals, Seventh Circuit. April 26, 1921. Rehearing Denied August 19, 1921.)

No. 2889.

1. Patents ⇨157(1)—Patentee's definition of words, phrases, and terms accepted by court.

A patentee may define his own terms, regardless of common or technical meaning, and his definition of words, phrases, and terms will be accepted by the court.

2. Patents ⇨328—825,856, for spark plug featured by "soft-metal bushings," held infringed.

Mills patent, No. 825,856, for spark plug featured by "soft-metal bushings" described as tapered or beveled bushing of such length as to be upset under pressure, held infringed by manufacture of cold rolled steel bushings, the term "soft-metal" not referring solely to the metals sometimes or frequently claimed as soft, but to a particular bushing which possesses the quality of a soft yielding material and will upset under pressure.

3. Patents ⇨289—Laches not sufficient to bar rights of patentee as to future infringements.

Laches may be one and a most important element in proving estoppel, but ordinarily, where laches alone is shown, patentee should not be barred

from asserting his rights under the patent so far as future infringements are concerned, though he may because of that fact alone, be refused damages for past infringements.

4. Patents \Leftrightarrow 289—**Delay in commencement of infringement suit held not to constitute laches or establish estoppel.**

Delay in commencing of action for infringement of spark plug patent did not constitute laches or estop patentee from complaining of infringement, where defendant had promised patentee to cease manufacturing the spark plugs covered by patent.

5. Patents \Leftrightarrow 312(1)—**Burden of proving laches and estoppel on defendant.**

In patent infringement suit, defendant had burden of proving defenses of laches and estoppel.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the Rajah Auto Supply Company against the Belvidere Screw & Machine Company and another. Decree of dismissal, and complainant appeals. Reversed, with directions.

See, also, *Rajah Auto Supply Co. v. Emil Grossman Co.*, 188 Fed. 73, 110 C. C. A. 143; *Same v. Rex Ignition Mfg. Co.* (D. C.) 209 Fed. 622.

Emerson R. Newell, of New York City, for appellant.

Wallace R. Lane, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Appellant's patent deals with a spark plug. Mills, the patentee, says in his specifications:

"It has been found that where an earthenware shank—such, for example, as porcelain—is used with an unyielding bushing screwing down upon a collar on the same there has been great danger of cracking the shank, because the pressure when the bushing was screwed down too tight or the expansion of the shank when heated would cause the porcelain to crack, even when a packing material is used. The embodiment of my invention illustrated avoids both these objections, and also avoids the necessity of providing a gasket between the bushing and the collar of the shank. * * *

"The bushing is preferably formed of soft brass, and I prefer to sharpen or bevel the edge of the same, * * * so that when the bushing is screwed down this edge—that is, the portion which contacts with the shank—will be upset and will turn outward. In this way a close fit will result, and even if the bushing is screwed down too tightly the porcelain will not be cracked, as the bushing will yield and upset further. Substantially the same result will occur if the shank expands under the heat of combustion. The shank is, furthermore, thicker above the enlargement, and therefore stronger than would be the case if the sides of the shank above the enlargement were parallel."

Claims 1, 2, 3, and 6 alone are involved, and the two broadest claims, 1 and 2, are herewith set forth.

"1. In a spark plug in combination, a socket having a screw thread and a shoulder, a shank of insulating material having thereon an enlargement adapted to rest on said shoulder and tapering upward from said enlargement and a threaded bushing surrounding said tapered portion and screwing upon said socket to press the bushing against the tapered portion, the bushing where it presses upon said tapered portion being formed of soft metal whereby it is adapted to be upset by said pressing upon said tapered portion, said bushing being of a sufficient length to cause such soft-metal portion to be upset.

"2. In a spark plug in combination, a socket having a screw thread and a

shoulder, a shank of insulating material having thereon an enlargement adapted to rest on said shoulder and tapering upward from said enlargement, and a threaded bushing surrounding said tapered portion and screwing upon said socket and adapted to press against said tapered portion, the lower edge of said bushing being formed of soft metal and adapted to be upset when screwed down upon said tapered portion."

Three defenses are interposed—invalidity, noninfringement, and estoppel. Neither in this court nor in the District Court was the defense of invalidity seriously urged. It hardly merits serious consideration. The patent was early sustained by the Circuit Court of Appeals for the Second Circuit, affirming the decision of the District Court. Both opinions may be found in *Rajah Auto Supply Co. v. Emil Grossman Co.*, 188 Fed. 73, 110 C. C. A. 143 et seq., and reference is made to them for a more complete description of the patent and the art to which it applied. There has not been, since these decisions, a serious challenge of the patent's validity.

The chief defense relied upon in the District Court was estoppel, but noninfringement is also urged in this court. The latter defense is based upon the asserted distinction between "soft-metal bushings," described in the patent, and "cold rolled steel bushings," such as appellee uses. Insisting that "soft-metal bushings" is synonymous with "soft brass metal bushings," and that appellant is necessarily limited by its patent thereto, appellee seeks to avoid liability by reason of its use of a metal ordinarily classed as hard.

Neither the specifications, the claims, nor the file wrappers justify such a limitation. Patentee sought protection for a bushing which, when screwed down tightly, would not crack the porcelain, but would "yield and upset further." He described a bushing which was "adapted to be upset by said pressing upon said tapered portion"—a "bushing * * * of a sufficient length to cause such soft-metal portion to be upset." At no place in the record have we found patentee's asserted position to be different from the one now taken. Cold rolled steel, if thin enough, may well be called soft metal. It will upset.

[1, 2] We have so frequently said that each patentee may define his own terms, regardless of common or technical meaning, that it is unnecessary to refer to these decisions. Fairness to any patentee requires the court to accept his definition of words, phrases, and terms. Patentee meant by the words "soft-metal" a material which would upset, or was adaptable to be upset, when under pressure such as is applied to a spark plug. What he was contributing to the spark plug art was the combination with a bushing possessing yielding and close-fitting qualities which would eliminate or tend to lessen breakage in the porcelain and also would tend to prevent oil leakage. In using this term "soft-metal" he was not referring solely to the metals sometimes or frequently classed as soft, but was referring to a particular bushing which possessed the qualities of a soft, yielding material, one that would upset under pressure and thereby accomplish certain results. Certainly, the expression "hard steel" is not unknown or unusual. It follows that, if there be a "hard steel," there must be a soft steel. "Soft" and "hard" are relative terms at best, and the matter of degree must often be determined by other language with which the words are used.

Patentee, in each claim, modified his description of "soft-metal" by defining the bushing to be tapered or beveled, and of such length as to cause it to upset under pressure. In other words, any metal shaped and sized as patentee's bushing, that would upset under pressure such as is ordinarily applied to a spark plug, is what patentee intended to include in his term "soft-metal." It would therefore be an unjustifiable limitation of this invention to exclude cold rolled steel made so thin that it will bend and yield and upset readily under pressure and similarly to brass or other metals which in more bulky quantities may with propriety be referred to as soft. In *Munson Manufacturing Company et al. v. Deere & Co.*, 257 Fed. 318, 168 C. C. A. 402, this court, upon the facts there disclosed, rejected the defense of noninfringement where it appeared that patentee described a "looped clod fender" as "being formed of looped wire," the infringing structure being made of malleable iron.

Noninfringement is further urged because it is claimed defendant's bushings do not upset under pressure. It may be that some of defendant's bushings do not, but the record clearly and satisfactorily establishes that certain of defendant's spark plugs, notably exhibits 6, 7, 8 and 10, are supplied with bushings "adapted to be upset when screwed down upon said tapered portions." The experiments made by various witnesses with defendant's spark plugs where pressure was applied upon these bushings demonstrate that they not only were adaptable to upsetting, but that they actually did upset. Our attention has not been called to any testimony that contradicts or casts doubt upon the figures given by the witness who made the measurements with the micrometer before and after pressure, and we have no doubt but that certain of appellee's spark plugs infringe.

Estoppel: Failure of counsel to distinguish between laches and estoppel may account for some of the confusion which appears in that part of the brief devoted to a discussion of this defense. Appellee contends that it made many spark plugs of the kind and description now complained of, to the knowledge of appellees and without opposition, and that because of appellee's delay in insisting upon its rights it is now estopped to assert its monopoly. This court had occasion to speak of the effect of laches as such as distinguished from an estoppel in *Wolfe v. U. S. Slicing Machine Company* (C. C. A.) 261 Fed. 195. There it was said:

"But it does not follow that, because appellee failed to assert its rights for seven or more years, it should be denied any and all relief in this suit. * * * The evidence, we think, discloses such laches as to prevent appellee from collecting damages for past infringements, but fails to establish an estoppel."

[3] True, laches may be one, and a most important element in proving estoppel, but ordinarily, where laches alone is shown, patentee should not be barred from asserting his rights under the patent so far as future infringements are concerned, though he may, because of that fact alone, be refused damages for past infringements. *McLean v. Fleming*, 96 U. S. 245, 257, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526.

[4] In the present case, the evidence fails to satisfy us that there

was established laches or estoppel. The patent was issued July 10, 1906. There were numerous spark plugs upon the market. Types and material were constantly changing. The great and growing popularity of the gasoline engine and the importance of the spark plug in its successful operation made experiments and frequent changes in spark plug construction inevitable. Appellant demanded of its competitors respect for its patent and brought suit against one for infringement. The decision heretofore referred to was pronounced in the District Court January 24, 1911. It was affirmed upon appeal shortly thereafter. Appellant then advised all competitors of its patent and the court's rulings thereon, and threatened suit against those that did not cease infringing. Among the recipients of this notice was the Motor Accessories Manufacturing Company, the predecessor of appellees. This company, when thus notified and warned, sought, but was refused, a license. It then ceased making the type of spark plug of which appellant complained. Another spark plug made by this company was brought to appellant's attention, and another warning letter was sent, and the Motor Accessories Company promptly replied, a portion of which letter is herewith reproduced:

" * * * Will say that we have discontinued the manufacture of plugs as we agreed to on the bushing as per our conversation while there and we discontinued at the time we said we would.

"Now in regard to our last letter advising that we were manufacturing under Schmidt patent, No. 999,343, we have taken this proposition up with the Champion Ignition Company, who are owners of the Schmidt patent, and have been waiting their advice in regard to same. But, on the other hand, we discontinued making up the Schmidt patent shortly after hearing from you.

"Sincerely hoping that this takes care of your correspondence of November 14, we remain as ever,

"Yours very truly,

Motor Accessories Mfg. Co."

In view of this letter, appellee's present argument in support of its defense of laches or its defense of estoppel is not very persuasive. Having first recognized appellant's monopoly, it sought a license. Unable to obtain one, it modified its structure. Again confronted with threatened suit, it assured appellant that it had ceased infringing just as it had agreed to do by word of mouth on a previous occasion. Appellee now asks the court to find appellant guilty of laches for fully accepting appellee's promise. Certainly appellee should be the last to complain because appellant relied upon its spoken and its written agreement.

[5] Appellant stoutly maintains that it had no knowledge, up to a short time prior to the commencement of this suit, of appellee's manufacture of the infringing spark plug. The only evidence that tends to dispute its assertion is the fact that appellee's spark plugs were in extensive use and must therefore necessarily have come under the observation of its rival. This evidence alone would hardly justify a finding of laches, much less estoppel. But the record is by no means clear that the spark plug complained of was so extensively used, or that its production covered such a period of time as appellee urges. The bur-

den of proving either defense is upon the appellee. We conclude it has not overcome the burden.

The decree is reversed, with directions to enter an injunction and order an accounting.

HINES v. SMITH.

(Circuit Court of Appeals, Seventh Circuit. June 13, 1921. Petition for Re-hearing Overruled August 19, 1921)

No. 2940.

1. Master and servant ⇨110—Bell “appurtenance” within federal Boiler Inspection Act.

A bell ringer is a “part” or an “appurtenance” of a “locomotive and tender,” within the meaning of the Boiler Inspection Act (Comp. St. § 8631), as amended in 1915 (Comp. St. § 8639a), providing that railroads must equip locomotives and tenders with proper appurtenances.

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

2. Master and servant ⇨110—Boiler Inspection Act liberally construed.

The amendment of March 4, 1915, § 1 (Comp. St. § 8639a), to Boiler Inspection Act, § 2 (Comp. St. § 8631), providing for equipment of locomotives with suitable boilers and appurtenances, should be liberally construed, and its obvious purpose effectuated.

3. Pleading ⇨63—Not necessary to specifically refer to statute.

In an action under the Boiler Inspection Act (Comp. St. § 8631), as amended in 1915 (Comp. St. § 8639a), to recover for death of railroad employee, allegations charging defendant with failure to keep its bell ringer in a “proper condition and safe to operate in the service to which the same is put,” etc., was sufficient, without referring to the statute, inasmuch as the facts as set forth disclosed a violation of it.

4. Master and servant ⇨110—Hand operated bell insufficient under Boiler Inspection Act.

If a locomotive is equipped with an automatic bell ringer which is out of repair, hand operated bell cord cannot be accepted as a substitute under the Boiler Inspection Act (Comp. St. §§ 8631, 8639a), an act to promote the safety of employees, especially where the hand operated arrangement is utterly insufficient.

5. Master and servant ⇨285(5)—Proximate cause of injury by locomotive with defective bell held for jury.

In an action for death of a fireman struck by locomotive while operating switches at roundhouse, whether defective automatic bell ringer was proximate cause of accident *held* for the jury.

6. Appeal and error ⇨994(2), 996—Credibility of witnesses for jury.

Questions of credibility, as well as persuasiveness of facts and inferences, were for the jury.

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

Action by Ferne Smith, administratrix of the estate of Earl Glen Smith, deceased, against Walker D. Hines. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff brought this action against defendant (plaintiff in error here) to recover damages resulting from the death of Earl Smith while engaged as a fireman on the Cleveland, Cincinnati, Chicago & St.

Louis Railroad. The trial resulted in a verdict and judgment in her favor for \$17,500 and costs, from which judgment this writ of error is prosecuted. A statement of facts necessary to a proper consideration of the issue involved will appear in the opinion.

George B. Gillespie, of Springfield, Ill., for plaintiff in error.
Charles C. Spencer, of Chicago, Ill., for defendant in error.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Affirmance depends upon the application of the Boiler Inspection Act to the facts disclosed upon the trial. Assignments of error directed to the rulings on evidence, the charge to the jury, and the refusal to give requested instructions, as well as the motions for nonsuit and directed verdict, all assume, in part at least, the nonapplication of this act. This Boiler Inspection Act, as originally enacted, provided:

"Sec. 2. From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." U. S. Comp. St. § 8631.

This section was amended in 1915, section 1 of the amendment reading as follows:

"Section two of the act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof." U. S. Comp. St. 8639a.

[1, 2] It is claimed on behalf of plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915, we think, leaves no room for doubt. Certainly a bell ringer is a "part" or an "appurtenance" of a "locomotive and tender." While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated. *Great Northern Ry. Co. v. Donaldson*, 246 U. S. 121, 38 Sup. Ct. 230, 62 L. Ed. 616, Ann. Cas. 1918C, 581.

[3] As to the allegations set forth in the declaration we have no hesitancy in saying that count 5 charges the defendant with failure to keep its bell ringer in a "proper condition and safe to operate in the

service to which the same is put," etc. It was unnecessary to specifically refer to the statute, inasmuch as the facts as set forth disclosed a violation of it. *Grand Trunk Ry. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168.

This being our conclusion in respect to the application of this statute, the proposed instructions, dealing with assumption of risk and contributory negligence, rejected by the court, need not be discussed. Admittedly they were properly refused if liability could be predicated upon defendant's failure to comply with the provisions of the Boiler Inspection Act.

True, there were counts in the declaration to which assumption of risk and contributory negligence were defenses. But the proposed instructions, the refusal of which is assigned as error, were intended to commit the court and the jury to a repudiation of the count or counts that predicated liability upon the defective bell ringer. In fact, as the trial concluded, it became evident that defendant's liability turned almost solely upon its failure to provide its engine with a workable automatic bell ringer on the night in question.

Likewise rulings upon evidence dealing with the bell ringer and its failure to work need not be separately considered, for the basis of each exception was the nonapplication of the statute to the facts disclosed.

But conceding the Boiler Inspection Act applied to and covered bell ringers, counsel insist that no actionable negligence is disclosed by the evidence, and therefore its motions, timely made, to take the case from the jury, were erroneously denied.

[4] In considering this contention, an apparently erroneous impression may be first corrected. We have no hesitancy in saying that the hand operated bell cord cannot be accepted as a substitute for an automatic bell ringer. If the engine is equipped with an automatic ringer which is out of repair, we fail to see how some other means, not automatic, will meet the requirements of the statute.

Furthermore, the facts in this case show the utter insufficiency of the hand operated arrangement, constructed for emergency use by a fireman and placed on the fireman's side of the engine cab. The fireman was on the ground attending to switches. It was in the night, and the engineer's undivided attention was, or should have been, directed to the operation of the engine, which necessitated his keeping a lookout for signals. He neither did, nor could with dependability, operate the bell by a cord so placed as to be operatable by a fireman.

[5] Moreover, defendant's insistent urge that such defective bell ringer was not actionable, that its failure to ring was not the proximate cause of the injury, must be rejected. While facts are recited tending to support such a conclusion, they are by no means conclusive, nor in all respects undisputed. This issue may well be said to be primarily a jury question. And while the facts may, in certain cases, be so clear and undisputed, so free from conflicting inferences, as to not only justify, but demand, the court's favorable ruling on defendant's motion for a directed verdict, that situation does not exist here. The engine was being taken by the engineer and the fireman from the roundhouse to the main track. It was in the nighttime, and numerous engines were

in the yard. The fireman was required to perform the duties commonly performed by a switchman. He had to "throw" three switches, or at least examine them and determine whether they were properly "lined up." The first one was on the right, the other two on the left side, of the track. The engineer was on the right side of the cab, and he was advised by deceased that the first switch was "lined up." Immediately thereafter, deceased crossed the track, disappearing from the engineer's range of vision, to "line up" the other switches. The engineer gave his signal, indicating the engine was about to move. He also "turned on" the automatic bell ringer, which responded a few times and then stopped. There was evidence tending to show that the automatic bell ringer was constantly rung by engineers in this yard when engines were being moved. Under these circumstances, may not a jury well have said that the failure of the bell to ring and thus warn deceased of the approach of the engine, and of its nearness, was the proximate cause of the injury? We think so. *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. And it was the jury's duty, not the court's, to determine the question, there being some evidence upon which it could base a finding.

[6] True, it was the duty of the servant to avoid injury, to place himself outside the field of danger, avoid the on-coming engine, assuming he knew it was constantly in motion. But we are here not considering a question of contributory negligence. Instead, we must determine whether any of the facts and circumstances which the jury might have accepted as true pointed to the absence of a working automatic bell ringer as the proximate cause of the fatal injuries. It is unnecessary to discuss the testimony further. Questions of credibility, as well as persuasiveness of facts and inferences, were for the jury. The judgment is affirmed.

SINCLAIR REFINING CO. v. SCHAFF.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1921.)

No. 5583.

Carriers ⇐100(1)—Strike cannot exempt from payment of demurrage charges.

Under the Interstate Commerce Acts the charge of demurrage by a railroad company for detention of cars by a shipper or consignee is not a matter of contract between the parties, but the rates fixed by the tariff schedules filed must be charged and enforced, and it is not a defense to an action to collect such charges that the detention was occasioned by a strike, or was by orders of a sheriff, prohibiting moving of the cars to prevent inciting mob violence.

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

Action at law by Charles E. Schaff, receiver of the Missouri, Kansas & Texas Railway, against the Sinclair Refining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. McCune, of Kansas City, Mo. (Edward H. Chandler, Summers Hardy, and William O. Beall, all of Tulsa, Okl., on the brief), for plaintiff in error.

W. W. Brown, of Kansas City, Mo. (O. T. Atherton, of Parsons, Kan., on the brief), for defendant in error.

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

JOHNSON, District Judge. In the court below this cause was submitted upon a stipulation filed by the parties, in which it is agreed that the allegations of fact contained in the amended petition of the plaintiff, Charles E. Schaff, receiver for the Missouri, Kansas & Texas Railway, are true, and that the allegations of fact contained in the affirmative defense set up in the answer of the defendant, Sinclair Refining Company, are true.

From the amended petition of the plaintiff it appears that under tariffs duly published and filed with the Interstate Commerce Commission certain demurrage charges accrued in favor of the plaintiff, as receiver of the Missouri, Kansas & Texas Railway, on cars delivered by him to the defendant at its refining plant in Coffeyville, in the state of Kansas. The receiver brought this action in the court below to recover said demurrage charges. As a defense the Refining Company in its answer alleged:

"On or about October 31, 1917, a large number of its employees at its refinery plant at Coffeyville, Montgomery county, Kan., went on a strike, and continued on such strike until on or about December 6, 1917; that on and after October 31, 1917, or immediately prior thereto, certain cars were delivered by said plaintiff to said defendant for loading or unloading, and when the said strikers went on strike they assembled in force around said plant of this defendant, seriously assaulted and beat various employees of defendant, who remained at their work notwithstanding said strike, and committed other acts of violence, and the acts and deeds of said strikers assumed the proportions of mob violence, and said strikers threatened the plant of said defendant with destruction in the event defendant should attempt to operate its said plant, or load or unload or move any of said cars; that said strikers picketed the said plant, and remained in force about the same, and forcibly prevented defendant from operating its said plant, or loading or unloading, moving or removing, any of said cars; that the sheriff of Montgomery county, Kan., and his deputies, intervened in an effort to protect the property of this defendant, and permit said defendant to operate its plant without hindrance from said strikers, and the defendant had a sufficient number of loyal employees who were ready and willing to load and unload said cars, and it attempted to do so, not only with the aid of its said employees, but also through the aid of outside agencies and at other places than at its said plant, but the said strikers forcibly prevented the defendant from so doing; that the said sheriff and his deputies could not control the said strikers, and in order to protect life and the property of this defendant and other persons and corporations, the said sheriff ordered the agents and servants of this defendant to carry on no operations at said plant, and not to load, unload, move or remove any railway cars consigned to defendant or located at this plant; that appeal was made to the proper authorities for troops and military assistance, for the purpose of preserving order at said plant, and to permit the defendant to operate the same, together with said cars, but it was not until the representatives of the military authorities arrived at said plant that said defendant was able to operate said plant, and to load, unload, move, and remove any of said cars; that because of the interposition of the superior unlawful authority exercised by the strikers, over which this

defendant had no control, and because of the orders and directions of the sheriff of Montgomery county, Kan., as hereinbefore set forth, said defendant was prevented from loading, unloading, moving, or removing any of said cars, and that if any of the demurrage accrued as alleged in said petition it was solely caused by virtue of the unlawful acts of said strikers, and the superior mob violence, and orders and directions of the peace officers of said county, to wit, the duly elected and acting sheriff of Montgomery county, Kan.; that without delay and as soon as order was restored at said plant this defendant caused said cars to be loaded, unloaded, and moved, and said cars were immediately placed at the disposition of said plaintiff."

The allegations of fact contained in the above defense are, as already stated, admitted by the receiver to be true. A jury was waived and the cause submitted to the trial court on the stipulation for decision. The receiver had judgment, and the Refining Company brings error.

It is the contention of the plaintiff in error that the matters set up in its answer, and admitted by the defendant in error to be true, constitute a good defense to the action. It is argued that, as the delay in the return of the cars on which the demurrage charges accrued was caused by the unlawful acts of strikers, over whom the company had no control, and whom it was powerless to resist, it should be excused for the delay and relieved from making payment. In support of this proposition counsel for the plaintiff in error cite: *Geismer v. Lake Shore & M. S. R. Co.*, 102 N. Y. 563, 7 N. E. 830, 55 Am. Rep. 837; *Haas v. Kansas City, Ft. S. & G. R. Co.*, 81 Ga. 792, 7 S. E. 629, in which the delay of the carrier in making delivery of goods being transported by it was excused when caused by a strike of its employees or the employees of a connecting line; *Empire Transportation Co. v. Philadelphia & Reading Coal & Iron Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, in which a strike of the employees of the charterer was held to excuse delay in unloading vessel; *The Richland Queen*, 254 Fed. 668, 166 C. C. A. 166, in which delay in completing repairs on vessel in dry dock held reasonable in view of strike of employees of Dock Company.

It is argued, in the second place, that since the sheriff of the county ordered plaintiff in error to carry on no operations at its plant, and not to load, unload, or remove the cars on which the demurrage charges accrued, it was justified in obeying the orders of the sheriff, and is excused for the delay in returning said cars, and should be relieved from the payment of the demurrage charges demanded by the receiver. In support of this proposition counsel cite: *Alabama & Vicksburg R. Co. v. Tirelli Brothers*, 93 Miss. 797, 48 South. 962, 21 L. R. A. (N. S.) 731, 136 Am. St. Rep. 559, 17 Ann. Cas. 879, in which the carrier was held not liable for damages for failure to deliver a car of fruit, where the municipal authorities were present and prepared to prevent delivery; *Southern Express Co. v. Sotille Bros.*, 134 Ga. 40, 67 S. E. 414, in which a carrier was relieved from liability on account of an interstate shipment of intoxicating liquors in its possession, which had been seized by public officers acting under a warrant issued in conformity to law.

Counsel also cite, to like effect, *So. Ry. Co. v. Heymann*, 118 Ga. 616, 45 S. E. 491; *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536. In their brief counsel quote the following statement from the opinion in *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. Ed. 625:

"But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens"

—and seem to rely upon it as applicable to the facts in this case. They also cite and quote from the opinion in the case of *The Kronprinzessin Cecilie*, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960, and, commenting upon this case, they say:

"If the master was justified in turning back to avoid capture, plaintiff in error was justified in its conduct and excused from liability, because, construing the contract with business sense, it cannot be said that the parties contemplated that it would be the duty of plaintiff in error to organize armed resistance to the duly constituted authorities of the state of Kansas, and by force of arms overcome the sheriff and his deputies, and at all hazards and in defiance of the sheriff's orders, proceed to unload the cars, or attempt to do so, and thereby cause the destruction, not only of the property of plaintiff in error, including its plant, but also the property of defendant in error, including the very cars upon which the demurrage is claimed, and, in addition thereto, provoking acts of violence and murder by the members of the mob. It would be extremely unreasonable to say that the parties had in mind, at the time the contract was entered into, that such a contingency might arise, and that plaintiff in error had contracted, under these circumstances, to unload the cars at all hazards."

There are other citations of authorities, with variations of the argument. Doubtless if it had then been decided, counsel would have cited *Texas Co. v. Hogarth Shipping Corporation, Ltd.*, 256 U. S. —, 41 Sup. Ct. 612, 65 L. Ed. —, decided by the Supreme Court of the United States June 6, 1921, and would have relied upon it as supporting their contention.

The contention of the plaintiff in error is unsound, because based upon premises inapplicable to the present case. The argument overlooks or ignores the fact that the court below was, as this court is, dealing with an act of Congress which has clearly defined and determined the rights and obligations of the parties in respect to the subject-matter of the action. In *Louisville & Nashville Railroad Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, the court, in discussing the acts of Congress regulating commerce, says:

"It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit. That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 64. The court cannot mold a statute simply to meet its views of justice in a particular

case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the supreme law of the land. * * * In our opinion, after the passage of the Commerce Act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know what the rates were, as well as to have the equal benefit of them. To that end the carrier was required to print, post, and file its schedules, and to keep them open to public inspection. No change could be made in the rates embraced by the schedules, except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail, and would not ordinarily be of any practical value, if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier. * * * It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute. *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 690, 691; *Gulf, Col., etc., Ry. Co. v. Hefley*, 158 U. S. 98, 102; *I. C. C. v. Ches. & Ohio Ry. Co.*, 200 U. S. 361, 391; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439. That rule was established in execution of a public policy which, it seems, Congress deliberately adopted as applicable to the interstate transportation of persons or property."

In the case of *Louisville & Nashville R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665, the court says:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they, as well as the carrier, must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The act (section 6) provides: 'Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.' The scope and effect of the provisions of the statute as to filing tariffs (both in their present form and as they stood prior to the amendments of 1906) have been set forth in numerous decisions. *Gulf, Col. & Sante Fé Ry. v. Hefley*, 158 U. S. 98; *Tex. & Pac. Ry. v. Mugg*, 202 U. S. 242; *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 445; *Armour Packing Co. v. United States*, 209 U. S. 56, 81; *N. Y. C. & H. R. R. v. United States*, 212 U. S. 500, 504; *Chicago & Alton R. R. v. Kirby*, 225 U. S. 155, 166; *Illinois Central R. R. v. Henderson Co.*, 220 U. S. 441; *Kansas Southern Ry. v. Carl*, 227 U. S. 639, 653; *Pennsylvania R. R. v. International Coal Co.*, 230 U. S. 184, 197; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 110-113; *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 284."

In the case of *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U. S. —, 41 Sup. Ct. 584, 65 L. Ed. —, decided by the Supreme Court of the United States June 1, 1921, the court says:

"The Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544 (Comp. St. § 8563), broadened the scope of the Act to Regulate Commerce to include 'telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from (a) state * * * to any foreign country.' And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act. *Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury*, 254 U. S. 357, 41 Sup. Ct. 114, 65 L. Ed. —. * * * The act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

And referring to the rule applicable to railroads under the Act Regulating Commerce, the court says:

"It is true that a railroad rate does not have the force of law, unless it is filed with the Commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger. The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in section 3 of the Act to Regulate Commerce (Comp. St. § 8565). Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. Congress apparently concluded, in the light of discrimination theretofore practiced by railroads among shippers and localities, that in transportation by rail equality could be secured only by provisions involving the utmost definiteness and constant official supervision. Accordingly by section 6 (Comp. St. § 8569) it forbade a carrier of goods from engaging in transportation unless its rates had been filed with the Commission; and it prohibited, under heavy penalties, departure in any way from the terms of those rates when filed."

The Interstate Commerce Commission, in Conference Ruling No. 8, has declared that:

"The Commission has no power to release carriers from the obligation of tariffs providing for demurrage charges, on the ground that such charges have been occasioned by a strike."

In view of the prohibitions of the statute, it is clear that courts are equally without power to release parties from the obligation of tariffs providing for demurrage charges on the ground that such charges have been occasioned by a strike. Congress alone has the power to write such an exception into the statute.

Judgment affirmed.

ELWELL v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1921. Rehearing Denied June 16, 1921.)

No. 2829.

1. Grand jury \Leftrightarrow 31—May be continued beyond term at which summoned.

A grand jury may be continued beyond the term at which it was summoned by an order of court as authorized by Judicial Code, § 284 (Comp. St. § 1261), to complete unfinished business before it, and when so continued retains its power to call and examine witnesses.

2. Witnesses \Leftrightarrow 306—Privilege against self-incrimination is personal to witness.

The privilege against self-incrimination given by the Fifth Amendment to the Constitution is personal to the witness and cannot be invoked in favor of another person, or of a corporation of which the witness is an officer or employee.

3. Witnesses \Leftrightarrow 308—Whether testimony would tend to incriminate witness is question for court.

A witness is not entitled to determine for himself that his answer to a question propounded would tend to incriminate him, but the court must see, from the circumstances of the case and the nature of the evidence he is called on to give, that there is reasonable ground to apprehend danger to him from his answer.

On Petition for Rehearing.

4. Grand jury \Leftrightarrow 36—Willful refusal to obey order to answer questions held contempt.

An order adjudging a witness before a grand jury guilty of contempt for refusal to obey an order to answer certain questions affirmed, where it appeared from the record that the witness fully understood that the court had ruled that the questions were proper, pertinent, and material, and that his refusal to obey the order was willful and deliberate.

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

Proceeding for contempt by the United States against Hector H. Elwell. From an order adjudging respondent guilty of contempt, he brings error. Affirmed.

Roy D. Keehn, of Chicago, Ill. (Charles Center Case and Edward G. Woods, both of Chicago, Ill., of counsel), for plaintiff in error.

Rex Mackenzie, of Chicago, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is a writ of error prosecuted to reverse an order of the United States District Court for the Northern District of Illinois, Eastern Division, adjudging the plaintiff in error (herein called plaintiff) guilty of contempt of court.

Because of the publication in the Chicago Evening American on January 26, 1920, of alleged facts said to have been gathered for presentation to, and touching a matter then pending before, a grand jury duly impaneled at the December, 1919, term of the said court, the grand jury was inquiring into the origin of such publication. In response to a subpoena, plaintiff, on February 3, 1920, appeared before the grand

jury, and, being interrogated, said he knew who wrote the article in question, but refused to divulge the name, saying:

"If newspapers do not protect people who furnish them news, it would be impossible for them to get news."

Pursuant to petition by the grand jury, setting up such refusal to answer, plaintiff was ordered by the District Court to appear and show cause why he should not be required to answer the questions or be punished for contempt. Plaintiff appeared before the court and filed his answer, alleging: First, that the term for which the grand jury had been impaneled had terminated, and therefore the grand jury had ceased to exist; second, he admitted the publication as charged and set out, but justified refusal to answer, because such answer would tend to incriminate him under the statute of Illinois relating to criminal libel; third, he set out in full the article as published; fourth, he admitted that he was city editor of the paper publishing the article, and specified many, if not all, of his duties as such; fifth, he admitted that he appeared, as charged, before the grand jury and was questioned regarding the article, that he responded to the questions as set out in the petition, that the testimony was given reluctantly and under compulsion, that at the time he had no opportunity and had not consulted with counsel, that he since such time had advised with counsel, and averred that answers to questions which he declined to answer as aforesaid might tend to incriminate him; sixth, that he ought not to be required to answer any question which might tend to incriminate him, and asked all the immunities and privileges granted him by law, including those guaranteed by the Fifth Amendment to the Constitution of the United States, and that he be not required to answer such questions, or any of them, and that he be discharged.

Upon the hearing, the court found that the petition was true, and the information sought to be adduced was necessary and proper, in order to enable the grand jury to comply with the order of the court, and ordered plaintiff to appear on March 15, 1920, before the grand jury, and answer the questions set forth in the petition. On the 15th day of March, 1920, the grand jury filed its further petition in the District Court. The language of the petition, in part, is:

"And this honorable court did, on the 12th day of March, 1920, enter an order directing the said Hector H. Elwell to appear on March 15, 1920, at 2 o'clock p. m., before the said grand jury and answer said questions set forth in said petition hereinabove referred to. Your petitioner further represents unto your honor that the said Hector H. Elwell did appear before the said grand jury on the day and the hour above set forth in the *petition* hereinbefore filed before this honorable court, and the said Hector H. Elwell then and there declined to answer said questions."

It is probable that the grand jury used the above underscored word "petition" instead of the word "order." Upon the filing of said petition, the District Court, on the 15th day of March, entered the following order:

"This matter coming on to be heard upon the order heretofore entered herein by this court on, to wit, the 12th day of March, A. D. 1920, ordering Hector H. Elwell to appear forthwith before the said grand jury and to answer the

certain questions set forth in the certain petition of the said grand jury heretofore filed herein, as set forth in said order last hereinabove referred to; and the court having heard the arguments of counsel in the premises; and it appearing to the court that the said Hector H. Elwell has wholly refused to comply with the said order of March 12, A. D. 1920, hereinabove referred to: The court doth find that the said Hector H. Elwell has willfully refused to answer the said questions above referred to, as he was ordered to do, as aforesaid, and has willfully refused to comply with said order last hereinabove referred to. Therefore it is hereby adjudged that the said Hector H. Elwell is guilty of a contempt of this court in having so willfully refused, as aforesaid, and to comply with said order. It is therefore ordered, adjudged, and decreed that the said Hector H. Elwell forthwith pay to the clerk of this court a fine of \$500, and that the said Hector H. Elwell be imprisoned in the common jail of Cook County, there to remain charged with contempt, until he answers the said questions as aforesaid, and that a warrant for said commitment issue to carry this judgment into effect."

Plaintiff, on March 24th, appeared before the District Court and moved to vacate and set aside the last entered order, quash the order for commitment, and dismiss and discharge the respondent, for the following reasons, stated in writing: That he had not willfully refused to answer the questions or wholly refused to comply with the previous order of March 12, 1920; that there was no grand jury; that the persons who had theretofore been a grand jury assembled on March 15th and assumed to act as a grand jury, and that plaintiff appeared before them; that certain questions were asked him, and that his response to such as he failed to answer was set forth in "Exhibit A" attached to said motion. Referring to the person who wrote the published article, the question asked plaintiff was, "Will you tell the grand jury the name of that man?" "Exhibit A," so far as material, is:

"I regret that I must decline to answer the question. * * * I decline to answer, because my answer might tend to incriminate me. I regret I cannot explain how or why my answer might tend to incriminate me, because such explanation might tend to incriminate me."

[1] 1. The question as to whether there was a grand jury before which plaintiff could be required to answer is partially disposed of by plaintiff's own motion, which says:

"The said persons who had composed the December, 1919, grand jury aforesaid, after separating as aforesaid, did not thereafter assemble until on March 15, 1920, * * * when they assembled and assumed to act as a grand jury."

It is admitted that the grand jury during the December term was legal. The motion shows a de facto grand jury on March 15, 1920. Section 284 of the Judicial Code (Comp. St. § 1261), referring to the District Court, provides:

"And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct."

An order of the District Court entered January 31, 1920, showed unfinished business before the grand jury, and expressly continued its existence to finish business then before it. See *United States v. Rockefeller*, 221 Fed. at page 466; *People v. McCauley*, 256 Ill. 504, at page 509, 100 N. E. 182, Ann. Cas. 1913E, 318. There is some claim that the formal order continuing the jury is not properly shown. In

any event the court that originally organized it was treating it as a bona fide grand jury, and it was doing the business ordered by the court.

2. It is contended that when the order of March 15, 1920, was entered there was nothing before the court to show that plaintiff did not appear and answer questions as commanded in the order of March 12th. This contention is based upon the claim that the petition filed March 15th fixed the time of plaintiff's appearance before the grand jury by an obviously inadvertent reference to a petition which had no existence. Despite the use of the word "petition," we are of opinion that it was clearly shown that plaintiff appeared before the grand jury on March 15th, pursuant to the court's order of March 12th, and that he there refused to answer the questions. (See reference to grand jury's petition of March 15th, supra.)

3. It is argued, too, that plaintiff was not present when the order of March 15th was entered; but his motion makes no such contention, and the order shows that the court heard arguments of counsel, and that it appeared that plaintiff wholly refused to comply with the order of March 12th. His motion shows that he was before the grand jury on March 15th and refused to answer. Every utterance of plaintiff, from his first appearance before the grand jury to the end of the record, shows, not compliance, but refusal to comply, so that, unless the plaintiff was to be excused because of his claim made under the Fifth Amendment, the only thing the court could have done, at the hearing on plaintiff's motion, was to deny it, or else set the order of March 15th aside and immediately re-enter it as of March 24, 1920, which would have been an idle and purposeless ceremony.

[2] 4. Plaintiff's main contention is based upon the question raised by the following answers to the grand jury, viz.:

"I decline to answer, because my answer might tend to incriminate me. I regret I cannot explain how or why my answer might tend to incriminate me, because such explanation might tend to incriminate me."

Plaintiff in argument cites the statutes of Illinois relating to criminal libel, and suggests:

"In the light of such statutes, reference to the newspaper article will show that in addition to the matters hereinbefore indicated, in which plaintiff in error might have criminated himself by his answers, a crime may have been committed against the people of the state of Illinois."

This contention has been fully disposed of by the Supreme Court of the United States adversely to plaintiff's suggestion in *Hale v. Henkel*, 201 U. S. at page 68, 26 Sup. Ct. 370, 50 L. Ed. 652.

[3] 5. The above-quoted answers show that plaintiff claimed before the grand jury, and he is here claiming, not only the right to refuse to make answers that might tend to incriminate him, but also the right in himself, and not in the court, to determine what might or might not tend to incriminate him. This precise question was before the Supreme Court of the United States in *Mason v. United States*, 244 U. S. at page 365, 37 Sup. Ct. at page 622, 61 L. Ed. 1198, and determined ad-

versely to plaintiff's contention. There the court, quoting from *The Queen v. Boyes*, 1 B. & S. 311, said:

"It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. * * * To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. * * * A question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

The plaintiff expressly refused to give any information which would enable the court to determine whether his answer to the question as to who wrote the article would tend to place the witness in peril. Under such circumstances, it was the duty of the District Court to insist upon the question being answered.

Order affirmed.

On Petition for Rehearing.

It is urged that plaintiff's constitutional rights were infringed because he had no notice of the filing of the grand jury's petition of March 15th, and was not present at the hearing thereon and the entry of the order of the same date. The following, taken from the record, shows substantially all of the facts in the record:

On February 6, 1920, the grand jury, making the inquiry shown in the opinion filed herein, set out in a petition to the court certain questions and answers as follows:

"Q. Do you know the name of the man who wrote the article which appeared in the *Chicago Evening American* of the issue of Monday, January 26, 1920, which article is headed 'Ex.-U. S. Agent in \$500,000 Drug Graft, Sage Named as Leader of Click'? A. I do.

"Q. Will you tell the grand jury the name of that man? A. I will not. I decline to give the name of the writer of that article, because I feel in honor bound to protect him; because, if newspapers do not protect people who furnish them news, it would be impossible for them to get news."

The petition asked that the court order plaintiff to appear and—

"show cause why he should not be required to answer said questions, or, upon his failure so to answer same, to be punished for contempt of court in refusing to answer said questions."

Pursuant thereto, plaintiff was ordered to appear on the 7th—

"then and there to show cause why he should not answer said questions, or, upon his failure so to answer same, to be punished for contempt of court in refusing to answer said questions."

Plaintiff, on February 13th, appeared in the District Court and filed his written answer, in which he identified himself as the respondent

named in the petition filed by the grand jury on February 6th, and then said:

"Respondent, having been ordered by said court to show cause why he should not answer certain questions set forth in said petition, or, upon his failure to answer same, be punished for contempt of court, respectfully answers aforesaid petition, and complies with aforesaid order, as follows"

—stating, in substance, first, that there was no grand jury; second, that to answer would tend to incriminate him under the statutes of Illinois relating to criminal libel; and, in conclusion, said:

"Wherefore, in consideration of the premises and because he ought not at any time, whether heretofore, when he declined to answer as aforesaid, or now or hereafter, be required or compelled to answer any question the answer to which might tend to incriminate him, hereby praying and claiming all the immunities and privileges granted him by law, including those guaranteed by the Fifth Amendment, having fully answered said petition and complied with the order of said court, respectfully prays this honorable court that he may not be required to answer said questions, or any of them, or be punished for any failure so to do, but that the rule on him be discharged, and that he be hence dismissed."

On February 23d the court entered the following order:

"This matter coming on to be heard upon the petition of the grand jury heretofore called for the December term, A. D. 1919, of this court, heretofore filed herein on February 6, 1920, and the answer of Hector H. Elwell thereto, filed herein on February 13, 1920, come the parties by their attorneys, and, after hearing statements and arguments of counsel, the court, being insufficiently advised in the premises, takes time to consider."

On March 12th the court entered the following order:

"This matter coming on to be heard upon the petition of the grand jury heretofore called for the December term, A. D. 1919, heretofore filed herein, for an order upon Hector H. Elwell to show cause why he should not be required to answer the certain questions set forth in said petition, or upon his failure so to do, to be punished for contempt of court therein, and further coming on to be heard upon the answer of Hector H. Elwell to said petition heretofore filed herein, the court, having read said petition and said answer, and having heard the arguments of counsel for the respective parties hereto, and being fully advised in the premises, does hereby find that all of the material allegations in said petition contained are true, that the questions in said petition set forth were pertinent and material to the investigation being then carried on by said grand jury as therein alleged, and that the information sought to be adduced by same was necessary and proper in order to enable said grand jury to comply with the order of this court set forth in said petition. Wherefore it is ordered by this court that the said Hector H. Elwell be, and he is hereby, ordered to appear on March 15, 1920, at 2 o'clock p. m., before said grand jury, and answer said questions set forth in said petition."

On March 15th the grand jury filed in the District Court its further petition, showing that plaintiff had appeared before the grand jury on that day, but that he then and there declined to answer said questions, and asked that he be punished for contempt of court for refusing to comply with the order of March 12th. Thereupon, on March 15th, the court entered the following order:

"This matter coming on to be heard upon the order heretofore entered herein by this court on, to wit, the 12th day of March, A. D. 1920, ordering Hector H. Elwell to appear forthwith before the said grand jury and to answer the certain questions set forth in the certain petition of the said grand jury.

heretofore filed herein, as set forth in said order last hereinabove referred to, And the court having heard the arguments of counsel in the premises, And it appearing to the court that the said Hector H. Elwell has wholly refused to comply with the said order of March 12th, A. D. 1920, hereinabove referred to: The court doth find that the said Hector H. Elwell has willfully refused to answer the said questions above referred to, as he was ordered to do as aforesaid, and has willfully refused to comply with said order last hereinabove referred to. Therefore it is hereby adjudged that the said Hector H. Elwell is guilty of a contempt of this court in having so willfully refused as aforesaid, and to comply with said order. It is therefore ordered, adjudged, and decreed that the said Hector H. Elwell forthwith pay to the clerk of this court a fine of \$500, and that the said Hector H. Elwell be imprisoned in the common jail of Cook county, there to remain charged with contempt, until he answers the said questions as aforesaid, and that a warrant for said commitment issue to carry this judgment into effect."

On March 24th, on a motion to vacate the foregoing order, plaintiff, again denying that there was any grand jury, said:

"The said persons who had composed the December, 1919, grand jury aforesaid, after separating as aforesaid, did not thereafter assemble until on March 15, 1920, previous to aforesaid order of that date, when they assembled and assumed to act as a grand jury in a room on the eighth floor of the building on the sixth floor of which said court was then holding its sessions in the city of Chicago, state of Illinois, and respondent then and there appeared before said persons assembled and assuming to act as a grand jury as aforesaid, and they proceeded then and there to put to said respondent certain questions, to each of which this respondent responded; his response to such questions as he failed to answer, however, being then and there substantially in the words set forth in the copy hereto attached and marked for identification Exhibit A, and except as above set forth said respondent did not and was not commanded or summoned or given opportunity to appear or testify or make answer before any grand jury, or any persons assuming to act as such, or said court, at any time after the entry of said order on March 12, 1920, until after the entry of said order of March 15, 1920."

Exhibit A is as follows:

"I regret that I must decline to answer the question.

"I am advised that I have the right to state—in fact, I believe that I am compelled to state—the reason I decline to answer.

"I decline to answer, because my answer might tend to incriminate me.

"I regret I cannot explain how or why my answer might tend to incriminate me, because such explanation might tend to incriminate me.

"I ask and claim every right and privilege of declining to answer any question that might tend to incriminate me, given by the Constitution and laws.

"I especially ask and claim all the rights and privileges granted by the Fifth Amendment to the Constitution of the United States.

"In reference to these matters, I have had the advice of my lawyer.

"In connection with my declination to answer and the reasons therefor, I wish also to state that the order of court pursuant to which I am here, and the petition upon which such order is based, each informs me that the question you ask me is a pertinent and material question in an investigation being carried on relative to certain alleged improper disclosures regarding deliberations of a grand jury in a grand jury room."

[4] It is important to note that plaintiff's written motion to vacate and set aside the order of March 15th and Exhibit A filed therewith fully substantiate the truth of the petition filed by the grand jury on March 15, 1920, and further substantiate the facts that, when plaintiff went before the grand jury on March 15th, he knew and understood that he was there pursuant to the court order of March 12th,

and that the question which he was asked was a pertinent one in regard to the investigation then before the grand jury. The conclusion is irresistible that, when he went before the grand jury on March 15th, he went there intending to disobey the order of March 12th, and to depend for protection, against the consequences of any order, upon what he considered to be his legal rights asserted in his answer before Judge Carpenter on February 13, 1920, after consideration of which the order of March 12th was entered. The legal rights asserted in the answer of February 13th were substantially identical with those reasserted in Exhibit A before the grand jury, and again in the motion to set aside the order of March 15th.

Petition for rehearing is denied.

In re F. G. BORDEN CO.

RICE, Town Treasurer, et al. v. CLEMMONS et al.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2820.

Bankruptcy ⇨346—**State held entitled to preference for income tax; "all taxes"; "legally due and owing."**

Under Bankruptcy Act, § 64a (Comp. St. § 9648), the estate adjudicated bankrupt March 22, 1919, on application filed that day, was, as to income earned in 1918, subject to the preferential claim of the state of Wisconsin, enacting a Soldiers' Bonus Act on September 11, 1919 (Laws Sp. Sess. 1919, c. 5), and which by another act of the same Legislature (Laws 1919, c. 667) was to be raised chiefly by an extra or surtax on 1918 incomes; "all taxes," as used in such section, being a comprehensive term, including personal as well as property taxes, income as well as real estate, and the provision "legally due and owing" restricting both kinds of taxes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legally Due; Tax—Taxation.]

Appeal from the District Court of the United States for the Western District of Wisconsin.

In the matter of the F. G. Borden Company, bankrupt. Miles Rice, Town Treasurer, and others, and the State of Wisconsin were enjoined from collecting income tax, and the State appeals. Reversed, and trustee ordered to pay taxes.

J. F. Baker, of Madison, Wis., for the State of Wisconsin.
Harold F. Wilke, for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The material facts are few and undisputed. The state of Wisconsin collects a substantial part of its revenue through an income tax. Its character and general provisions are set forth in an able and carefully prepared opinion by the late Judge Winslow in the Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135

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

N. W. 164, where the constitutionality of the law was sustained. This tax is a personal rather than a property tax. State ex rel. Sallie F. Moon Co. v. Tax Commission, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470.

Wisconsin's so-called "Soldiers' Bonus Act" was enacted September 11, 1919 (Laws Sp. Sess. 1919, c. 5), and gave to each returning soldier an option to obtain at the state's expense a four years' collegiate education, or a certain amount in cash, depending on length of service, etc. The money necessary to meet these expenses was, by another act of the same Legislature (Laws 1919, c. 667), to be raised chiefly by an extra, or so-called surtax, on 1918 incomes. These acts have both been upheld by the Wisconsin Supreme Court. State ex rel. Atwood v. Johnson, State Treas., 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617; Id., 170 Wis. 251, 176 N. W. 224. A complete statement of the two enactments may be found in the opinions.

The F. G. Borden Company was adjudged bankrupt March 22, 1919, upon application filed the same day. The trustee refused to pay this surtax on its 1918 income, amounting to \$3,046.13, and its action was sustained by the District Court; a restraining order against the treasurer being entered. The state appeals.

Both parties urge as reasons for supporting their respective views the absurd results which would follow a contrary ruling. Appellee points to a hypothetical situation that may arise if its views be not accepted, picturing a corporation that for several years previous to bankruptcy enjoyed great prosperity, with the result that large dividends were declared, followed by a year of adversity, resulting in bankruptcy. The imposition of a large progressive income tax under these circumstances would, it is claimed, entirely wipe out the assets of the estate, and leave nothing for the creditors. Appellant, on the other hand, points out that, unless Wisconsin can bring its claim within the language of section 64a of the Bankruptcy Act (Comp. St. § 9648), it will not occupy as advantageous a position as a general creditor. In other words, it says:

"There are no Wisconsin taxes more entitled to consideration, more sacred, than the taxes levied by these acts, and yet the claim for these taxes was not accorded the standing of a grog bill."

While, in doubtful cases, absurd or unfortunate results following any construction may well be considered in construing a statute, we are not much impressed by either illustration. For hardship may well be expected to fall on some claimant after bankruptcy intervenes, especially if the assets be small compared to the liabilities. The Congress has enacted the Bankruptcy Law and in one section (section 64) the rights of preferred creditors, general creditors, and the sovereign are established. Section 64a reads:

"Debts Which Have Priority.—a. 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."

Our problem, then, is to construe this section, not to weigh the evils or hardships against the advantages arising from its application. That the Congress desired to prefer the sovereign is evident. This court said of this section in another case (*In re Clark Realty Co.*, 253 Fed. 938, 166 C. C. A. 38):

"This statute and the construction placed upon it by the court is but another expression of the policy of the United States to exact priority in favor of the United States, the state, county, or municipality, in all cases of taxes where insolvency has intervened."

Somewhat similar expressions attributing the same purpose to the Congress may be found in various opinions. With this manifest intent to secure the sovereign as a background for the construction of section 64a, we may direct our attention to the query: Did the Congress mean to limit the sovereign's claim to "taxes due and owing by the bankrupt" to such as were due and owing at the date of the adjudication, or was the Congress directing the court to protect the sovereign in its revenues at any time that taxes may become "legally due and owing"?

Some phases of this question fortunately have been definitely settled and our task thereby is lightened. In *New Jersey v. Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, the expression "all taxes" was defined and held to include personal taxes as well as property taxes. In *Dayton, Trustee, v. Stanard*, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190, affirming the decision in 220 Fed. 441, 137 C. C. A. 35, the court held that the taxes described in section 64a were payable out of the general estate of the bankrupt, and were not limited to that part of the estate represented by the property which gave rise to the tax. The court there said:

"Considering the plain provision in section 64a of the Bankruptcy Act of 1898 (30 Stat. 544), that 'the court shall order the trustee to pay all taxes legally due and owing by the bankrupt * * * in advance of the payment of dividends to creditors,' we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancellation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well."

The court was there speaking of taxes levied and assessed subsequent to adjudication and directed their payment out of the general estate of the bankrupt. The Circuit Court of Appeals in that case said:

"Taxes accruing after bankruptcy proceedings are instituted are included among those to be paid. *Swarts v. Hammer*, 120 Fed. 256, 56 C. C. A. 92; *Id.*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060; *City of Waco v. Bryan*, 127 Fed. 79, 62 C. C. A. 79."

The chief, if not the sole, difference between the District Court and the Court of Appeals was in reference to the query,

"Were taxes levied subsequent to an adjudication in bankruptcy payable out of the general estate under section 64a?"

The District Court answered in the negative. The Court of Appeals reversed it, and the Supreme Court approved the decision of the Court

of Appeals. In other words, in this case "all taxes legally due and owing by the bankrupt" is held referable to the date of the order. For no authority exists for the payment of taxes ahead of general creditors excepting section 64a. In fact, the court makes this section the sole basis for its order. If taxes levied subsequent to the adjudication are payable out of the general estate under section 64a, it can be so only because the taxes of which the Congress was speaking were "legally due and owing by the bankrupt" at the time the order of payment was made.

But counsel have attempted to distinguish between property taxes, levied subsequent to adjudication, and personal taxes levied subsequent to adjudication. The former, so it is claimed, should equitably be paid by the estate because the property passed to the trustee, has been enjoyed by the estate, and the property could, in certain states at least, be seized to satisfy the tax. Conceding for the purpose of the argument, and for that purpose only, that the claim for property tax levied under these circumstances is a stronger one in equity than a claim for an income tax levied on income earned before adjudication (because one is a property and the other a personal tax), we are nevertheless unable to find justification for the distinction either in the language of the statute or the language of these decisions.

The Congress has spoken. Our duty is to enforce the statute as enacted and in the light of the construction placed upon it by the courts. We are not to review the reasons which lead to its passage, nor to pass judgment upon their soundness. In passing, however, we may add that we see no reason why the Congress, desirous of securing the collection of the sovereign's revenues, should distinguish between revenues derived from incomes earned prior to bankruptcy and revenues derived from ownership of property. "All taxes" as used in this section is a comprehensive term. It includes personal as well as property taxes, income as well as real estate taxes. The provision "legally due and owing" restricts both kinds of taxes. If, when applied to property taxes, it applies to taxes levied subsequent to adjudication, it must necessarily also apply to personal taxes levied after adjudication but on income earned and received before that date. Had Congress added to the clause "legally due and owing" the further and modifying clause, "and a charge on the estate of the bankrupt," a different situation would have arisen.

Moreover, what reason exists for distinguishing between a property tax and an income tax on income earned prior to bankruptcy proceedings? In Wisconsin, neither the real estate nor the personal property tax had been levied at the date of adjudication. Neither was a lien upon the property that passed to the trustee. Events occurring subsequent thereto necessarily determined their amount. The Soldiers' Bonus Act laid a part of the tax upon the real estate. Why pay this tax and not that based upon the income of the bankrupt during 1918? Certainly such property tax was not strictly speaking, "due and owing" at the date of adjudication.

When the bankrupt availed itself of the Bankruptcy Act and turned over its property to its creditors, and, in a sense, died, it owed, among

other creditors, the government, the state, the county, and the town in which it resided. Its normal income tax, its personal property tax, and its real estate tax were all undetermined and their amounts unknown. It was at the same time subject to such other burdens as the state of Wisconsin might, within its constitutional powers, see fit to impose. One of these burdens to which it was subjected was an additional income tax, based on the income of the previous year, to meet an extraordinary, an emergency situation. Desirous of showing its appreciation of the services of those who made sacrifices during the World War, Wisconsin enacted this legislation. The belief that the large incomes earned during the war, and in some instances by industries favored by the war, should carry a generous portion of this burden, no doubt influenced the Legislature. The debt thus created was therefore apportioned among the property owners and the recipients of large 1918 incomes. Had the entire tax been levied against the real or personal property, the trustee would not and could not, under the decision in *Dayton v. Stanard*, supra, have disputed liability. The trustee should not occupy a better position than the bankrupt, had bankruptcy not intervened.

We conclude that the sovereign's revenue, which the Congress aimed to secure, included income taxes as well as property taxes; that both forms of revenue are covered by section 64a and come within the meaning of the term "all taxes" as used therein; that the clause "legally due and owing by bankrupt" modifies "all taxes" and applies to property taxes as well as to personal taxes; that the estate of the bankrupt was, at the date of adjudication, subject to be taxed upon the income earned during the previous year as well as subject to be taxed on its real and personal property; that the state's claims for such taxes, personal and property, should, under section 64a, be paid out of the general estate of the bankrupt.

The decree is reversed, with direction to order the trustee to pay the taxes in question.

AMERICAN CAR & FOUNDRY CO. v. EAST JORDAN FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2869.

Sales ⇐77(1)—Pig iron contract as to price construed.

Where pig iron contract provided that the price for each month should be the average of market price quotations from a trade journal, minus 50 cents per ton and the average freight rate between the place of manufacture and Chicago, no mention being made of different grades of iron, and in time manufacturing conditions changed, so that there was a greater spread between the various grades than existed at the time the contract was made, the fact that the lower priced grades, which were the grades in fact preferred by the buyer, constituted the bulk of the output, and that the tonnage of the highest quoted grades was comparatively very small, did not justify the buyer in changing from the prior method of computing the price by averaging the highest and lowest quotations, regardless of grades, and, ignoring the quoted prices on such grades as were

not represented in the monthly production, considering only such grades as had been produced by the seller.

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

Action by the East Jordan Furnace Company against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John R. Montgomery, of Chicago, Ill., for plaintiff in error.
Edgar Bronson Tolman, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The action was upon a contract whereunder plaintiff in error, Car Company, agreed to buy, and defendant in error, Furnace Company, agreed to sell for the term of 10 years from December 4, 1909, the Furnace Company's entire output of standard Lake Superior charcoal pig iron up to 25,000 tons per annum. It was specified that the price for the iron shipped in any calendar month shall be determined as follows:

"The average market price per ton of Standard Lake Superior charcoal pig iron, Chicago delivery, during each month, shall be first ascertained. The market price from time to time shall be taken to be the price quoted in the Iron Age in its issues for that month; e. g., should the four issues of Iron Age during any month show quotations on standard Lake Superior charcoal pig iron, Chicago delivery, as follows:

First issue	\$18.50 to \$19.50
Second issue	19.00 to 19.50
Third issue	19.50 to 20.00
Fourth issue	20.00 to 20.50

then the average price of such pig iron, Chicago delivery, would be \$19.50 per ton. From this average price, Chicago delivery, shall be deducted 50 cents per ton, and also the average freight rate during such month from East Jordan to Chicago. The remainder will be the price per ton of twenty-two hundred and forty (2,240) pounds to be paid to Furnace Company for the pig iron sold under this agreement for such month, f. o. b."

For the first five years of the contract period the price of the delivered iron was computed and paid in accordance with the method set out. During this time the quotations in Iron Age (a weekly trade paper for the iron industry) were in the form set out in the contract, which had been the form of the quotations for years prior to the contract. Early in 1915 the Iron Age changed the manner of quotation upon such iron, to show the market price on various grades of the iron. It seems that there have always been different grades of the iron, determined by the extent of its silicon content; the larger proportion of silicon generally bringing the higher price, where there was difference in the price of the grades. There were recognized in the trade about fourteen grades.

In the smelting of the iron various grades were unavoidably produced, because of the impossibility of maintaining uniform heat. Whether during the early years of the contract the high and low figures reported in the Iron Age represented to any degree differing prices of the grades or the variation of the iron generally without

reference to grades, is not clear from the evidence; but that there was more or less difference in price of some of the grades during the last five contract years is well established. Grades 2, 3, 4, and 5, generally the lower priced grades, and indeed those which the Car Company preferred, constituted the bulk of the output; the tonnage of the highest quoted grades being comparatively very small.

When Iron Age began quoting figures on the grades, the Furnace Company computed its price by taking the highest and lowest quotation shown for the issues of the month, and averaging them; the figures being taken regardless of the grades that had been actually produced. But the Car Company contended that this change in the mode of market price quotation necessitated change in the manner of the computation, and insisted that the proper method was to ignore entirely the quoted prices upon such grades as were not represented in the production during such month, and that only such grades as had been produced by the Furnace Company should be considered. These they figured at the quoted price and divided the sum by the total tonnage shipped, which, less the 50 cents per ton, was the price per ton which the Car Company insisted it should pay, and it was upon this, or substantially this, method that the Car Company, against protest of the Furnace Company, made its computation and payments from month to month. Upon the approximately 100,000 tons of ore involved during this period of the contract, the difference in price under the two methods is somewhat over \$60,000, for which the Furnace Company brought the action. Jury was waived, and the cause submitted to the court, which did not adopt either method in its entirety, but obtained the average of all of the quoted prices as the basis of computation, deducting therefrom the 50 cents per ton. This yielded a result of \$59,-052.38, for which judgment was rendered. The Furnace Company assigns no error on the mode of computation which the court adopted.

In the contract itself there is no ambiguity in its provisions for the ascertainment of the price. While the contract was made in the light of the fact that various grades of this iron would be inevitably produced, which might, even if at the time they did not, vary in the market price, no mention whatever was made of grades; but the contract was for the entire output up to a fixed maximum, and the provision for fixing price was for the taking of the quoted figures in Iron Age, wholly regardless of whether in fact, then or thereafter, the figures might apply to one grade or to another, and regardless, also, of the grades which were in fact produced.

The contract does not provide that the price to be paid for the iron shall be the market price, but market price quotations from Iron Age were to be the basis upon which the price under the contract was to be fixed by averaging all the figures for the month as shown in Iron Age. It might be that the highest figures quoted would represent but a very small tonnage of iron which during the period covered by the quotation actually sold at that price; and if grade and quality of the iron had in fact anything to do with the price, as well might have been the case, a small quantity of the superior quality sold at the higher price would be the basis for the higher figure. This, of course, would

redound to the advantage of the Furnace Company, if it had actually produced but little of the higher priced iron; and if the converse were true as to the lower price quotation, this would operate to favor the Car Company. But, as has been observed, the contract was not to pay market price, but the average of market price quotations in Iron Age according to the method indicated. Nor in our view of the contract was the average necessarily limited to two figures. The two figures given in the contract were simply by way of illustration. Had there been at times no variation to report, one figure might have been reported for such weeks, and this would not have changed the contracted method of fixing the price; and if by reason of a subsequent greater spread in prices of different grades several figures should be quoted, we do not perceive why the taking of all in arriving at the average market price would be in derogation of the method prescribed in the contract.

If it were conceded that the change in quotation produced such an uncertainty or ambiguity in the Iron Age quotations as to make impossible an application of the contractual method of price fixing, and that the actual market price of the various grades produced must be taken, it would follow that the Car Company could not then deduct the 50 cents per ton, since this deduction was but one of the elements in the fixing of the price; the deduction being, not from the market price of the iron actually produced, but from the average of the prices quoted in Iron Age. The fact that in the course of time manufacturing conditions and exigencies arose whereunder there was a greater spread in price between the various grades than existed, if any there did exist, at the time the contract was made, does not render ambiguous and uncertain that which was plain and certain at the inception of the contract.

"The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfillment." *Virginia v. West Virginia*, 238 U. S. 202, 236, 35 Sup. Ct. 795, 809 (59 L. Ed. 1272).

The fact that the changed conditions of manufacturing demands, and of the markets, and of the Iron Age quotations, may, under the peculiar conditions of the change, give one party or the other some advantage as against actual market prices upon the actual output produced and sold, must not be suffered to modify the sufficiently clear terms of the contract as the parties made it.

It seems that for about the last five months of the contract period Iron Age made further change in the manner of its quoting such iron, by quoting only one figure for "iron of average silicon 1.50, other grades subject to usual differentials." As to what these differentials were, the parties agreed, and in making the computation the court added to the base price given in the Iron Age quotation the excess for each grade wherein, because of larger or smaller content of silicon the market price was higher or lower, then adding them together and dividing by the number of prices. Iron Age thus supplying by apt reference the figures on the various grades, we find no error in this mode of computation for that time.

For many years there appeared weekly elsewhere in Iron Age certain comparative figures on market prices of such iron, to now adopt which for these calculations would be of material advantage to the Car Company, and which it was suggested should be adopted for the time in question. These figures are not referred to in the contract, and both parties, through long and uniform practice under the contract, have not employed them, and have not during the contract period recognized them as having any place or influence in fixing prices under the contract. The court was justified in ignoring those figures.

The views above expressed make it unnecessary to consider the assignments of error respecting the rulings of the court upon the admission of evidence, save only to say that, finding no insuperable difficulty in applying the Iron Age quotations to the contract in the fixing of prices, the rulings of the court upon questions of admissibility of evidence were proper.

We are of opinion that the judgment fairly represents the excess of the full contract price over the amount which the Furnace Company has received, and, no error appearing, the judgment is affirmed.

GRAHAM v. JONES.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1921.)

No. 3661.

1. **Vendor and purchaser** ⇨18(3)—**Time is of essence of option.**
In an option to purchase land time is of the essence of the contract, and where payment is not made within the time limited the option expires.
2. **Vendor and purchaser** ⇨18(4)—**Letter of third party held not repudiation by vendor.**
Where vendor gave an option to purchase land, title to which was vested in a corporation, a letter from the president of the corporation to the option holder, stating that the vendor had said that the option holder had offered to buy subject to a *lis pendens*, was not a repudiation by the vendor of the option contract.
3. **Vendor and purchaser** ⇨18(3)—**Conditional tender held not sufficient.**
Where vendor gave an option to purchase land, title to which was vested in a corporation, a tender of a check for the payment required to exercise the option was insufficient, where conditioned on the execution by both the vendor and the corporation of the contract of sale sent with the check; the corporation not being a party to the option.
4. **Vendor and purchaser** ⇨170—**Conditional tender not sufficient.**
A tender of purchase money of land, if coupled with the condition that the party to whom made shall execute a deed to the land, is not a good tender.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Action by John A. Graham against Allen W. Jones. Judgment of dismissal, and plaintiff brings error. Affirmed.

William H. Barrett, of Augusta, Ga., and James M. Hull, Jr., of Augusta, Ga., for plaintiff in error.

E. H. Callaway, of Augusta, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Graham brought suit against Jones in the United States District Court for the Southern District of Georgia to recover damages for the alleged breach of an option for the sale of lands in Florida. The petition was dismissed on demurrer.

The question raised is: Had the option ripened into a binding contract? The option was contained in two letters dated July 31, 1919. By the first letter Jones agreed to have conveyed to Graham, or assigns, by good and sufficient warranty deed by the National Security Company, a corporation in which the title was vested, the lands described therein, containing 10,280 acres, more or less, for \$8 per acre; the sum of \$1,000 to be paid on or before August 10, 1919, and the balance on or before September 1, 1919. Jones was to furnish Graham, or assigns, a certified abstract, showing clear, unincumbered, merchantable title to said lands in said Security Company. Jones was to discharge all taxes and liens on the land, and on payment of the full purchase price cause to be delivered a warranty deed from said Security Company, conveying said lands by a clear and merchantable title.

Graham was to have "this option to purchase said lands without payment until August 10, 1919," on or before which date Jones was to be paid \$1,000, and on its payment Graham was to have until September 1st in which to complete the payment of the purchase price, and if not paid by said date the agreement to sell to be void; the \$1,000 to be retained as liquidated damages. If the \$1,000 was not paid on or before August 10, 1919, the agreement was to terminate as of that date, and to be null and void and of no effect.

This letter created an option without consideration until August 10th, when, on payment of \$1,000, it would have constituted a contract between the parties for the purchase and sale of the land, with the right in Graham to avoid further compliance by forfeiting \$1,000 as liquidated damages on failure to complete the sale by September 1st. The second letter agreed that, if the option was complied with, the total price should be \$70,000.

It appears that in 1918 a contract for the purchase of said land was entered into between Graham and the Security Company, which was canceled by Graham on request of Jones in March, 1919, to enable him to effect a settlement with one Wilson, who claimed an interest therein. Jones, in the letter requesting such cancellation, promised that if he acquired Wilson's interest he would convey the land to Graham for \$7 per acre at any time within three months of the settlement of said controversy. Jones never acquired Wilson's interest.

On August 4, 1919, Graham wrote Jones a letter, addressed to Midville, Ga., stating he was prepared to pay the \$1,000 on August 10th, requesting Jones to have the abstract brought down to date as soon as possible, and to state where he could communicate with Jones on or about August 10th for the purpose of making the \$1,000 payment, sug-

gesting that Jones meet him in Atlanta on the 11th to receive payment. He requested a prompt reply stating to whom he should send the \$1,000 in the event Jones would not meet him in Atlanta.

On August 7th, E. W. Brooks, president of the National Security Company answered said letter from Midville, saying the option agreement of July 31st and said letter of August 4th had been turned over to the writer. Brooks requested that the check for \$1,000 be sent to him, on receipt of which he would send the Security Company's usual form of option allowing payment of the \$70,000 on or before September 1, 1919. The letter also stated that Jones said he had called Graham's attention to the *lis pendens* recorded in Manatee county, Fla., and that Graham had offered to buy subject to said *lis pendens*.

On August 9th, Graham replied to Brooks, rehearsing his version of the agreement, and denying that he had agreed to accept the title subject to the *lis pendens*, but that he had stated "that the title would have to be investigated by the attorney of the purchaser, who would have to certify that the same was not a cloud on the title, and that the Security Company's deed conveys a clear, unincumbered, merchantable, fee-simple title, before accepting same or making final payment." He advised that he was sending a check, accompanied by a contract to be signed by Jones and the Security Company, providing for the sale of said land, and binding all parties according to its terms, to the Bank of Midville, to be delivered on the execution of said contract by said Jones and said Security Company. Graham also on said August 9th wrote to the Bank of Midville, inclosing a certified check for \$1,000, payable to the order of Jones, together with said contract, with direction to deliver the check on execution of said contract. The check was requested to be returned by the Bank of Midville, and the signature of the Security Company to the contract tendered by Graham declined. No other tender of payment of said \$1,000 seems to have been made at any time, and no tender of the \$69,000 was ever made.

[1] Whether there was, or not, any consideration for the option of July 31, 1919, it is plain that its continuance beyond August 10, 1919, was conditioned on the payment of \$1,000 on or before said date. If payment of \$1,000 is not made on or before August 10th by express terms, it is provided that "this agreement likewise will terminate as of that date, and will be null and void and of no effect." It is therefore plain that the contract was an option, in which time was of the essence of the contract, and that the payment of the \$1,000 on or before that date was essential to keep it alive. In an option to purchase land, time is of the essence of the contract, and where not made within the time limited the option expires. "It is peculiarly a contract of which time is of the essence." *Larned v. Wentworth*, 114 Ga. 222, 39 S. E. 895; *Jarman v. Westbrook*, 134 Ga. 19, 67 S. E. 403; *Pollock v. Riddick*, 161 Fed. 280, 88 C. C. A. 326; *Kelsey v. Crowther*, 162 U. S. 404, 408, 16 Sup. Ct. 808, 40 L. Ed. 1017.

[2] It is insisted that, when Brooks wrote his letter of August 4th, the statement therein that Jones said Graham had agreed to take the property regardless of the *lis pendens* filed by Wilson in Manatee county was a repudiation of the agreement of July 31, 1919. We do not

think it is. It was only a statement of Brooks of what Jones claimed to be the result of a conversation, which in his reply Graham admits was had, respecting this *lis pendens*, and was no claim of a change of the contract. Both of these letters are set out in plaintiff's petition. Graham did not regard it as a withdrawal by Jones from the contract, but proceeded on the assumption that the option continued of force, and sent his check for delivery on the conditions contained in his letter to the bank.

[3] If the tender of the check on August 11th was in time, the same was not an unconditional tender, such as is required to constitute a tender under an option to buy land. Conceding that Jones would have been bound to accept a tender made according to the terms of the letter of July 31st, no such tender was made. The offer of the check was conditioned on the execution by both Jones and the Security Company of the contract of sale sent with it. The Security Company was not a party to the letter of July 31st. Had the option extended in that letter ever ripened into a fixed contract for the sale of, and payment for, said land, it would have been a contract alone between Graham and Jones, and Jones only would have been liable for a breach. Had the Security Company signed the contract demanded by Graham as the condition to the delivery of his check, payable to Jones, it would have been liable for any breach of that agreement, as well as Jones.

[4] A tender of purchase money of land, if coupled with the condition that the party to whom made shall execute a deed to the land, is not a good tender. *De Graffenreid v. Menard*, 103 Ga. 651, 30 S. E. 560; *Morris v. Continental Ins. Co.*, 116 Ga. 53, 42 S. E. 474; *Terry v. Keim*, 122 Ga. 43, 49 S. E. 736. It is quite clear that no tender of the \$1,000 was ever made under the terms of said letter of July 31st, but only coupled with a demand for a contract to be signed by the National Security Company; that therefore the option never continued of force after August 10, 1919, and the District Court correctly decided that plaintiff's petition set up no cause of action.

Judgment affirmed.

KEYSTONE STEEL & WIRE CO. v. KOKOMO STEEL & WIRE CO.

(Circuit Court of Appeals, Seventh Circuit. September 13, 1921. Petition for Rehearing Overruled October 27, 1921.)

No. 2780.

1. Evidence ⇨460(11)—Parol evidence not admissible to vary quantity of goods sold.

Where written contract for sale of steel rods specified the maximum and minimum quantities to be delivered, parol evidence was inadmissible to show that the rods contemplated by the contract were to be manufactured by the seller at its factory, and were to be in quantity only the surplus over and above the seller's requirements of rods in its own business.

2. Appeal and error ⇨1031(2)—In absence of bill of exceptions it will not be presumed that overruling of demurrer to paragraph of answer was not prejudicial because of evidence to sustain other part of answer.

Where, after overruling of demurrer to a paragraph of the answer pleading a parol agreement varying the terms of the written contract of sale sued on, the case was tried and there was a general finding and judgment for defendant, the Circuit Court of Appeals would not presume, in the absence of a bill of exceptions, that there was evidence on the trial to sustain any proper theory of defense admissible under any other part of the answer, so as to render the error in overruling the demurrer harmless.

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

Action by the Keystone Steel & Wire Company against the Kokomo Steel & Wire Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

The complaint alleges that on May 21, 1915, the parties hereto entered into a written contract of purchase and sale of "9,000 to 11,000 gross tons basic rods. Shipments prior to May 31, 1916, in approximately equal monthly shipments. Prices and terms, from July 1, 1915, to November 30, 1915, \$27.08 g. t. [gross ton] f. o. b. Peoria. For December, 1915, and January, 1916, \$27.58 per g. t. f. o. b. Peoria. From February 1, 1916, to May 31, 1916, \$28.08 per g. t. f. o. b. Peoria. The prices December 1, 1915, to May 31, 1916, will be subject to reductions should conditions warrant. * * * Each month's shipments to be treated as a separate and independent contract. * * * Strikes, differences with workmen, accidents to machinery, or other contingencies beyond the control of the seller, to be sufficient cause for any delay in shipment traceable to such cause. Within a reasonable time after removal of such contingency seller is to deliver as rapidly as possible. The purchaser shall give the seller specifications of goods covering shipments, not less than ten days before time of shipment. * * *" That at the time of the making of the contract it was the generally recognized custom, usage, and practice in the steel trade throughout the United States, that where minimum and maximum quantities were stipulated, the right or option was with the buyer, within such limits to fix the quantity to be delivered. That on May 29, 1915, the buyer (plaintiff in error) ordered from the seller 200 tons for delivery during the ensuing week, on July 2, 1915, 800 tons for shipment during July, and thereafter 1,000 tons per month for shipment in each successive month of the following 10 months, making a total of 11,000 tons, but that the seller (defendant in error) shipped a total of only 9,271 tons. That the balance of the 11,000 tons the seller refused to deliver, and same remained undelivered at the commencement of suit December 18, 1916. That the nondelivery was not caused by strikes or other contingencies in the contract referred to, and that by reason of the nondelivery the buyer was damaged \$75,000.

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

Demurrer to the complaint being overruled, answer was filed consisting of— first paragraph, a general denial of each and every allegation of the complaint; second paragraph, admitting the execution of the contract, and the delivery thereunder to the buyer of 9,071 tons, but denying right of recovery for nondelivery of the balance claimed, because at and before the contract was made the seller was a manufacturer of steel wire, wire fence and nails, and was making "basic steel rods" for use primarily in making its own products, but was not engaged in making such rods as a business for selling them on the market, and was not equipped for turning out such rods for the market generally; that at the time the contract was made it was agreed and understood between buyer and seller that the rods were to be manufactured at the seller's factory in Kokomo, Ind., and that the buyer was buying from the seller only part of the buyer's requirements for such rods, and that it would be impossible for the seller to state how many and what quantity of surplus rods over and above its own needs it would have during the contract, and that the rods which the seller would supply under the contract would be only the seller's surplus after its own requirements had been met; that the seller operated its furnaces in a careful manner, and that during the period covered by the contract, the seller, after supplying its own reasonable requirements of such rods, did deliver to the buyer all its surplus of rods manufactured during that time; that because of unavoidable accidents, strikes, and other contingencies beyond the seller's control it was not able to manufacture more of such rods, over and above its own needs, than the quantity which was so delivered to the buyer, and that from time to time as such contingencies would arise it would notify the buyer thereof; that somewhere about December 1, 1915, a representative of the seller informed the buyer that during the early part of the contract there might be delivered the maximum monthly requirement, but that later the shipments would not be beyond the minimum amount; and that in addition to the quantity of rods delivered upon the contract as stated in the answer, there were delivered in May and June of 1915, 800 tons of such rods.

Demurrer to the second paragraph of the answer was overruled, and a general denial of its allegations filed. Jury was waived and the cause submitted to the court, and upon trial by the court there was a general finding and judgment for the defendant in the action.

Chester F. Barnett, of Peoria, Ill., for plaintiff in error.

Conrad Wolf, of Kokomo, Ind., for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] Practically the only proposition which plaintiff in error urges is the alleged error committed in overruling the demurrer to the second paragraph of the answer. We are of the view that, in so far as in that paragraph the defense is rested upon the allegation that the rods contemplated by the contract were to be manufactured by the seller at its Kokomo factory, and were to be in quantity the surplus only over and above the seller's requirements of rods in its own business, it would by parol import into the contract material terms and conditions which the written contract itself did not include, and this the seller cannot be permitted to do. Possibly so much of the paragraph as sets up unavoidable delays in manufacture would raise an issue of fact as to whether or not the alleged occurrences would, under the contract, justify postponement of delivery to a time as late as the date the suit was begun. Manifestly, under the contract, such occurrences would not excuse, but would merely warrant, delay in making shipments.

[2] Jury was waived, the cause was tried by the court, and a general finding made for defendant in error. The District Court clerk

certifies that the transcript shows all proceedings in that court, of record in the cause, and, no bill of exceptions appearing, we conclude there was none. Defendant in error contends that, even though the court erred in upholding the second paragraph of the answer, yet in the absence of bill of exceptions it will be presumed that there was evidence on the trial to sustain any proper theory of defense admissible under any other part of the answer.

If paragraph 2 of the answer were merely an amplification of the general denial, a different question might be presented. But paragraph 2 set up in defense a contemporaneous parol agreement between the parties, which would materially modify the written instrument. The general denial put in issue every allegation concerning the contract, but presented no issue as to any contract other than the one alleged in the complaint. The demurrer to paragraph 2 directly challenged the right of defendant in error to show by parol a contract different from the written instrument sued on, as a basis for the defense of fulfillment of the alleged modified agreement of the parties. In overruling this demurrer the court necessarily held as the law of the case that such modification of the writing might lawfully be shown.

It is true the judgment might have been wholly based on any one of several facts which, under the general denial, might have appeared—that there was no contract as alleged, that the contract had been fully performed by defendant in error, etc. But no special finding appears in the record to indicate that the judgment was so predicated, rather than on the untenable defense of performance of a contract different from the one sued on. The record thus disclosing nothing from which it appears that the indicated error was harmless, it remains a substantial and reversible error in the record on which this judgment is based. *Deery v. Cray*, 5 Wall. 795, 18 L. Ed. 653; *Moores v. Citizens' National Bank*, 104 U. S. 625, 26 L. Ed. 870; *Miller v. Houston Ry. Co.*, 55 Fed. 366, 5 C. C. A. 134; *Abdil v. Abdil*, 33 Ind. 460; *Pyle v. Peyton*, 146 Ind. 90, 44 N. E. 925.

Defendant in error contends the complaint itself discloses that plaintiff in error was not entitled to recover, in that, as defendant in error maintains, the option as between 9,000 and 10,000 tons was in law with the seller, and that more than 9,000 tons appearing from the complaint to have been delivered, no cause of action was stated. A sufficient answer to this is found in the fact that the complaint also alleges a trade custom to the effect that in such contracts the option is with the buyer. Even if the rule governing the option is as so claimed to be, the rule might not apply if such alleged custom were established by evidence.

The judgment is reversed, and the cause remanded to the District Court for new trial, with direction to sustain the demurrer to the second paragraph of the answer.

CHICAGO RECORD-HERALD CO. v. TRIBUNE ASS'N.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2834.

1. Copyright ⚡4—News not subject of copyright.

News, as such, is not the subject of copyright; but in so far as an article involves authorship and literary quality and style, apart from the bare recital of facts or statement of the news, it is protected by the copyright law.

2. Copyright ⚡57—Copyrighted news item held infringed.

An article stating news concerning Germany's hope of succeeding in the war by reason of her submarines held infringed under the copyright law.

3. Copyright ⚡58—What constitutes substantial part of copyrighted article not determined alone by measurement.

Whether an appropriated publication constitutes a substantial portion of that which is copyrighted cannot be determined alone by lines or inches which measure the respective articles.

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

Action by the Tribune Association against the Chicago Record-Herald Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alfred S. Austrian, of Chicago, Ill., for plaintiff in error.

Harry W. Lippincott, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The judgment complained of was rendered against plaintiff in error upon its election to stand by its overruled demurrer to the declaration, which charged plaintiff in error with wrongfully publishing in its Chicago newspaper, the Chicago Herald, an original composition of which one Edwards was the author, and for which defendant in error had duly secured a copyright under the laws of the United States; that defendant in error published the copyrighted article in its New York newspaper, the New York Tribune, on the early morning of February 3, 1917, and offered it for exclusive publication in Chicago to plaintiff in error, which declined to purchase it, and it thereupon sold the exclusive right of Chicago publication to the Chicago Daily News, an afternoon paper of that city; that plaintiff in error, well knowing the article to have been copyrighted, nevertheless on the morning of said February 3, 1917, caused parts of the article to be published in the Chicago Herald, whereupon the Chicago Daily News declined to receive it or to pay the purchase price therefor.

The article as published in both newspapers is set forth in the declaration; that in the Chicago Herald, and the comparable portions of the entire copyrighted article in New York Tribune being in parallel columns, as follows:

Chicago Herald.

"Germany Pins Hope of Fleet on 300 Fast Supersubmarines.

"New York, Feb. 3, 3 A. M.—(Special)—The Tribune this morning in a copyrighted article of Louis Durant Edwards, a correspondent in Germany, says that Germany to make the final effort against Great Britain has plunged 300 or more submersibles into the North Sea. These, according to this writer, were mobilized from Kiel, Hamburg, Wilhelmshaven and Bremerhaven, where for months picked crews were trained.

"They form the world's first diving battle fleet," he says, "a navy equally prepared to fight above or beneath the waves."

"There are two types of these new boats now in commission, one of 2,400 tons and one of 5,000 tons displacement."

"They dive beneath the water in a fraction of the time that it takes the older types to submerge. They mount powerful guns, are capable of great surface speeds, and are protected by a heavy armor of tough steel plate."

"The motors develop, 7,000 horse power and drive the boats under the surface at 22 knots an hour. These smaller cruisers carry a crew of from 60 to 80 men."

"The submersibles have a radius of action of 8,000 miles."

New York Tribune.

"By Louis Durant Edwards. Copyright, 1917, by The Tribune Ass'n (New York Tribune).

"Germany plays her trumps. Three hundred, or more, submersibles have plunged into the waters of the North Sea to make the final effort against Great Britain. They mobilized from Kiel, Hamburg, Wilhelmshaven, Bremerhaven, where, for months, picked crews have trained.

"They form the world's first diving battle fleet, a navy equally prepared to fight above or beneath the waves."

"There are two types of these new boats now in commission, one of 2,400 tons and one of 5,000 tons displacement."

"They dive beneath the water in a fraction of the time that it took the older types to submerge. They mount powerful guns, are capable of great surface speeds, and are protected by a heavy armor of tough steel plate."

"The motors develop 7,000 horse power, and drive the boats over the surface at a speed of 22 knots an hour. These smaller cruisers carry a crew of from 60 to 80 men."

"They have a radius of action of 8,000 miles."

Following the stars above shown there appears in the New York Tribune very much more; the copyrighted article as there published being in its entirety about tenfold longer than the Herald publication.

For plaintiff in error it is contended (1) that its publication was of news only, and that the news feature of the copyrighted article was not properly subject to copyright; (2) that what the Herald published was not any substantial part of the entire copyrighted article.

[1, 2] It is true that news as such is not the subject of copyright, and so far as concerns the copyright law, whereon alone this action is based, if the Herald publication were only a statement of the news which the copyrighted article disclosed, generally speaking, the action would not lie. But in so far as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the

facts or statement of news, it is protected by the copyright law. That the entire copyrighted article involves in its production authorship as generally understood, and manifests literary quality and style in striking degree, is impressively apparent from its perusal. While the appropriated portions comprise in perhaps larger degree the salient facts than do the deductions, descriptions, and comments with which the other parts of the copyrighted article more largely deal, they are nevertheless not wholly or strictly confined to recital of mere facts. This appears evident from the perusal of some of the portions appropriated:

"They form the world's first diving battle fleet, a navy equally prepared to fight above or beneath the waves. * * * They dive beneath the water in a fraction of the time that it takes the older types to submerge. They mount powerful guns, are capable of great surface speed, and are protected by heavy armor of tough steel plate."

This is plainly more than a mere chronicle of facts or news. It reveals a peculiar power of portrayal, and a felicity of wording and phrasing, well calculated to seize and hold the interest of the reader, which is quite beyond and apart from the mere setting forth of the facts. But if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law.

[3] We find no merit in the contention that the Herald publication constitutes no substantial part of the copyrighted article. It presents the essential facts of that article in the very garb wherein the author clothed them, together with some of his deductions and comments thereon in his precise words, and all with the same evident purpose of attractively and effectively serving them to the reading public. Whether the appropriated publication constitutes a substantial portion of that which it copyrighted cannot be determined alone by lines or inches which measure the respective articles. We regard the Herald publication as in truth a very substantial portion of the copyrighted article, and the transgression in its unauthorized appropriation is not to be neutralized on the plea that "it is such a little one."

Nor is here influential the suggestion that the Herald article gives credit to the author, and sets forth as its authority that the article was copyrighted by the New York Tribune. Far from there being any exculpatory virtue in this, it would tend rather to convey to the reading public the false impression that authority to appropriate the extracts from the copyrighted article had been duly secured by the offending publisher.

We are of the opinion that the facts set forth in the declaration warranted the judgment, and, no error appearing, it is affirmed.

AMERICAN STEEL FOUNDRIES v. INDIAN REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921. Rehearing Denied August 19, 1921.)

No. 2854.

Evidence ↯450(8)—Sales ↯71(4)—Sales contract held unambiguous, and not subject to extraneous evidence, and to permit call for shipment of 15,000,000 of oil, but not more than 1,000,000 gallons per month; "requirements contract."

An oil sales contract, whereby seller was to furnish and buyer to purchase during a stated period of 15 months oil at agreed prices, "Maximum of 15,000,000 gallons. Minimum to be actual requirements"—shipments to be made in "fairly equal monthly quantities" on specifications furnished by buyer before 20th day of month preceding month for shipment, each shipment to be deemed a separate and independent contract, *held* unambiguous, and not subject to explanation by admission of extraneous matters, such as omitted paragraphs, and constituted a sale of a maximum of 15,000,000 gallons of oil, with monthly maximum of 1,000,000 gallons, and was not a "requirements contract," so that the buyer could not request delivery of 5,000,000 in 10 months, and then demand the balance of the 15,000,000 within the remainder of the period.

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

Action by the Indian Refining Company against the American Steel Foundries. Judgment for plaintiff, and defendant brings error. Affirmed.

The parties will be designated as they appeared in the court below. Plaintiff, Indian Refining Company, brought this action to recover an alleged balance due for fuel oil shipped defendant pursuant to a written agreement, the material portions of which are as follows:

Memorandum of Sales Contract.

Indian Refining Company, hereinafter called "seller," agrees to sell, and American Steel Foundries, of Chicago, Illinois, hereinafter called "buyer," agrees to purchase during the period from January 1, 1915, to March 31, 1916, the following petroleum products at the following prices:

Requirements or Quantity.	Grades.	Price.
Maximum of 15,000,000 gallons	* * *	* * *
Minimum: To be actual requirements at East St. Louis, Ill.—Granite City, Ill.—Indiana Harbor, Ind.—Hammond, Ind.—Alliance, Ohio,—Sharon, Pa.—Franklin, Pa., Plants.	* * *	* * *

Shipments: Shipments are to be made in fairly equal monthly quantities upon specifications furnished by the buyer before the 20th day of the month preceding the month in which such shipments are to be made. Shipment within five days before or after the date specified will be deemed compliance herewith.

Each shipment shall be deemed to be a separate and independent contract, but if buyer fails to fulfill the terms of this contract, or of any other contract of buyer with seller, or if buyer's financial responsibility shall become impaired in the judgment of the seller, seller may, without prejudice to other lawful

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

remedy, defer shipments until payment be made or terms of contract be complied with, or may demand cash payments, or may cancel this contract.

The proposed contract as originally submitted contained two paragraphs which were stricken from it. The two paragraphs read:

"If buyer fails in any one month to take his monthly proportion of the above stated requirements or quantity, buyer cannot thereafter, without the written consent of seller, take the balance of the proportion for that month, but may be required by seller to take such balance. For the purposes of this contract, the failure of the buyer to furnish specifications for at least the minimum requirements or quantity deliverable hereunder monthly, shall excuse tender of performance hereunder on the part of the seller.

"Buyer agrees to receive shipments and unload same with reasonable promptness, and return empty tank cars as per instructions from seller, 48 hours being deemed reasonable time for receiving, unloading and releasing tank cars. Buyer agrees to pay seller \$1 per day rental for time tank cars are held over 48 hours after delivery to buyer."

Shipments were made pursuant to the purchaser's orders for the first 10 months; that is to say, defendant asserted a requirement of 5,334,783 gallons of fuel oil for this period, and such amount plaintiff shipped. Such controversy as exists arises out of plaintiff's alleged failure to deliver defendant's asserted requirements for the next 5 months which were 7,161,899 gallons. During this period, defendant furnished 5,162,799 gallons.

Although there was a marked increase in defendant's requirements in the 15 months' period, during which time the market price for this oil rose rapidly and exceeded the contract price, there is no claim of "padding" presented by the record. In other words, it is conceded that the requisitions were the actual bona fide requirements of defendant. Plaintiff recovered judgment for the sum withheld by defendant because of the alleged failure to deliver the oil demanded.

Max Pam, of Chicago, Ill., for plaintiff in error.

Charles Y. Freeman, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). The parties differ as to the proper construction to be given to their contract. Defendant contends that it was obligated to purchase all of its requirements from the plaintiff, and plaintiff was obligated to sell all of defendant's requirements up to a maximum of 15,000,000 gallons in fifteen months; that if it did not order 1,000,000 gallons in any one or more months, it could, if its requirements permitted, increase its demand for any other month. Plaintiff contends that it was not compelled to ship more than 1,000,000 gallons in any one month.

Was this a requirements or a quantity contract? Defendant urges that the fair construction of the entire contract impels us to hold that it was a requirements contract, and further, if any uncertainty exists, it is removed when we read the two paragraphs above quoted which were stricken from the contract before it was executed. When these omitted paragraphs were offered in evidence, Judge Page said:

"It seems to me that the language of this contract is perfectly plain and easily understood, and for this reason I am not permitting extraneous and outside matters to be introduced."

We agree that the contract is clear and unambiguous, and needs no evidence to remove asserted ambiguities. Further, we cannot agree with counsel that the two paragraphs stricken from the original con-

tract would tend to clarify it. The evidence was therefore properly excluded. *Brawley v. United States*, 96 U. S. 168, 173, 24 L. Ed. 622; 6 Ruling Case Law, p. 839.

The contract contains a maximum and a minimum provision. The minimum is stated as "the actual requirements" of defendant. It is evident therefrom that the contract is not, as defendant urges, a "requirements contract." For it must have been contemplated that there was a difference between the minimum and the maximum, and if the minimum was represented by defendant's requirements, it cannot be said that the parties were contracting to furnish defendant's actual requirements. Rather would it be logical to assume that the parties were contracting to purchase and sell a quantity of oil, the maximum amount being 15,000,000 gallons, and the minimum to be defendant's requirements, not, of course, exceeding 15,000,000 gallons. This conclusion might be entirely consistent with defendant's claim (if not with its theory) but for the two other quoted paragraphs of the contract, which we are not at liberty to ignore. When the parties provided for shipments to be made in "fairly equal monthly quantities," the maximum and minimum provision must be read in the light thereof and in connection therewith.

Is a court justified in saying that a contract which contained a clause for shipment in "fairly equal monthly quantities" permits of a construction that allows defendant to demand 254,633 gallons in one month and 1,632,236 gallons in another month? Or for four successive months the defendant may call for a total of 1,280,000 gallons, and for four other successive months 5,970,000 gallons? To justify this conclusion we would be compelled to totally ignore the "fairly equal monthly shipments" provision of the contract.

But another reason may be found to support plaintiff's position. The provision making each shipment a separate and independent contract cannot be ignored. Read in the light of the further clause calling for shipments to follow shortly after plaintiff's receipt of a statement of defendant's monthly requirements, we conclude the separate shipment which is there referred to as a separate and independent contract is a monthly shipment. Further reason, therefore, exists for stressing the effect of a "fairly equal monthly quantities" provision, where the parties have specifically provided that each such monthly shipment is "a separate and independent contract."

The maximum amount which plaintiff was obligated to deliver was 15,000,000 gallons. The period of delivery was 15 months. Deliveries were to be made in "fairly equal monthly quantities." The conclusion that the parties intended that the monthly maximum should be 1,000,000 gallons is unavoidable.

The judgment is affirmed.

PAYNE, Director General of Railroads, v. COHLMAYER.
(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2858.

1. Master and servant ⇨351—Employee may reject federal Compensation Act.

While an employee of the federal government may elect to take under the federal Employés' Compensation Act (Comp. St. §§ 8932a-8932uu), he is not required to do so.

2. Carriers ⇨317 (5)—Held entitled to show condition of cars the day after injury by derailment.

Where, on injury to a passenger by derailment, a carrier was charged with negligence in running rapidly over track recently repaired, and in failing to provide cars with proper equipment and with defective attachments, it was error to refuse permission to the carrier to show disclosures of an inspection of the cars some shortly after and the balance the next day; it being incumbent on the carrier to meet and disprove the alleged acts which would give application to the rule of *res ipsa loquitur*.

3. Evidence ⇨553 (2)—Omission of fact from hypothetical question held error.

Where, in an action for injury to a passenger from derailment, it appeared that section men had repaired a portion of the tracks by taking out old ties and replacing them with new, it was error to permit a witness to answer a hypothetical question by saying that a foreman replacing ties should protect his work by flags, omitting from the hypothetical question the alleged material fact that such ties were not adjacent to one another; there being evidence of a rule that, where single ties were replaced here and there, no flag was used.

4. Carriers ⇨280 (1)—Not an insurer.

A carrier of passengers is not an insurer.

5. Carriers ⇨321 (3)—Instruction held erroneous, as making carrier of passengers an insurer.

In an action for injuries from derailment, an instruction that the carrier of passengers for hire must permit nothing that he can do to preserve the safety of his passengers, failure to exercise every degree of care that he may renders him responsible, with regard to the individuals whom the carrier selects to operate the machinery, the law requires it to select such persons as do and will, and that they must, use all the care necessary to prevent the happening of an accident, otherwise defendant would be responsible, and that the railroad was not responsible after it had done everything it could to prevent the accident, with other similar expressions, *held* erroneous, as tending to charge that the carrier was an insurer.

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

Action by August H. Cohlmeier against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Defendant in error, herein called plaintiff, a deputy marshal of the United States in the performance of his official duties, was riding in a passenger car of the Wabash Railroad Company operated at the time by plaintiff in error, herein called defendant, when he received injuries fixed by the jury at \$15,000. The various acts of negligence complained of dealt with the car's leaving the track. A further statement of facts will be found in the opinion.

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

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. [1] Because plaintiff was a deputy marshal of the United States, it is claimed his right to recover is fixed and determined by the federal Compensation Act (Comp. St. §§ 8932a-8932uu). This contention was not pressed on the oral argument, yet not specifically withdrawn. We conclude, however, that he was in a position to maintain this action. While an employee may elect to take under this Compensation Act, he is not required so to do. *Dahn v. McAdoo* (D. C.) 256 Fed. 549; *Hines v. Dahn* (C. C. A.) 267 Fed. 105, 114. It is not necessary to determine whether he was an "employee" of the United States at the time he was injured.

Further assignments of error deal with the admission and rejection of evidence, a consideration of which requires a more detailed statement of the pleadings and the evidence.

Defendant was charged with negligence (a) in running the train at a great speed over a portion of the track recently repaired; (b) in failing to provide the cars with proper and safe equipment and running at an excessive speed; (c) in running the train at an excessive speed over a defective switch; (d) in using cars with defective attachments and in failing to repair its roadbed and in running at a great speed under these conditions.

It appeared that the roadbed had been recently repaired, new ties having replaced old ones at a split switch not far from Sangamon; that the train was traveling some 45 or 50 miles an hour at the point when one car left the track. Other cars followed, some were turned over, and the train broke in two. Plaintiff was in a rear car, one that did not turn over. He was, however, injured by the sudden release of the air and by the train's derailment.

[2] From this brief statement of the pleadings and the evidence it is apparent that the condition of the cars, as well as their attachment and equipment and the state of the roadbed, were legitimate matters of inquiry. Defendant sought and was refused permission to show the disclosures of an inspection of the cars in the train, part of them shortly after the accident, and the balance the next day.

This was error. Plaintiff having charged, among other acts, defective equipment of the cars, and having relied upon the rule of *res ipsa loquitur*, so far as this rule may apply, it was incumbent upon the defendant to meet and disprove each of the alleged acts of negligence which would give application to the rule. The lapse of time between the accident and the inspection, at most only a few hours as to some of the cars, and less than a day as to the others, affected the weight, but not the admissibility, of this evidence.

[3] The court, against defendant's objection, permitted a witness to answer a hypothetical question, and say that a section foreman replacing ties should protect his work by flags. It appeared that the section men had repaired the track by taking out 30 old ties and re-

placing them with new ones in a distance of approximately 100 to 125 feet. Defendant called the court's attention to the absence of an alleged material fact from the hypothetical question, namely, that the ties removed were not adjacent to, but separate from, one another. The significance of this omitted fact was disclosed by the same witness, who stated on cross-examination that, where single ties were replaced here and there by new ones, no flag was used. While this statement may in part have overcome the effect of the previous answer, the jury was left in doubt as to whether a flag should or should not have been placed at the point of repair.

[4, 5] In charging the jury the court said, among other things:

"The carrier of passengers for hire must omit nothing that he can do to preserve the safety of his passengers. The failure to exercise every degree of care that he may renders him responsible should any damages occur because of the failure to exercise that high degree of care. In regard to the selection and adoption of the implements or machinery suitable for the transportation of passengers for hire, a common carrier is expected under the law to use the best means at hand—the best machinery at hand—and with regard to the individuals whom the common carrier selects to operate their machinery or keep it intact or keep it in repair, the law says it must select such persons as do and will, and that they must use all the care necessary to prevent the happening or the occurrence of an accident; otherwise, should damages arise, the defendant would be responsible and would have to respond in money damages.

* * * * *
"If the railroad company has done everything it was required to do under the law, if it has done everything that it could do to prevent the accident, and it can explain that the accident occurred in some way whereby it itself—it cannot be explained that the railroad company is responsible in some way—then in that case the railroad company should not be held responsible."

This was error. The carrier was not an insurer. 10 Corpus Juris, 858; 4 R. C. L. § 582, p. 1137; Louisville & Nashville Railroad Co. v. Fisher, 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. (N. S.) 926. Yet no other impression could have been gathered from the above quoted instruction. True, at other places in the charge a rule announcing a more limited liability was set forth. But the jury must have concluded from the entire charge that the defendant was required to "use all the care necessary to prevent the happening or the occurrence of an accident; otherwise, should damages arise, the defendant would be responsible and would have to respond in money damages." If this was not the effect of the entire charge, then the best that can be said is that a state of doubt and confusion existed.

The judgment is reversed, and a new trial ordered.

CONTO v. FRANKLIN COUNTY.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2905.

Counties ⇨148—Not liable for mob violence within city.

Without reference to whether or not Laws Ill. 1905, p. 190, providing in section 4 that any person suffering material damage to property or injury to person by a mob shall have an action against the county or city in which such injury is inflicted, is in pari materia with Laws Ill. 1887, p. 237, providing that, where property is destroyed by a mob, "the city, or if not in a city, then the county in which such property was destroyed shall be liable," a county is not liable under such section 4 for damages for personal injuries suffered at the hands of a mob within a city.

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

Action by Dominick Conto against the County of Franklin. Judgment for defendant, and plaintiff brings error. Affirmed.

Ira E. Westbrook, of Chicago, Ill., for plaintiff in error.

Roy C. Martin, of Benton, Ill., for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. The declaration charges that in the city of West Frankfort, Franklin county, Ill., a mob of more than five persons, assembled for the unlawful purpose of doing violence to plaintiff in error (a nonresident), who was supposed to have been guilty of a violation of the law, and for the purpose of unlawfully exercising correctional powers over him, attacked him, doing him personal injury, to his damage of \$3,000. Franklin county, the defendant in error, demurred on the ground that, under the statute authorizing such action to be brought, action against a county will not lie where the occurrence was within a city. Demurrer was sustained, and plaintiff in error, electing to stand by his declaration, judgment was given against him.

The statute under which the suit was brought was passed in 1905 (Laws 1905, p. 190), and is entitled "An act to suppress mob violence." Section 1 provides that five or more persons assembled for the unlawful purpose of offering violence to the person or property of one supposed to have been guilty of a violation of law, or for unlawfully exercising corrective or regulative power over any person by violence, shall be deemed a "mob." Section 3 prescribes penalty against those who compose a mob with intent to inflict injury to person or property of any such person, and section 4 prescribes further penalties against those composing such a mob who inflict material or serious injury to such person or his property, and the last clause of this section provides:

"And any person so suffering material damage to property or injury to person by a mob shall have an action against the county or city in which such injury is inflicted, for such damages as he may sustain, to an amount not exceeding five thousand dollars."

Section 5 makes provision for recovery by the dependents of one who has been lynched by such a mob, and section 6 makes it the duty of the Governor to remove from office the sheriff of any county from whose custody any person is taken and lynched.

The sole question is upon the construction of the clause quoted from section 4—whether or not one so injured within a city may at his option sue either the city or the county. We have been referred to no decisions in Illinois which consider this question. A long-existing similarly worded statute in New York has been referred to, but we can find no decision of that state wherein the proposition is decided or considered. In 1887 (Laws Ill. 1887, p. 237) there was passed an act entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," the first section of which provides that, where property is destroyed by any mob composed of twelve or more persons, "the city, or if not in a city, then the county in which such property was destroyed shall be liable * * * for three-fourths of the damages sustained by reason thereof." The other six sections of the act make detailed provisions respecting the liability and its enforcement.

From the reading of these acts it would seem that the 1887 act is of remedial character, while that of 1905 is penal. The first gives right of action only for property damage, while the last penalizes the individuals comprising the mob as well as city or county wherein injury to person or property is inflicted. The first gives right of action in *all* cases where the damage is caused by the mob; the last gives the right of recovery for property damage only where the mob is organized for the particular purpose indicated by the act. Instances are conceivable in which either act might be invoked to recover property damage, but the two acts differ so greatly that it cannot be said, nor is it contended, that by implication the first adopted was repealed by the last. In the first act it is plainly stated that, if the damage occurred in a city, the city is liable, and, if outside of a city, the liability is on the county. It is contended for defendant in error that the statutes are in *pari materia*, and that in that of 1905 there must be read that part of section 1 of the first act which makes the county liable only where the damage was not inflicted within a city therein. But in view of the penal character of the 1905 act, as well as the mainly different subjects and elements of liability therein provided for, as compared with the 1887 act, we think the rule in *pari materia* is hardly applicable here. We see no reason for importing into this act that part of the 1887 law, any more than we do to further engraft upon it the limitations as to notice and commencement of suit as found in the act of 1887.

But, considering the 1905 act without reference to the other, may it fairly be said to warrant the construction that in all cases arising within a city the plaintiff has the option to sue either city or county? While it was undoubtedly within the legislative power to prescribe upon which the liability shall rest, there would be much reason and justice in an enactment making the city alone liable if the occurrence was within its limits, and the county only if happening outside of the limits of cities therein. An Illinois city must be a more or less compact community having a population when organized of not less than 1,000. At-

taching to the urban dignity are duties and obligations imposed by law, additional to those which the same community sustains as a part of the county. There are city officers, including police, charged by law with the special duty of preserving the peace within the city. While the duties of the sheriff of a county as a peace officer are coextensive with the county's borders, the city government has been too long and well recognized as a sort of imperium in imperio to permit courts to close their eyes to that condition. Generally the instrumentalities of the city government are primarily relied upon to preserve the peace within the cities; and to that end these have their separate police courts and jails, and those other means at hand for nipping in the bud incipient riots, which too often grow and spread, unless promptly checked by the authorities with whom they first come in contact. Here, then, are conditions under which neglect of the city authorities to do their full duty may well be the primary cause of the damage for which the action is given. And in such case it would be unfair to visit responsibility upon the entire county for the shortcomings of a city and its officers. While perhaps no rule could be adopted which would work out exact justice in every case, if it were held that in every instance the county may be held liable, few, indeed, would be the cases where the city, though the primary cause of the damage, but ordinarily (though not necessarily) less able than the county to bear the financial burden of the liability, would be sued. For all practical purposes the right of action might then have been given against the county alone.

This situation is helpful in determining what was the legislative intent of the expression "shall have action against the county or city in which the damage shall have been inflicted." The coincidental fact that every city is of necessity within the border of some county or counties should not, in our view, be considered as conferring on plaintiffs suing under this act the option of proceeding against city or county. A side light upon the proposition may be found in the fact that in Illinois there is statutory provision for cities lying within more than one county. In case of the damage occurring within such a city, would the plaintiff have further election among the counties of which it is a part, against which to bring the action? We do not think such a result was intended, and are sufficiently assured that the true intent and meaning of this somewhat equivocal phrase of the act is to authorize the action against the city alone where the damage is therein inflicted, and against the county alone if inflicted within its borders outside of its cities.

The judgment is affirmed.

ONE BUICK AUTOMOBILE et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1921.)

No. 5653.

1. Indians ⇨35—Evidence held admissible in proceeding to forfeit automobile.

In proceedings to forfeit automobile as having been used in attempting to introduce intoxicants into former Indian country, evidence tending to show that shortly before the seizure of the car it was seen going in the direction of a city outside the Indian country, and that the whisky found in the car when seized was such as was being sold at the time in that city, and that the day before the claimant of the automobile was seen in the city, and that the car was there at that time, was properly admitted.

2. Indians ⇨35—Failure of claimant of automobile to testify might be considered against him.

In proceedings to forfeit automobile as having been used in attempting to introduce intoxicants into former Indian country, the court properly refused to charge that interpleader, claimant of the automobile, "does not have to testify, and his failure to do so is not to be considered against him"; the proceeding being a civil action, though penal.

3. Evidence ⇨76—Failure of party to testify may be considered against him.

Failure of a party to testify may be considered by the jury, when there is substantial evidence, which, by failing to testify, he does not deny.

4. Trial ⇨193(2)—Expression of court's opinion held not error.

In proceedings to forfeit automobile as having been used in attempting to introduce intoxicants into former Indian country, where, after the jury had been out for some time without reaching a verdict, the court stated to the jury that in its opinion the government should prevail, adding that its opinion was but advisory, such action was not error.

In Error to the District Court of the United States for the Eastern District of Oklahoma; R. L. Williams, Judge.

Libel in the United States to forfeit an automobile as having been used in introducing intoxicants into Indian country, in which T. C. Wilson, as claimant, intervened. Judgment of condemnation, and claimant brings error. Affirmed.

James S. Davenport, of Tulsa, Okl., for plaintiff in error.

C. C. Lydick, Asst. U. S. Atty., of Shawnee, Okl. (John T. Harley, U. S. Atty., of Coalgate, Okl., on the brief), for the United States.

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

PER CURIAM. This is a writ of error to review a judgment of condemnation of one automobile. The United States Attorney filed a libel against it, asking for a forfeiture thereof for violation of that provision of the Indian Appropriation Act of Congress approved March 2, 1917, 39 St. 970 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4141a), which reads:

"That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and for-

feiture provided in section 2140 of the Revised Statutes of the United States."

The libel charged that on or about the 30th day of May, 1919, in Craig county, Okl., Hiram Stevens, deputy special officer, by virtue of authority conferred upon him by law, seized one Buick roadster (describing it) and brought it to the city of Miami, Okl., within the Eastern district of Oklahoma, where it is now held as forfeited to the United States, and subject to libel and sale by the United States, for the following reasons:

"That at the time of the seizure of said above-described property by said officer, as above set out, said property was in the possession of and being used by T. Wilson for the purpose of introducing, transporting, and conveying from without the state of Oklahoma, into the eastern part of the state of Oklahoma, formerly Indian Territory, spirituous, vinous, fermented, and intoxicating liquor, in violation of section 8 of the Act of Congress of March 1, 1895 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4136b], and other acts of Congress in such cases made and provided; that the said place where the said property was seized by said officers is and was at the time of the seizure within the Eastern judicial district of the state of Oklahoma; and that the introduction and transportation of liquor into said district was at the time of the seizure of said above described property prohibited by federal statute."

Then follows the usual prayer for monition and judgment. A monition in proper form was issued and served, whereupon the plaintiff in error filed an intervention. In the intervention he claims ownership of the car and denies all the allegations in the libel. There was a trial to a jury, and a verdict in favor of the United States, on which judgment was entered.

[1] There are numerous assignments of error, but some have been abandoned, as they are not insisted on in the brief of counsel for plaintiff in error. It is assigned as error that the court admitted in evidence testimony tending to show that, shortly before the seizure of the car, it was seen going in the direction of Joplin, Mo., and that the whisky found therein when the car was seized, 204 quart bottles, labeled "Old Davidson" was such as was being sold at the time in Joplin, Mo. There was also evidence tending to show that the day before the intervener was seen at Joplin, and that the car was there at that time. In our opinion the court committed no error in admitting this testimony, as circumstances to establish the fact that the whisky was being introduced into that part of the state of Oklahoma which was formerly the Indian Territory, where by the laws of the United States the introduction was prohibited. *Laughter v. United States*, 259 Fed. 94, 170 C. C. A. 162; *Berryman v. United States*, 259 Fed. 208, 170 C. C. A. 276; *Lindsey v. United States* (C. C. A. 4th Ct.) 264 Fed. 94, certiorari denied 252 U. S. 583, 40 Sup. Ct. 393, 64 L. Ed. 727; *Knowlton v. United States* (C. C. A. 9th Ct.) 269 Fed. 386.

[2, 3] There are some assignments of error attacking the refusal of the court to give certain instructions to the jury, asked on behalf of the intervener. The court was asked to charge that "the interpleader does not have to testify, and his failure to do so is not to be considered against him." As this was a civil action, although penal, the rules of law governing civil actions, and not criminal prosecutions, apply, and

in a civil action the failure of a party to an action to testify may be considered by the jury, when there is substantial evidence against him, which by failing to testify he does not deny. 14 R. C. L. § 26, p. 758.

The main contention for a reversal is that the evidence was insufficient to warrant the submission of the case to the jury, and that it was error to refuse a peremptory instruction to find for the intervener. We have read the evidence with great care, and, without prolonging this opinion by setting it out, we are unanimously of the opinion that the evidence was assigned to require its submission to the jury.

[4] It is also assigned as error that, after the jury had been out for some time without reaching a verdict, the court stated to the jury that in its opinion the government should prevail, adding:

"But that opinion is advisory. It is not for the purpose of coercing this jury, and I will instruct you that, where a juror has an honest conviction or opinion contrary to that expressed by the court, I want him to stay with it. * * * The verdict of the jury is to reflect the independent judgment of 12 jurors."

In the original charge the court had told the jury that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and that its expressions as to the weight or value of the evidence is merely advisory. That the judges of the federal courts may express their opinions as to the weight of the evidence, when limited by such words as the learned trial judge expressed in the instant case, is well settled. *Robinson v. Belt*, 187 U. S. 41, 50, 23 Sup. Ct. 16, 47 L. Ed. 65; *Lesser Cotton Co. v. St. Louis, etc., R. R.*, 114 Fed. 133, 52 C. C. A. 95; *Maynard v. Reynolds*, 251 Fed. 784, 786, 164 C. C. A. 18; *United Mine Workers v. Coronado Coal Co.*, 258 Fed. 829, 844, 169 C. C. A. 549. Even in criminal cases it is permissible. *Allis v. United States*, 155 U. S. 117, 122, 15 Sup. Ct. 36, 39 L. Ed. 91; *Horning v. District of Columbia*, 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. —.

There is no error in the record, and the judgment is affirmed.

Judge HOOK participated in the hearing and concurred in the result, but died before the opinion was prepared.

In re ROCKFORD PRODUCE & SALES CO.

HARDEN v. PETRITZ.

(Circuit Court of Appeals, Seventh Circuit. August 19, 1921. Rehearing Denied October 6, 1921.)

No. 2810.

1. Bankruptcy ⇨293(2)—Federal court held to have jurisdiction to try issue of preference.

Under the amendment of Bankruptcy Act of June 25, 1910, the federal court had jurisdiction to try the issues on a petition by a trustee in bankruptcy, charging payments by the bankrupt constituted preference, and requesting an order requiring the creditor to show cause why the money should not be turned over to the trustee.

2. Bankruptcy ⇨287 (1)—Creditor charged with preference held entitled to plenary trial.

A creditor charged by bankrupt's trustee with receiving preference is entitled to a plenary suit, if objection be timely made.

3. Bankruptcy ⇨287 (1)—Trial on trustee's petition to recover preference held not a summary proceeding; "summary proceeding."

While a summary proceeding ordinarily implies one begun without summons or subpoena, usually tried on affidavits and on short notice or determined even as an ex parte matter, a proceeding by a trustee in bankruptcy to recover alleged preference from a creditor, begun by petition and rule of court, but treated as a suit in equity, with a reply in every way meeting requirements of an answer, and amendment permitted as to an answer, with the cause set for trial and heard in open court as a suit in equity, to which both parties presented testimony and had cross-examination, held plenary, rather than a "summary proceeding."

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

4. Bankruptcy ⇨288 (1)—Creditor held to have consented to trial as to preference on petition and rule.

A creditor of a bankrupt, who, on being charged by petition and rule at the instance of the trustee with having received a preference, by answering, amending, and proceeding to trial as on a suit in equity, could not object that such proceeding could not be heard on petition and rule.

Appeal from the District Court of the United States for the Western Division of the Northern District of Illinois.

In the matter of the Rockford Produce & Sales Company, bankrupt. Petition by John G. Petritz, trustee, charging preference, and from a decree on a rule to show cause, Frank B. Harden appeals. Affirmed.

C. H. Linscott, of Rockford, Ill., for appellant.

Thomas E. Gill, of Rockford, Ill., for appellee.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Appellee filed a petition charging payment of various sums of money by bankrupt to appellant, as a preference, and obtained an order requiring appellant to show cause why this money should not be turned over to the trustee. Appellant answered fully, and upon his application leave was granted to file an amended answer. He denied the facts constituting a preference, asserted his right to hold the money, and prayed the court to "dismiss the petition filed by the trustee in this cause, for the reason that said moneys in fact and in law belong to this respondent." A trial thereafter occurred, the testimony being heard in open court, at the conclusion of which the court found for appellee.

[1] Two questions are presented: (a) Did the court have jurisdiction to try the cause? (b) Do the facts support the decree?

The recent decision of the Supreme Court, Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898, has set at rest some of the questions which have apparently vexed counsel. If doubt otherwise existed as to the effect of the amendment to the Bankruptcy Act of June 25, 1910 (36 Stat. 838), it is removed by this decision. It is there said:

"By Act June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, section 23b was further amended, so as to confer jurisdiction upon the courts of bankruptcy without consent of the proposed defendant in suits for the recovery of property under section 70e. The present suit, being of this nature, might have been brought in the District Court, or it might have been brought in a state court having concurrent jurisdiction under section 70e as amended."

[2] But appellant urges that his rights could only be determined in a plenary suit, and, having been denied such a trial, the decree must be reversed. That a plenary suit, if objection be timely made, is necessary to determine controversies of this character, must be conceded. *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Weidhorn v. Levy*, 253 U. S. 268, 272, 40 Sup. Ct. 534, 64 L. Ed. 898. But were appellant's rights not litigated in a plenary suit? May not consent be given to dispose of such a controversy in a summary proceeding? The answers to these questions are determinative of the appeal.

At no time was objection made to a disposition of the suit in the manner pursued by the court. In fact, appellant encouraged the proceedings. When brought into court upon appellee's petition and the court's order, instead of objecting to the forum or to the method of procedure, he asked the court in the very proceeding to litigate and determine his right to retain the money by him received from the bankrupt. Not only did he answer the petition fully, but he amended his answer, and again reiterated his demand for a decree in his favor on the only controverted issue presented.

Were appellant's rights determined in a summary proceeding? This query may require an affirmative answer, if determined solely by the manner in which the proceedings were instituted; in the negative, if determined by the course followed after joinder of issue.

A "proceeding" is a generic term. 24 Standard Enc. of Procedure, 320. In its commonly accepted meaning it is comprehensive and inclusive. A summary proceeding ordinarily implies one begun without summons or subpoena, and is usually tried upon affidavits and upon short notice, or determined even as an ex parte matter. Statutes specifically authorize it in certain matters, and prescribe the necessary procedure. Provision is frequently made for it in the statutes of the several states, when dealing with contempt, temporary injunctions, etc.

[3] The proceedings here under review, while begun by a petition and rule of court, were from their commencement treated as a suit in equity. The petition was the bill in equity. The reply was designated, and in every way met the requirements, of an answer. It was amended; the course followed being such as would have been pursued, had the pleader wished to amend an answer. The cause was set down for trial in its order, and when reached was heard in open court, and in the same manner as a suit in equity; that is to say, petitioner presented his witnesses who were cross-examined by the opposing party or his counsel, and, when the affirmative rested, the defendant presented his testimony. Whether this proceeding was summary or plenary, it is evident that appellant secured a full hearing on an issue over which he and the trustee were in controversy, and the determination was made at appellant's as much as at appellee's re-

quest. Under the circumstances we think the record discloses a plenary, rather than a summary, proceeding. In re Raphael, 192 Fed. 874, 113 C. C. A. 198.

[4] But it is not necessary for us to rest the decision upon our determination of the nature of the proceeding, for by consent the parties may dispose of such a controversy as was here considered in a summary proceeding. In re Plymouth Elevator Co., 191 Fed. 633, affirmed 208 Fed. 394, 125 C. C. A. 609; In re Brantman, 244 Fed. 101, 156 C. C. A. 529; In re Blake, 150 Fed. 279, 80 C. C. A. 167; Salsburg v. Blackford, 204 Fed. 438, 122 C. C. A. 624; In re Ironclad Mfg. Co. (D. C.) 194 Fed. 906; 7 Corpus Juris, 252. Certainly an appellate court should hesitate to disturb a decree because of the course pursued in the trial court, where it appears that the losing party asked the court to litigate the question, submitted evidence in support of his contentions, accepted his chance of a favorable decision, and all before any question of procedure was raised.

Upon the merits of the controversy, we find nothing that would justify our disturbing the finding. Not only does the evidence support the finding, but, we might add, no other conclusion could have been reached.

The decree is affirmed.

SMIETANKA, Internal Revenue Collector, v. ULLMAN.

(Circuit Court of Appeals, Seventh Circuit. July 20, 1921.)

No. 2861.

Internal revenue ⇨27(1)—**Liberty Bonds, converted to 4¼ per cent. bonds less than six months before death, not receivable at face value to pay transfer tax.**

Under Third Liberty Loan Act, § 14 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 68290), Liberty Loan 4 per cent. bonds issued to subscriber November 15, 1917, and converted by him into Third Liberty 4¼ per cent. bonds issued to him May 9, 1918, were not, on his death May 27, 1918, receivable at face value in payment of the federal estate tax on the estate of the deceased. Section 14 requires the holding of the 4¼ per cent. bonds, however acquired, to have been for a time not less than six months next preceding the death, in order to be receivable at face value in payment of a tax.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by Charlotte T. P. Ullman, in her own right and as executrix, against Julius F. Smietanka, Collector of Internal Revenue, to require acceptance of Liberty Bonds at face value in payment of transfer tax. From a judgment for complainant, defendant appeals. Reversed, demurrer ordered sustained, and bill dismissed.

The bill charges that appellee is executrix and sole heir under the will of her deceased husband, who died May 27, 1918; that October 22, 1917, he subscribed for \$20,000 of Second Liberty Loan 4 per cent. bonds, which were issued to him November 15, 1917; that pursuant to section 14 of the Act of

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

April 4, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 68290)¹ (the Third Liberty Loan Act), he presented these bonds for conversion into Third Liberty 4¼ per cent. Bonds, which, for the same aggregate amount, were issued to him May 9, 1918, and remained in his possession until his death, about three weeks thereafter; that the federal estate tax upon the estate of the deceased was assessed at \$18,285.57, in payment of which appellee tendered to appellant as collector of internal revenue \$18,000 of these 4¼ per cent. bonds at par, with sufficient cash to make the total of the estate tax. These bonds were then, and at the time bill was filed of the market value of \$94.38. Appellant refused to receive the bonds as payment on such estate tax. The bill asks that the collector be required to receive these bonds at face value in such payment, and to enjoin the collector from otherwise attempting to collect such estate tax. Appellant's demurrer to the bill was overruled, and appellant elected to stand by its demurrer, and decree was entered, finding the facts as in the bill stated, and granting relief as prayed.

James A. Miller, of Chicago, Ill., for appellant.
Frederic Ullmann, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The government contends that the 4¼ per cent. Third Liberty Bonds, not having been held at least six months prior to the death, are not under the terms of section 14 receivable in payment of the estate tax. The executrix maintains that the time deceased held the 4 per cent. bonds should be reckoned in the holding period, in which case it would exceed the six months.

It goes without saying that unmatured obligations of the government are not generally receivable in payment of taxes which the government levies. If this were not so, the very object of making long-time loans might be frustrated through thus requiring the government to pay these obligations far in advance of the time for which it was deemed necessary for the government to use the borrowed funds. It is evident that the receivability of such unmatured obligations in payment of any taxes due the government enhances the desirability of the obligation as an investment, and facilitates their sale. But it is for the government by its legislation expressly to fix the conditions and terms upon which its unmatured obligations may be so receivable, which conditions and terms may not by implication or construction be extended beyond the plain provisions of the statute fixing them.

Section 14, under which alone there is provision for receivability of these bonds for taxes due the government, prescribes that "any bonds

¹ "Sec. 14. That any bonds of the United States bearing interest at a higher rate than four per centum per annum (whether issued under section 1 of this act or upon conversion of bonds issued under this act or under said act approved April twenty-fourth, nineteen hundred and seventeen), which have been owned by any person continuously for at least six months prior to the date of his death, and which upon such date constitute part of his estate, shall, under rules and regulations prescribed by the Secretary of the Treasury, be receivable by the United States at par and accrued interest in payment of any estate or inheritance taxes imposed by the United States, under or by virtue of any present or future law upon such estate or the inheritance thereof."

of the United States bearing interest at a higher rate than four per centum per annum * * * which have been owned by any person continuously for at least six months prior to the date of his death * * * " shall be receivable for estate taxes. It is very plain that, where one subscribes for and acquires bonds under the act and dies before the expiration of six months, still holding the bonds, the definite terms of the act would prevent their receivability in payment of a federal estate tax. Was it the intention of Congress to extend to the holders of 4 per cent. bonds, who converted them into $4\frac{1}{4}$ per cents, a larger privilege than was given to original subscribers and purchasers of the later issue, through permitting them to tack onto the period of holding of the later issue the time during which they had held the earlier bonds, in order to comply with the statutory requirement of six months' continuous holding? There is nothing in the circumstances in which the act was passed that would suggest such intended advantage. The First and Second Liberty Loans had been sold, their billions of dollars having presumably greatly strained the government's borrowing powers. It was found necessary to float a third loan for yet more billions, and was deemed advisable to augment its attractiveness for purposes of investment. The interest rate was increased to $4\frac{1}{4}$ per cent., and the feature added of receivability in payment of estate taxes which the federal government might impose, which the prior issues did not include.

It was to the interest of the government to maintain the standing of its previous bond issue, as bearing upon the desirability of its obligations generally, and the facility with which future loans might be floated at times of great stress. To this end means were provided, through provisions for conversion, whereby the holders of the prior loan might convert them into bonds of the third issue. But there is nothing in the situation to suggest an intention to grant to holders of the converted bonds any larger or better privilege or immunity in this respect than would be enjoyed by those who would subscribe for the third issue, and we find nothing in the wording of section 14 from which it would follow that the time of prior holding of the 4 per cent. bonds may be added to the time following their conversion into $4\frac{1}{4}$ per cents in order to fulfill the statutory requirements of six months' continuous holding of the latter before the right of receivability for federal estate taxes arises.

It is insisted for appellee that section 14, so construed, would work such unwarranted discrimination against that class of holders whose death occurred within the six months period after the issue of the bonds as to render unconstitutional so much of section 14 as made possible such result. We fail to see any merit whatever in the contention. The classification was reasonable and proper to be made. In this respect it treated all persons alike, for, while "no man knoweth the day of his death," the uncertainty is not peculiar to any class, but is present with all persons. The six months provision would have the tendency of inducing in every one a disposition to hold at least so many of the $4\frac{1}{4}$ per cent. bonds as might be deemed necessary to meet the estimated amount of a federal estate tax in case of death, and thus tend to pre-

vent throwing the bonds on the market and depreciating their market value.

We are of opinion that section 14 requires the holding of the $4\frac{1}{4}$ per cent. bonds, however acquired, to have been for a time not less than six months next preceding the death, in order to be receivable in payment of the federal estate tax. This conclusion is in harmony with the rulings of the Treasury Department on the same question.

The decree is reversed, with direction to sustain the government's demurrer, and to dismiss the bill.

DAHLEN v. HINES, Director General of Railroads.
(Circuit Court of Appeals, Seventh Circuit. June 25, 1921.)

No. 2888.

1. Master and servant ⇨286 (32)—Negligence as to air inspector held for jury.

In an action by an air inspector injured when 16 loaded cars were shunted at great speed down grade against the cars which he was inspecting, whether defendant railroad was guilty of negligence held for the jury.

2. Master and servant ⇨289 (35)—Existence of blue signal rule held question for jury.

The question whether a rule requiring blue signals to indicate the presence of workmen under or about cars was in force at the time of injury to plaintiff air inspector held one for the jury on evidence of abandonment or modification by custom.

3. Negligence ⇨101—Contributory negligence of railroad employee reduces recovery.

Contributory negligence of employee of a railroad does not bar recovery for injuries occasioned by railroad's negligence, but simply reduces the damages.

4. Master and servant ⇨285 (11), 289 (39)—Proximate cause of injury to inspector omitting blue signal held for jury.

In an action by an inspector for injuries received when working between cars against which loaded cars were shunted, whether plaintiff's disobedience of a rule requiring blue signals or the negligence of the railroad was the proximate cause of the injury held for the jury.

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

Action by Edward Dahlen against Walker D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Reversed, with directions to grant new trial.

See, also, 267 Fed. 926.

Henry Mahoney and Irving A. Fish, both of Milwaukee, Wis., for plaintiff in error.

C. H. Van Alstine and Henry J. Killilea, both of Milwaukee, Wis., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. The determination of the questions raised by this writ of error necessitates an examination of the facts

to ascertain whether there was any evidence that required defendant's liability be submitted to a jury. The testimony, viewed most favorably from plaintiff's standpoint, supports this statement:

Plaintiff, an air inspector in the Milwaukee terminal of defendant company, on May 29, 1919, while inspecting the air hose connections on a train of cars which had been examined and repaired, and occupied the track used only by cars about to "go out," and which were ready for service, found the hose uncoupled. He paused to look up and down the train, and, seeing no moving cars at either end thereof, stepped between the two cars, picked up the ends of the hose, and connected them. They, however, fell apart, whereupon he examined the gaskets, and, finding them satisfactory, he stooped down again to connect them, when a sudden movement of the cars, following a crash, knocked him over. He seized the hose and was dragged some distance, but his feet avoided the wheels. He pulled himself up, when a second crash resulted in a second fall, and this time one foot was thrown over the rail, and the loss of a leg resulted.

The cause of the unexpected crash was another train of 16 loaded cars coming down the track at a rapid speed in charge of one brakeman, who was unable to control them, due to the momentum and the grade. There is testimony to the effect that these cars were moving at the rate of 15 miles per hour when they crashed into the standing cars, which plaintiff was inspecting, whereas 2 miles per hour was the usual and ordinary speed at which such cars were moved.

On July 1, 1918, defendant adopted what was called the Standard Code of Train Rules, among them being rule 26, which reads:

"A blue signal, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it; when thus protected, it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals, without first notifying the workmen."

Another rule, announced May 15, 1918, reads:

"This rule will apply to all repair tracks, and car foremen are hereby instructed to keep a blue flag or blue lantern on the main track end of the first car on repair track at all times, except to permit switching."

Rule 26 was not followed by the employees (in fact, there is evidence that it was totally ignored in these yards) until January 22, 1919, when defendant secured from all employees, including plaintiff, a written acknowledgment that rule 26 was understood. Thereafter, for several days, blue flags were "put out" on incoming and outgoing trains, when they were being inspected by car and air inspectors. This construction of the rule resulted in a "tie-up" of the yards, and much delay in making up trains was experienced. Employees, including plaintiff, were thereupon instructed by the yards foreman not to use flags when inspecting outgoing trains. Thereafter car and air inspectors did not use the blue flags when inspecting cars on outgoing trains. This practice continued until the accident, and was known to and sanctioned by the three yards foremen and the chief inspector, and was

either known or chargeable knowledge given to the general supervisor of the freight department and others.

[1] The foregoing facts would, we have no hesitancy in saying, have supported a finding of negligence in shunting the train of 16 loaded cars down grade along this track at the rate of speed described by certain witnesses. It can hardly be successfully contended that ordinary care was disclosed when 16 loaded cars disconnected from the engine were shunted down a track at a rate of speed seven times what competent witnesses declared was the usual rate of speed—at such a rate of speed that the brakeman was unable to check or control the train—at such a rate of speed that, notwithstanding the brakeman's efforts, the moving cars struck the standing cars with such force as to "drive in" and "break off" drawbars. We are not required to say that, under all the evidence, this was negligent conduct as a matter of law, but merely to determine whether a jury question was presented.

[2] Nor could the court say, as a matter of law, that rule 26 was in force at the time of the injury. Perhaps the jury, from all the evidence, might have so found; but the most favorable ruling the defendant was entitled to receive called for a submission of the question to the jury. The evidence above referred to, if believed by the jury, entirely eliminated rule 26 from the case, either on the theory of abandonment or waiver or modification by custom.

[3, 4] Moreover, if rule 26 were applicable, it would only establish plaintiff's contributory negligence, which of itself would not bar recovery, but simply reduce the amount of the judgment. But counsel for defendant urge that, while plaintiff's contributory negligence as such would not defeat the action (negligence appearing), yet if, as in this case, the plaintiff's contributory negligence was the proximate cause, then liability is avoided. This position assumes, of course, the unqualified and unlimited application of rule 26. Rejecting this premise, it is impossible for us to accept the conclusion that failure to comply with the rule was the proximate cause of the injury. Without discussing the evidence further, we might add that in our opinion, even though rule 26 applied, the question of proximate cause was nevertheless a jury question. *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330, 38 Sup. Ct. 318, 62 L. Ed. 751.

The judgment is reversed, with directions to grant a new trial.

Petition of SAFRAN et al.
In re JAFFEE.

(Circuit Court of Appeals, First Circuit. November 7, 1921.)
No. 1512.

Bankruptcy ⇨120—Trustee not disqualified by distance of residence alone.

Where the person appointed trustee by a majority in number and amount of creditors was within the qualification of Bankruptcy Act, §§ 44-56 (Comp. St. §§ 9623-9640), referee was not authorized in disapproving the appointment on the sole ground that the person, though living within the district, lived at too great distance from the business of the bankrupt.

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

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

In the matter of Abraham Jaffee, bankrupt. Petition of Robert Saffran and others to revise the action of the court on the referee's appointment of trustee. Decree of the District Court (272 Fed. 899) reversed, and cause remanded.

Mark M. Horblit, of Boston, Mass. (Jacob Wasserman and Horblit & Wasserman, all of Boston, Mass., on the brief), for petitioners.

William F. Barrington, of North Adams, Mass., for respondent.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. This is a petition under section 24b of the Bankruptcy Act (Comp. St. § 9608) to revise in matter of law an order of the United States District Court for Massachusetts. It is brought by 18 creditors of Abraham Jaffee, of North Adams, in Berkshire county, in the district of Massachusetts, who was adjudicated a bankrupt in an involuntary proceeding in the District Court.

The case was referred to the referee in bankruptcy for Berkshire county. A meeting of the creditors, duly called for proving claims and appointing a trustee, was held March 17, 1921. The 18 petitioners proved their claims, aggregating \$7,418.28, which were allowed, as were claims of 6 creditors that totaled \$502.96. The claims having been allowed, the petitioners filed with the referee a written vote appointing Jacob Wasserman, of Boston, in the district of Massachusetts, trustee, and no other vote was then filed.

Although no objection was interposed to this appointment, the referee, without a hearing or affording an opportunity for the introduction of evidence as to the competency of the person thus appointed, disapproved the appointment, and then stated orally his reason for so doing, and later, in a written memorandum, as follows:

"This appointment by the creditors was disapproved by me, and the reason was stated to all parties present as being that I would not approve the appointment as trustee in this case of any person living as far from the bankrupt's place of business as in Boston. I had, and have, no opinion as to the suitability of Jacob Wasserman, other than, in my opinion, no person is suitable who lives at a distance from the bankrupt's place of business as great as that between North Adams and Boston."

This appointment having been disapproved, thereafter the 6 creditors represented at the meeting, whose claims aggregated \$502.96, filed a vote setting forth that they were the majority in number and amount of the claims of the creditors of the bankrupt whose claims had been allowed, and who were present at the meeting, and appointed William F. Barrington trustee. This appointment the referee approved, subject to the objection of the 18 petitioners and to the disapproval of their choice.

The petitioners then filed a petition for review by the District Court, and the referee certified the two votes above referred to, the memoran-

dum, and the petition for review. The District Court confirmed the order of the referee, which order is now sought to be revised.

It thus appears that Jacob Wasserman was the person appointed trustee by a majority in number and amount of the creditors, that he lives within the judicial district in which the bankruptcy proceedings are pending, that his competency was not questioned, and that the disapproval of the referee was for the sole reason that he lived in Boston, at a considerable distance from North Adams.

In section 55 of the Bankruptcy Law of 1898 (Comp. St. § 9639) provision is made for meetings of creditors, and in subdivision "c" of that section it says:

"The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act."

In section 56a (section 9640) that:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

In section 44a (section 9628) that:

"The creditors of a bankrupt estate shall, at their first meeting after the adjudication * * * appoint one trustee or three trustees of such estate. * * *"

In section 45a (section 9629) that:

"Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed. * * *"

As the person appointed by a majority in number and amount of the creditors lived within the judicial district of Massachusetts and no objection was made as to his competency, the question is presented whether good cause was shown for the disapproval from the fact that his residence within the district was at a distance from North Adams, the domicile of the bankrupt.

It is apparent that under sections 44 and 56 of the Bankruptcy Act the choice of a trustee is committed to the creditors, and that the exercise of that choice is to be had at their first meeting by a majority vote in number and amount of the claims of all creditors whose claims have been allowed and are present. And under section 45 and section 2, subdivision 17 (section 9586) their choice, so far, at least, as concerns the qualifications of the appointee, is to be approved, if he is competent to perform the duties and resides or has an office in the judicial district within which he is appointed.

The appointee's residence being within the district, he fulfilled the requirements of the statute in that respect, and the fact that he resided at Boston, rather than at North Adams, was not a disqualification, within the meaning of the statute, affecting his competency. To authorize a disapproval on grounds other than the appointee's failure to fulfill the qualifications specifically prescribed by section 45a, some failure on the part of the creditors to meet the requirements of the act leading up to the appointment (sections 44a, 56a) should appear, or

some action in the choice be shown to have taken place, the effect of which would be to contravene the purposes of the act and prevent it from being carried into effect, such as interference in the election by parties having interests hostile to the general creditors. In re Callahan, 242 Fed. 479, 155 C. C. A. 255; Bollman v. Tobin, 239 Fed. 469, 471, 152 C. C. A. 347. But in this case there is nothing in the record on which to base such a ground of disapproval.

We are therefore of the opinion that the referee should have approved the choice of the petitioners, and that the decree of the District Court, confirming the appointment of William F. Barrington, should be reversed.

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 in this court to the petitioners.

JOHNSON v. DOEBLER.

(Circuit Court of Appeals, Eighth Circuit. September 29, 1921.)

No. 215.

Bankruptcy ⇐288(1)—**Summary proceeding not available to trustee to recover bankrupt's assets held by bankrupt's landlord.**

A summary proceeding will not lie to determine the right of a trustee in bankruptcy to recover possession of the bankrupt's property held in good faith by the landlord of the bankrupt to enforce his lien reserved in the lease for rent; but such right can be determined only by a plenary proceeding.

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

Summary proceeding by R. J. Doebler, as trustee in bankruptcy of the Electric Supply Company, against B. A. Johnson. An order of the referee for the trustee was sustained by the District Court, and defendant petitions to revise the order of the District Court. Order reversed, with directions to dismiss proceedings.

George H. Stillman, of Minot, N. D., for petitioner.

V. E. Stenerson, of Minot, N. D., for respondent.

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

PER CURIAM. The only question involved in this cause is whether the referee in bankruptcy had jurisdiction to proceed summarily against the petitioner. The facts are:

A partnership doing business under the firm name and style of Electric Supply Company entered into a written contract on May 1, 1919, with the petitioner, for the lease of a store building to be occupied by the said copartnership for a term beginning May 1, 1919, and ending January 31, 1922, at a rental to be paid monthly for the entire term of

\$82 per month; that among other provisions the lease contained the following:

"It is further stipulated and agreed by and between the parties hereto that first party [B. A. Johnson] shall have an express lien upon all property of second parties [W. S. Hulett, Ted B. Huff, Ernest L. Dalheim, copartners as Electric Supply Company] of every kind, nature, and description used, kept, or stored upon, in, or about said premises, to secure the payment of the rents reserved herein for the full term of this lease, and should said second parties fail to pay the said rents promptly as above specified, demand therefor being hereby expressly waived, or fail to perform and fulfill all or any of the covenants herein contained, then and in that case it shall be lawful for, and second parties do hereby authorize and empower, first party, his heirs, executors, administrators, or assigns, by himself or agent, to re-enter and take full and absolute possession of the above-described premises, and of the property therein contained, and hold and enjoy the same fully and absolutely, without such re-entering working a forfeiture of the rents to be paid, or the covenants to be performed by second parties, for the full term of this lease."

The lease was duly filed for record, as required by the laws of the state of North Dakota, in the office of the register of deeds of Ward county, N. D., on May 12, 1919. On July 1, 1919, the copartners, the lessees, formed and organized a corporation to be known as "the Electric Supply Company," to succeed and carry on the business of said copartnership, to which corporation the copartners transferred all of the property of the copartnership, the corporation assuming and agreeing to pay all of the obligations of said copartnership; that, agreeably thereto, said corporation continued to occupy and use said premises, and paid the rentals reserved in said lease therefor up to and including the month of September, 1920; that on September 30, 1920, said corporation notified petitioner that it was unable to pay the rental due and payable October 1, 1920, for said premises, and would be unable to perform any of the covenants of said lease, or to pay the rentals reserved therein thereafter, it being then insolvent; that on October 1, 1920, the general manager of the corporation delivered the keys to said premises to the petitioner, who thereupon immediately entered upon said premises under the terms of said lease, and, agreeably to the written request of the said general manager, took possession of all the property of said corporation on and in said premises, which consisted of a stock of electrical goods and appliances, and certain fixtures, tools, and machines; that thereupon, on October 7, 1920, the petitioner commenced proceedings by advertisement, agreeably to the statutes of the state of North Dakota, to foreclose the lien reserved to him in said lease, to secure the payment of the rents due, and to accrue under said lease, which proceedings were enjoined by the district court of Ward county, N. D., from proceeding further with the foreclosure by advertisement, and requiring him to have all further proceedings for the foreclosure of said lien, by action in said district court of Ward county, N. D.; that petitioner was preparing the necessary proceedings for the foreclosure of said lien by action as required in said restraining order; that on October 15, 1920, petitioner was notified that the Electric Supply Company, the corporation, had been adjudicated bankrupt in proceedings instituted on that day in the District Court of the United States for the District of North Dakota; that thereafter the respondent was

elected as trustee in bankruptcy of said corporation and on November 4, 1920, he filed his petition with the referee in bankruptcy for said district for a summary proceeding against your petitioner; that thereupon the referee in bankruptcy entered an order requiring the petitioner herein to show cause why he should not forthwith deliver to the said trustee the full control and possession of all and every part of the property of the estate of said bankrupt, now in his possession and control; that the petitioner specially appeared before the referee on the date set for the hearing, and objected to his jurisdiction in the premises, claiming that he held adverse possession of said property under and by virtue of the mortgage lien reserved in the lease hereinbefore set out; that upon a hearing the referee overruled the objections to his jurisdiction and thereupon he was required to turn over said property to the trustee; that he filed a petition in the District Court of the United States for the District of North Dakota to review and reverse said order. Upon a hearing of the petition for review the court denied the petition and sustained the action of the referee.

It is undisputed that the petitioner was in actual possession of the property at the time and in good faith and with reasonable cause claimed the right to hold it adversely to the claim of the trustee in bankruptcy. The latest decisions of the Supreme Court have settled beyond controversy that a summary proceeding will not lie to determine the right of the trustee to recover the possession of the property, upon such a state of facts, but that only by a plenary proceeding can that question be determined. *Weidhorn v. Levy*, 253 U. S. 268, 40 Sup. Ct. 534, 64 L. Ed. 898; *Galbraith v. Vallely*, 256 U. S. 46, 41 Sup. Ct. 415, 65 L. Ed. 505, opinion filed April 19, 1921.

The court below erred in sustaining the order of the referee, and the cause is reversed with directions to dismiss the proceedings.

HOOK, Circuit Judge, participated in the hearing and concurred in the result, but died before the opinion was prepared.

ALEXANDER v. FARMERS' SUPPLY CO. et al.

In re FARMERS' SUPPLY CO.

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

No. 3713.

Bankruptcy ⇐51—**Stockholder held not entitled to have adjudication in bankruptcy of corporation set aside.**

Stockholder of a corporation, who had knowledge of all the steps taken from filing of voluntary petition in bankruptcy to sale of the assets, and remained inactive, was not thereafter entitled to defeat the voluntary petition because there was no proper corporate action authorizing the institution of the proceeding, or to have the adjudication in bankruptcy set aside on that ground.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Northern District of Georgia, in Bankruptcy; Samuel H. Sibley, Judge.

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

In the matter of the Farmers' Supply Company, bankrupt. Petition by J. F. M. Alexander to set aside an adjudication in bankruptcy and for the appointment of a receiver. There was a decree in part denying the prayers, and petitioner petitions to superintend and revise. Denied.

Phil W. Davis, Jr., of Lexington, Ga., for petitioner.

Howell C. Erwin, William L. Erwin, and Stephen C. Upson, all of Athens, Ga., for respondents.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. By the decree complained of, entered upon the amended petition of J. F. M. Alexander, the prayers of that petition for the setting aside of the adjudication in bankruptcy of the Farmers' Supply Company, and for the appointment of a receiver, were denied, and it was ordered that the petition stand as an intervention in said bankruptcy proceeding, and that the petitioner be heard upon the question of the debts owing by the bankrupt corporation, or otherwise as his interest may appear.

The Farmers' Supply Company was a corporation, having an issued capital stock of 64 shares, of \$100 each. It engaged in a mercantile business at Lexington, Ga. Alexander, the petitioner, owned 7 of the shares; and until the spring of 1919 was secretary and treasurer of the company. During the year 1919 J. A. Moore became the secretary and treasurer. Thereafter he acquired all the capital stock, except the 7 shares owned by Alexander. From the time Moore became the owner of 57 shares of the stock, about one year prior to December 17, 1920, he was in sole charge of the business, and conducted it in the name of the corporation, just as it had previously been conducted, and in the same place, held himself out as the president of the corporation, and contracted debts in its name. The voluntary petition to have the Farmers' Supply Company adjudged a bankrupt was filed in its name, by Moore, as its president, on December 17, 1920, and the adjudication in pursuance of the prayer of that petition was made on December 18, 1920.

In filing the petition Moore acted on his own initiative, the matter of instituting the bankruptcy proceeding not having been considered or acted on at any meeting of officers, directors, or stockholders of the corporation. Alexander, who lives at Lexington, Ga., learned of the filing of the petition the next day. He saw the newspaper notice of the first meeting of creditors. He knew when the stock of goods was being advertised for sale under the order of the court in the bankruptcy proceeding, and when the sale took place. He knew that the stock of goods was bought at such sale by two purchasers, that they divided the stock between them, that one of them moved his part of the goods to South Georgia, that the other, with his part of the goods, went into business at Lexington, in the old stand of the Farmers' Supply Company, and that later a fire destroyed that building and the goods therein. In February, 1921, Alexander was a witness in the bankruptcy proceeding, being examined on the question of the corporation's indebtedness for rent from the year 1915 to the date of the bankruptcy. From

the time he learned that the Farmers' Supply Company was in bankruptcy until March 10, 1921, when he filed the petition which prayed that the bankruptcy adjudication be vacated, he made no complaint, and in no way questioned the validity or regularity of the proceedings. The petition which prayed the vacation of the bankruptcy adjudication contained averments to the effect that debts which were scheduled as liabilities of the Farmers' Supply Company were not debts owing by it, but were individual debts of J. A. Moore.

We are of the opinion that, if Alexander had the right to defeat the voluntary petition in bankruptcy filed in the name of the Farmers' Supply Company, because there was no proper corporate action authorizing the institution of the proceeding, he lost that right by his silence and inaction under the circumstances and for the length of time above indicated. His conduct, with full knowledge of what was going on, was such as to support an inference that he acquiesced in the bankruptcy adjudication, and in the administration and disposition under the orders of the court of the property of the corporation, which came into the court's possession as a result of the adjudication. If Alexander's objection, based upon the absence of proper corporate action authorizing the institution of the proceeding, had been successfully made before the administration of the property brought into the bankruptcy court had been entered upon, it may be supposed that the result would have been only a short delay in getting the corporation adjudged bankrupt on its voluntary petition. Moore, being the owner of 57 of the 64 shares of the corporation's capital stock, readily could have brought about a proper corporate authorization to institute such a proceeding.

Alexander's failure to raise the objection at that time may be attributed to the realization by him, or by the lawyers he then consulted, of the futility of his doing so. Having full knowledge of what was going on, Alexander could not remain silent and inactive while the court dealt with the assets of the Farmers' Supply Company as property subject to be administered and disposed by it, and retain the right to impeach the adjudication of bankruptcy on the ground urged after, as results of the court's action, changes in the condition of the property and in the situation, and relations of interested parties had been effected while the validity and regularity of the adjudication were unquestioned. Under the circumstances disclosed, Alexander, by failing to act promptly, lost the right to bring the bankruptcy adjudication in question on the ground relied on. In *re First National Bank*, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; *Collier on Bankruptcy* (9th Ed.) 434.

In so far as Alexander controverted the liability of the bankrupt on claims scheduled as debts owing by it, the decree under review was not adverse to him. He was permitted to be heard on that question, or otherwise as his interest might appear. More than that he was not entitled to at the stage of the proceedings at which his petition was filed.

The petition to superintend and revise is denied.

In re GOULD.

GOULD v. J. W. BUTLER PAPER CO.

(Circuit Court of Appeals, Seventh Circuit. June 27, 1921.)

No. 2899.

1. Bankruptcy \Leftrightarrow 467—Findings against bankrupt's right of discharge held not to be disturbed, if supported by evidence.

Findings against a bankrupt's right to discharge, on evidence on issues as to his making a false statement of his financial condition to secure credit, and making a false statement when examined in respect to property statement, will be sustained on appeal, if there is evidence, though disputed, to support them.

2. Bankruptcy \Leftrightarrow 407 (5)—Statements by bankrupt held not to warrant refusing discharge.

Statements, to secure credit, as to property, held not so willfully or materially false as to warrant refusal of discharge.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Arthur Gould, bankrupt. From an adverse decree, on objections by the J. W. Butler Paper Company to his discharge, the bankrupt appeals. Reversed, with instructions to grant discharge.

Melvin M. Hawley, of Chicago, Ill., for appellant.

L. A. Peck, of Chicago, Ill., for appellee.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Appellant, Gould, sought, but was denied, a discharge of his debts in the bankruptcy court. The referee found that he (a) had made a false statement of his financial condition for the purpose of securing credit, and (b) had made a false statement when examined in respect to the written property statement.

[1] The findings against appellant on both of these issues will be sustained, if there is evidence, though disputed, to support them. In re Croonborg (C. C. A.) 268 Fed. 352; In re Matthews (C. C. A.) 272 Fed. 263. Our examination of the record, however, convinces us that appellant has not presented a question of disputed evidence, but rather a question of the effect to be given to undisputed evidence.

[2] Appellant for some 10 years conducted a business, which he owned, under the name of "Advance Thought Publishing Company." His wife for some 12 years owned and conducted a separate business, under the trade-name of "Yogi Publishing Society." In 1916 she was compelled to surrender the active control of it to appellant, who assumed its management and paid her a royalty.

Shortly thereafter, appellant sought a credit from appellee for a small amount, and at the request of the latter's credit man furnished a written statement, the one here in question. He also gave Mr. Grace, the credit man, a list of references. Mr. Grace was unable to recall the conversation, but said he made inquiry concerning appellant's standing,

and, finding all reports favorable, extended the credit, which was later increased, adding that he had extended the credit upon the basis of the written statement and the reports he received from others.

The written statement was made upon one of appellee's blanks, which contained many questions calling for specific and detailed information as to assets, liabilities, and volume of business. In the answers to the specific queries, no misstatement was made. Admittedly, the answers were true. The statement was signed: "Yogi Publishing Co., A. Gould." It was headed: "Name, Yogi Publication Co. Personnel of firm, A. Gould, owner." It is apparent, from the foregoing alone, that appellant filled out the blank and gave the assets and liabilities of his company, the Advance Thought Publishing Company, but the name of the company was given as Yogi Publishing Company.

At the time the statement was delivered, appellant explained to Mr. Grace that he was acting for the Advance Thought Publishing Company, and not for the Yogi Publishing Society, which was owned by his wife, but temporarily managed by him. Credit was given to the Advance Thought Publishing Company, bills were made out to it, and notes taken thereafter were executed by the Advance Thought Publishing Company, of which Gould was the owner.

In reference to the false statement made at one of the hearings, it appears that appellant was asked whether he had not made a statement wherein he claimed to be the owner of the Yogi Publishing Society. He replied in the negative. He was not permitted to see the statement until after the answer was given. When the statement was presented to him, he promptly admitted signing it, but explained that it was the statement of the Advance Thought Publishing Company, and that the error in the name, before any business transactions occurred, had been explained to appellee's credit man, who had stated that it was not necessary to correct it.

Undisputed by appellee's credit man, this story must be accepted as a verity. In fact, appellee's conduct in opening its account with the Advance Thought Publishing Company, and its acceptance of such company's notes thereafter, strongly confirm the story. Still more conclusive is the detailed information of assets and liabilities of the Advance Thought Publishing Company alone appearing.

There is not, under these circumstances, room for doubt that no such false statement as will defeat a discharge in bankruptcy was made. 7 Corpus Juris, 371-373; In re Marcus, 203 Fed. 29, 121 C. C. A. 393; In re Rosenfeld (C. C. A.) 262 Fed. 876; Aller Wilmes Jewelry Co. v. Osborn, 231 Fed. 907, 146 C. C. A. 103. In fact, some false statements, if promptly corrected before the witness leaves the stand, will not justify a refusal to grant a discharge. 7 Corpus Juris, 373. But it is hardly possible to announce any hard and fast rule that will govern all cases of corrected testimony. In the instant case, however, the written statement had been made about 18 months before the date of the inquiry. The witness did not deny making a written statement, and, when confronted by the answer in the document above set forth, made the explanation, which stood undisputed and unimpeached thereafter.

We conclude the burden resting upon the creditor to prove the facts necessary to defeat a discharge has not been overcome.

The order is reversed, with instructions to grant appellant a discharge.

In re ROGERS PALACE LAUNDRY CO.

TAAFFE v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2878.

1. Bankruptcy §184(2)—Subrogation §23(3)—Person, lending money used in canceling bonds, held an unsecured creditor.

Where one advanced money to a bankrupt, to be used in payment of mortgage bonds, and such bonds and interest were paid, and he accepted for security a larger amount of bonds represented by a new bond issue, and took no assignment of the first mortgage bonds, and did not agree with bankrupt that he would have a lien similar to the lien of the holders of the canceled bonds, and did not record the new trust deed, he was an unsecured creditor, and was not entitled to subrogation.

2. Subrogation §35—Must rest on agreement.

A conventional subrogation must rest on an agreement, express or implied, and this agreement must be to the effect that the payor shall have the same priority as the holder of the security and be substituted for him, and the payor is not entitled to subrogation if he accepts other and different security.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the Rogers Palace Laundry Company, bankrupt. Matthew Taaffe, executor of the estate of Edwin Henning, deceased, sought a lien on funds in the possession of the Central Trust Company of Illinois, trustee of the bankrupt estate. From a decree denying lien, the executor appeals. Affirmed.

Appellant sought, but was denied, a lien to the extent of \$3,384 and interest upon funds in appellee's possession realized from the sale of bankrupt's property, and which realization was, by order of the court, made subject to any lien found to exist against the property. Briefly stated, it appeared that bankrupt, while a going concern, executed its deed to secure an indebtedness of \$80,000, payable, with interest, in installments. Unable to meet its maturing obligations, and representing that a larger capital was essential to the successful conduct of its business, its representative sought financial assistance from one Edward Henning, then in California for his health. A plan was discussed for financing the company, which called for the issue of bonds to the extent of \$80,000, the proceeds to be used in refunding the outstanding mortgage and in paying other outstanding and unsecured obligations.

Henning at the time loaned bankrupt \$3,384, a sum sufficient to pay interest coupons and six bonds of \$300 each, then due, leaving a balance on the first mortgage indebtedness of \$51,000. Henning's loan was represented by a promissory note and was to be secured by bonds of the new issue. Bankrupt paid to the holders of the first mortgage bonds the amount thus received, and the first mortgage indebtedness was thereupon reduced to \$51,000. The trust deed for \$80,000 was duly executed and delivered to Henning, who received and held \$29,000 of the bonds to secure his loan of \$3,384. Henning during his life, and the executor after his death, neglected to record the mortgage. It was the plan of bankrupt and Henning to sell these \$29,000 of bonds and pay Henning

and unsecured creditors, and it was further planned to sell the remaining \$51,000 of bonds to satisfy the outstanding mortgage. Bankrupt failed to dispose of any part of the \$80,000 bond issue. Later bankruptcy proceedings were instituted and an adjudication followed.

Carroll J. Lord, of Chicago, Ill., for appellant.

Frank Schoenfeld, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Priority is sought on the theory of subrogation. Having paid \$3,384 on the first valid and subsisting mortgage, appellant urges equitable considerations in support of his claim for a lien. He invokes the doctrine of conventional rather than legal subrogation, and disclaims all rights under and by virtue of the trust deed given to secure the \$80,000 bond issue.

[1, 2] That appellant could have protected his advance cannot be questioned. That he failed to do so, however, is, we think, equally apparent. Instead of taking an assignment of the first mortgage bonds and interest coupons, or agreeing with the creditor that he should have a lien similar to the lien of the holders of the bonds that were canceled, he accepted, for his security, a much larger amount of the bonds represented by the new \$80,000 issue. His failure to record this trust deed, thus defeating the lien which a recordation thereof would have given, leaves him, in view of the bankruptcy act, in the position of an unsecured creditor.

Conventional subrogation must rest upon an agreement, express or implied, and this agreement must be to the effect that the payor shall have the same priority as the holder of the security and be substituted for him. Sheldon on Subrogation (2d Ed.) § 248; 37 Cyc. 469, 470; Murphy v. Baldwin, 159 Wis. 567, 571, 150 N. W. 957; 25 R. C. L. p. 1342. Generally speaking, the payor is not entitled to subrogation, if he accepts other and different security.

The evidence in this record convinces us that Henning was not to have a lien similar or equal to that of the creditors whose bonds he satisfied, nor was there any agreement or understanding between him and bankrupt that he was to have the security of a first mortgage. He accepted bonds of the face value of \$29,000, secured by a second mortgage, to secure his \$3,384 loan. These bonds, as well as the entire issue of which they were a part, were executed on the hypothesis of a complete satisfaction and discharge of the bonds and interest coupons paid by his loan. In other words, instead of an agreement whereby Henning was to be subrogated to the rights of the then existing lien holders, the evidence establishes another and different agreement as to security, the terms of which negative the existence of any agreement for subrogation. Instead of supporting, the agreement of the parties actually defeats, any claim of subrogation; for to accept twenty-nine eightieths of a new bond issue, secured by a second mortgage, instead of a lien of approximately three fifty-fourths of the first mortgage, is necessarily fatal to appellant's asserted lien based on conventional subrogation.

The decree is affirmed.

McLAIN-HADDEN-SIMPERS CO. v. TRENT RUBBER CO.

Appeal of HOPE WEBBING CO.

(Circuit Court of Appeals, Third Circuit. November 8, 1921.)

No. 2778.

Sales ⇨82(1)—Provision for approval of terms of payment by seller held not to continue open during the life of the contract.

A sales contract for materials to be delivered during four months, a certain amount every month, "terms strictly 2 per cent. cash 10 days from date of invoice or 30 days net, f. o. b., * * * application of these terms subject to the approval of [seller's] credit department," did not mean that the terms of payment were subject to the approval of the seller's credit department at will during the running of the contract, but gave a right to be exercised only before it performed by making deliveries, and credit having become an established term of the contract by proceeding thereunder, an attempt to impose new terms was an abandonment, warranting buyer's rescission.

Appeal from the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

Claim by the McLain-Hadden-Simpers Company against the Trent Rubber Company, in the hands of John O. Bigelow, receiver. From an order sustaining the receiver in disallowing the claim, the Hope Webbing Company appeals. Affirmed.

Whiting & Moore, of Newark, N. J. (Ira C. Moore, Jr., of Newark, N. J., of counsel), for appellant.

McCarter & English, of Newark, N. J. (Conover English, of Newark, N. J., of counsel), for appellee.

Before WOOLLEY and DAVIS, Circuit Judges, and THOMPSON, District Judge.

WOOLLEY, Circuit Judge. This appeal is from an order of the District Court sustaining the receiver of Trent Rubber Company in disallowing a claim filed by Hope Webbing Company.

In May, 1920, the Webbing Company and the Rubber Company entered into a contract by an order and acceptance for the purchase and sale of 1200 gross yards of tire wrapping tape; deliveries to be made through the following months of June, July, August and September, at 300 gross yards per month. The order of the Rubber Company named the price at \$8.00 per gross yards but was silent as to terms of payment. The acceptance by the Webbing Company repeated the price named and imposed terms of payment as follows:

"Terms of sale are strictly 2 per cent. cash 10 days from date of invoice or 30 days net, f. o. b. Providence, R. I. Application of these terms subject to the approval of our Credit Department."

The Webbing Company delivered only 50 gross yards of the required 300 in June and none in July, August and September, having disposed of its output to other customers at higher prices. The Rubber

Company did not pay for this shipment either within 10 days or 30 days, but paid for it in September.

Thus the matter went along until September 16, when the Webbing Company wrote the Rubber Company that, being no longer satisfied with the financial status of the latter, it would resort to the cited provision of the contract as to the application of terms of payment subject to the approval of its credit department, and would deliver the balance of the contract quantity of tape only upon receipt of "cash before shipment." The Rubber Company indicated its willingness to take belated deliveries but declined to accept them except upon the original terms of the contract giving a discount for cash in 10 days or 30 days credit. Construing this declination as a breach of the contract, the Webbing Company filed a claim for damages against the receiver of the Rubber Company.

It is clear that the parties severally breached the contract as to deliveries and payments and that each waived the other's breach. The real trouble began when the Webbing Company undertook to change the terms of the contract as to manner and time of payments. The provision in the contract that the terms of payment shall be subject to the approval of the seller's credit department was not a right reserved by the seller to extend and withdraw credit at will during the running of the contract, but was a right to be exercised by the seller only before it began performance of the contract by making deliveries. Evidently the quoted credit terms first met the approval of the seller's credit department, for the only shipment made was on 10 days cash or 30 days credit. Credit thus became an established term of the contract. By withdrawing that term and imposing a new one, the Webbing Company in effect abandoned the contract under the old terms and gave the Rubber Company the right to rescind. And this right the Rubber Company exercised.

For these reasons we think that the District Court did not commit error in sustaining the action of the receiver and that, in consequence, its decree should be affirmed.

In re MARLEY-MORSE CO.

WILSON v. KANTER et al.

(Circuit Court of Appeals, Seventh Circuit. April 26, 1921.)

No. 2871.

Bankruptcy \Leftrightarrow 165(1)—**Payments for current supplies held not preferential.**

Payments for current supplies by a mail order house in precarious condition, but expecting to avoid bankruptcy, to a wholesaler, in accordance with creditors' agreement that claims for current supplies furnished during the term of the agreement should be preferred, *held* not preferential.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Marley-Morse Company, a copartnership, bankrupt.

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

The claim of H. L. Kanter and another, copartners, was allowed, and Henry L. Wilson, trustee of the bankrupt estate, appeals. Affirmed.

Lloyd C. Whitman, of Chicago, Ill., for appellant.
Henry S. Blum, of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. The controversy is over the allowance to appellees of a general claim against the bankrupt estate for \$1,408.18; the asserted impropriety of its allowance being predicated on the contention of unlawful preferential payments to appellees. Upon this issue the referee, after hearing the evidence, found that sufficient proof did not appear to warrant the conclusion that bankrupt was insolvent at the time of the payments. But apart from this issue the record discloses facts which unquestionably justified the allowance of appellees' claim.

Bankrupt was in the mail order grocery business. In 1917 it extensively advertised to sell sugar at considerably lower than current prices, as part of a combination order comprising also other goods. Many orders were received, but in November, 1917, the federal authorities controlling the distribution of sugar ordered discontinuance of such advertising and sales. The business immediately dropped off, although for a time orders with cash were received, which bankrupt could not then fill. In February its 10 largest creditors, with aggregate claims of about \$14,000, of which appellee held \$764, entered into agreement with bankrupt for a three months' extension of their claims, and the appointment of a creditors' committee of three, of which a member of appellees' firm was one, who were to exercise a general supervision over the business, and to whom reports were to be made, and it was agreed that, for any goods sold to the bankrupt by any one of these creditors during the term of the agreement, there should be a preferred claim against the assets for the amount thereof.

Appellees were in the wholesale grocery business, and had all along been selling goods to appellant; the sales being frequent and the most usual terms being 30 days. Upon the agreement being made, it continued to sell as theretofore, the sales being almost daily, and sometimes several items in a day, and upon such sales payments were made with more or less regularity, sometimes in cash and sometimes through a return of goods. This course of dealing continued into the middle or latter part of March.

It is true that one of the appellees' firm was related to a member of the bankrupt firm; but the record, far from showing any advantage to have been taken by reason of the fact that one of its partners was a member of the creditors' committee, discloses that the balance due the firm when the contract was made, instead of being reduced, became considerably increased. The record fairly warrants the conclusion that, in thus supplying merchandise after the creditors' agreement was made, it was upon the faith, not only that the concern would thus be saved from bankruptcy, but that such merchandise should not, upon being supplied, at once go to enhance the estate for the benefit of other

creditors, but that, out of the proceeds of sales in due course of business, the merchandise thus supplied would be paid for. Such payments, under the indicated facts, are not preferential within the meaning of the law, and do not interfere with the allowance as a general claim of the entire debt, exceeding as it does the indebtedness to this creditor at the time the agreement was made. *Benjamin v. Buell* (C. C. A.) 268 Fed. 792; *Ill. Parlor Frame Co. v. Goldman*, 257 Fed. 300, 168 C. C. A. 384; *Lake View State Bank v. Jones*, 242 Fed. 821, 155 C. C. A. 409.

The order of the District Court is affirmed.

BANK OF ELBERTON v. SWIFT.

In re SWIFT.

(Circuit Court of Appeals, Fifth Circuit. October 12, 1921.)

No. 3756.

Bankruptcy ⇐413(9)—Application for discharge need not be pressed, pending motion to vacate adjudication.

A motion to dismiss a bankrupt's application for discharge for laches in not pressing such application pending a motion to vacate the adjudication of bankruptcy on his voluntary petition was properly denied.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

In the matter of John K. Swift, bankrupt. The Bank of Elberton petitions to superintend and revise an order denying its motion to dismiss the bankrupt's application for discharge. Petition denied.

See, also, 259 Fed. 612; 268 Fed. 305.

Stephen C. Upson and Horace M. Holden, both of Athens, Ga., for petitioner.

Daniel MacDougald, of Atlanta, Ga., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Swift filed his petition to be adjudged a bankrupt on November 6, 1917, and was so adjudicated on November 8. On June 7, 1918, the Bank of Elberton filed a petition to vacate the order adjudicating Swift a bankrupt. On October 29, 1918, Swift filed his application for a final discharge. The petition to vacate the order adjudging Swift a bankrupt was litigated in the District Court and in the Circuit Court of Appeals until February 22, 1921, when the mandate from this court was made the judgment of the District Court.

During April, 1921, the application for discharge was advertised, and set for a hearing on May 7, 1921. The Bank of Elberton then filed its motion to dismiss such application for want of earlier prosecution. The District Judge overruled said motion to dismiss, holding

that the bankrupt was not guilty of laches in not pressing said application for discharge during the pendency of the petition of the bank to vacate the order adjudicating him a bankrupt; that if the bank had any special reason for an earlier hearing of the application for discharge it could have moved therein. The bank files this motion to superintend and revise the order of the District Court dismissing its motion.

We think the District Judge decided correctly in holding that the bankrupt was not in laches in not pressing his application for discharge, during the pendency of the petition of the bank to vacate the order adjudicating him a bankrupt. If this petition had been sustained, it would have disposed of the application for discharge. It was in its nature a matter to be first disposed of, before the time of the court was taken up on the application to grant the bankrupt a final discharge. The bank does not contend that the application should have been decided until its petition was disposed of, but that the court should have heard the evidence on the application to discharge, and have withheld judgment until the petition to vacate had been finally disposed of.

This, at best, is an unusual method of trying an issue, and certainly, as the court below held, the bank, if special reasons for such a course existed, could have moved in the matter of hearing. Unquestionably the court could have declined to hear a matter in this way, or to hear the application to grant a final discharge, pending the termination of the proceeding to set aside the order of adjudication. His judgment on such a matter would have involved the exercise of a discretion with which this court would not interfere in the absence of an error of law, clearly pointed out. In *re* Neal (D. C.) 270 Fed. 289.

The case is wholly unlike that of *Lindeke v. Converse*, 198 Fed. 618, 117 C. C. A. 322, which presented a delay without legal excuse or reason for over four years of the setting down of an application for discharge, which had been filed, by permissive order, after the regular time for filing had elapsed.

The petition to superintend and revise is therefore denied.

BANK OF MADISON v. BELL (two cases).

In re SMITH.

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

Nos. 3659, 3663.

Bankruptcy \Leftrightarrow 184 (2)—Unrecorded assignment of bond for title subordinate to lien of judgment creditor.

Under the law of Georgia, the right of an assignee in an unrecorded assignment of a bond for title to land as security for a debt is subordinate to the lien of a judgment creditor of the assignor, and the debtor's trustee in bankruptcy, having the rights of a judgment creditor, has a lien which takes precedence of the unrecorded assignment.

Petition to Superintend and Revise, and Appeal from, the District Court of the United States for the Northern District of Georgia; Samuel H. Sibley, Judge.

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

Action by the Bank of Madison against Austin Bell, trustee in bankruptcy of W. A. Smith, bankrupt. Petition by Bank of Madison to superintend and revise, and appeal from, an adverse decree. Affirmed.

Howell C. Erwin, of Athens, Ga., for petitioner.

Stephen C. Upson, of Athens, Ga., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The ruling complained of was to the effect that under the law of Georgia the right of the assignee in an unrecorded assignment of a bond for title to land as security for a debt is subordinate to the lien of a judgment creditor of the assignor, and that the debtor's trustee in bankruptcy, having the rights of a judgment creditor, has a lien which takes precedence of the unrecorded assignment of the bond for title. That ruling is sustained by the decision of this court in the case of Fuller v. Atlanta National Bank, 254 Fed. 278, 165 C. C. A. 566.

As we have not been convinced that this court was in error in its above mentioned former ruling, the decree under review is affirmed.

THE CALVIN AUSTIN.

THE HELEN B. MORAN.

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

Collision \Leftrightarrow 95(4)—Steamer and tow meeting in Hell Gate.

A steamer passing down through Hell Gate, which was swung so far northward by the strong flood tide that she was unable to round the south side of Man O'War Rock as intended, and in maneuvering to regain her position got in the way of a meeting tug and tow, held in fault for a collision with one of the barges of the tow.

In Admiralty. Suit for collision by Cleary Brothers, a corporation, against the steamship Calvin Austin and the tug Helen B. Moran. Decree for libelant against the Austin, and libel dismissed as to the Moran.

Thomas Cooper Byrnes, of New York City, for libelant.

Haight, Sandford, Smith & Griffin, of New York City, for the Calvin Austin.

Park & Mattison, of New York City, for the Helen B. Moran.

CHATFIELD, District Judge. On the 28th day of June, 1919, passage through Hell Gate was restricted by a dredge and a drill working on the Long Island side of the channel across from and to the south of Negro Point. At about 8:30 a. m. the steamer Calvin Austin, which has a length of 298 feet and is used upon the route between Boston and New York, was coming through the Sound bound for New York. When reaching the turn at Pott Cove, she headed toward Man O'War Rock, with the intention of passing it on the southerly or Long Island

side. The tide had been running flood for about an hour and was particularly strong that morning. Flood tide, as it passes up the East River, divides at Man O'War Rock, one part running into the Harlem River for some distance until it meets the tide from the Hudson, while the greater body of water goes on through Hell Gate to the Sound. A part of the stream running into the Harlem sweeps around to the north of Man O'War Rock and joins the stream running to the Sound, thus causing an eddy close to Man O'War Rock along its northeastern shore.

When the Austin attempted, under a hard astarboard helm, to make the turn to the south at Man O'War Rock, the strong tide, running more than 5½ miles an hour and striking the port bow of the steamer at this turn, carried the bow towards Ward's Island, compelling the steamer to go to the northeastward of Man O'War Rock in order to avoid striking the rock. As the bow of the steamer reached the eddy behind the rock, her stern swung over towards Ward's Island, until the steamer was in such a position that she could not proceed ahead around Man O'War Rock into the Harlem River, so as to pass down through the westward channel.

It appears from the testimony that the Austin could with safety have navigated the channel to the north and west of Man O'War Rock, if her captain had undertaken the passage in time, but after she reached the position where her bow was forced in close to the rock, it was impossible for her to obtain steerageway and to get away from the rock without stopping, backing, and withdrawing into either one channel or the other. By careful maneuvering, both backing and going ahead upon her engines, she reached a position where she could draw back away from the upper end of the rock, and then passed within a distance estimated as 50 feet from the corner of the rock, down through Hell Gate in the direction of her original course. In the meantime a tow, in charge of the tug Helen B. Moran, was coming out through Hell Gate, and, when off the upper end of Blackwell's Island, near Eighty-Sixth street, or opposite Horn's Hook, observed the Austin passing across and apparently proceeding through the channel to the west of Man O'War Rock. The tow of the Moran consisted of the Weiant upon her port hawser, the St. Cyr upon her starboard hawser, and the Hastings No. 2 behind the St. Cyr in the second tier. The scows were loaded with rubbish, and were upon a hawser estimated at 150 feet in length.

The Austin gave no signal to the Moran before coming out from behind Man O'War Rock. The mate of the Austin saw the Moran tow after passing the dredge and drill. The captain of the Austin did not see the Moran nor her tow, but was paying undivided attention to the navigation of his own vessel until after the Austin had resumed her course to pass Man O'War Rock upon the south side.

It is the custom for a Sound steamer, passing down through the Hook against the flood tide, not only to blow a long whistle before entering the Gate, but also to wait in the neighborhood of Pott Cove, or further back toward the Sound, if a tow is met directly in the Gate. It is also the custom for a tug passing up around Negro Point to haul over toward Negro Point, in order to keep its tows away from the steep

or scaly rocks on the Long Island side of the river at that point. Thus the Sound steamers lie back far enough to pass the tow's port to port to the eastward of Negro Point, pass them starboard to starboard by proceeding into Pott Cove, or pass port to port between Negro Point and Man O'War Rock. It is the custom, also, for the tows, after leaving Horn's Hook, to haul over to the port side of the channel and within some 300 or 400 feet of Man O'War Rock; in other words, to follow the stream of the tide past Man O'War Rock until the corner is reached, where the turn of the tide itself takes them straight down past Hog's Back and Negro Point.

The presence of the dredge and drill made it much more difficult for a steamer to run in toward Pott Cove or under the shore of Hallets Point, and thus to pass a boat starboard to starboard in the fashion indicated. But on the occasion in question no such maneuver was necessary, for the Austin would plainly, if she had obeyed her helm and proceeded at regular speed upon her course, pass well below Man O'War Rock before meeting the Moran and her tow. It was not negligence, therefore, for the Austin to fail to blow a whistle to the Moran before running behind Man O'War Rock. The long whistle, to indicate that the Austin was coming through the Gate, had been blown some time previous to reaching the point in question. The Moran also had blown a whistle when off Horn's Hook, which was not noticed by the Austin, but which would have had no bearing upon the Austin's movements under the circumstances.

The Austin apparently reached a point where she was approximately parallel to the general longitudinal dimension of Man O'War Rock, and where her bow was some 250 or 300 feet away from the western or lower extremity of the rock, while her stern reached up to the broader or central portion of the rock and was some 75 feet out in the river therefrom. Her officers had been so apprehensive of striking Man O'War Rock, when so close to its dangerous shore, up to this point, that they had been proceeding at slow speed, barely holding their own against the tide, and moving at a rate of not more than 6 miles through the water. They thus had mere steerageway, but with little possibility of changing the position of their vessel unless the speed was quickly increased.

Under these circumstances the captain of the Austin observed the Moran and her tow, which had approached until it was nearly opposite Man O'War Rock and on a course some 300 feet out from its western or lower end. It appears from the testimony that the Moran could not approach closer to Man O'War Rock without putting the tow in a position where it might be carried by the tide into the Harlem River, yet the captain of the Moran was compelled to get as far as was safe over toward Man O'War Rock, in order to have plenty of room to avoid the dredge and the drill after turning the corner.

As the Moran and the Austin saw each other in these respective positions, each blew a one-whistle signal, followed by alarm whistles on the part of the Moran. The captain of the Austin testifies that the alarm whistles preceded the one-whistle signal, but this is evidently a mistake. The Moran pulled over slightly under a port helm, in or-

der to hold her tows from swinging against the Austin; but, as the boats were passing each other, the Moran reached a point where the set of the tide rapidly swung her scows closer to the Austin, with the result that the port side of the Austin, about 60 feet from her stem, came in contact with the port side of the Weiant, about 20 feet from the after corner. The Weiant was forced by the blow away from the side of the Austin, which passed on as the scows continued their course, and struck also the Hastings No. 2, which had swung further around toward the Austin through the breaking of the starboard line from the St. Cyr. Considerable damage was done to the Hastings No. 2, which was owned by the libellant in this action, and for which damage this suit has been brought.

As has been previously stated, no negligence can be predicated upon the signals (or lack of signals) of the Austin or of the Moran prior to the time when the Austin came out from behind Man O'War Rock. It evidently would have been better navigation if the Austin had attempted (immediately after passing the dredge and drill) to have worked over toward Halletts Point under a starboard helm, and thus to have avoided the force of the tide, which made her unmanageable and forced her toward Man O'War Rock. But at that time there was no danger apparent from the Moran or her tow, and it cannot be held to have been negligent navigation, with respect to the Moran, for the captain of the Austin to have failed to anticipate that his subsequent difficulties might put him in a position where danger would arise. It is impossible to determine why the Austin did not answer her helm. Perhaps her way slackened, or an unexpected swing of the tide may have put her out of control; but at that time the Moran was not in such a position as to make it imperative for the Austin to initiate a course by which the Moran would pass starboard to starboard, nor was it negligence for the Austin to continue with the idea of passing her port to port. Nor is there any evidence in the case that negligence upon the part of either boat can be predicated upon their whistles.

As has been said, the Moran was not at fault for failing to understand that the Austin was in difficulty, or that this large and powerful steamer was going to put herself in such a position that she could not pass through to the north and westward of Man O'War Rock, where the captain of the Moran knew there was plenty of water for her to proceed. When the Austin backed out from behind Man O'War Rock and again turned downstream, the Moran could not change the course of her tow further toward Long Island without danger of bringing up against the dredge and drill, nor could she change her course so as to go into the Harlem River without danger of striking Man O'War Rock.

It is evident that the Austin was at all times visible to the Moran, and that the Moran was at all times visible to the Austin. The first obvious act of negligence, therefore, was in the failure of the Austin and her lookouts to take into account the approach of the Moran and to bear her in mind while maneuvering to get out from behind Man O'War Rock. A vessel with the power of the Austin should have been able to have dropped back from the side of Man O'War Rock

and to have directed her course through the westward channel, and thus to have kept out of the way of the Moran, if the presence of the Moran and her boats had been taken into account by the master or pilot of the Austin at the time when the Austin once more was gotten under control and before she proceeded along the south side of Man O'War Rock toward the Moran and her tow. Further, according to the testimony, the water is deep enough on the south side of Man O'War Rock and toward its western end so that if the Austin had increased her speed and attempted to throw her bow closer to the narrow part of Man O'War Rock, it would appear that she could have avoided the swing of the Moran's scows and the accident would have been prevented.

The captain of the Austin was justified in his desire to keep away from the vicinity of Man O'War Rock, but if he deliberately preferred to run down the Moran's scows in order to avoid possible danger from the Rock, then, having made the choice, the Austin is responsible for the damage inflicted in furthering the safety of the large vessel. On the other hand, if the captain of the Austin, who was acting as his own pilot, had been thoroughly acquainted with the depth of water along the side of the Man O'War Rock, he could apparently with safety have given way somewhat and avoided the collision.

In these conclusions the court has been taking the position of the Austin to be that fixed by her own captain and as indicated by models in court at the time of the trial. If the position be that fixed by the captain of the Moran, and to some extent substantiated by the mate of the Austin, then the bow of the Austin was so far over toward Long Island, and on a course away from Man O'War Rock, that the failure of the Austin to take notice of the presence of the Moran must be held to have been negligence. The Austin could not have swung around so far toward the Long Island shore, and put herself so nearly upon a course where she could, if necessary, have gone back through the Gate, in order to avoid the Moran, without being held responsible for getting in the way of the Moran and her tow.

It would appear, however, from the testimony of all the witnesses, that the extreme care used by the captain of the Austin in proceeding slowly because of his proximity to Man O'War Rock left him without sufficient control over the movements of his vessel to enable him to clear the Moran's tows, even though he had sufficient room within which to change his course the slight amount necessary to escape collision.

The libelant may have a decree against the Austin, and the libel against the Moran will be dismissed.

GARVAN, Alien Property Custodian, v. COMMERCIAL TRUST CO. OF N. J.
(District Court, D. New Jersey. October 22, 1921.)

1. War ⇨12—Alien Property Custodian's determination as to enemy property is conclusive.

Under Trading with the Enemy Act, §§ 5a, 6, 7a, 7c, 7d, 7e (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½c-3115½d), the Alien Property Custodian, as the representative of the President, has authority to determine, after investigation, whether property is held for or on behalf of an enemy, and to insist that such property be turned over to him, if held for an enemy, and one holding such property will be fully protected on compliance with the Custodian's demands.

2. War ⇨12—That preliminary investigation whether owner was alien enemy was not made cannot be urged in suit to enforce Custodian's demands.

The objection that the preliminary investigation required by Trading with the Enemy Act, § 7c (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), was not made by Alien Property Custodian before demanding property from the holder thereof, cannot be made in a proceeding to enforce the Custodian's demands instituted under section 17 of the act (section 3115½i), where the Custodian's determination and demands as to such property positively asserted that such investigation was made.

3. War ⇨12—Property held in trust for joint account must be delivered, if either cestui an alien enemy.

Where a trust company held securities under a trust agreement "for the joint account" of W. and S. and was obligated to pay over such securities and interest "to either the said" W. or S., or "to the survivor of them," the trust company, on demand for the property by the Alien Property Custodian under Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½a et seq.), could not base a defense on the claim that S., who alone had been determined to be an alien enemy not holding a license from the President, owned at most but a part of the property, as it was bound to deliver the property to either W. or S. on demand, so that, if either was an enemy, the Alien Property Custodian, by taking the requisite steps under the act, would be substituted in the place of the enemy and entitled to demand and recover the trust fund.

4. War ⇨12—Claims to property cannot be litigated in Alien Property Custodian's suit for possession thereof.

In Alien Property Custodian's suit for possession of alleged enemy property under Trading with the Enemy Act, § 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), questions as to title or interest in the property cannot be determined, but can be raised only by filing a claim and instituting the proceeding as provided by section 9 (section 3115½e).

5. War ⇨12—Report of holder of property held to show property was held for an enemy.

Where a trust company reported to the Alien Property Custodian that one of its clients was a resident of enemy territory, and that under a trust agreement she had a right to demand of the trust company that certain moneys and securities held by it be turned over to her, the Alien Property Custodian could justly determine that the properties were held for an enemy on that report alone, under Trading with the Enemy Act, § 7c (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d).

At Law. Suit by Francis P. Garvan, as Alien Property Custodian, against the Commercial Trust Company of New Jersey. On rule to show cause why certain moneys and securities should not be turned over to the Alien Property Custodian. Rule made absolute.

Elmer H. Geran, U. S. Atty., of Ashbury Park, N. J., and Lucien H. Boggs and Dean Hill Stanley, Sp. Asst. Attys. Gen., for petitioner. Fisk & Fisk, of Jersey City, N. J. (Seldon Bacon, of New York City, and J. Fisher Anderson, of Jersey City, N. J., of counsel), for respondent.

RELLSTAB, District Judge. This is a suit to enforce demands made by the Alien Property Custodian under Trading with the Enemy Act Oct. 6, 1917, 40 Stat. 411 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{2}$ a-3115 $\frac{1}{2}$ ff, 3115 $\frac{1}{2}$ g-3115 $\frac{1}{2}$ j), for the delivery to him of certain securities and moneys held by the Commercial Trust Company of New Jersey as trustee for the joint account of Helene J. von Schierholz and Frederick Wesche; the former having been determined to be an enemy not holding a license from the President.

In the Custodian's petition it is alleged, inter alia:

That on or about December 19, 1917, the trust company, acting in compliance with the terms of the Trading with the Enemy Act and the executive orders issued thereunder, reported in writing to the Custodian's predecessor in office that it held in trust certain specified securities and cash for the joint account of Frederick Wesche, of France, and Helene J. von Schierholz, of Germany, under a certain agreement which reads:

"Received, Jersey City, January 30, 1913, for the account of Frederick Wesche, of Paris, France, and Helene J. v. Schierholz, of Plauze, Thuringen, Germany, the bonds particularly set out in the schedule or list hereto annexed, and having a par value of five hundred and twenty-four thousand dollars (\$524,000), to be held for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to collect the interest to become due and payable on said bonds for the joint account of the said Frederick Wesche and Helene J. v. Schierholz, and to deliver over said bonds from time to time as requested, to the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them; it being understood that the said bonds and the said interest money to be collected thereon are to be held and collected and delivered or paid over to either the said Frederick Wesche, or to the said Helene J. v. Schierholz, or to the survivor of them. Upon all interest moneys collected on said bonds there is to be retained by the undersigned for its services in the premises 2% of the amount so collected; this receipt is executed in triplicate.

"Commercial Trust Company of New Jersey,

"By J. W. Hardenbergh, President.

"Attest: [Seal] Wm. J. Field, Secretary.

"The deposit of the bonds with the Commercial Trust Company of New Jersey and the terms upon which said trust company is to hold and deliver over the said bonds and to collect and pay over the interest thereon as set forth in the above receipt is hereby ratified and confirmed.

"Dated February, 1913.

Fr. Wesche.

"Helene J. v. Schierholz."

That on or about June 19, 1918, petitioner's predecessor in office, acting under the authority of said act and executive orders, after investigation, determined that said Mrs. von Schierholz was an enemy within the meaning of said act, and thereafter demanded the trust company to deliver to him all said securities and cash so held in trust. That on or about March 28, 1919, the trust company reported to the petitioner that it held, for the benefit of Wesche and Schierholz, additional sums of money, designated respectively as "checking account"

and "trust account." That on or about the last-named date the petitioner acting under said act and executive orders, further demanded the trust company to deliver to him the said cash moneys and certain securities therein described.

In these demands (copies of which were annexed to the petition and made a part thereof) it is recited that they are made pursuant to the authority vested in the Alien Property Custodian by the Trading with the Enemy Act and the amendments thereto and the proclamations and executive orders issued thereunder, and that after investigation the Custodian determined that the said Mrs. von Schierholz was an enemy within the purview and meaning of the said act, not holding a license granted by the President. The later of the two demands, dated March 28, 1919, declared that the therein described securities and income accrued and collected thereon were by the trust company "owing and held for, on account of, on behalf of, and for the benefit" of the said Mrs. von Schierholz, and that the Custodian seized the same and required that the securities be conveyed to him, and that the cash therein specified be delivered to him, both securities and cash to be held by him as such Custodian, to be administered and accounted for by him as provided by law.

The petitioner further alleged that, by virtue of said determinations and demands made by petitioner and his predecessor in office, petitioner, as Custodian, was vested with all the beneficial interest in said moneys and other properties, and that by virtue of said act and executive orders and the facts alleged in the petition he was the only person entitled to the said moneys and property, but that the trust company refused, and continues to refuse, to recognize his authority as Custodian, and refuses to deliver said money or property to him.

On the filing of such petition a rule was issued, requiring the trust company to turn over such moneys and properties to the petitioner, or show cause why an order should not be made requiring it to do so. On the hearing of this rule the trust company appeared and filed its answer, setting up a number of grounds for refusing to obey such demands. These may be grouped under two heads: First, that the Alien Property Custodian has not shown that he has complied with the provisions of the Trading with the Enemy Act, so as to entitle him to the possession of these properties; and, second, that, having appealed to a court of equity to enforce his demands, that court will determine the question of title or interest in such properties, and award possession to the Custodian only of such properties as belong to or are held for the benefit of an enemy.

Section 5 (a) of the act provides that:

"The President may exercise any power or authority conferred by this act through such officer or officers as he shall direct."

Section 6 authorizes him to appoint an Alien Property Custodian, who is "empowered to receive all money and property in the United States due or belonging to an enemy." By executive order of October 12, 1917, the President vested in the Alien Property Custodian, an officer appointed under the act, "the executive administration of all the provisions of section 7 (a), section 7 (c) and section 7 (d)" of the act, "in-

cluding the power and authority conferred upon the President by the provisions of section 7 (c)." By executive order of December 3, 1918, the President vested in such Custodian "the executive administration of all of the provisions of subsection (c) of section 7" of the act as amended by the Act of November 4, 1918.

The Custodian's demands upon the trust company were made under section 7 (c) of the Act, the later demand after such subsection had been amended. As amended, this subsection, so far as pertinent to the present inquiry, reads:

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

Section 7 (e) provides:

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

[1] By these excerpts it is manifest that the Custodian, as the representative of the President, had ample authority to determine, after investigation, whether property was held for or on behalf of an enemy, and to insist that such property be turned over to him, if held for an enemy. *Stoehr v. Wallace* (decided February 28, 1921) 255 U. S. 239, 41 Sup. Ct. 293, 65 L. Ed. —. And the trust company will be fully protected on a compliance with the Custodian's demands. *Garvan v. Marconi Wireless Telegraph Co. of America* (decided by this court) 275 Fed. 486, and cases therein cited.

[2] However, while the making of such determinations and demands with reference to the properties in question is not disputed, it is insisted that the preliminary investigation required by the act was not made. But this challenge is met by the positive assertion in the determinations and demands that investigation was made. This precludes any further inquiry in proceedings like the present, instituted under section 17 of the act, which are merely possessory. *Central Union Trust Co. of N. Y. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. Ed. —; *Stoehr v. Garvan*, supra.

[3] The trust company also claims that at most but a part of this property is owned by Mrs. von Schierholz, and that a proper investigation would have revealed that fact. Under the trust agreement herein set out the trust company held the securities therein referred to and the interest money to be derived therefrom, in trust "for the joint account of the said Frederick Wesche and Helene J. von Schierholz," and it was obligated to deliver or pay over such securities and interest "to either the said Frederick Wesche or to the said Helene J. von Schierholz, or to the survivor of them." So far as the trust company was concerned, it made no difference what were the relative rights of

the cestuis que trustent in and to these moneys and securities. It was bound to deliver them to either on demand. This being so, if either of these persons was an enemy within the meaning of the Trading with the Enemy Act, the Alien Property Custodian, by taking the requisite steps under the act, which he did, would be substituted in the place of the enemy, and entitled to demand and recover the trust fund. By section 2 of this act "any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war" is an enemy within the meaning and purpose of the act. This definition embraces Mrs. von Schierholz, for she was a resident of Germany, which, at the time of the determinations and demands, was enemy territory.

The trust company concededly is but a trustee of these properties. Its contractual obligation to its cestuis que trustent was superseded by the duty cast upon it by the Trading with the Enemy Act. On the demands made by the Custodian it was its duty to comply with them in every particular.

[4] The question whether Wesche, or any other person other than Mrs. von Schierholz, has any title or interest in these moneys and securities, can be raised only by filing a claim and instituting the proceedings as provided by section 9 of the act. *Stoehr v. Garvan*, supra; *American Exchange National Bank v. Garvan* (C. C. A. 2) 273 Fed. 43. This section, as amended June 5, 1920 (41 Stat. 977, c. 241), long before the present suit was brought, amply protects the rights of claimants to properties taken over by the Alien Property Custodian, and a determination of such rights has no place in the present proceedings, which, as noted, are purely possessory in character.

[5] In the instant case the trust company's report to the Custodian showed that Mrs. von Schierholz was a resident of enemy territory, and that under the trust agreement she had a right to demand of the trust company that the moneys and securities in question be turned over to her. On that report alone the Custodian could justly determine that the properties were held for an enemy. Having so determined, his right to secure them cannot be resisted or questioned by the trust company. This conclusion renders it unnecessary to consider any of the other grounds stated in the answer or briefs.

The rule is made absolute.

PUMMILLI v. RIORDAN, Internal Revenue Collector.

(District Court, W. D. New York, November 22, 1920. On Rehearing, June 24, 1921.)

1. Internal revenue ⇨2—Provision for civil remedy and criminal punishment held valid.

A provision assessing a tax, and with a penalty declared not to absolve from criminal liability, is not invalid as to provision for both civil remedy and criminal prosecution.

2. Internal revenue ⇨2—Provisions of Internal Revenue Act for collections held not repealed by National Prohibition Act.

Procedure for collecting the taxes assessed under the National Prohibition Act for illegal manufacture or sale of liquor with additional penalty is governed by the Internal Revenue Law; such procedure not being inconsistent with the Prohibition Act and not repealed by implication.

On Rehearing.

3. Internal revenue ⇨28—Collection of taxes and penalty for illegal manufacture and sale cannot be enjoined.

As the provisions of the Internal Revenue Act for collection apply to the taxes and penalty under the National Prohibition Act for illegal manufacture and sale, collection thereunder cannot be restrained; there being adequate remedy by proceedings to obtain a refund, and subsequent suit, if necessary, for recovery.

4. Internal revenue ⇨28—Existence of other license as defeating tax and penalty cannot be determined on application for injunction, which does not lie, to restrain collection.

As injunction does not lie to restrain collection of tax and penalty under the National Prohibition Act by the internal revenue collector, the contention that the petitioners owed no tax, because they had paid annual retailers' license fee, which had not expired, was not determinable in a suit for injunction.

In Equity. Bill for injunction by Fillippo Pummilli against Vincent H. Riordan, as Collector of Internal Revenue. On motion for injunction pendente lite. Motion for rehearing denied, and all injunctions vacated.

George P. Keating, of Buffalo, N. Y., for plaintiff.

Edward N. Mills, Asst. U. S. Atty., of Buffalo, N. Y., for defendant.

HAZEL, District Judge. This is a motion in an action in equity to restrain the Collector of Internal Revenue for this district from collecting taxes and penalties levied by him upon the plaintiff under the provisions of section 35 of the National Prohibition Act (41 Stat. 317). The assessment and accruing penalty amount to \$533.76. The bill avers that the plaintiff sold beer in the city of Buffalo containing an alcoholic content, as claimed by the Commissioner of Internal Revenue, in excess of one-half of 1 per cent., in violation of the National Prohibition Act, commonly known as the Volstead Act; that no revenue taxes are collectible for the manufacture and sale of beer, since such manufacture and sale is prohibited by law; that the assessment and penalties imposed are for violations of the criminal statute, and not for

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

violation of any revenue laws, and accordingly the assessment and levy in question is unlawful, and not legally collectible, since all penalties in violation of the Volstead Act are penalties for crimes and misdemeanors, and not for nonpayment of taxes. The government objected to the jurisdiction of the court, and sought a cancellation of the temporary stay on the ground that the bill is without equity.

Title I, section 2, and title II, section 2, of the act under consideration, vest certain powers and duties in the Commissioner of Internal Revenue, his assistants, agents, and inspectors, in the prosecution of offenders, and in having them held for the grand jury. By section 28 power is vested in such officers to enforce the provisions of the Volstead Act, or any provision thereof, which is conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors under the law of the United States, and section 35 reads:

"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 any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

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

[1] It seems reasonably clear that Congress intended to repeal only such parts of the existing laws as are inconsistent with this act, while any provisions remaining in harmony therewith were retained. For violating the Volstead Act by manufacturing or dealing in intoxicating liquor a person is not relieved from paying taxes or other charges imposed by the Commissioner simply because he also subjects himself to criminal liability. Although no tax receipts are issuable by the collector of internal revenue in advance, or licenses granted for manufacturing or dealing in such liquor, still persons who disobey the law subject themselves to a double liability, viz. punishment for criminal violation, and assessment of a tax against them to be collected as section 35 states "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." Such a provision for both a civil remedy and a criminal punishment is not void. *U. S. v. One Ford Automobile and Fourteen Packages of Distilled Spirits (C. C. A.)* 262 Fed. 374.

The regulations embodied in the National Prohibition Act, it will be observed, are an addition to the existing laws. It is true that, before

there may be an assessment with a penalty, there must be evidence of illegal manufacture or sale; but the term "evidence" implies a state of facts from which inferences may be drawn as to the existing facts, and does not, in my opinion, mean judicial evidence received under the rules of legal procedure. Although it is not specified that the tax assessed for illegal manufacture or sale may be collected by summary procedure, still I think effect must be given to section 28, which makes clear the intention of Congress that the Commissioner of Internal Revenue retained under the Volstead Act the power which existed at the time of its enactment for enforcing criminal laws relating to the manufacture or sale of intoxicating liquors, or any provision thereof which is conferred by law for the enforcement of existing laws, etc. See, also, section 23. Congress is presumed to have been familiar with the law that no suit for the purpose of restraining the assessment or collection of any tax is maintainable in any court, and no doubt purposely retained the enforcement of the taxing feature for illegal manufacture or sale according to the existing revenue laws.

Importance is attached to the authority given the Commissioner to compromise any civil cause arising under title II, and it is argued that a fair construction of the clause is that penalties imposed must be recovered in a civil action or recovered as an additional penalty in a sentence after conviction by the trial court. But any such construction of the phrase "civil cause" would be illiberal, in view of the character of civil actions that may be brought in the name of the United States under the provisions of the act.

The case cited by the plaintiff in support of his main contention, *U. S. v. Windham* (D. C.) 264 Fed. 376, is not believed applicable. The defendant in that case was criminally indicted under the internal revenue laws after the Volstead Act was passed, and the court held that the latter act, in this particular, was inconsistent with the statute under which the indictment was found. The former act no doubt was superseded by the later as to the character of the offenses arising from illegal dealing in intoxicating liquor. The penalties for similar offenses were different, and, as stated by the learned court, the existing provisions providing for punishment were repealed to that extent. In this case, however, we are not concerned with the criminal feature of the revenue laws, or with an attempt to try an offender twice, or punish him twice, for the same offense.

[2] The sole question is whether the tax and charges for illegal dealing imposed by the Commissioner of Internal Revenue under the provisions of the act are collectible by the mode of procedure prescribed by the existing internal revenue law, or whether its enforcement is required by criminal prosecution or in a civil action. The answer is that the procedure for collecting the taxes assessed for the illegal manufacture or sale of liquor with the additional penalty is governed by the internal revenue law, and such procedure in my opinion is not inconsistent with the National Prohibition Act, and is not repealed by implication. In *U. S. v. Yugini* (D. C.) 266 Fed. 746, the court broadly held that one who manufactures liquor in violation of the Prohibition Act, though liable for the tax thereon, must nevertheless be proceeded

against under the Prohibition Act, and not the revenue statute. But this decision was in a criminal case, wherein the defendant was indicted for violation of the Internal Revenue Act and the court, as I read the opinion, held (properly, I think) that a prosecution by indictment for engaging in the business of a distiller without having paid the tax required by law must be under the Prohibition Act, and not the revenue statute.

The motion is denied.

On Rehearing.

On reargument on application of Fillippo Pummilli, and the following interveners: Harold S. Gall, Herbert Skerrit, Henry C. Heinike, George Ahmler, Robert Arnold, Edward Golwitzer, John Leyden, F. L. Heitzman, William Metzger, H. W. Zimmerman, F. W. Lang, Nate Fenton, Daniel Montgomery, Godfrey Prenevau, Max Sellers, and separate suits against George B. Wende, as acting Collector of Internal Revenue, by Max Lubelski, by Charles Fix and Frank F. Fix, by Joseph L. Schneider, by Louis Smith, by Frances Bauer, by Salvatore Agnello, by Peter Varlan, by Raymond A. Nunn, by Frank J. Kolb, by Michael A. Zeller, by John A. Dicks, by Frank J. Schulte, by William McDonald, by Willey H. Almy, and by James Sbarbati, and against Bert P. Gage, Collector of Internal Revenue, by Thomas McCormick.

George P. Keating, of Buffalo, N. Y., for Pummilli, Heitzman, Metzger, Zimmerman, and Lang.

Goldring & Sherman, of Buffalo, N. Y., for Fenton.

William W. Dickinson, of Buffalo, N. Y., for Lubelski and Schneider.

Ernest W. McIntyre, of Buffalo, N. Y., for Heinike, Skerrit, Golwitzer, Arnold, Ahmler, Leyden, Gall, Montgomery, and Prenevau. Stanley & Gidley, of Buffalo, N. Y., for Charles and Frank F. Fix.

Corcoran & Corcoran, of Buffalo, N. Y., for Smith.

G. H. Wende, of Los Angeles, Cal., for Bauer.

William J. Brock, of Buffalo, N. Y., for Sellers.

Watts, Hunt & Findlay, of Niagara Falls, N. Y., for McCormick, McDonald, and Sbarbati.

Doyle & Corcoran, of Rochester, N. Y., for Agnello, Varlan, Nunn, Kolb, Zeller, Dicks, and Schulte.

Harry H. Servis, of Rochester, N. Y., for Almy.

HAZEL, District Judge. Since filing the original opinion prepared by this court herein, the Supreme Court, in *U. S. v. Yuginovich*, 256 U. S. —, 41 S. Ct. 551, 65 L. Ed. — (decided June 1, 1921), construed section 35 of the National Prohibition Act to mean that the intention of Congress was to retain the prior revenue laws in so far as they were not inconsistent with the National Prohibition Act, and that Congress had the right, under its taxing power, to tax intoxicating liquors notwithstanding their illegal manufacture or sale, and prescribe penalties for violations. Such is the prior holding of this court in this case.

The Supreme Court, it is contended, did not, however, directly pass upon the question of how the additional penalty of \$500 on retail dealers and \$1,000 on manufacturers was to be assessed and collected—whether in a civil action or by distraint and sale under section 3187, R. S. (Comp. St. § 5909). It was my original opinion that the assessment of a double tax, including the additional penalty, was collectible by distraint and sale; but since filing the opinion several decisions rendered in other jurisdictions expressing views to the contrary have been shown me, and I have therefore re-examined the questions involved in these cases. Such adjudications are: *Accardo v. Fontenot* (D. C.) 269 Fed. 447; *Kausch v. Moore* (D. C.) 268 Fed. 668; *Thome v. Lynch*, (D. C.) 269 Fed. 995.

In the *Accardo Case* Judge Foster ruled that the taxes and penalties under section 35 of the National Prohibition Act were merely additional penalties for violation of a criminal statute, and that a suit to enjoin collection was maintainable, since the correct determination of the question involved depended upon the construction of provisions under which the assessment was made.

In the *Kausch Case* it was held by Judge Faris that it was the duty of the plaintiff in that case, who sought to enjoin the collector, to pay all taxes assessed, and that for failure to pay distraint was warranted, but that, since the additional penalty in his opinion was punitive, the collector did not have the right to distraint the plaintiff's property for its collection, as section 3224, R. S. (Comp. St. § 5947), does not apply to such a penalty.

In the *Thome Case* Judge Booth also held that the collector of internal revenue, though authorized to collect taxes by distraint, could not collect penalties in general by that method, except the 5 per cent. penalty added under section 3184, which were the penalties that could properly be taxed.

In the *Yuginovich Case*, *supra*, the Supreme Court had before it an indictment charging defendant with unlawfully engaging in the business of a distiller and defrauding the United States of the tax on spirits. The question was whether the defendant could be punished under section 3257, R. S. (Comp. St. § 5997) providing for forfeitures and fines, and also whether he was punishable for violating section 35 of the Volstead Act. It is substantially stated in the opinion of the court that section 35 must be construed in the light of legal principles governing the interpretation of statutes, and that, though Congress manifested an evident intention to tax liquors illegally, as well as those legally, produced, yet it did not intend to preserve old penalties in addition to the specific punishments provided by the Volstead Act for a violation.

The collection of the assessed double tax and penalty with which we are concerned, as heretofore stated, is specifically included in section 35, and at least by inference it may be adduced that the Supreme Court regarded such penalty as a part of the tax, and that manufacturers or traffickers in intoxicating liquor were subject thereto, and moreover that the assessment was distinguishable from a criminal penalty.

In support of my former conclusion the case of Regal Drug Corporation v. Wardell, 273 Fed. 182, recently decided by the Circuit Court of Appeals for the Ninth Circuit, is instructive. There the precise question here considered was determined against the plaintiff, who sought to enjoin the collector from enforcing the tax and additional penalty. It was contended there, as here, that the liability of the offender was for the penalty and not for a tax, and that the penalty could be enforced only by proceedings in court, and not by a summary proceeding of an assessment. But the court in answer quoted section 3220 of the Revised Statutes (Comp. St. § 5944), wherein it is substantially provided that the Commissioner of Internal Revenue had the power to remit, refund, or pay back all taxes erroneously or illegally assessed or collected, including all penalties collected without authority, and since it did not appear that the plaintiff had sought to have such erroneous taxes and penalties remitted or refunded to him, as provided by statute, the court was required to give effect to section 3226, R. S. (Comp. St. § 5949), which provides that no suit shall be maintained in any court for the recovery of an internal tax or penalty, etc., and upon the authority of *Cheatham v. U. S.*, 92 U. S. 85, 23 L. Ed. 561, and *Dodge v. Osborn*, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557, it was decided that the suit in equity could not be maintained, since the remedy for erroneous assessment and collection was in an action to recover back the tax and penalty after payment. *Snyder v. Marks*, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901. In *Appell v. Miles*, a suit pending in the Supreme Court of the District of Columbia, the bill asking for temporary injunction to restrain the collection of the double tax and penalty was vacated. Although no written opinion was filed in that case, it may be presumed that the court based its conclusion upon the decision by the Supreme Court in the *Yuginovich* Case.

[3] The question presented is not, in my opinion, free from difficulty and doubt, but I nevertheless think that those actions to restrain the collector of internal revenue cannot now be maintained, since there is a plain, adequate, and complete remedy at law. *Regal Drug Corporation v. Wardell*, supra; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035. Under section 3226, R. S., such a suit for the recovery of an internal tax or penalty improperly collected may not be brought until after the Commissioner, to whom an appeal must be taken, has delayed making a decision for more than six months.

[4] It is also contended by plaintiff Pummilli and several interveners that they have paid the annual retailer's license fee, amounting to \$25; that the license did not expire until July 1, 1920, and hence no tax was owing to the government or collectible at the time the assessments were made. But any questions of that character are not determinable here.

The applications for rehearing are denied, and all injunctions are vacated.

In re DISPOSITION OF CERTAIN INTOXICATING LIQUORS.

(District Court, W. D. Pennsylvania. March 18, 1921.)

No. 4892.

Intoxicating liquors ⇐251—Evidence held insufficient to sustain claim to seized liquors.

Evidence *held* insufficient to sustain claim that liquors seized by the government in shipment were the property of claimant, and had been stolen from him and reshipped when seized.

In the matter of the disposition of certain intoxicating liquors. On petition of the United States Attorney and answer claiming ownership by Julius B. Press. Order denying return of liquor to claimant and directing sale thereof by the marshal.

The United States Attorney, pro se.

ORR, District Judge. On the 23d of December, 1920, the United States Attorney presented a petition for the disposition of intoxicating liquors under section 27, title 2, of the National Prohibition Act. 41 Stat. 305. The subject-matter of the petition was a large quantity of whisky, which had been seized by the prohibition officers on a railroad siding at Glenshaw, in the county of Allegheny, within this district, and not far from the city of Pittsburgh. The petition discloses that the said car was shipped from Atlantic City, N. J., in the name of James Baker, and consigned to Philip Logomaresia of Pittsburgh; that said seizure was made on the 8th of November, 1920; that no such person as the consignee had been found, and that no person acting for the consignee or otherwise had claimed the whisky; that on November 9, 1920, by order of this court, the said whisky had been turned over to the marshal of this district, who had placed it in a storage warehouse, thus incurring expense of drayage, watchman, storage, etc.

On the presentation of said petition, which was duly verified by the affidavit of the marshal, this court granted a rule to show cause why the said whisky should not be offered for sale under the provisions of the National Prohibition Act, and directed that notice of the rule should be served on the said James Baker and Philip Logomaresia, wherever found, and that, if personal service could not be made, then notice of the rule should be published for an appropriate time in a newspaper published at Atlantic City, N. J., and in the city of Pittsburgh, and that the rule should also be served upon the carrier.

The proofs of publication of the notice of the rule show that the first publication of the notice in the Atlantic City Gazette-Review was on January 1, 1921, and that the first publication in the Pittsburgh Post was on December 31, 1920. On the date last mentioned, Julius B. Press, of Atlantic City, by his attorney having an office at said place, presented his petition to this court, briefly averring that the said whisky was his, and had been stolen from him on or about the 7th day of November, 1920, and praying to be admitted as an intervening respondent, with leave to file an answer. On the same day this court

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

made an order that the said Julius B. Press be admitted as an intervening respondent, with leave to file an answer to the petition of the United States Attorney. On the same day, the said Press presented his petition, and procured an order of this court thereon for the taking of the depositions of two employees of the American Railway Express Company at Atlantic City.

Upon January 4, 1921, the said Julius B. Press filed his answer to the petition of the United States Attorney for this district, in which he sets forth his claim of title to the said whisky and avers with more detail, his story of how the whisky was stolen from him. In the second paragraph of his answer, he makes this statement:

"That he does not know either the said Baker or the said Logomaresia."

After averring that he is the holder of a lawful permit to sell intoxicating liquors to others and the proper authorization for the withdrawal of 1,000 cases of whisky from a distilling company at Troy, Ohio, and the shipment by said company to the respondent, he proceeds:

"(3) That respondent received at Atlantic City, N. J., on November 6, 1920, an express car containing 1,000 cases of whisky from the Hayner Distilling Company, for which respondent paid the express charges and concerning which respondent instructed his confidential clerk, one Roy Zeigler, to unload and place in respondent's warehouse at Atlantic City, N. J.

"(4) That respondent then proceeded to Newark, N. J., on other business; that upon his return on November 9, he learned that said Zeigler had never unloaded said car, but on the following day, to wit, November 7, 1920, had called upon the agents of the Express Company in Atlantic City, N. J., in company with one James Baker, who is entirely unknown to respondent, and had presented their government papers, under the law, directing a shipment of 1,000 cases of whisky from Baker to one Logomaresia, of Pittsburgh, Pa., that respondent immediately endeavored to locate his property, and found that it had previously been seized by United States government officers at a place called Glenshaw, Pa., which respondent is informed is somewhere near Pittsburgh, Pa.

"(5) That the whisky concerning which the petition of the United States District Attorney for the Western district of Pennsylvania, has been filed are the goods of respondent and were stolen from respondent either by Zeigler or Baker or Logomaresia, or by a conspiracy between two or all of them."

I am constrained to hold that the said Julius B. Press has not sustained his claim in this case. On the witness stand he detailed a story of which many parts are corroborated, but which in the material parts lacks corroboration, where corroboration could be supplied by him. His positive statement in his answer that he does not know "the said Logomaresia" is consistent with his statements in letters written to prohibition agents about the said whisky, but it is not a full statement with respect to Philip Logomaresia so far as the respondent had dealings with one who went by that name. The very first sale made by the respondent after engaging in business in the summer of 1920, according to his books, was to Philip Logomaresia, and it was a sale of no small quantity. One week later he made another sale to a person by the same name, and the place of business of the said Logomaresia, as it appears upon respondent's books with reference to above sales, was 1154 Main street, Reading, Pa. The respondent on the witness

stand admitted that he had never, at any time, gone to Reading in search of Philip Logomaresia. He further admitted that he did not come to Pittsburgh in search of Philip Logomaresia, and did nothing with respect to the recovery of the whisky in and about Pittsburgh, except to call one Martin Burk by telephone to ascertain whether the whisky seized at Glenshaw was Hayner whisky. He stated on the stand that Roy Zeigler, who he thought was his confidential clerk, had informed him, when first employed at Atlantic City, that he had been a resident of Pittsburgh, and the claimant never came to Pittsburgh, or took any steps to have any one else search around Pittsburgh for the said Zeigler. Further, in other particulars, the conduct of the claimant was wholly inconsistent with that of a man who had been robbed of \$25,000 worth of property.

On November 3, 1920, the Hayner Distilling Company caused to be shipped by express at Troy, Ohio, 1,000 cases of whisky in Lehigh Valley car No. 518. The agent of the express company at Troy, Ohio, checked the packages and they were in proper form with the name of the shipper, the serial number, and the name of the consignee, Julius B. Press, marked on each case. On the evening of the 5th of November, 1920, said car arrived at Atlantic City, the place to which it was consigned. On the morning of the 6th the claimant, with Zeigler, appeared at the office of the express company and the claimant paid a large amount of expressage. He testified that he told Zeigler to unload the whisky, place it in his storehouse, and give the keys to his wife, and thereupon soon after the claimant took the train for Newark and New York. That he told Zeigler something to that effect was corroborated by an employee of the express company, who overheard the conversation. It appears, from the evidence of the employees of the express company, that deliveries by the express company of consignments such as that in said car were made at night, after the light business of the day had ceased. There was no delivery made of the contents of that car to claimant's warehouse that night, or at any other time. On the 7th of November, 1920, said car with its contents was reconsigned by a man purporting to have the name of James Baker, who paid the expressage thereon, to the said Philip Logomaresia, at Glenshaw, Pa. The said Baker was accompanied by the said confidential clerk, Zeigler, and there was as well with them on the platform three men, more or less intimately associated with the claimant. They were Keuben Lippman, Fred Chase, and Samuel Press, the latter the son of the claimant. Sam Press and Chase had re-marked the shipments. By re-marking the shipments, as found to be a fact in accordance with the testimony of W. D. Adams, a witness called for the claimant, must be meant the obliteration of the serial numbers and other marks on the cases of whisky in said car, for the most, if not all, of the cases found in said car by the prohibition agents at Glenshaw had such marks obliterated.

It is unnecessary to comment upon the precise relationship of either of these three men named, other than Baker and Zeigler; but it is important to note that Sam Press, the son of the claimant, was present just before the car moved out and was engaged in re-marking the ship-

ment. Sam Press was not called by the claimant as a witness in his behalf. While the final hearing in this matter did not take place until Friday, March 11, 1921, the depositions taken by and on behalf of the claimant, were taken on the 20th day of January, 1921, at Atlantic City, and on the date last mentioned the claimant must have learned from the testimony of an employee of the express company that his son and Lippman had visited the car together.

[2] Furthermore, so far as appears, there were 1,000 cases in that car when it was originally shipped from Troy, Ohio; but when it was seized at Glenshaw, so far as the record shows, there were but 800 cases. The claimant had it in his power to have the testimony of his son taken, if not the testimony of Lippman, Chase, or Zeigler, who, the claimant says, have disappeared. He has not produced the testimony of his son, either by deposition or in person, and it is fair to assume that, because he did not do so, the testimony of the son, if truthful, would not support the claimant's case, or that the father would not impose upon his son a temptation to commit perjury. There can be no comment made upon the failure of the government to have any of the persons named produced. Lippman, Chase, and Zeigler were not where they could be found, and the government could not safely compel Sam Press to testify in the case.

The claimant testified that he learned of the missing whisky on the afternoon or evening of the 9th of November, upon his return from Newark, and that before his return to Atlantic City he had read in the newspaper of the seizure of the whisky at Glenshaw. His conduct was more directed towards straightening out the matters with the prohibition officers, so that the whisky could be returned to him, than it was towards seeking punishment and getting restitution from those who had, as he says, robbed him of \$25,000 worth of property.

From what has been found as facts, as hereinbefore set forth, and from the inferences lawfully to be drawn from the testimony, the plaintiff has not sustained his claim, and therefore an order may be presented, denying to him the return of the liquor, and directing the sale thereof by the marshal.

NATIONAL CITY BANK OF NEW YORK v. UNITED STATES.

(District Court, S. D. New York. March 8, 1921.)

1. War ☞14—Plaintiff bank held "person entitled to receive" compensation under Lever Act.

Where bank paid for coffee on account of a Russian company, its payment therefor resulting in an overdraft by the company of \$94,000, secured by a lien on the coffee, and the coffee was later commandeered under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½(1)), and the government paid 75 per cent. of the award therefor, or \$313,000, to the bank, thus wiping out the overdraft, the bank, holding the legal title to the coffee under General Business Law N. Y., § 125, by virtue of negotiable warehouse receipts issued to it, was entitled to sue the government for the balance of the compensation due under the Lever Act, as the "person entitled to receive" such compensation as trustee for its principal the Russian company; such right not being affected by the fact that

neither the bank nor the company were licensed under proclamation of the President of January 30, 1918, as neither the bank nor the company were engaged in importing or exporting or distributing coffee in this country, nor by the further fact that part of the coffee was sold by the company in Russia, there being no showing that the vendees there acquired title.

2. Eminent domain Ⓒ69—**War power does not abrogate constitutional guaranties of Fifth Amendment.**

Const. art. 1, § 8, cl. 11, conferring on Congress power to declare war, does not abrogate the constitutional guaranty contained in the Fifth Amendment.

3. Constitutional law Ⓒ54, 79—**Fixing compensation for property taken for public use is judicial question.**

The executive officers of the government have no power to fix compensation for property taken by the government, nor can the Congress determine by statute what is just compensation; but the question is judicial, and can be determined only by the courts.

4. Eminent domain Ⓒ131—**"Just compensation" is fair market value.**

The just compensation guaranteed by the Constitution is the fair market value of the property taken, and the market must be a free market, as prices prevailing in a market not free are not the measure of compensation.

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

5. War Ⓒ14—**"Just compensation," under Lever Act, is free market value.**

"Just compensation" for property taken under Lever Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), is the free market value thereof, not cost plus 5 per cent.; the governmental power to fix prices in ordinary trading or commercial transactions not authorizing the government itself to acquire property in invitum at such reduced prices.

At Law. Action by the National City Bank of New York against the United States. Judgment for plaintiff.

Shearman & Sterling, of New York City (Carl A. Mead and Philip A. Carroll, both of New York City, of counsel), for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., and Theodor Megaarden, Sp. Asst. U. S. Atty., both of New York City, of counsel), for the United States.

MAYER, District Judge. This case is brought under section 10 of the so-called Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii) to recover such sum as, added to 75 per cent. of the award made by the President, will constitute "just compensation" for 20,000 bags of Santos and Guatemala coffee commandeered by the Navy Department in November, 1918. For the purpose of this proceeding it is agreed that the coffee weighed 2,737,064 pounds, and consisted one-half of Santos and one-half of washed Guatemala of certain grades.

Section 10 of the act, supra, provided:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the

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

United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies. * * *

The two main questions here presented are: (1) Whether plaintiff can maintain this action as "the person entitled to receive" compensation; and (2) what is "just compensation"?

[1] 1. The coffee here concerned was imported by coffee dealers at various dates, but in any event all was imported prior to January 18, 1918. On that date the coffee was brought on a cable order from North Oceanic Steamship & Trading Company, a Russian corporation located at Archangel (hereinafter called the Russian Company) to Francisconi & Co., a New York firm. The coffee was purchased for export to Northern Russia, where there was great need of foodstuffs. Plaintiff (hereinafter called the Bank) paid for this coffee under a letter of credit in favor of Francisconi & Co. and Hard & Rand, coffee dealers, for account of the Russian corporation. These payments resulted in an overdraft, which on November 21, 1918, amounted to \$13,324.60, and on July 5, 1919, amounted, according to the Bank's figures, to \$94,312.42. The overdrafts were secured by a lien upon the coffee, and the warehouse receipts for the coffee were taken in the Bank's name.

On November 21, 1918, the navy commandeered the coffee. On February 17, 1919, the government awarded the sum of \$423,536.69 at the price of 15.29 cents per pound f. o. b. warehouse as compensation for the coffee. On July 5, 1919, the Bank notified the government that the award was not satisfactory. The government on August 26, 1919, paid 75 per cent thereof—i. e., \$313,356.77—to the bank; the debit balance in favor of the Bank being at that time \$94,763.61. This debit balance was wiped out by the payment aforesaid, and on September 19, 1919, when this action was commenced, there was nothing due the bank.

At the outset, it may be stated that the evidence clearly leads to the conclusion that the coffee was seized and that the award was made under the so-called Lever Act, and not under other provisions of law. At the time when the coffee was purchased by the Russian Company, the provisions of the Lever Act and the rules and regulations of the United States Food Administration had not been extended to coffee. On January 30, 1918, however, the President placed green coffee on the conservation list by a proclamation which read in part as follows (40 Stat. pt. 2, p. 1742):

"All persons, firms, corporations, and associations engaged in the business of importing or distributing green coffee are hereby required to procure a license on or before February 4, 1918."

Clearly the Bank was not then engaged in the business either of importing or distributing coffee, and neither the proclamation nor the rules applied to it, and the Russian Company was not then engaged in the business of importing coffee. But it is claimed that the Russian Company was engaged in the business of distributing. The coffee was purchased for export, and, had it been attempted to export the same,

there was a regulation made in March, 1918, which required a license to export green coffee.

No attempt was ever made either by the Bank or the Russian Company to distribute the coffee here. The Bolsheviki had cut off Archangel from the rest of Russia in April, 1918, and the Allies did not drive them out until August, 1918. Later, under the Tchajkowsky government, one Danischewski, who was the managing director of the Russian Company, became a member of the Supply Committee of the Northern Region government, whose object was to supply Northern Russia with all kinds of food. He then sought to send the coffee and other food supplies to Archangel.

The coffee was intended for the use of the Northern District, under the control of the Archangel government. A large part of it was sold to the Northern Region Supply Company, which was organized by and under the control of that government. Danischewski was not in the United States between February and December, 1918. He was sent to the United States by the Supply Committee of the Northern Region Government, but he did not arrive here until March, 1919. Until his arrival here he had no knowledge of the American regulations in regard to dealing in coffee. He never made any contract to sell the coffee in America, and made no effort to do so until after he had heard that it had been commandeered by the government. The futile efforts of the Russian Company, per Danischewski, to supply coffee in Northern Russia, took the form of sales made there, and not here, in June, July, and September, 1918.

The proclamation of the President, *supra*, and the rules made thereunder, cannot be strained to cover attempted distribution in Russia by sales made in Russia, when there was no exporting, and hence no need for a license to export, and when the Russian Company was neither engaged in importing coffee here nor distributing it here. This disposes, *inter alia*, of the contention that the Bank or the Russian Company was hoarding, contrary to rule 5, because that rule applied only to licensees, and neither the Bank nor the Russian Company was required to be a licensee under the President's proclamation.

It thus appears that on November 21, 1918, when the Navy Board commandeered this coffee, as it had the right to do, the Bank had the legal title to the coffee, and had its lien thereon, and was holding the coffee lawfully, and that the Russian Company's beneficial interest was lawfully held. At any time up to August 26, 1919, when the government paid 75 per cent. of the award, the Bank was clearly the "person entitled to receive compensation," and was so recognized by the government. When the Bank received that compensation, it became a trustee to pay over to the rightful owners the balance after retaining the amount due it. But its duty did not end there.

The warehouse receipts had all issued to the order of the Bank and were negotiable; hence they gave to the Bank the legal title to the coffee. New York General Business Law (Consol. Laws, c. 20) § 125. This section, which is a provision of the Uniform Warehouse Law, contains the following:

"A person to whom a negotiable receipt has been duly negotiated acquires thereby:

"(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value."

In this case, the Bank itself, acting, however, for account of the owners, was the depositor of the goods. Its act in depositing the goods in the warehouse was the act of the owners, who were, accordingly, under the provision of this section, the depositors of the coffee and had full power to convey the title to it. The Bank, under this section, had, by virtue of holding the negotiable warehouse receipts, the title to the coffee, in trust, however, for the owners.

The Bank still held the legal title after its advances had been paid, by virtue of the negotiable warehouse receipts; and it was still a trustee, and, as such, entitled to maintain the action. As trustee it could not stand by and see the property of its principals taken, even by authority of law, and yet make no effort to enforce the remedy accorded by the Lever Act to it as the "person entitled to receive the compensation." Indeed, the attitude of the Bank has been commendable, and has evidenced appreciation of its duty; for the owners were in Russia, and in all the circumstances were unable to protect their rights.

It is plain that the owners, by their course of conduct, had made the Bank their trustee, and that the Bank still remains the trustee, and the government need have no fear that it will be subjected to a double recovery. The attempted sales in Russia in no manner changed the legal status of the Bank, and, for that matter, the legal effect of those sales is not disclosed by the evidence, and whether or not the vendees have title, as we understand that term, has obviously not been shown. It is held, therefore, that the Bank is the proper claimant or party plaintiff.

[2] 2. The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without just compensation. Article 1, § 8, cl. 11, of the Constitution of the United States confers upon the Congress power to declare war. This war power, however, does not abrogate the constitutional guaranty contained in the Fifth Amendment, as has been recently reiterated by the Supreme Court in the Lever Act cases.

[3] The executive officers of the government have no power to fix compensation, nor can the Congress determine by statute what is just compensation. The question is judicial and can be determined only by the courts. *Cooley*, Constitutional Limitations (7th Ed.) 817; *Matter of City of Buffalo*, 139 N. Y. 422, 430-431, 34 N. E. 1103; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, 9 L. Ed. 773; *Mongahela Navigation Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463.

[4] It is the rule of law in condemnation cases that the just compensation guaranteed by the Constitution is the fair market value of the property taken. *Lewis on Eminent Domain* (2d Ed.) § 706, p. 1048;

Kerr v. South Park Commissioners, 117 U. S. 379, 6 Sup. Ct. 801, 29 L. Ed. 924; Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; McGovern v. N. Y., 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391; N. Y. v. Sage, 239 U. S. 57,¹ U. S. v. Chandler-Dunbar Co., 229 U. S. 57, 33 Sup. Ct. 667, 57 L. Ed. 1063. The Chandler-Dunbar Case is a helpful illustration of the principle because the rule was applied in order to prevent the owner from recovering more than the fair market value. There it was contended that the parcel taken possessed "strategic value" with reference to a general scheme of water-front development, such as that for which the property was taken. The court, in disallowing this item of value, said (Mr. Justice Lurton, at 229 U. S. 81, 33 Sup. Ct. 679, 57 L. Ed. 1063):

"The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

Not only is market value the measure of just compensation, but it must be the value in a free market. Prices prevailing in a market which is not free are not the measure of just compensation. Muser v. Magone, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135; Lawrence v. Boston, 119 Mass. 126; Lovejoy v. Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770.

It is well settled that a person whose property is taken is entitled to its market value for the most valuable use, although as matter of fact he did not devote it to that use, and for some reason or other could not do so. In such case, however, he would be free to sell it to a person who could so use it. Matter of Gilroy, 85 Hun. 424-427, 32 N. Y. Supp. 891; Boom Co. v. Patterson, 98 U. S. 403, 409, 25 L. Ed. 206; Goodin v. Cincinnati, etc., Canal Co., 18 Ohio St. 169, 181, 98 Am. Dec. 95; Little Rock Junction Ry. Co. v. Woodruff, 49 Ark. 381-393, 5 S. W. 792, 4 Am. St. Rep. 51; San Diego, etc., Co. v. Neale, 78 Cal. 63, 68, 73, 20 Pac. 372, 3 L. R. A. 83.

[5] Under these decisions it is clear that the provisions of the Lever Act and of the regulations thereunder, attempting to limit the powers of the owner of property, cannot be considered in this proceeding as affecting the value of the property. The government, as a war measure under the exercise of governmental powers, may fix prices, either directly or by governmental regulations necessarily reducing the prices; but this does not authorize it to acquire the property in invitum at such reduced prices. Los Angeles v. Los Angeles Gas Corporations, 251 U. S. 32, 40 Sup. Ct. 76, 64 L. Ed. 121.

The preamble of the Lever Act provided:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the army and navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, * * * hereafter in the act called necessities; to prevent, locally or generally, scarcity, monopolization, boarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution and movement; and to establish and maintain governmental control of such necessities during the war. * * * The President is authorized to make such regulations and to

¹ 36 Sup. Ct. 25, 60 L. Ed. 143.

issue such orders as are essential effectively to carry out the provisions of this act."

To carry out the purposes of the act, the President could make regulations in the way, inter alia, of fixing prices in ordinary trading or commercial transactions; but when the United States itself took foods—i. e., property—it was bound to award just compensation, and what is just compensation under the Constitution is determined by the same legal principles in war as in peace. Adopting the principles stated supra, the testimony shows clearly that there was a free market; not, it is true, a large or comprehensive market, but nevertheless a substantial trading sufficient to characterize a free market.

The Bank produced experienced coffee men, probably the best informed in this trade in respect of the prices of the coffee here under consideration. It is unnecessary to review their testimony in detail, because the data are clearly established. To award only cost plus 5 per cent. profit, as contended by the government, would not be just compensation, constitutionally considered. In all litigations like this, principle must never be departed from. In the long run, the Constitution remains a safe guide, although worthy sentimental considerations, at times, offer temptations to go astray.

The prices, as matter of law, must be ascertained as of the free market of November, 1918. The exact figure to a cent is difficult of ascertainment; but, on the evidence, the market value of the coffee is found to be as follows: Santos, averaging prime, 20 cents; washed Guatemala, averaging prime, 20½ cents. Counsel will make the necessary calculations to work out the exact figures, and judgment will be ordered accordingly.

Submit on five days' notice.

C. G. BLAKE CO. v. UNITED STATES.
(District Court, S. D. Ohio, W. D. March 4, 1921.)
No. 2918.

1. Eminent domain ⇨131—Compensation measured by market value, if there is a market, notwithstanding government regulations, floods, etc., affecting market.

Where one is entitled to compensation based on the value of property, the measure of recovery, where such property can be procured in the market, is its market value, even though such market value is affected by laws and governmental regulations affecting the sale of such property, drouths, floods, commercial panics, crop failures, labor difficulties, or other similar causes; the true value being otherwise determined only where there is no market value.

2. Evidence ⇨113 (21)—Compulsory sales and purchases not indicative of true market value.

Compulsory sales and purchases are not indicative of true market value.

3. War ⇨14—Evidence held to show market value of coal in action against government for compensation for requisitioned coal.

In suit against the United States government for compensation for coal requisitioned under National Defense Act, § 10 (Comp. St. 1918,

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

Comp. St. Ann. Supp. 1919, § 3115½ii), evidence as to the range of prices that obtained throughout seven months at different cities for coal of the same grade as that requisitioned, f. o. b. mines, held sufficient to show a market value, as against contention that the sales were extraordinary, unusual, and forced sales, and therefore not indicative of the true market value.

4. War ⚡14—Compensation for requisitioned coal held measured by market value, and not cost plus a reasonable profit.

Owner of coal requisitioned for the maintenance of the United States Navy under National Defense Act, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), suing the government for "just compensation" under such statute, was entitled to the market value, notwithstanding abnormal condition of market resulting from the war and governmental regulations, and was not limited to the cost of production plus a reasonable profit.

In Equity. Suit by the C. G. Blake Company against the United States. Decree for the plaintiff.

Murray Seasongood, of Cincinnati, Ohio, for plaintiff.

Allen C. Roudebush, Asst. U. S. Atty., of Cincinnati, Ohio, and Howard W. Ameli, Asst. Atty. Gen.

PECK, District Judge. The President of the United States, acting by the Secretary of the Navy, requisitioned of the plaintiff, under section 10 of the National Defense (Lever) Act of August 10, 1917 (U. S. Comp. Stat. 1918, Comp. St. Ann. Supp. 1919, § 3115½ii), as necessary to the maintenance of the navy, on June 30, 1920, 48.75 gross tons; on July 17, 1920, 3,984 gross tons; on August 20, 1920, 3,003 gross tons; and on September 18, 1920, 1,613 gross tons—of New River run of mine bunker coal, fixing a price of \$4 per gross ton, f. o. b. mines, for the same, which the plaintiff declined to accept. Plaintiff was paid \$3 per ton by the government on account, and, in accordance with the provisions of the act, brings this suit to recover "such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation," which, it avers, is not less than \$5.60 per gross ton, f. o. b. mines. The government answers that just compensation is not \$5.60 per ton, but the sum allowed. The action is submitted on the evidence, without the intervention of a jury.

It is not disputed by the government that coal of the grade in question was freely sold in the open market throughout the period covered by the requisitions at prices as high or higher than claimed by the plaintiff. It is the government's contention, however, that on account of abnormal conditions, resulting from the war and other causes, there was no true or fair market, and no such thing as fair market value; that market value, in and of itself, is not the end to be sought in the present investigation, but that the goal of this proceeding is just compensation; that where there is no fair market there can be no fair market value; that therefore some other standard must be sought; and that the true measure of just compensation, under the circumstances of this case, is the cost of production, including the expense of operation, maintenance, depreciation, and depletion, plus a just and reasonable profit.

The evidence shows that the market price of coal sold for consumption within the United States during the period ranged from \$5 to \$10, and even as high as \$14, per ton; but after the 1st of July it was not less than \$5.60 a ton. The market reached its peak in the middle or latter part of August, when the quotations ranged from \$8 to \$14 a ton, and receded somewhat thereafter. Coal of the same character sold at tidewater for export purposes at prices ranging from \$14 to \$20 per gross ton. It is true that the Navy Department received five bids upon April 6th, for an aggregate of 285,000 gross tons, at prices ranging from \$4.37 to \$5, and upon May 18th three bids for an aggregate of 185,000 tons at from \$4.48 to \$4.82 per ton. These bids were for a very small part of the navy requirement of about 1,200,000 tons, and were received in response to a letter requesting bids sent to those upon the navy list of approved producers, in which it was stated, in substance, that, unless sufficient coal was thus secured, the department would have to continue the practice of requisitioning. In the latter event the producer would either be compelled to accept the price fixed by the department, or, having been paid three-fourths thereof, to sue for the remainder. These bids cannot, therefore, be considered as entirely voluntary quotations. The department rejected them on the ground that the quantity was too small and the price too high.

The United States Fuel Administration had relinquished control of prices April 1, 1920. It is true that the market was extremely irregular, and that the price was frequently dictated largely by the buyers' necessities. Many large dealers, including plaintiff, limited themselves, however, so far as their domestic business was concerned, to prices much below what could have been asked, for the purpose of retaining the good will of their customers for future business, and in view of the provisions of the fourth section of the Lever Act, the unconstitutionality of which was then not decided, restricting dealers to reasonable prices. Certain so-called priority orders of the Interstate Commerce Commission, by which freight cars were ordered to certain portions of the United States for the purpose of relieving local coal shortages, undoubtedly had a tendency to raise prices at some places and reduce them elsewhere. The demand was abnormal as the immediate aftermath of the war, and the supply was curtailed by labor troubles and car shortages. But, when all has been considered, the fact remains that the total coal output of the country, some 600,000,000 tons, including about 35,000,000 tons of the character of that in question, was sold and bought, for the most part, by voluntary transactions, and by persons under no restrictions or necessities, except the restraints of law and the needs that ordinarily impel consumers to buy fuel.

[1] The general rule is, of course, that where one is entitled, in any form of action, to compensation based on the value of property, the measure of recovery, where such property can be procured in the market, is the value of it in the market, and not the cost; but, when there is no market value, the true value must be determined in some other way, from such elements of value as are attainable. Sedgwick on Damages, §§ 244, 250. The abnormalities of the market, on which the government relies to set aside the ordinary rule and invoke the excep-

tion, are of two classes—those resulting from governmental regulation, and those consequent upon unusual commercial conditions following the hostilities and accompanying a technical state of war.

The fact that laws and governmental regulations affect the sale of commodities does not abrogate the settled rule that market value is just compensation. All transactions in the commercial world are more or less affected by such conditions. Tariffs, transportation regulations, and various legal restraints and restrictions are in constant operation. Neither does the fact that unusual conditions affect the market mean that there is no market or market price. Drouths, floods, commercial panics, crop failures, labor difficulties, and other causes frequently affect markets seriously, but not so as to warrant a court, when assessing compensation consequent upon the exercise of the right of eminent domain, in saying that there is no market. The effects of war may differ in degree, but, so long as a market—that is, a general buying and selling of the commodity—exists, the rule persists.

Of the cases cited by the government that most nearly sustaining its contention is *Kountz v. Kirkpatrick & Lyons*, 72 Pa. 376, 13 Am. Rep. 687, an action for damages for failure to deliver oil pursuant to an assigned contract. By the day fixed for delivery an unlawful combination of dealers, including the original purchasing party, but not his assignee, had gained control of the market, and had forced the price up temporarily to a greatly inflated figure. A few days later the price dropped to the normal. The real plaintiff, for whose benefit the suit was prosecuted, was innocent of this inflation. It was held that "value" and "market price" are not always convertible terms; that there could be no difference in justice or law between an unnatural depression and an unnatural exaltation in the market price; that neither is the true and only measure of value; that, when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is unjust compensation. It was concluded (two of the five justices dissenting) that it was a fair question for the jury to determine whether the price which was demanded for the oil on the delivery day was not a fictitious, unnatural, inflated, and temporary price, the result of a combination to "bul" the market, as it was termed, and to compel sellers to pay a false and swollen price in order to fulfill their contracts.

"If so," the court said, "then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December 1869" (delivery day). "Any other cause [course] would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. * * * Men are not to be stripped of their estates by such cruel and wrongful practices, and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation."

It is to be noted that even there the court did not abandon the rule of market value, but, for the ascertainment of it, merely justified a departure in evidence from the exact date set for delivery. The plaintiff here does not seek to base its claim upon unusual sales at the precise

dates of requisition, but keeps well within the range of the market for a period of about seven months. *Kountz v. Kirkpatrick* was interpreted in the case of *Vickery v. Foley*, 17 Victoria Law Reports, 407, to hold merely that the price paid in the market on a particular day is not always the market value of the article on that day, and the court did not follow it in the case of an attempted, but unsuccessful, "corner" of a mining stock. Nor does the rule of the *Kountz Case*, decided nearly a half century ago, appear to have been elsewhere applied as against one innocent of the unlawful inflation of the market, and its soundness in that regard may well be doubted.

In the case of *Lovejoy v. Michels*, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770, cited by the government, the court refused to allow the market value, because prices of the commodity there under consideration were dictated by an association of manufacturers, of which plaintiff was one, and it was held that the price arbitrarily fixed by such a combination was no more evidence of value than a price arbitrarily stated by any vendor for his wares, and not a market value, and therefore the court had recourse to the rule of cost of production plus a reasonable profit. There was, in effect, but one vendor, dictating the price and attempting to make it the measure of damages in an action at law for the reasonable worth of the goods. No such situation is before the court here.

The subject of market value artificially enhanced is treated by *Sedgwick on Damages*, vol. 1, § 249, as a question still undecided, and the author concludes:

"Where, however, the market price of property has been enhanced by such an operation, it will be regarded as the value of the property, at least when the question arises between parties neither of whom has been concerned in the raising of the price. And since value is really measured by the opinion of the public, and that opinion, when expressed in a free market, is the market value, it would seem that, if even for a short time buyers and sellers, unconstrained to act, are willing to pay and to receive a certain price for the commodity, this price is its value, but what one when *constrained* to buy must pay is not necessarily the value."

The author and the causes cited deal with instances where prices have been artificially advanced by manipulators for the purpose of increasing profit. The evidence discloses no such fact in the instant case. Scarcity of supply and increased demand, resulting from war and labor conditions, cannot be said to constitute artificial enhancement. The effect of the Lever Act was not to increase, but to reduce, prices. There is a distinction between a market controlled by unlawful combination and manipulation, and one that is high and irregular, due to disturbed conditions at home and abroad. The former is the result of activities which were unlawful, and no doubt the same public policy which condemns the conspiracy to control the price rejects the result as a rule of evidence, when offered on behalf of a member of the combination. The latter is the result of circumstances not within control of either purchasers or sellers.

The government calls attention to the language in the opinion of the court in *New York v. Sage*, 239 U. S. 57, 61, 36 Sup. Ct. 25, 60 L. Ed. 143, where it is stated that—

"What the owner is entitled to is the value of the property taken, and that means what it may fairly be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots."

The question under consideration was whether the commissioners, in fixing compensation for property appropriated by the city for reservoir purposes, were justified in adding to the sum allowed for the land and building a further amount "for reservoir availability and adaptability." No question as to the general condition of the real estate market was before the court. The court found that the commissioners had considered the value of the reservoir as a whole and allowed a fair proportion of the increase over and above the market value of the lot. It was held that adaptability for the purposes for which the land could most profitably be used might be considered, but only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain; also that the city was not to be made to pay for any part of what it had added to the land by uniting it with the lots, if that union would not have been practicable or have been attempted, except by the intervention of eminent domain. The fair market conditions there referred to seem to have been those conditions of availability of the land itself and the title thereto which would have affected its sale to one of the public, as distinguished from those conditions supplied by the city by the very exercise of the right of eminent domain. If, in the instant case, the plaintiff sought to trade upon the necessity of the navy for fuel, and so enhance the price, the case would be directly in point. But it is not so. The plaintiff asks the same price that it received from others in the general market, and not more, but less, than the prevailing market price. There is no evidence to show that the market was affected by the navy's requirements. It took less than 1,500,000 out of some 35,000,000 of tons produced in the smokeless coal region during the year 1920.

The same consideration shows those cases to be not here pertinent which hold that value to the party taking is not the test, and that enhancement of the price by reason of the obligation of the government to take the property should not be considered in determining a fair price. *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53-77, 33 Sup. Ct. 667, 57 L. Ed. 1063; *McGovern v. New York*, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391; *United States v. Seufert Bros. Co.* (C. C.) 78 Fed. 520; *Sargent v. Merrimac*, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528; *Burger v. State Female Normal School*, 114 Va. 491, 77 S. E. 489. It is said that the market was not a fair market. The term "fair market value" does not mean value in a fair market, in the sense of a market in which the supply about equals the demand, and in which conditions might be termed fairly normal, but means fair worth in view of existing market conditions.

[2, 3] The government cites cases to show that compulsory sales and purchases are not indicative of true market value and that proposi-

tion is undoubted. *Lanquist v. Chicago*, 200 Ill. 69, 65 N. E. 681; *Brown v. Calumet River Ry. Co.*, 125 Ill. 600, 18 N. E. 283. But the evidence here is not of that character. The market value of plaintiff's coal is established by the range of prices that obtained throughout the entire seven months in question at Hampton Roads and at Baltimore, Philadelphia, New York, Boston and Columbus, for coal of this grade, f. o. b. mines. The market so established is too broad to come within the rule excluding extraordinary, unusual and forced sales.

Suppose this coal had been requisitioned, not from the producers or the producers' selling representatives, but from those who had purchased the same upon the open market, as, for instance, retail dealers, operators of coal yards, or the like; would it be said that the measure of just compensation was the cost of production plus a reasonable profit? Or, on the other hand, cost to the dealer from whom it was taken plus a reasonable profit? Assuming part were requisitioned from the producer, and part from the retail dealer, would they be allowed different rates of compensation? Is the compensation to be determined by who receives it? Just compensation is for the property, not to the owner. Mr. Justice Brewer in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463. It is obviously impossible to depart from the rule of market value with regard to marketable commodities. Value is compensation; money for money's worth. Any other rule would lead to inequality and confusion.

In *United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474, it was held that where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied, and that the government is bound to make "full compensation" to the owner. The meaning of the phrase "just compensation," as used in the Fifth Amendment, is discussed by Mr. Justice Brewer in *Monongahela Navigation Co. v. United States*, supra:

"The noun 'compensation,' standing by itself, carries the idea of an equivalent. * * * And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

The compensation must, of course, be just to the public as well as to the owner. *Searl v. School District*, 133 U. S. 553, 562, 10 Sup. Ct. 374, 33 L. Ed. 740; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270.

[4] How can there be a full and just equivalent, unless the plaintiff receives from the government as much as it might have received from others in the open market for this coal? Cost plus a reasonable profit may be more or less than an equivalent for an article seized, depending upon the state of the market. It is not a dependable rule, but one to which recourse has been had only as a *dernier ressort* in cases where the rule of market value was impossible of just application.

It is therefore concluded that neither the then existing legal regulations, nor the unusual disparity between supply and demand, nor both together, produced a condition which the court is warranted in pronouncing "no market." The price of \$5.60 per gross ton which the plaintiff asks for the coal does not exceed its fair value, in contempla-

tion of the available market and the prevailing market prices at the time the government requisitioned it, and therefore the obligation of the government to pay just compensation requires that judgment be awarded the plaintiff for that sum less \$3 per ton heretofore paid on account.

In re PARKER et al.

(District Court, N. D. Illinois, E. D. September 9, 1921.)

No. 29464.

1. **Bankruptcy** ⇨99—**Controverted facts resolved in petitioner's favor on motion to dismiss.**
On motion to dismiss petition in involuntary proceedings, controverted facts must be resolved in petitioner's favor.
2. **Bankruptcy** ⇨4—**Bankruptcy Act to be liberally construed.**
The Bankruptcy Act (Comp. St. §§ 9585-9656) was of remedial character and should be liberally construed to effect its purpose of securing equal distribution of assets of an insolvent party among unsecured creditors.
3. **Bankruptcy** ⇨70—**Business trust known as a "common-law trust," "pure trust," or "Massachusetts trust" is subject to adjudication as bankrupt; "any unincorporated company."**
Under Bankruptcy Act, §§ 4, 5 (Comp. St. §§ 9588, 9589), declaring persons, partnerships, corporations, and unincorporated companies subject to adjudication as bankrupts, a trust to carry on a business, known variously as a "common-law trust," or a "pure trust," or a "Massachusetts trust," may be so adjudicated; the term "any unincorporated company" being a comprehensive term, and, if given normal meaning, used as a part of the entire context, includes such trust.
4. **Bankruptcy** ⇨81(3)—**Involuntary petition need not set forth claim with particularity.**
Petitioner's claim in involuntary petition need not be set forth with the same particularity as might be required, if judgment on the claim was sought, rather than an adjudication in bankruptcy.
5. **Bankruptcy** ⇨81(1)—**Involuntary petition need not give details as to insolvency.**
The allegation that the alleged bankrupts are insolvent in an involuntary petition is sufficient, without setting forth detailed statements of the debts and assets.
6. **Bankruptcy** ⇨81(4)—**Details of acts of bankruptcy need not be minutely particular.**
References to the transaction constituting an alleged act of bankruptcy in the involuntary petition necessarily apprises the debtor of the transaction complained of, and the details, being known better to the debtor than the petitioner, need not be alleged with great particularity.
7. **Bankruptcy** ⇨81(2)—**Involuntary petition not bad for alleging partnership.**
Involuntary petition for adjudication of bankruptcy was not bad for alleging the respondents were partners, though the facts alleged in the answer might show them to be trustees in the conduct of a business.

In Bankruptcy. In the matter of Harrison Parker and others, alleged bankrupts. Heard on motion to dismiss the involuntary petition. Motion denied.

McCormick, Kirkland, Patterson & Fleming, Charles S. Deneen, Lee D. Mathias, Andrews & Cohen, and Harris F. Williams, all of Chicago, Ill., for alleged bankrupts.

EVAN A. EVANS, Acting District Judge. Petitioners filed their petition to have respondents adjudged bankrupts. Respondents answered, and then filed this motion to dismiss.

[1] Upon this motion to dismiss controverted facts must be resolved in petitioners' favor. The four questions are presented: Does the petition show: (a) That respondents are subject to an adjudication in bankruptcy; (b) that they committed an act of bankruptcy; (c) that respondents are insolvent; (d) that petitioners have debts provable in bankruptcy against the bankrupts, assuming respondents are insolvent?

[2, 3] The first is, perhaps, the most important question, and certainly was the most elaborately argued. Its determination in favor of the respondents will terminate the proceedings, while the other issues must ultimately be disposed of by a trier of the facts.

(a) The Bankruptcy Act (Comp. St. §§ 9585-9656) was a general enactment of a remedial character, and should be liberally construed to effect the purposes of the enactment. 5 Cyc. 242. The general object of the act, as I understand it, was to secure the equal distribution of the assets of an insolvent party among the unsecured creditors. The respondents assert that they are the trustees of a "common-law trust," or "a pure trust," or "a Massachusetts trust," and are not subject to the Bankruptcy Act, though engaged in a commercial enterprise of wide scope and in various fields. One is impressed, therefore, at the outset that, if such a commercial enterprise is not subject to the Bankruptcy Act, it was an oversight on the part of Congress.

But, confessedly, the Bankruptcy Act must itself furnish the answer to this first query. In other words, if the Bankruptcy Act does not make business concerns, associations, or companies, of the character of the respondents, subject to an adjudication in bankruptcy, this court must dismiss the petition. It likewise appears to me that, if the Bankruptcy Act covers or includes companies like respondents, it must be by virtue of sections 4 and 5 of the act. These two sections define the parties who may be adjudged a voluntary bankrupt, as well as an involuntary bankrupt. Examining section 4b, we can readily understand who is defined by the term "natural person." Likewise we may readily know who is meant by "a partnership" as used in section 5. With equal certainty we may understand what is meant by the term "corporation" as used in section 4b, but uncertainty may well arise over the term "unincorporated company." Respondents ask the court to give this term a restricted meaning. But should the court do so, if the result of such a construction is to defeat in part, at least, the manifest purpose of the entire enactment?

The words "any unincorporated company" were not present in the act when it was originally introduced in Congress. They were added in the committee. The term is comprehensive in its ordinary and usual meaning. When used with the other terms, "natural person," "corpo-

ration," and "copartnership," it completes the description of all subjects which may be adjudged bankrupts. It seems to me that its insertion in the act denotes a congressional intent to be inclusive in the characterization of organizations or of individuals subject to bankruptcy. If the words be given their normal meaning used as a part of the entire context, we can find nothing in the adjective "unincorporated" that does not include respondents. The adjective plus the noun "company" is, of course more elastic, more uncertain; but, used in connection with the words "natural person" and "corporation," it is entitled to such a meaning as will cover that which is neither corporation, natural person, or copartnership.

A reading of section 4a strengthens this conclusion. There Congress uses an expression which, properly construed in the light of the exceptions, includes everything that transacted business. Section 4b is not less comprehensive, but the exceptions are more inclusive. These views find support in *Collier on Bankruptcy* (11th Ed.) p. 154, in matter of *Associated Trusts* (D. C.) 222 Fed. 1012, and *In re Order of Sparta* (*Vadakin v. Cass et al.*) 242 Fed. 235, 155 C. C. A. 75. I recognize a contrary expression of opinion may be found in *Sears' work on Trusts*.

Considering all phases of this question, I conclude that the answer to the first query must be in the affirmative. The remaining questions can be disposed of very briefly.

[4] Petitioners' claim need not be set forth in this petition to have respondents adjudged a bankrupt, with the same particularity as might be required if judgments on the claims were sought rather than an adjudication in bankruptcy. Ordinarily the court is not passing upon the claims as such.

[5, 6] Their allowance or disallowance will be determined later by the referee. The allegation that the alleged bankrupts are insolvent is sufficient without setting forth a detailed statement of the debts and a detailed statement of the assets. The allegation setting forth the alleged act of bankruptcy might well be more particular and specific than the allegations of indebtedness and insolvency; but here, too, the facts are in the possession of the debtor, and reference to the transaction constituting the alleged act of bankruptcy necessarily apprises the debtor of the transaction complained of, the details of which need not be charged with greater particularity because they are known better to the debtor than to the petitioning creditors.

Criticisms of the petition in respect to its allegations respecting acts of bankruptcy are made on the assumption that respondents are partners. They fail, however, if the respondents constitute an unincorporated company in the nature of a common-law trust. The mere fact that respondents are called a copartnership does not necessarily establish that status. The facts must govern. The status is a conclusion fixed by the facts as ultimately found. And, if the facts disclose an "unincorporated company," it may have committed an act of bankruptcy by wrongfully paying money to a so-called trustee.

[7] Nor do I think that the petition is bad because it alleges the respondents are a partnership. It may be that the express trust agree-

ment set forth in the answer will not, upon a full showing, be found to be expressive of the true relation of the parties. The petitioners so informed the court. If a partnership be disclosed it may be that the alleged act of bankruptcy as charged in the petition is sufficient. The court cannot upon these pleadings make any findings of fact. It must accept the allegations of the petitioner as true, except as the allegations appear to be statements of conclusions.

So construing the petition, the real question in controversy determinative of the motion to dismiss is the first query. Having determined this issue in petitioners' favor, it follows that the controverted issues of fact must be litigated and determination made only after the parties have submitted their proofs.

The motion to dismiss is denied. The court also directs the entry of an order referring the issues presented by the petition to Hon. C. D. Morrison, as a special master, to take the testimony and make findings of fact and conclusions of law in respect thereto.

BORDERLAND COAL CORPORATION v. INTERNATIONAL ORGANIZATION OF UNITED MINE WORKERS OF AMERICA et al.

(District Court, D. Indiana. October 31, 1921.)

No. 433.

1. Monopolies ⇨9—Mining and loading coal for interstate shipment held within protection of the Sherman Anti-Trust Act.

A conspiracy to destroy the competition of a company which was engaged in the mining of coal in one state and placing it on cars for shipment to other states was in contravention of the Sherman Anti-Trust Act, § 1 (Comp. St. § 8820), forbidding combination or conspiracy in restraint of trade or commerce among the several states.

2. Monopolies ⇨12 (1)—Sending money to destroy competition in another state, whether spent for food or for arms, and the "check-off system," held subject to injunction.

Where mine operators and a miners' organization were charged with conspiring in unlawful efforts to unionize and destroy competition of mines in another state, it was no reason to refuse to enjoin sending of funds by the miners' organization to advance such efforts that such funds were spent for food, and not for arms and ammunition purchased by the miners in such other state; and the raising of such funds by the "check-off system"—the retention thereof by the operator from the wages of the miner and paying over sums retained to the miners' union—held subject to injunction.

3. Continuance ⇨49—Properly refused for production of evidence where defendant refused to preserve status quo.

Where, on application for temporary injunction against an unlawful conspiracy by mine operators and mine owners to destroy competition by enforcing the unionization of mines in another state, defendant, moving for time to introduce explanatory evidence as to expenditure of money in the mining fields of such other state, refused to accede to the condition that it preserve the status quo, the application was properly denied.

4. Courts ⇨262 (4)—Federal District Court may enjoin those within its district from furthering conspiracy against trade in another district.

The federal District Court in Indiana may enjoin the unlawful activities of parties in Indiana under the jurisdiction of the court in attempt-

ing to further a conspiracy and destroy the competition of a company in another state and district.

In Equity. Suit by the Borderland Coal Corporation against the International Organization of the United Mine Workers of America and others. On hearing of application for temporary injunction. Temporary injunction ordered.

Z. Vinson, of Huntington, W. Va., A. M. Belcher, of Charleston, W. Va., and E. L. Greever, of Tazewell, Va., for complainant.

Shirley, Whitcomb & Dowden and Miller, Dailey & Thompson, all of Indianapolis, Ind., Randolph & Milford, of Lafayette, Ind., Henry Warrum, of Indianapolis, Ind., Cooper, Royse, Bogart & Gambill, of Terre Haute, Ind., and William A. Glasgow, Jr., of Philadelphia, Pa., for defendants.

ANDERSON, District Judge. The bill avers and the proof shows a combination and working arrangement, a conspiracy, between the United Mine Workers of America and the coal operators in the so-called "central competitive field," to destroy what some of the conspirators call the "vicious competition" of the West Virginia mines.

[1] Almost all of the coal produced in West Virginia is shipped out of the state in interstate commerce, and the business of the plaintiff is shown to be interstate. It lifts its coal out of its mines in one state and places it upon cars for shipment in another. The evidence shows that the competition complained of and sought to be destroyed is competition in the sale of bituminous coal throughout the several states. A conspiracy to destroy such competition is in direct contravention of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830). Section 1 of that act provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

The bituminous coal fields of the United States are already unionized except a portion of West Virginia and a small section of the Southwestern part of the country, and an effort to unionize the West Virginia mines is part of an effort to monopolize all the coal industry in the United States until, as one of the conspirators says, the United Mine Workers' Organization "shall cover every coal-producing state in the republic."

The method agreed upon and adopted by the conspirators to thus destroy competition was to organize or unionize the West Virginia field. These West Virginia operators desire to run their mines on a nonunion basis. The effort on the part of the defendants to unionize these mines and thus compel the operators to unwillingly run upon the union basis would result either in the suppression of this nonunion mining altogether, or would put such restrictions on it as to accomplish the objects of the conspiracy, namely, raise the price of the West Virginia product so that it could not compete with the so-called "central competitive field." The attempt to do this was continued for some time accompanied by the

usual incidents of violence and exhibitions of force, and matters progressed until a state of war existed in West Virginia which the state government was unable to put down, and upon the call of the state authorities, the President of the United States declared martial law, sent federal troops into West Virginia, and restored order.

The evidence shows that members of the mine workers' union purchased firearms and ammunition and otherwise financed the violent activities in behalf of the unionizing forces in West Virginia, and this state of war continued until the President sent troops into the state, and it is only held in abeyance because of that fact.

The evidence shows that the revenues of the mine workers' union are produced from dues and assessments laid upon the members; that these dues and assessments are by an arrangement between the miners' organization and the operators, taken from the wages of the workers in the mines by the operators and paid by them to the organization of mine workers. This is the "check-off" system. The membership is large, and the dues and assessments yield an enormous sum.

Statements made by officers of the United Mine Workers show that the miners' organization has sent into West Virginia to carry on this struggle more than two and a half million dollars, and the secretary-treasurer of that organization, in his report to the convention recently held in this city, stated that during the year ending August 1, 1921, the organization had sent into West Virginia more than a million dollars. This money was derived from the "check-off" system, and was sent to West Virginia to assist in the effort to organize the West Virginia field.

[2] The evidence without contradiction shows that ammunition and arms were purchased by members of the mine workers' union and used for the purpose of carrying on this struggle. It is claimed on the part of the defendants that the money used to purchase these arms and this ammunition and to mobilize and direct these armies came from the locals, and that no part of the money sent from here was used for that purpose, but that such money was and is used only in such peaceable ways as caring for and feeding and furnishing supplies to those union miners who have been evicted from their homes or deprived of a living or otherwise put to a disadvantage in carrying on this struggle.

If this be true, it is quite apparent that there is no difference in the activities of those who furnish the food and supplies for the army and those who furnish it its arms and ammunition. The money sent by the miners' organization derived from the "check-off" system, as above stated, is sent there to aid, abet, and assist those on the ground, actively engaged in the unlawful attempt to unionize the nonunion mines in West Virginia and destroy competition, as above stated.

The evidence clearly shows that the mine operators know—at least they know now—that this money thus contributed by them through the "check-off" system is used in this unlawful manner. It therefore follows that the use of such money should be enjoined, and the carrying on of the "check-off" system as a means for raising it should likewise be enjoined.

[3] At the conclusion of the evidence, counsel for the miners requested time to introduce some evidence explanatory of the large sums of money shown to have been sent by the organization into the West Virginia fields, and also asked for an extension of time for 30 days in which to file their answer to the bill. The court at once conceded that these requests were reasonable and indicated its willingness to grant such extensions, and stated that, owing to the great importance of the questions involved, and considering that, if the relief prayed for in the bill were granted, it would have such far-reaching consequences, suggested that it would like all the light upon the subject that could be furnished by evidence, and time for investigation, and argument as to the principles of law involved, and stated that the time requested by the mine workers' counsel would be granted, upon condition that the status quo be preserved in the meantime. Mr. John L. Lewis, the president of the United Mine Workers of America, being in the courtroom at the time, was asked by the court if he would agree to preserve the status quo—that is, cease efforts to unionize these mines in West Virginia until the court would have time to more thoroughly investigate the matter—the court stating that it would be entirely satisfied with Mr. Lewis' assurance to that effect. Mr. Lewis promptly declined to agree to desist, thus creating the emergency for the issuing of a temporary injunction, and compelling the court to act without further opportunity to investigate the important questions involved.

[4] This court cannot police West Virginia, nor does it hold that the United Mine Workers Union is itself an unlawful organization, nor will it in any way attempt to curtail its lawful activities; but it can enjoin the unlawful activities of the parties here in Indiana who are here now under the jurisdiction of this court, and a temporary injunction to that effect will be issued.

CHADEK v. TURCOTTE et al.

(District Court, D. Montana. October 25, 1921.)

No. 87.

Public lands Ⓒ135(2)—**Transfer after final proof held valid.**

Where final homestead proof was made before a United States commissioner, and later the same day the homesteader conveyed the land to defendants, and a few days earlier a departmental agent filed in the land office a protest against the entry and making of final proof, and when the proof was received the entry was suspended, and the issuance of final receipt stayed "pending further proof" by the homesteader "as to residence and pending a field examination" by the department, and these were accomplished, final receipt issued, and patent issued 14 months after proof made, defendants' deed was valid, for, if conditions precedent have been performed, that final proofs in some particulars may be defective does not debar the entryman from alienation of the land, as they or their vendees may furnish supplemental proof.

In Equity. Suit by E. E. Chadek against F. W. Turcotte and others. Decree for defendants.

F. W. Mettler, of Helena, Mont., for plaintiff.

Norris, Hurd & Rhoades, of Great Falls, Mont., for defendants.

BOURQUIN, District Judge. This suit to quiet title presents but the issue of the validity of conflicting deeds executed in circumstances following: Before a United States commissioner L. Chadek made homestead final proof, and later in the day agreed to and did execute a deed of the land to Turcotte and two other defendants. Two days later the commissioner transmitted the proof to the land office, and the deed was recorded. A few days earlier a departmental agent filed in the land office a protest against the "entry and the making of final proof," and when the proof was received the "entry was suspended and the issuance" of final receipt stayed "pending further proof by Chadek as to residence and pending a field examination" by the department. These were accomplished, final receipt issued, and, 14 months after proof made, patent issued. Some 19 months subsequent to patent, the patentee executed a deed of the land to plaintiff.

It is plaintiff's contention that the deed to defendants violated the statutory prohibition of alienation before final proof—that is, before the proof was complete and filed in the land office—and so is void. The homestead statutes are in the nature of an offer to convey public lands of the United States to qualified persons who will reside upon, cultivate, and not alienate the lands for a term of years, and then submit their affidavits and evidence thereof, their final proof that they have performed the conditions precedent to patent. The lands are earned by performance of the conditions precedent, and the affidavits and evidence, or final proof, is but a method of information of the fact to the United States. Prohibition against alienation is not express, but is inferred from the statute (Comp. St. § 4532) providing that the entrymen shall make affidavits at time of final proofs that they have not alienated any of the lands; and hence this prohibition applies to only the period "before the oath is filed for final certificate," and terminates when said affidavits have been made, or, in some circumstances, should have been made. See *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769.

Final proofs made before United States commissioners are made before officers provided by statute and at the direction of the land office. For the occasion commissioners are quasi agents of the land office, and proof made before them is by them transmitted to the land office, and is equivalent to proof made before the land office. The nonalienation affidavit before them made is in legal effect then "filed for final certificate." Final proofs so made, the entrymen have done all the law requires, and are vested with right to title or patent in fee and free from all conditions and restrictions. If the conditions precedent have been performed, that final proofs in some particulars may be defective, and require supplement, does not impair this vested right. It is not a matter of substance, but of form only, and does not in the interval debar the entrymen from alienation of the lands. They or their vendees may furnish the supplemental evidence or proof. See *Dittmer v. Wolfe*, 25 Land Dec. 137, and cases cited.

In *Lehman's Case*, 8 Land Dec. 487, the vendee was permitted to furnish proof of nonalienation at time of final proof by the entryman; he failing and refusing to make the affidavit thereof. And it is not perceived wherein the statutes would be infringed, their policy in substance impaired, if entrymen, after performance of all conditions precedent, alienated the land without having made final proof; the vendee making it, as in effect was done in *Barringer's Case*, 12 Land Dec. 623. *Hale v. McGraw*, 201 Ala. 358, 78 South. 214, is not in point. There the entryman alienated the land before he had completed the statutory term of residence, before he had performed the conditions precedent, before he had earned it, before his right, free from restrictions upon alienation, had vested. Herein the defendants' deed and title are valid, and are quieted against the claims of plaintiff.

Decree accordingly.

THE NACOOCHEE.

(District Court, D. Massachusetts. September 22, 1921.)

No. 1509.

Seamen ⇨29 (1)—Accident to quartermaster, oiling steering engine, held not caused by master's negligence.

Where quartermaster, while oiling, as ordered, steering engine in small room under pilot house, had his hand crushed when the vessel lurched, the negligence of the master did not appear, either as respects the lighting of the room or in ordering him to do work outside his duties, for which he was not fitted, where evidence showed that he started to oil the engine without artificial light, although there were plenty of available lanterns on the ship, and that, if the oilers failed to oil the engine, it was regarded as more or less within the scope of the duties of the quartermaster, who was experienced, to do so.

In Admiralty. Libel by Victor Greenwood against the steamship *Nacoochee*. Libel dismissed.

Russell, Moore & Russell, of Boston, Mass., for claimant.

P. Edward Fardy, John J. O'Connor, and Walter H. Watson, all of Boston, Mass., for libelant.

MORTON, District Judge. This is a libel for personal injuries sustained by the libelant while serving as quartermaster on the steamship *Nacoochee*. It was heard in open court entirely on oral testimony. The facts are as follows:

The libelant was ordered by the first mate to oil the steering engine, which is located in a small room under the pilot house. While he was doing so, and was in a crouching position, the vessel gave a lurch, which threw him off his balance. He put out his hand quickly to steady himself, and it was caught between the wheel rope and the pulley on the engine, and so badly crushed that three fingers had to be amputated. The negligence charged is failure to have the room properly lighted, and ordering the libelant to do work for which he was not fitted, and which lay outside the scope of his duties.

As to the lighting, the room in question was equipped with electric lights, but the current was not on during the daytime, when this accident happened. A lantern hung outside, but there was no oil in it. The libelant went to the lamp room and found it locked. He then got an oil can and started to oil the engine without any artificial light. It had a full-sized door, which was hooked back and made the room pretty light. There were plenty of lanterns on the ship, and the libelant could have hunted up the porter and got one that was filled. The charge that the ship was at fault in respect to the lighting was not argued on behalf of the libelant, and it is not established by the evidence.

As to the alleged improper order, the libelant had been 15 years at sea, and had been acting as quartermaster since some time in May. The accident happened on October 1, 1916. During that interval he had, on his own testimony, oiled the steering engine several times without accident. He understood what the work required and the dangers which it involved. Primarily it was the duty of the oilers to oil this engine; but, if the engine was in need of oiling, it seems to have been regarded as more or less within the scope of the quartermaster's duty to see that it was oiled, so that it would run well. The order to oil the engine was not negligence, unless it required the libelant to do something which was so dangerous and for which he was so ill-equipped that injury to him from obedience was likely to result, which was plainly not this case. As the order was not a negligent one to give, Act March 4, 1915, § 20 (38 Stat. 1185 [Comp. St. § 8337a]) need not be considered. See *Chelentis v. Luckenbach Co.*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; *Crockett v. Brandt* (C. C. A.) 271 Fed. 415.

The libel must be dismissed. So ordered.

BALDWIN et al. v. GUSS et al.

(District Court, E. D. Pennsylvania. October 3, 1921.)

No. 8106.

Pleading ⚡350 (3)—**Statement of claim held insufficient to warrant judgment for want of sufficient affidavit of defense.**

The court will not enter judgment on the pleadings on mere inferences or conclusions of law to be drawn from such inferences, and in an action for goods sold and delivered to defendants and defendants' nominees, in the absence of specific averments of delivery to a carrier, or that delivery was made to third parties at defendants' instance and request, the statement of claim is not sufficient to support a judgment for want of sufficient affidavit of defense.

At Law. Action by William H. Baldwin and others against Charles L. Guss and others. On rule for judgment for want of sufficient affidavit of defense. Rule discharged.

Reber & Granger, of Philadelphia, Pa., for plaintiffs.
Clinton O. Mayer, of Philadelphia, Pa., for defendants.

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

THOMPSON, District Judge. The plaintiffs set up insufficiency of the affidavit of defense, in that it does not sufficiently deny delivery to the defendants and defendants' nominees. The statement avers sale and delivery to the defendants at their special instance and request, at the times, for the prices, and in the amounts set forth in the attached copy of the plaintiffs' book of original entries. The defendants deny delivery to them, either at their place of business or at the places to which deliveries were to have been made.

The affidavit of defense is vague and evasive, but the statement of claim also is not sufficiently specific in setting out the facts upon which the plaintiffs rely for judgment, and the court will not enter judgment upon mere inferences or conclusions of law to be drawn from such inferences. The Practice Act of May 14, 1915 (P. L. 483), provides in section 5¹ that the pleadings shall contain the material facts upon which the party relies for his claim or defense. A copy of the book of original entries is sufficient to establish, if not denied, the times, prices, and amounts as set out therein. But it is not sufficient to establish delivery to third parties, as is attempted to be done in this case by inference without the aid of specific averments. There is no averment in the statement of claim, nor in the affidavit of defense, that the goods which are the subject of book entries were delivered to a common carrier, and the facts set out in the statement are not sufficient to raise a presumption to that effect.

In the case of *Braunn & Fitts v. Keally*, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811, relied upon by the plaintiffs, the affidavit of defense contained averment sufficient to raise a presumption of delivery to a carrier, in that it set out that the goods were to be billed by the plaintiffs to the defendants at factory prices, defendants paying freight at Pittsburgh, the point of delivery, and that the goods were sent by the plaintiff into the state of Pennsylvania. In the absence of specific averments of delivery to a carrier, or that delivery was made to third parties at the defendants' instance and request, the statement of claim is not sufficient to support a judgment for want of sufficient affidavit of defense.

The rule for judgment is discharged.

NORTHWESTERN CONSOL. MILLING CO. v. ROSENBERG et al.

(District Court, E. D. Pennsylvania. October 3, 1921.)

No. 8136.

1. **Frauds, statute of** \S 118(1)—**Sale contract evidenced by unsigned memorandum not taken out of statute by application by buyers for shipping permit.**

A sale contract, evidenced by a memorandum not signed by the buyers and so not enforceable under Sales Act Pa. May 19, 1915 (P. L. 543),² is not taken out of the statute by a signed application by the buyers for a shipping permit, which was made to a third party and would require oral evidence to connect it with the unsigned memorandum.

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

¹ Pa. St. 1920, \S 17185.

² Pa. St. 1920, \S 19649-19726.

2. **Frauds, statute of** \Leftrightarrow 89 (3), 90 (2)—Requests by buyers granted by seller held not acceptance or receipt of goods taking contract out of statute. Requests to extend the time for payment of drafts, and to allow merchandise to remain in a warehouse for a considerable time, made by buyers and granted by seller, do not constitute an acceptance or receipt of goods, so as to take a contract out of the statute.

At Law. Action by the Northwestern Consolidated Milling Company against Jacob Rosenberg and others on affidavit of defense raising question of law. Sustained with leave to plaintiff to amend.

Levi & Mandel, of Philadelphia, Pa., for plaintiff.
Englander, Cohen & Korn, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. [1] In the affidavit of defense, it is set up as a bar to the suit that the alleged contract sued upon is unenforceable, because it is not based upon a note or memorandum in writing of the contract or sale signed by the party to be charged; i. e., the defendants, or their agents in that behalf, as required by the Sales Act of May 19, 1915 (P. L. 543 [Pa. St. 1920, §§ 19649-19726]).

The application for the shipping permit is made to a third party, and not to the plaintiff, and it would require oral evidence to connect it with the unsigned memorandum. Moreover, the unsigned memorandum contemplates on its face that it is to be signed by the purchaser and returned to the seller, and that it is subject to confirmation by the seller. In their contention that the unsigned memorandum and the signed shipping permit are not sufficient in themselves to support an action, the defendants are supported by the authorities. *Manufacturers' Light & Heat Co. v. Lamp*, 269 Pa. 517, 112 Atl. 679; *Mason-Heflin Coal Co. v. Currie*, 270 Pa. 221, 113 Atl. 202.

It is set up as another ground of demurrer that the statement of claim fails to allege delivery either to the defendants or to a carrier within 60 days as required by the terms of the alleged contract. There are, however, averments in the statement of claim of requests by the defendants granted by the plaintiff for extension of time for payment of the draft, and the plaintiff contends that such extensions at the defendants' request constitute a waiver on their part, and, through having induced the plaintiff to allow the merchandise to remain in a warehouse for a considerable length of time at their request, the defendants are estopped from setting up the statute as a defense.

[2] The plaintiff further contends that such conduct on the part of the defendants constituted an acceptance of the merchandise. The statement of claim does not contain sufficient averments either of acceptance or receipt of the goods by the defendants to establish the plaintiff's contentions as matter of law.

The plaintiff has leave to amend the statement of claim within 15 days; otherwise, judgment will be entered for the defendants.

In re CROSBY.

(District Court, D. Massachusetts. October 31, 1921.)

No. 16339.

Bankruptcy ⇨384—**Composition approved, where creditors did not object.**

If the creditors do not see fit to appear and protect their interests, after being duly notified of pendency of offer in composition, no evident fraud being practiced, the court in bankruptcy proceedings ought not to refuse approval of the composition, notwithstanding a report of the referee under Bankruptcy Act, § 12b (Comp. St. § 9596), in which he states that, in his opinion, the composition is not in the best interests of the creditors.

In Bankruptcy. In the matter of Archer G. Crosby, bankrupt. Composition approved.

Harvey H. Pratt, of Boston, Mass., for bankrupt.

MORTON, District Judge. All scheduled creditors and all other persons who have entered appearances in this case have been duly notified of the pendency of the offer in composition and afforded an opportunity to appear and oppose the confirmation of it. No person now does so. The statutory requisites have been complied with, and there is no reason why the composition should not be confirmed, unless the report of the referee, in which he states that in his opinion the composition is not in the best interests of the creditors, be so regarded. This statement, however, is made in connection with a reference under Bankruptcy Act, § 12b (Comp. St. § 9596), the purpose of which is to ascertain whether the formal requisites have been complied with. The intention of the statute is that the question whether the composition is in the best interests of the creditors shall be raised in such a way that an issue shall be framed on which the opposing parties can be heard. In re Graham & Sons, 252 Fed. 93, 164 C. C. A. 205. Nothing of that sort has occurred here. The situation is that the learned referee, from his general knowledge of the estate, is strongly of the opinion that the creditors are sacrificing their interests by not objecting to the composition. But, if the creditors do not see fit to appear and protect their interests and raise the question, I do not think that, as no evident fraud is being practiced, the court ought, of its own motion, to refuse approval of the composition. It is to be presumed that the creditors have sufficient and proper reasons for their failure to object.

Composition approved.

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

FELS v. EAST ST. LOUIS & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 3, 1921. Rehearing Denied December 16, 1921.)

No. 5731.

1. Evidence ⇨147—Testimony of various car men that they did not see plaintiff attempt to board street car held admissible.

Where, in an action for personal injuries occasioned by attempting to board a street car, the particular car had not been identified, it was permissible for defendant to call the motormen and conductors on cars that had passed the place of injury at or near the time thereof, to testify that they did not see the plaintiff, and knew nothing about the accident.

2. Carriers ⇨233—Relation of passenger depends on contract.

The relation of passenger and carrier depends on contract, express or implied.

3. Carriers ⇨247(3)—Plaintiff, who ran after car and seized it as it started, not a passenger.

The relation of carrier and passenger was not created, where plaintiff was not waiting for the car which stopped, but was running after it, and seized the handle bar just as the car was starting.

4. Appeal and error ⇨1068(3)—Plaintiff not entitled to recover held not harmed by instructions.

Where there was no proof sustaining finding of relation of carrier and passenger in plaintiff's action for injuries as a passenger, question of error in the instructions was immaterial.

Cotteral, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Action by Raphael Fels against the East St. Louis & Suburban Railway Company, a corporation of the state of Illinois. Judgment for defendant, and plaintiff brings error. Affirmed.

Shepard Barclay, of St. Louis, Mo. (Louis J. Portner, of St. Louis, Mo., on the brief), for plaintiff in error.

Robert A. Holland, Jr., of St. Louis, Mo. (Thomas G. Rutledge and J. M. Lashly, all of St. Louis, Mo., on the brief), for defendant in error.

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

LEWIS, District Judge. This action was brought to recover damages for personal injuries received by Fels while he was attempting to get aboard one of defendant's street cars, caused, as he alleged, by the sudden starting of the car. There was verdict and judgment against him. He saw one or two persons standing at a street crossing in East St. Louis as if they were waiting for an approaching car, and believing it would stop he ran to catch it. It did stop and those who were waiting got aboard. As Fels ran in the direction the car was going he left the sidewalk and went into the street and the car passed him, so that he was behind it when it stopped. But he continued to run and

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

seized the handle at the entrance which was on the side of the car near its rear end, with one hand, as it was about to start, or after it had started, was thrown violently to the ground by the motion of the car, and received the injuries of which he complains and for which the jury by its verdict found the defendant not liable.

[1] There was no evidence that Fels was seen by the conductor or motorman on the car. The car was not identified, it went on, and it negatively appears that Fels was not seen by them. The defendant met the point by calling the motormen and conductors on three cars that passed nearest the time fixed by Fels as the time when the accident occurred. Each of them testified that he did not see Fels and knew nothing about the accident. These cars followed each other at intervals of fifteen minutes on regular schedule. Fels objected to the motormen and conductors on the three cars testifying, and assigns as error the action of the court in permitting them to do so. This contention seems to be wholly without merit. Apparently it was the only way open to the defendant to show, negatively though it be, that the motorman and conductor did not see Fels and did not know that he desired to take passage or that he had attempted to do so. The other errors assigned and relied on relate to the giving of instructions and refusal to give others.

All of the facts describing the occurrence, including those already stated, were obtained from Fels and his two witnesses, the latter looking on at some distance from the car. He testified that he saw but one waiting passenger who got aboard while he was thirty or forty feet away, that the car did not start until he had run that distance, that he was running right next to the track.

"When I got there I just got hold of the handle bar and was coming up with my foot, and that is as far as I know. I fell; they throwed me over, and the car went on. * * * I grabbed the handle of the car and was coming up with my foot, but whether I got my foot on the steps or not I don't know. * * * I never got on there, I don't think. * * * There is a bruised place on my leg here which must have struck the step."

One of his witnesses testified that two persons boarded the car, that the car was standing still when Mr. Fels got hold of the handle bar, that when the last passenger got on the car Fels was five or six feet away, still running after it, and the car seemed to start just as Fels got hold of the handle bar. The other one, that only one person boarded the car, that Fels came down the road running and grabbed hold of the right handle bar, and just as he did he fell flat to the ground.

"He grabbed and got hold of the right handle bar, and I couldn't say now whether his foot was on or not, but down he went. * * * Q. And then you say just as he grabbed it the car started and he fell, is that right? A. Yes, sir."

It thus appears that when the car stopped Fels was not waiting to enter it, was thirty or forty feet behind it and running to catch it, and did not reach the entrance at the side of the car until it was starting, or an instant before that, and that no one in charge of the car saw him. He must have come up to the entrance suddenly and grabbed the handle bar hurriedly, and was instantly thrown down, before he could

get his foot on the step. The situation thus presented induced the court to state in its charge the principles of law applicable to the relation of carrier and passenger, and the duty of the former to the latter.

[2] Was there any evidence, allowing to it every reasonable inference favorable to plaintiff that could be drawn, on which the issue of fact thus submitted could rest? We think not. The place of the accident was not at a station maintained by the defendant for the reception and discharge of passengers, but at a street crossing on a public thoroughfare. We appreciate the difficulty under such circumstances in determining when the relation of carrier and passenger begins, and what acts of the parties are sufficient to create it, as was pointed out in *Schepers v. Union Depot R. Co.*, 29 S. W. 712, 126 Mo. 665. But it was there said, in recognition of the general rule:

"Yet one test applies alike to all, and that is, the relation can only be created by contract between the parties, express or implied. There must always be an offer and request to be carried on one side, and an acceptance on the other."

The principle is stated again in *Purple v. Railway Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, in this way:

"A contract is indispensable to the relation of carrier and passenger. * * * This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created."

And in *O'Mara v. Transit Co.*, 102 Mo. App. 202, 76 S. W. 680:

"The right of a person to carriage as a passenger on a street car rests on a contract, the essential ingredients of which are that the person must signify his intention to take passage, either by words or conduct, and the car men must assent, by words or conduct, to his becoming a passenger."

[3, 4] We are not unmindful that it does not take much to raise the implied contract, and that about all street car travel is under obligations of that sort; and so it is contended that the stopping of the car was an offer to receive all persons who wished to get aboard as passengers, and that Fels accepted the offer by grabbing on to the handle bar for that purpose before the car started, and was injured while trying to enter; and that thus he brought his case within the principle stated. The contention could not be refuted if Fels had been waiting where the car stopped, or had presented himself at the entrance before the motorman was signaled to start, or if the conductor had known before he signaled to start that Fels was approaching the entrance nearby with the intention of getting aboard, or by the exercise of a vigilant outlook could have discovered that fact,—and thus in plain view or his presence discoverable by the exercise of reasonable care, the car had been started to his injury while he was in the act of getting aboard with care for his own safety, a verdict for him under those conditions could stand. There is not only no proof to sustain any of those conditions, but the testimony of Fels and his two witnesses establishes the contrary. He was behind the car running after it. The conductor did not see him, nor was he required to know or suspect that he was there. He was not then in the usual place of those whose purpose it is to take passage. He

came on rapidly and seized the handle bar just as the car was starting and was instantly thrown down before he could place his foot on the step. We are of opinion that there was no proof to sustain a finding of the relation of carrier and passenger, and inasmuch as the verdict was for defendant the objections to the instructions present a moot controversy. *Robinson v. Tramway Co.*, 164 Fed. 174, 90 C. C. A. 160. Nevertheless, those objections have been considered, and on the assumption that there was an issue of fact as to whether the relation of carrier and passenger existed we are not prepared to say that the court erred in the respects claimed. The situation was treated in two aspects, the duty of the carrier to those in the street, prior to the inception of the relation of carrier and passenger, and then its duty after that relation arose. As to the first, it was stated that defendant's measure of duty was ordinary care. *Lamline v. Houston Ry. Co.*, 14 Daly (N. Y.) 144; *Foster v. Electric Co.*, 35 Wash. 177, 76 Pac. 995; *Welsh v. Concord Street Ry.*, 223 Mass. 184, 111 N. E. 695; *Donovan v. Hartford Street Ry. Co.*, 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297; *Duchemin v. Boston Elevated Ry.*, 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, 1 Ann. Cas. 603. And as to the second, it was said that after one became a passenger the highest degree of care which a very careful and prudent person would have exercised under the same or similar circumstances was exacted of the carrier; and the substance of the conditions and requirements set out above to make one a passenger was also stated. Bearing in mind the facts which the jury was called upon to consider, we think there is no room for the claim that it might have been misled to apply one measure instead of the other. There is some color to the criticism, but the principles were stated more than once, and with sufficient clearness and separateness to avoid any confusion in their application; and after the summing up of the case by the court there was no chance left for a misconception of either principle. Taking the case on the basis dealt with by the trial court we are not persuaded that there was prejudicial error.

Affirmed.

COTTERAL, District Judge (dissenting). My dissent is necessary, as I think there was error in giving and refusing instructions to the jury. Concededly, the plaintiff was injured at a street crossing where this car and cars usually stopped for passengers to get on and off. There was the implied invitation to passengers subject to their acceptance. The conductor had the duty, before giving the signal to start, to look and see whether passengers were safely on board. Where an invitation is given for the purpose and one attempts to go upon the steps to take passage, the relation of passenger and carrier is made out. 3 *Thompson*, Neg. § 3514; *Cohen v. West Chic. St. Ry. Co.*, 60 Fed. 698, 9 C. C. A. 223; *Dudley v. Front St. C. R. Co.* (C. C.) 73 Fed. 128; *St. Louis S. W. Ry. Co. v. Wainwright*, 152 Fed. 624, 82 C. C. A. 16; *Memphis St. Ry. Co. v. Huggins*, 215 Fed. 37, 131 C. C. A. 345; *Devoy v. Transit Co.*, 192 Mo. 197, 91 S. W. 140.

It is true the evidence tends to show that the plaintiff attempted to board the car at the time it was starting. No complaint is made of the

charge on that theory. But there was sufficient evidence to uphold a finding that while the car was stationary, the plaintiff seized the hand rail in order to board the car. This was recognized by the trial judge. A charge was asked for plaintiff, that if in such state of facts the car was suddenly and violently started, and thereby he was injured, and such conduct was not in the use of the highest degree of care exercised by prudent persons in like circumstances, and he was ordinarily careful for his safety, he was entitled to recover; also, that it was the duty of the motorman and conductor to see before starting the car, in so far as practicable, that there was no passenger in the act of boarding, and "that all passengers attempting to get on had done so safely, even tho the car had stopped for a reasonable length of time." In my judgment, these requests should have been given.

But the trial court gave the jury this rule:

"If plaintiff did get hold of the car before it started, but the persons in charge thereof did not know of the fact, and could not have known of it by the exercise of ordinary care, and he gave no notice of his intention to become a passenger, and had not timely presented himself, then he cannot recover."

And again:

"If you shall find * * * that plaintiff ran and placed his hand on the handle of the car before it started, and that thereafter, or thereupon, the car started and caused plaintiff to fall, and in this connection, if you shall further find * * * that neither the motorman nor the conductor saw plaintiff when he got hold of the handle of the car, and that they did not know, and by the exercise of ordinary care could not have known or observed, that plaintiff was about to board the car, then you ought to find for defendant."

These instructions are deemed to be erroneous, for the plaintiff might have become in fact a passenger before the car was started, as the evidence substantially tends to show, and, if so, then it would not be questioned that by uniform authority he was entitled to the highest practicable degree of care for his safety, and not merely ordinary care.

Clearly, it seems to me, the plaintiff should be awarded a new trial.

YUMA COUNTY WATER USERS' ASS'N et al. v. SCHLECHT et al.

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

No. 3593.

1. Waters and water courses \Leftrightarrow 222—Secretary of Interior's notice of charges based on "estimated cost" of irrigation project sufficient under Reclamation Act.

A public notice by the Secretary of the Interior, specifying lands for which water would be furnished under an irrigation project, the classes of charges therefor, and the construction charge as \$75 per acre of irrigable land, payable in installments as enumerated, was in accord with Reclamation Act June 17, 1902, § 4 (Comp. St. § 4703) as amended, and Act Aug. 13, 1914 (Comp. St. §§ 4713a-4714f), authorizing the Secretary to let contracts for construction work, and thereupon to give public notice of the

lands irrigable thereunder, of the charges per acre and the number of annual installments, to be determined with a view of returning to the reclamation fund the "estimated cost" of the project, by which is meant, not the actual, exact final sums paid for construction, but such sums as it is believed after careful computation will cover the expenses directly and fairly connected with the construction of the project.

[Ed. Note.—For other definitions, see Words and Phrases, Estimated Cost.]

2. **Waters and water courses** ⇨222—**Correspondence between Secretary of Interior and Reclamation officials as to irrigation project estimates before contracts for payment of cost not binding, as public notice, on government.**
Under Reclamation Act June 17, 1902, § 4 (Comp. St. § 4703), as amended, and Act Aug. 13, 1914 (Comp. St. §§ 4713a-4714f), requiring the determination of charges for the construction and maintenance of irrigation projects with a view of returning to the reclamation fund the estimated cost of the project, correspondence between the Secretary of the Interior and officials of the Reclamation Service relative to estimates of the cost prior to the date of a contract between the landowners and the United States, for the payment thereof cannot be regarded as a public notice to the former, nor as binding on the government.
3. **Waters and water courses** ⇨222—**Though Secretary of Interior's estimate of cost of irrigation project was materially lower than later estimate, court will not interfere, in absence of fraud.**
Though there was a substantial and material difference between preliminary engineering estimates of the cost of an irrigation project and a later estimate, the courts will not interfere, in the absence of some substantial showing that the action of the Secretary of the Interior in publishing notice of charges based on such original estimates was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrongdoing, especially where the increased cost was due to unexpected physical difficulties, higher wages, change of plans, increased mileage of canals, etc.
4. **Waters and water courses** ⇨222—**That cost of irrigation project was greater than expected held no ground for equitable relief, in view of contract to pay amount to be determined.**
Where a contract between the United States and a water users' association provided that the latter should promptly collect such charges as should be apportioned to its shareholders, the fact that the cost was greater than expected cannot be urged as a ground for equitable relief.
5. **Waters and water courses** ⇨222—**Landowners not entitled to equitable relief from payment of increased charges on ground system not completed when suit filed, where public notice and Secretary of Interior's letters to them based on his determination project was completed.**
Where the Secretary of the Interior in the exercise of his discretion withdrew certain lands from an irrigation project and confined it to the area described in the public notice to the landowners affected, the latter, who contracted to pay for that part of the cost which should be apportioned to them by the Secretary could not restrain the local reclamation officers from turning off the water for failure to pay an assessment in excess of the original estimate and of the actual value of work to be constructed, on the ground the system was not completed when the suit was filed.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Bill for injunction by the Yuma County Water Users' Association and others against W. W. Schlecht and another. From a decree dismissing the bill, complainants appeal. Affirmed.

Thos. D. Molloy, of Yuma, Ariz., for appellants.

Thomas A. Flynn, U. S. Atty., of Phoenix, Ariz., and Oliver P. Morton, Sp. Asst. Atty. Gen., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an appeal from a decree dismissing a bill asking an injunction against appellees, local officers of the Yuma project of the United States Reclamation Service. The Yuma County Water Users' Association is an Arizona corporation, and other appellants are members of the water users' association and landowners within the district over which the association exercises authority.

The complaint alleges: That in May, 1904, the Secretary of the Interior contracted for the construction of the Laguna dam across the Colorado river, and determined and estimated the cost of the construction of the Yuma project, and gave public notice of the charges which should be made per acre upon all the lands within the irrigation district and Yuma project to be developed for the construction cost of the project exclusive of the cost of operation and maintenance; that \$35.28 was determined upon with a view of returning to the fund created by the Reclamation Act the estimated cost of the project; that the Secretary set aside \$3,000,000 from the fund furnished by the Reclamation Act for the construction of the Yuma project, and gave public notice of the lands irrigable under the Yuma project, as well as the number of annual installments within which charges should be paid and the time when payment should commence; that the Yuma County Water Users' Association was organized under the direction of the Secretary of the Interior for the purpose of securing the aid of the United States in the construction of the irrigation project, and for the collection and payment to the United States of moneys which might be due for the use of water from any irrigation works, to be constructed under the provisions of the Reclamation Act under a plan approved by the Secretary and prescribed by the articles of incorporation of the water users' association. The shareholders in the association pledged their respective tracts of land as security for the payment of the estimated costs and charges of any irrigation project which might be constructed by the United States for the irrigation of the lands in the district, and it is alleged that in May, 1904, relying upon the estimate of \$35.28 and on what was said by certain officials of the Reclamation Service, that the Yuma project would be completed at the estimated cost and within two years from the commencement of the work, plaintiffs were induced to mortgage their lands and to become shareholders; that on May 31, 1906, the association for itself and the shareholders agreed with the United States through the Secretary of the Interior that the estimated cost of the Yuma project should be divided into not less than 10 annual payments; that the association would collect from its shareholders the amount of the cost of the project. It is alleged that the corporation performed, but that, notwithstanding the estimate and determination of the Secretary, and the promises by the engineers of the United States, and notwithstanding the agreement of 1906, the project has

not been completed, and large portions of tracts have been left in desert condition; that defendants, with the intention of compelling the shareholders in the Yuma County Water Users' Association to make a contract whereby they would agree to pay into the reclamation fund for the cost of expense of the Yuma project, exclusive of the cost of operation and maintenance, \$75 per acre, threaten that unless they make such payment the defendants will shut off the water; that the contract proposed is inequitable and unconscionable, in that it will compel each signer to agree to pay \$75 per acre for each acre of irrigable land, notwithstanding the estimates of the Secretary, and that such amount is greatly in excess of the actual value of work constructed or to be constructed in the Yuma project.

The principal points upon which decision must turn relate to the public notice required to be issued by the Secretary of the Interior, and the matter which it should contain, especially as to the amount of the cost. The formal notice dated April 6, 1917, was issued pursuant to section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388 [Comp. St. § 4703]), and the amendments thereto, and the extension act of August 13, 1914 (38 Stat. 686 [Comp. St. §§ 4713a-4714f]). It specified certain lands for which water would be furnished under the project; gave notice that all water right applications must be made to the project manager; specified the classes of charges for water rights, which included a charge against each irrigable acre "to cover the cost of construction of the irrigation system called the construction charge," and an annual charge against each irrigable acre "to cover the cost of operation and maintenance of the system called the operation and maintenance charge;" and specified "the construction charge for the unit as \$75 per acre of irrigable land" payable in installments which are enumerated.

Section 4 of the Reclamation Act gives authority to the Secretary of the Interior, after determining that an irrigation project is practicable, to cause to be let contracts for the construction work in such portions or sections as it may be practicable to construct and complete as parts of the whole project, provided funds are available in the reclamation fund, and thereupon to give public notice of the lands irrigable under the project, of the charges which shall be made per acre upon entries, and upon lands in private ownership capable of being irrigated and the number of annual installments in which the charges shall be paid. The section continues:

"The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of * * * the project, and shall be apportioned equitably: Provided," etc.

[1] The notice given was in clear accord with the statute, and presumably was based upon data and information then at hand. By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the

obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate.

[2, 3] Correspondence such as there was in the present case between the Secretary and officials of the Reclamation Service, wherein estimates are considered and discussed in laying out the work prior to the date of the contract between the landowners and the United States, cannot be regarded as a public notice, nor as in any way binding upon the government. *Utah Light & Power Co. v. United States*, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791. As the whole theory of the statute is that there shall be a return to the reclamation fund of the estimated cost of constructing the project, manifestly the United States should not be bound by letters or statements published antecedent to plain agreements made pursuant to the statute. It is unfortunate that in the Yuma project there was a substantial and material difference between preliminary engineering estimates and the estimate which was made at a later time; but in the absence of some substantial showing that the action of the Secretary was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrongdoing, it is not within the province of the courts to interfere. *Noble v. Union R. Logging Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; *Swigart v. Baker*, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143; *N. Y. Canal Co. v. Bond* (C. C. A.) 265 Fed. 228.

It is not out of place to say that the increased cost as explained by Chief Engineer Davis of the Reclamation Service was because of the unexpected difficulty in managing the rivers, rapid increase in price of labor, change of engineering plans by substituting a siphon under the Colorado for one under the Gila river, increasing mileage of canals, and other important modifications of originally conceived plans.

[4] Moreover, the contract between the United States by the Secretary of the Interior and the Water Users' Association provides that the association will promptly collect or require payment for that part of the cost of the works which shall be apportioned by the Secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106.

[5] There is no real importance to the point that the system was not completed when this suit was filed. The public notice and the letters of the Secretary of the Interior to the association are based upon his determination that the project was completed. His determination was based upon investigation into facts, and found support in the opinion of an experienced engineer, and we think that in withdrawing certain lands and confining the project to the area described in the public notice the Secretary but exercised discretion and power vested in him under the law.

We cannot find that appellants have made any showing which entitles them to relief.

The decree is affirmed.

BOSTON & M. R. R. v. SULLIVAN.

(Circuit Court of Appeals, First Circuit. October 19, 1921. On Petition for Rehearing, December 19, 1921.)

No. 1498.

1. Receivers \Leftrightarrow 175—Employee's claim under federal Employers' Liability Act determinable on intervention in equity proceedings.

Where a railroad employee, injured before a receiver was appointed, after such appointment petitioned for leave to sue and did sue the receiver, and subsequently moved to amend his motion for leave to sue by substituting a petition to intervene, proceedings on intervening petition were in equity, though the claim be in tort and statutory, and the employee's claim under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) could be adjudicated in such proceedings and in accordance with equity procedure, without a trial by jury, if the court so decided.

2. Limitation of actions \Leftrightarrow 127(5)—Amendment held not new case, barred by limitation under federal Employers' Liability Act.

Plaintiff railroad employee, being injured in September, 1915, while employed by a railroad for which a receiver was appointed in August, 1916, claiming under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), petitioned for leave to sue and did sue the receiver in August, 1917, and in October, 1918, moved to amend his motion for leave to sue by substituting a petition to intervene, which was granted in March, 1919. *Held*, that the petition to intervene, filed as an amendment of the motion to sue the receiver, being based on the same claim as that set out in the motion, related back to the time of the filing of the motion and constituted the commencement of an action, not barred by the limitation of two years in section 6 of said act.

3. Master and servant \Leftrightarrow 111(1)—Placing gondola car in train with drop end unfastened held negligence.

A railroad company was negligent in placing in a train with other cars a so-called gondola car—which had ends arranged so as to drop on being unfastened—with its drop ends standing, but unfastened.

4. Master and servant, \Leftrightarrow 217(20)—Risk of negligence in placing gondola car in train with drop ends unfastened held not assumed.

A trainman did not assume the risk of railroad company's negligence in placing in a train with other cars a so-called gondola car with drop ends standing, but unfastened.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Suit by George B. Sullivan against the Boston & Maine Railroad, by intervention in receivership proceedings. From a decree for plaintiff, the defendant appeals. Affirmed.

Albert W. Rockwood, of Boston, Mass. (Henry F. Hurlburt and Francis P. Garland, both of Boston, Mass., on the brief), for appellant.

Joseph P. Fagan, of Boston, Mass. (James E. Cotter and J. W. McAnarney, both of Boston, Mass., on the brief), for appellee.

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

JOHNSON, Circuit Judge. This is an appeal from a decree in equity of the District Court of Massachusetts. A brief statement of the facts necessary to an understanding of the case is as follows:

On September 10, 1915, the plaintiff was in the employ of the Boston & Maine Railroad as a trainman. He suffered a severe injury upon that date by the alleged negligence of the railroad in failing to properly secure the ends of what is called a "gondola car." This car had permanent sides, but the ends could be turned up or allowed to lie down. When turned up, the ends were usually secured by cleats or otherwise. On the night of the day in question, Sullivan had occasion to go over a train into which a gondola car, with its ends upright, but unfastened, had been set; and in attempting to pass from that car to a box car next to it, with a ladder upon it, he stepped upon the unfastened upright end of the gondola car, which gave way and he fell through a bridge to the street below, a distance of about 25 feet, suffering severe injuries.

August 29, 1916, a receiver was appointed for the Boston & Maine Railroad.

August 2, 1917, Sullivan filed a motion in the District Court, asking leave to sue the receiver in that court, which was allowed; and on August 7, 1917, he brought an action at law under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) against the receiver.

On October 18, 1918, he filed a motion to amend this motion for leave to sue the receiver, by substituting for it a petition to intervene in the original equity suit under which the receiver had been appointed.

On March 11, 1919, the District Court made and entered a decree allowing the motion to amend, and permitting Sullivan to intervene in the receivership proceedings, "for the sole purpose of establishing and liquidating his alleged claim for personal injuries." From this decree James H. Hustis, the temporary receiver, appealed; but this ground of appeal is not relied on.

Sullivan continued to press his suit at law against the receiver, and on November 26, 1919, the case came to trial and, after the opening by plaintiff's counsel, the court, on motion of the defendant, the temporary receiver, directed the jury to return a verdict for the defendant, on the ground that an action at law upon a tort claim for personal injuries arising prior to the receivership could not be maintained against the receiver.

On November 19, 1919, the District Court entered an order in the receivership proceedings discharging the receivership of the Boston & Maine Railroad, and on the same day the Boston & Maine Railroad filed a stipulation whereby it accepted all the terms and conditions of the order discharging the receivership and agreed to be bound thereby. It was provided in said order that the Boston & Maine Railroad should assume in its own name the prosecution or defense of all suits then pending in which the said receiver, as such, was a party.

On March 20, 1920, the court allowed a motion to amend the intervening petition by substituting therefor a petition more fully setting forth the alleged claim. Thereupon the Boston & Maine Railroad, in accordance with the order of the court discharging the receiver and its

stipulations thereunder, appeared, without waiving the objections of the receiver, and defended against said intervening petition.

The railroad company, in support of its appeal, relies upon the following propositions:

"First. Sullivan's claim under the federal Employers' Liability Act cannot be maintained and established against either the Boston & Maine Railroad or the receiver in this equity proceeding.

"Second. Any recovery under the federal Employers' Liability Act in this proceeding is barred by the expiration of the period of limitation fixed by the act.

"Third. Upon all the evidence Sullivan is not entitled to recover."

There can be no doubt that, if Sullivan had received his injuries while the railroad was being operated by the receiver, he could have intervened in the original suit, even if his claim was one under the federal Employers' Liability Act. It is also well established that, where property is in the actual possession of a court, all persons entitled to participate in its ultimate distribution may be allowed to have their claims adjudicated under the jurisdiction acquired between the original parties. *Rouse v. Letcher*, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341; *Kohn v. McNulta*, 147 U. S. 238, 240, 13 Sup. Ct. 298, 37 L. Ed. 150; *Mercantile Trust Co. v. Pittsburg & W. Ry. Co.*, 115 Fed. 475, 53 C. C. A. 207; *Kennedy v. I. C. & L. R. Co.* (C. C.) 3 Fed. 97; *Atkyn v. Wabash Ry. Co.* (C. C.) 41 Fed. 193.

[1] It is clear from these cases that the proceedings instituted by an intervening petition are proceedings in equity and are to be conducted in accordance with equity rules and practice; that the court may, if it desires, submit questions arising under them to the determination of a jury or may determine them itself; and that, if submitted to a jury, its verdict is only advisory, whether the claim upon which the action is brought is of a legal or equitable nature. Nor does it make any difference that it is a statutory claim, for, if a purely tort claim can be adjudicated in supplemental proceedings by way of intervention, we see no reason why a claim under the federal Employers' Liability Act, upon a cause of action arising either before or after the appointment of a receiver, cannot also be adjudicated in like proceedings and in accordance with equity procedure without a trial by jury, if the court so decides.

Sullivan, within two years after his cause of action accrued, filed a motion for leave to sue the receiver in action at law and therein stated the same cause of action as that set out in his petition to intervene. By so doing he mistook his proper remedy; but, before the court directed a verdict for the defendant in his suit at law, in which he set out a cause of action under the federal Employers' Liability Act, he filed a motion to amend his original motion, by substituting for it a petition to intervene, which was allowed by the court.

The petition to intervene set up no new cause of action. While, technically, it was a suit against the Boston & Maine Railroad, it was in effect a suit against the receiver; and it became his duty to defend against it. *High on Receivers* (4th Ed.) § 254c. It did not expand or enlarge the claim which the petitioner made in his original motion and

upon which he asked to be allowed to sue the receiver in the District Court, and no additional or different facts were alleged in it. Looking at the substance rather than at the form, the motion to sue the receiver and the petition to intervene each sought the same result, viz.: The adjudication of a claim for personal injuries and its satisfaction from the property in the possession of the court. While in the motion it did not appear that the claim which he asserted was under the federal Employers' Liability Act, the action at law which was brought only a few days after the leave to sue the receiver had been granted, contained a declaration alleging facts which brought it under that act, and before trial the claim set out in the petition to intervene was amended so as to include like allegations. While there was no appeal from the allowance of this amendment by the court, it is now contended that such amendment did not relate back to the original motion of August 2, 1917; but, having been made after two years from the time the cause of action accrued, recovery under it is by the special statute of limitations contained in section 6 of the act, which provides that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

In *Smith v. Atlantic Coast Line R. Co.*, 210 Fed. 761, 127 C. C. A. 311, it is held:

An amendment which "does not introduce a new cause of action, but only affects the defenses which may be made" is properly allowed. Thus, where "an employee against a railroad company to recover for a personal injury, commenced within two years after the injury occurred, alleged the facts and stated a cause of action of which the court had jurisdiction, an amendment, made after the expiration of such two years, alleging that defendant was engaged in interstate commerce * * * so as to bring the case within the Employers' Liability Act, * * * does not introduce a new cause of action."

See also *Mo., Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006, and *Friederichsen v. Renard, Executor*, 247 U. S. 207, at page 213, 38 Sup. Ct. 450, 452 (62 L. Ed. 1075), in which the court said:

"As we have seen, the 'amended petition' was not filed in a new case but was simply a step forward in progress toward settlement of the original controversy; the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action."

[2] Under the authority of these cases the petition to intervene in the original equity suit which was filed as an amendment of the motion to sue the receiver, and based upon the same claim as that set out in the motion, related back to the time of the filing of the motion and constituted the commencement of an action which was not barred by the special statute of limitations.

[3, 4] We are in full accord with the finding of the District Court that, in placing this gondola car in the train, with its drop end standing up, but unfastened, the railroad company was negligent, and that it was not one of the risks of employment assumed by Sullivan.

It might reasonably be expected that a trainman, in going over the train in the performance of his duty, would assume this upright end to be fastened, and that he could step upon it in attempting to reach the ladder of the box car next to the gondola car, and that, if he did so, he might be injured.

There was no evidence upon which it could be found that the situation created by placing this gondola car, with its drop end upright and unfastened, next to a box car in a train over which trainmen were required to pass in the performance of their duties, was one of the risks incidental to Sullivan's employment, so that he could be found to have assumed it.

The decree of the District Court is affirmed, with costs.

ALDRICH, District Judge, now deceased, concurred in this opinion.

On Petition for Rehearing.

JOHNSON, Circuit Judge. In the above case the appellant has filed a petition for rehearing, alleging that a ground of appeal duly raised by its assignments of error was not considered by the court, and that this appears from a statement in its opinion that the appellant did not rely upon the appeal which it had taken from an interlocutory decree of the District Court allowing an amendment.

The statement, without any qualification, may have been too broad, but it is apparent that the court in its opinion considered and decided that the amendment did not introduce a new cause of action, and that proceedings under it were not barred by the special statute of limitations under the federal Employers' Liability Act; thus in effect deciding that the amendment was properly allowed.

In its brief the appellant stated the propositions of law which it intended to raise by its assignments of error. These questions were considered and decided, and no useful purpose in the administration of justice would be served by granting a rehearing.

The petition is denied.

STOKES et al. v. SEDBERRY et al.

SEDBERRY et al. v. WALKER et al.

(Circuit Court of Appeals, Sixth Circuit. October 14, 1921.)

Nos. 3503, 3504.

1. Bankruptcy ◊440—Determination of attorney's fee held only step in administration of bankrupt estate, and not appealable.

Where trustee in bankruptcy employed attorney to set aside an alleged fraudulent conveyance of land on a 50 per cent. contingent basis, disposition of questions whether the 50 per cent. contract was valid, if it was not, whether attorney could recover the value of his services upon a quantum meruit, whether the fee should be charged against the 100 per cent. otherwise to be disbursed to creditors or against the surplus to be returned to the grantee, and what the amount of the fee should be, *held a*

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

step in the administration of the estate, rather than a controversy arising between adverse parties, and appeals therefrom must be dismissed; petition to revise being the proper remedy.

2. Bankruptcy ⇨482(1)—Value of service of attorney determined at final settlement.

The value to a bankrupt estate of the services of the trustee's attorney is ordinarily to be determined by the court when the estate is finally settled, under Bankruptcy Act, § 62 (Comp. St. § 9646).

3. Bankruptcy ⇨482(2)—Order of referee as to attorney's fee held invalid.

A referee's order in voluntary bankruptcy proceedings authorizing a contract between trustee in bankruptcy and his attorney for a 50 per cent. contingent fee, not made at a meeting of the creditors, but wholly *ex parte*, without notice to any parties adversely interested, would not render such contract, subsequently entered into by the trustee, valid.

4. Bankruptcy ⇨482(1)—Recovery under quantum meruit under champertous contract.

Where trustee in bankruptcy enters into a champertous contract with an attorney, such contract is not so inherently vicious in its tendency as to forbid the court finally to award to the attorney such compensation as it thinks right, because all such contracts are entered into subject to the approval of the court.

5. Fraudulent conveyances ⇨319—Attorney fees payable out of debts recovered.

In Tennessee, where a conveyance of property is set aside as fraudulent as to creditors, counsel fees must be paid out of the debts recovered, and cannot be charged against the surplus, under Shannon's Code Tenn. §§ 6097, 6099.

6. Bankruptcy ⇨474—Counsel fees not payable out of surplus on setting aside fraudulent conveyance.

Under Bankruptcy Act, §§ 67e, 70e (Comp. St. §§ 9651, 9654), if a bankrupt in Tennessee fraudulently conveyed property to his wife within four months before bankruptcy, on setting aside the conveyance, attorney's fees, as expenses of the trustee, are a lien upon the surplus left after payment of debts of defrauded creditors; but where the fraudulent conveyance was made more than four months before bankruptcy, attorney's fees must be paid out of the debts recovered, and cannot be charged against the surplus, in view of Shannon's Code Tenn. §§ 6097, 6099.

7. Pleading ⇨235—Order would justify amendment of petition *nunc pro tunc*.

In a bankruptcy proceeding, where the judge permitted bankrupt and wife on argument to change their position and to claim that attorney's fee in proceeding to set aside alleged fraudulent conveyance to wife should be paid by the creditor, instead of out of the surplus, this would fully justify an amendment of the bankrupt and wife's petition *nunc pro tunc*; such petition originally being on the theory that such fee should be paid out of the surplus.

8. Bankruptcy ⇨474—Bankrupt and wife not bound by agreement that attorney's fee should be paid out of surplus on setting aside fraudulent conveyance.

An understanding between bankrupt, wife, and others that attorney's fee for setting aside a fraudulent conveyance to bankrupt's wife should be paid out of surplus, which was a part of a general compromise arrangement, ought not to bind the bankrupt and wife, where they understood that the attorney was to ask the allowance of only reasonable compensation, while the attorney in fact intended to insist upon a 50 per cent. contract with the trustee.

9. Bankruptcy ⇨446—Discretion of trial judge as to attorney's fee not reviewed on petition to revise.

So far as the amount of a fee of an attorney in a bankruptcy proceeding involves the discretion of the trial judge, or his conclusion of fact as

to what was reasonable, the Circuit Court of Appeals cannot review it on a petition to revise in a matter of law.

10. Bankruptcy ⇨482 (2)—**Liberal fee to attorney suing on contingent basis.**

Where an attorney agreed with trustee in voluntary bankruptcy not to charge for his services unless he recovered property to be sued for, and there was supposedly small chance of successful outcome, there was justification for a liberal attorney's fee; but an attorney's fee of \$7,500 must be held excessive, where the District Judge considered the amount of recovery as \$29,000, while it should be treated as \$21,500.

11. Bankruptcy ⇨442—**No complaint of allowance to trustee for expenses.**

Bankrupt and wife cannot, on petition to revise order, be heard to complain of an allowance to trustee of \$750 for expenses of litigation without itemization, where trustee asked for \$1,200, and, on objection of bankrupt and wife, referee held the charge not properly itemized, but thought that \$750 would be a proper amount, and said he would make that allowance, but, if any party still thought there ought to be further itemization, application might be made, and he would consider it; no such application being made.

Petitions to Revise an Order of, and Appeals from, the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

In the matter of the bankruptcy of J. H. Sedberry; Thomas G. Walker, trustee. Order entered concerning attorney's fee of Jordan Stokes, Jr. Jordan Stokes, Jr., and others and Sedberry and others separately petition to revise and appeal. Order modified, and case remanded.

Clarence T. Boyd and John R. Aust, both of Nashville, Tenn., for petitioners Stokes and others.

Norman Farrell, of Nashville, Tenn., for petitioners Sedberry and others.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. Sedberry, the bankrupt, caused the title to a farm and the personal property thereon to be conveyed to his wife. At a later date he became financially involved and filed a voluntary bankruptcy petition. The trustee in bankruptcy entered into a contract with Mr. Stokes, an attorney, to endeavor to recover the property. Accordingly, Mr. Stokes, in the name of the trustee, filed a bill in the state chancery court, alleging that the conveyance to Mrs. Sedberry was in fraud of creditors, and finally obtained a decree accordingly. The property which Mrs. Sedberry held and which was affected by this decree was worth about \$100,000. The total claims against the bankrupt estate were about \$21,500. The contract with Mr. Stokes provided for a contingent fee of 50 per cent. of the amount recovered, and specified that he should advance and pay all the expenses of the litigation, without liability therefor on the part of the trustee in case of failure. The questions upon which controversy arose, and which now remain important, were whether the 50 per cent. contract was valid; if it was not, whether the attorney could recover the value of his services as upon a quantum meruit; if he could, whether the fee allow-

ed to him should be charged against the 100 per cent. otherwise to be disbursed to creditors or against the surplus to be returned to Mrs. Sedberry; and what the amount of the fee should be. The action of the referee in all these matters was taken before the District Judge on petition to review, and each party complains of the action of the District Judge; the complaints being both by appeals and by petitions to revise.

[1] The disposition of each one of the four questions above stated was a step in the administration of the estate rather than a controversy arising as between adverse parties. Both appeals must therefore be dismissed, and the cases stand for hearing upon the petitions to revise. *Davidson v. Friedman* (C. C. A. 6) 140 Fed. 853, 72 C. C. A. 553; *Ohio Co. v. Switzer* (C. C. A. 6) 153 Fed. 362, 82 C. C. A. 438; *In re Kinnane* (C. C. A. 6) 242 Fed. 769, 771, 155 C. C. A. 357.

[2, 3] The attorney's contract with the trustee is attacked for champerty and maintenance, and as being, therefore, void. The question is elaborately argued, but we agree with the District Judge that it need not be decided. The contract was, for other reasons, invalid. It is not suggested that the trustee would have power on his own account to make such a contract, but it is said to have been authorized in advance by an order of the referee, and its validity is claimed to find sufficient support in this authority. The referee's order was not made at a meeting of the creditors, but wholly *ex parte*. Neither the creditors, who would very probably have to pay the fee, nor the bankrupt, who would have to pay it if the creditors did not, had any notice in the matter. The value to the estate of the services of a trustee's attorney is, ordinarily, to be determined by the court when the estate is finally settled. Bankruptcy Act, § 62 (Comp. St. § 9646). If there are exceptions to this rule, and if the trustee may ever make a contingent fee contract in advance, which may be valid because of approval at the time by the court or referee, we find no provision in the Bankruptcy Law which could give authority for such an order when made, as here, without any notice to any of the parties adversely interested. We conclude that the contract was invalid, and that there could be no recovery by virtue of it.

[4] Both the referee and the District Judge allowed Mr. Stokes a fee upon the quantum meruit theory. This result is attacked because the attorney insisted and is still insisting upon his right under the contract, and because the contract was champertous, and therefore he could have no recovery whatever. As between ordinary parties, there is ample authority for this position (*Roller v. Murray*, 112 Va. 780, 72 S. E. 665, 38 L. R. A. [N. S.] 1202, Ann. Cas. 1913B, 1088), and, for the purposes of this decision, we assume that, except for the considerations to be stated, that rule would obtain here, and also assume, without deciding, that the contract was champertous. We are not satisfied that an entire forfeiture of the fee must follow, in a court of bankruptcy, and under the special circumstances here existing. We understand that the tendency of champerty and maintenance to stir up litigation which otherwise would not be brought is the reason why contracts tainted therewith are so contrary to public policy that there can be no recovery

for the value of services rendered under them. This reason applies with full force to unsupervised contracts of attorneys with individuals acting in their own right; but not only was the proposed bringing of this suit approved by the referee, but every such contract, made between attorneys and a trustee in bankruptcy, is made with knowledge that primarily the referee, and ultimately the District Court, must approve and must make an award before payment can be made. Each contract, therefore, in effect has written into it "subject to the approval of the court." We cannot think that such a contract, with this limitation and with this preliminary approval, is so inherently vicious in its tendency as to forbid the court finally to award to the attorney such compensation as it thinks right. It follows that Mr. Stokes was entitled to the reasonable value of his services.

Whether the fee should be charged against the fund devoted to pay the creditors, or should be added to that fund and charged against the surplus, is a question of difficulty, and often may be of importance. The District Judge here allowed a fee of \$7,500.

[5] In Tennessee, a creditor, or a group of creditors, claiming that a debtor's conveyance of his property is fraudulent as to them, can file a bill in the nature of a creditors' bill and have their debts established as a lien against the property superior to the fraudulent conveyance. This is the extent of their right and remedy. The counsel fees must be paid out of the debts recovered and cannot be charged against the surplus. Shan. Code Tenn. §§ 6097, 6099; *Bank v. Haller*, 101 Tenn. 83, 52 S. W. 807; *Douglas v. Bank*, 97 Tenn. 148, 36 S. W. 874. Such is also the general rule. 20 Cyc. 825.

[6] Did it make a difference of \$7,500 to these creditors and to Mrs. Sedberry whether the remedy was given through the state courts only or through bankruptcy? The grantee, who has held property for 20 years—as Mrs. Sedberry had done in this case—with knowledge that creditors may some time successfully complain, may ordinarily anticipate at least that the surplus over the amount of the debts, at the time when, if ever, the attack comes, will be immune. Such is the law of the state, and no direct provision of the Bankruptcy Law has been violated. It does not necessarily follow that the indirect effect of the Bankruptcy Law, when invoked, may not burden, and perhaps exhaust, this surplus; but that law should not be interpreted to bring such a result, unless that is its reasonably clear and certain effect. Two sections of the act deal with the remedies of creditors where there has been a transfer with intent to defraud. Section 67e (section 9651) refers only to such transfers as have been made within four months. It pronounces them null and void as against the creditors, and declares that the property shall be and remain a part of the assets of the estate of the bankrupt, and shall pass to the trustee, whose duty it shall be to recover and reclaim the same. This section is of no avail, where the transfer is more than four months old, but in such case the procedure can be only under section 70e (section 9654), which provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided.

There seems to be a distinct difference in the theories of the two sec-

tions. It is the theory of section 67e that the bankruptcy reaches back four months, and that any preference or fraudulent conveyance made within that time is not a thing accomplished but is inchoate and is retroactively obliterated. The property conveyed is therefore always a part of the bankrupt's estate. It is the theory of section 70e that the Bankruptcy Law should not by indirection take away from any creditor any right which he has under the law of the state, and its substance seems to be only that the remedy of the creditor must be pursued by and in the name of the trustee. In our judgment, these considerations justify the conclusion that when it is said in section 70a (4), that the trustee shall be vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of creditors, direct reference is had only to such transfers as have been invalidated by the Bankruptcy Act itself in section 67e, and that, even if the language should be thought to reach a transfer which the trustee might avoid under section 70e by subrogation to the rights of some creditor, the only "property" to which it could refer would be the property which, as between the bankrupt and these creditors, they had a right to subject to their claims—viz. enough to pay their debts. If a man transfers a \$100,000 farm, so that it may not be reached by his creditors, who have \$20,000 of claims, it is true in a very fair sense that the "property" which he transfers "in fraud of creditors" is the property which they had the right to get, and not the surplus.

Whether property which the assignee recovers under section 70e, in the special right of some particular creditors, should be distributed in bankruptcy only to them, or should be distributed, also, among creditors who could not have avoided the transfer, is a question which is now immaterial. We are concerned only with the extent of the recovery. See *Globe Bank v. Martin* (C. C. A. 6) 193 Fed. 841, 113 C. C. A. 627; s. c., 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583; *In re Stuart* (C. C. A. 6) 272 Fed. 938, 941.

The last part of section 70e, as applied to the facts in this case, helps us to interpret. For the purpose of such an action as was had here, the trustee may resort to the state court or to the bankruptcy court. The counsel fee being a part of the expenses of the trustee, the state court could have no jurisdiction to fix its amount, and yet, if resort was had to the state court to avoid the transfer, only that court could fix the amount which the defendants must pay in order to have the case dismissed, or for which, under the Tennessee statute, the creditor should have a lien. In the instant case, the state court could award a lien or recovery of only \$21,500, while the bankruptcy court, upon the same facts, awarded \$29,000. Certainly it was not intended that the statutory right of election between the courts should involve such a difference in the result.

We do not overlook that the form of the decree by the state court purported to transfer the whole title to the trustee; but the form which happened to be taken by the state court decree cannot control either the substantial right or the construction of the federal statute. Whatever the form of the decree, the trustee would doubtless be required to make a release of his lien or a conveyance of his title—whichever

the decree had given—upon payment or tender to him of the proper amount.

Our conclusion is that under section 70e, the property to be reached by the trustee is only that interest which would have satisfied the demands of the creditors who might have avoided the transfer, and that the recovery cannot include the costs of the bankruptcy administration. The rightfulness of this conclusion is indicated by the discussion by Judge Lowell (D. C., Mass.) in *Re Mullen*, 101 Fed. 413, and by Judge Clark (C. C., E. D. Tenn.) in *Bush v. Storage Co.*, 136 Fed. 918. The court below relied on *Rogers v. Page* (C. C. A. 6) 140 Fed. 596, 606, 72 C. C. A. 164, s. c., 149 Fed. 194, 79 C. C. A. 153, s. c., 211 U. S. 580, 29 Sup. Ct. 159, 53 L. Ed. 332, to the effect that such a counsel fee should be paid out of the surplus which would be returned to the grantee or bankrupt. If we are correct as to the substantial distinction in this respect between sections 67e and 70e, the inapplicability of *Rogers v. Page* appears, for that suit was brought under section 67e.

We also observe that, from our stated conclusion, it would follow that, where a fraudulent conveyance was within four months and there is a surplus above the claims of creditors, the bankruptcy administration expenses can be charged against the surplus, while, if the conveyance was more than four months old, this cannot be done, and that this seems an anomaly. However, the Bankruptcy Act is full of anomalies and contradictions, if every clause is literally applied. Further, we think this suggestion of conflict is only superficial, and that there is good reason for the distinction. Such a conveyance, made within four months, is forbidden equally in every state by the express terms of the uniform system of bankruptcy which Congress has established, and it is logical to consider, as the estate of the bankrupt in the District Court for distribution, all the property, the presence of which in that court is required by the direct operation of the law itself. On the other hand, if the conveyance is more than four months old, it is reached only through calling upon some state law for aid; its liability to attack is no part of the uniform bankruptcy system. In some states, such attack would bring general relief to creditors; in others, partial relief; in others, none. It is fitting that the administration of such a feature shall conform fully to the state law—that the same law which creates the right shall measure the remedy.

[7, 8] It is said that in this case payment of the counsel fee should be made out of the surplus, because there was an understanding to that effect between Mr. Stokes and the Sedberrys, and because the present controversy was initiated by the filing of a petition in the bankruptcy court by the Sedberrys, which petition was upon that theory. As to the second point, it should be observed that the District Judge expressly permitted the Sedberrys, upon the argument, to change their position and to claim that the fee should be paid by the creditors; this would fully justify an amendment of the Sedberrys' petition nunc pro tunc, if that were necessary. As to the first point, it appears that, though there was an understanding to this effect, yet that it was reached as a part of a general compromise arrangement then entered into, in connection with which the Sedberrys understood that Mr. Stokes

would ask the allowance of only reasonable compensation, while in fact Mr. Stokes then intended to insist upon the 50 per cent. contract, but did not disclose to the Sedberrys its existence. The Sedberrys ought not to be bound by their part of the proposed compromise.

[9, 10] So far as the amount of the fee involves the discretion of the trial judge or his conclusion of fact as to what was reasonable, we cannot review it upon a petition to revise in matter of law. The opinion of the trial judge, which he expressly made his finding of fact, discloses the reasons or rules which controlled him in reaching the amount, and we can observe what these were. We think that the supposedly rather small chance of successful outcome, and the fact that for lack of assets the attorney could get no pay unless he succeeded, rightfully tend to justify a liberal fee; also, the amount of the recovery is a material element; but the District Judge considered the amount of recovery as \$29,000, while we think the amount should be treated as \$21,500.¹

In view of the changes in the situation which our conclusion makes necessary, the award should be vacated, leaving the District Judge at liberty to use his discretion in again fixing the amount, with due regard to the modified character of the recovery and the change in the source from which payment must be made.

[11] In connection with the amount, complaint is made because the trustee was allowed \$750 for expenses, without such itemization as the statute requires. We agree with the District Judge that the Sedberrys cannot well be heard to raise this question. The trustee asked for about \$1,200 for the expenses of this litigation. There was no sufficient statement of detail, and the Sedberrys, on that ground, objected to its allowance. The referee held the charge not properly itemized, but thought \$750 would be a proper amount, and said he would make that allowance, but, if any party still thought there ought to be further itemization, application might be made, and he would consider it. No further application was made. This was, in effect, the suggestion of a compromise, for the sake of avoiding further trouble and expense, and the silence of the Sedberrys should be taken as an acceptance of the offer.

We have examined the complaints made by Mr. Stokes and the trustee in their petition to revise. So far as these are not already covered hereby, we think they are without substantial merit.

The order under review should be modified, to the extent here indicated, and the case is remanded for that purpose. The Sedberrys will recover their costs.

¹ All figures herein are approximate, and intended only to identify the sum involved, not to fix it.

MICHIGAN LUBRICATOR CO. v. ONTARIO CARTRIDGE CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1921.)

No. 3508.

1. **Corporations** ⇨661(2)—Michigan statutes forbid recovery by foreign corporation under contract contemplating performance of its part in state.
Comp. Laws Mich. 1915, §§ 9063, 9068, 12370, providing that foreign corporations, before doing business in the state, shall comply with certain requirements, forbid recovery under a contract which contemplates that the foreign corporation shall perform its part within the state, though such corporation is not doing business in the state at the time of the making of the contract.
2. **Corporations** ⇨642(1)—Foreign corporation, contracting for manufacture in Michigan of certain articles, held not "doing business" in state.
Where a foreign corporation entered into a contract with a Michigan company, whereby the domestic company was to manufacture brass parts for primers, which were to be completely assembled and loaded by the foreign corporation in Ontario, and then to be sold to another company, such foreign corporation was not "doing business" within the state, so as to require it to obtain a certificate under Comp. Laws Mich. 1915, §§ 9063, 9068, 12370, though it furnished an inspector or "production man" for the domestic company's plant, and its officers lived in Michigan and made executive decisions there.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]
3. **Sales** ⇨89—Manufacturer held to have broken contract to manufacture primers according to specifications, notwithstanding modification of contract.
Where defendant manufacturing company agreed to manufacture primers "to conform to the Russian government's specifications and requirements, typewritten copies being attached to the order," and it was agreed between the parties that defendant could use brass containing lead on defendant's assurance and guaranty that the primers would not expand, but defendant failed to furnish primers which would not expand, because of the presence of the lead therein, *held*, that the contract was broken by defendant.
4. **Sales** ⇨416(2)—Evidence as to cost of obtaining substitute held admissible, when offered.
In an action for damages for failure of defendant manufacturer to deliver primers, court did not err in admitting in evidence the cost of obtaining primers from other manufacturers on defendant's default, where it did not appear at the time the evidence was offered that the material used by the other manufacturers was different from that specified in defendant's contract, or that the process employed by them might not have been used by defendant with its specified material, so as to make good its guaranty of performance.
5. **Sales** ⇨416(2)—Not pertinent that purchaser would have sustained loss on resale.
In an action for damages for failure to manufacture and deliver primers to be used in shells, on the theory of the difference between the contract price and the market price at the time of breach, defendant was not entitled to show that, if delivery had been made, plaintiff would have had no market for the articles and would have sustained a loss thereon.
6. **Trial** ⇨343—Finding in favor of plaintiff implied finding against defendant on cross-action.
In an action for damages for breach of contract, where defendant claimed that a new contract was substituted for the one sued on, and that there

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

was a breach thereof by the plaintiff, a finding by the jury of substantial damages in favor of plaintiff amounted to a finding against defendant on the issue as to the alleged substituted contract.

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

Action by the Ontario Cartridge Company, Limited, against the Michigan Lubricator Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Paul B. Moody, of Detroit, Mich. (Corliss, Leete & Moody, of Detroit, Mich., on the brief), for plaintiff in error.

Justin R. Whiting, of Detroit, Mich. (Warren, Cady, Hill & Hamblen, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. In September, 1915, the Ontario Cartridge Company, an Ontario corporation, as purchaser, and the Michigan Lubricator Company, a Michigan corporation, as manufacturer and vendor, entered into a contract for the manufacture and sale of a large quantity of brass parts for primers, which were then to be completely assembled and loaded by the Ontario Company, and then to be sold to the Eddystone Company, and by it used in its business of making artillery shells for the Russian government. The contract was not carried out—no complete parts (except for test) having ever been delivered. The Ontario Company (hereafter called plaintiff) brought this action in the court below to recover its advance payment and to get damages for nonperformance; verdict and judgment in its favor were rendered; and the Michigan Company (hereafter called defendant) alleges error.

[1, 2] 1. Was the plaintiff "doing business" in Michigan, and thus barred from this action, because it did not possess the necessary certificate? The Michigan statutes direct that a foreign corporation, doing business in Michigan, shall comply with certain requirements and receive a certificate showing its performance thereof, and prescribe that no action shall be maintained by it on any contract made by it in the state while it is in default for lack of such compliance and certificate. C. L. 1915, §§ 9063, 9068, 12370. Plaintiff, clearly, was not doing business in Michigan before and at the time of making the contract in suit, as it had then done no business anywhere, and this contract is thus not within the letter of the prohibition; but the Michigan courts have accepted the statutes as invalidating and forbidding recovery under a contract which contemplated that the foreign corporation should perform its part within Michigan (*Haughton Co. v. Candy Co.*, 156 Mich. 25, 120 N. W. 18; *Imperial Co. v. Jacobs*, 163 Mich. 72, 127 N. W. 772), and we accept this construction. Plaintiff's articles fixed its place of business at Walkerville, Ontario, across the river from Detroit. It had there leased a building for assembling purposes, and the contract between plaintiff and defendant called for the manufacture of these parts by the defendant at Detroit, and their delivery by defendant to plaintiff at Walkerville. Nothing was to be done by the plaintiff in Michigan, except to inspect at defendant's factory.

It is only the unusual situation, in some details, which gives color to defendant's theory of bar under this statute. Plaintiff's officers and managers lived in Detroit, and were chiefly engaged in conducting a Detroit manufacturing business. The contract was negotiated by them with defendant, in Detroit, and was there signed, advance payment was made from a bank deposit which plaintiff had in Detroit, and, as the matter went along and defendant's manufacturing difficulties developed, the consultations between the parties as to what should be done were held, and the conclusions of plaintiff's officers were announced, at Detroit. One of plaintiff's agents spent most of his time at defendant's factory, advising and assisting defendant in its troubles, acting, as he says, as "production man" for plaintiff. Until some parts were made under this contract and ready for assembling, plaintiff did nothing actively and actually at Walkerville, except to possess its factory expectant and keep a bank account; indeed, it did no substantial business, except to take its contract from the Eddystone Company and give this contract to defendant and lease its factory.

It is not easy to see how a contract, valid when made, has become invalid because unexpected developments have led the foreign corporation to be more active within the state than it had intended; but, however that may be, we think the recited circumstances did not, severally or cumulatively, tend to show that "doing business" which the statute forbids. Making the parts in Detroit was the defendant's business, not the plaintiff's; and whatever was actually done by plaintiff within the state was collateral or incidental to the purchase by the Canadian corporation of property to be shipped to it in Canada. The presence of foreign commerce is the dominant characteristic of the transaction, and, in its expected consummation, the preparatory domestic details are merged.¹ It is the clear inference from the decided cases to be cited that the furnishing of an inspector or "production man" does not infringe the statute. To make executive decisions in the state where the officers live is not to do business within that state. *Empire Co. v. Lyons* (C. C. A. 6) 257 Fed. 890, 892, 169 C. C. A. 40, and cases cited. Numerous decisions, in the Supreme Court of Michigan, the Supreme Court of the United States, and this court, lead, we think, to our stated conclusion. *International Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Browning v. Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828; *Standard Co. v. Cummings*, 187 Mich. 196, 153 N. W. 814, L. R. A. 1916F, 329, Ann. Cas. 1916E, 413; *Power Specialty Co. v. Power Co.*, 190 Mich. 699, 710, 157 N. W. 408, and cases cited; *Hayes Co. v. American Co.* (C. C. A. 6) 257 Fed. 881, 888, 169 C. C. A. 31; *Empire Co. v. Lyons* (C. C. A. 6) *supra*. It follows that the trial court was right in declining to submit to the jury the question of whether the plaintiff was in default under the foreign corporation statutes.

[3] 2. Which party broke the contract? The trial court held that,

¹ See *Dahnke-Walker Co. v. Bondurant*, 256 U. S. —, 42 Sup. Ct. 106, 66 L. Ed. —, and *Eureka Co. v. Hallanan*, 256 U. S. —, 42 Sup. Ct. 101, 66 L. Ed. —.

as matter of law, the defendant was at fault, and directed a verdict for the plaintiff. This leads us to the matter of construction. The contract (in the form of an order and acceptance) specifies that the parts were to be made "to conform to the Russian government's specifications and requirements, typewritten copies being attached to the order." One of the requirements thus incorporated consisted of detailed specifications of the firing test which must be passed, and one of these details was that, after firing, the primer must be easily removable from the cartridge case, in the manner particularized, so that the case might be used again with another primer. This amounted to saying that, in firing, the primer must not expand so as to hold itself too firmly in the inclosing cartridge shell. There was a sharp issue of fact as to whether these Russian government specifications and requirements were in fact attached to the order, or otherwise simultaneously brought to the knowledge of defendant, and such instructions to the jury were given that its finding for the plaintiff implies an affirmative finding on this question. It must therefore be assumed that the firing test specifications were, in effect, attached to the contract as executed by defendant.

It was taken as a fact upon the trial, not substantially questioned, that the primers, which were assembled by plaintiff from the parts made by defendant and delivered for test, did not successfully pass the ordeal, and that they expanded too much because the metal was too soft; and so we arrive at the controlling question. The order, as first tendered by plaintiff to defendant, provided that the brass, from which the parts were to be made, should contain no lead. Defendant insisted that such brass would be too hard to be successfully machined as contemplated, and represented that the rolling mills would furnish a brass rod containing from $1\frac{1}{4}$ to $1\frac{3}{4}$ per cent. of lead, and would guarantee it to be satisfactory, and that the defendant would therefore guarantee such material to be suitable. Plaintiff consulted with its customer, which consented to this change, and defendant was so informed. Thereupon the order proffered was accepted in writing by defendant, containing, in addition to the above-recited requirement of conformity to the Russian tests, the following:

"The rod to contain the following ingredients: 66 to 68 per cent. copper, $30\frac{1}{4}$ to $32\frac{3}{4}$ per cent. zinc, $1\frac{1}{4}$ to $1\frac{3}{4}$ per cent. lead, and to stand the following physical tests: Yield—12 British tons; breaking—20 British tons; elongation—30 British tons. You are to guarantee that this rod will pass the tests of the Russian government, and shall be of a quality and condition to close without fracture over the disc as shown in the assembly print attached hereto."

If it could be assumed that primer parts made of the specified material could not pass the test, no matter how manufactured, and that both parties knew or should have known it, there would be such repugnancy between the specification of material and the guaranty of performance as to bring confusion; but there is nothing to indicate that either party knew of this contingent repugnancy, or to show that there was no process of manufacture open to defendant which would have insured passing the test. Indeed, there was nothing to show that the satisfactory primer parts later made by others contained any different

raw material; and the inference seems open that an additional manufacturing process to those used by defendant—namely, preliminary forging or equivalent condensation—would have solved the difficulty. Under these circumstances, we think the conclusion inevitable that defendant deliberately assumed whatever risk there was that the use of the specified material would lead to rejection upon the firing test.

Though both plaintiff and the plaintiff's customer agreed to this material, they did so, not absolutely, but only when their consent was coupled with defendant's guaranty of ultimate performance. Defendant was an experienced and successful worker in brass and of ample pecuniary responsibility. It was known to all parties that the completed primers must not be too soft, and that the firing tests were the final criterion to be applied by the Russian government to the ultimate product. We see no consideration which would justify the elimination from the contract of the defendant's guaranty, or the confining of that guaranty to the meeting of a part of the tests and requirements instead of extending to all of them; and, unless this guaranty is so eliminated or confined, it is clear that the defendant, in effect, abandoned any attempt to perform.

3. *The Measure of Damages.*—As soon as it was apparent that no material was available, which defendant would undertake to use under its contract and which would make primers which would pass the test, plaintiff undertook to get satisfactory parts made elsewhere. The contract price per set was about 14 cents. Another manufacturer was making acceptable primers for the same ultimate use, but apparently from a harder material and at a greater manufacturing cost, and its price was 35 cents per set. Plaintiff eventually found a manufacturer who contracted to make the parts, meeting the Russian specifications and tests, for about 21 cents per set. It is true this price was to rise or fall with the market price of copper, but it appears that, during the period when the contract would have been filed, copper was constantly rising in price. Hence it seems that defendant cannot complain if this contract is given the same force in fixing the measure of damages as if it had been a definite contract for 21 cents. Based on this proof, plaintiff claimed its damages to be measured by the difference between the contract price and this price, which it was compelled to pay in order to get the specified parts. The jury's verdict was necessarily based on this theory, although it allowed damages much less than this evidence would indicate.

[4] Defendant's objections to this measure of damages are two: First, that the 21-cent price was for a substantially different article; and, second, that the plaintiff did not buy any substantial quantity of the 21-cent article, but that, on the contrary, the plaintiff's contract with its customer was canceled by the customer with the plaintiff's consent or acquiescence, and that the plaintiff was, for that and other reasons, left without any market for the article.

As to the first of these points, it is raised only by objection to the admission of evidence of the contract with the new manufacturer, upon the ground that it pertained to a different article. The court admitted the evidence, because it tended to establish the measure of dam-

ages. In this ruling, the court was right. It did not, at that point, appear that the raw material to be used was different from that specified in defendant's contract, or that the process of forging which was employed by the new manufacturer might not have been used by defendant with its specified material, so as to make good its guaranty of performance. In the absence of such proof, it would have been error to reject this evidence. If, when the case was closed, it was thought that the whole evidence so failed to show equivalency between the old material and the new that there was no sufficient proof of any measure of damage to go to the jury, the question could have been raised by motion to instruct for the defendant on that ground; but no such motion was made. There was a general request to instruct a verdict for defendant; but this was necessarily denied, because, upon the theory that the defendant broke the contract, plaintiff was entitled to a verdict at least for a return of the advance payment.

[5] As to the second point, it seems to appear that, some time after deliveries under the contract should have been completed, and after plaintiff had placed its order at the new price with another manufacturer, plaintiff's contract with the Eddystone Company, its purchaser, was canceled and the whole enterprise was abandoned. This would be a defense requiring serious consideration, if the action were directly for breach of warranty or to recover the profits which plaintiff had lost. The declaration had counts upon the theory of lost profits; but, upon the trial, these counts were abandoned, and the plaintiff sought to recover only upon the theory of the difference between the contract price and the market price at the time of breach. The defendant's warranty and its breach were involved only collaterally, in determining who was at fault for the nondelivery. This being the nature of the action, we see no pertinence in the fact, if it is a fact, that plaintiff would have had no market for the articles completed and delivered under the contract, but would, in truth, have made a loss. The situation is the same in principle as if the market price at the time of the breach was greater than the contract price, while afterwards, and before the purchaser actually buys again upon the market, the market price falls below the contract price, and the purchaser never does purchase elsewhere.

In such an action, it is no concern of the defaulting vendor whether the purchaser would eventually have made a loss or a profit, or whether he does or does not buy the articles elsewhere. Mechem on Sales, § 1738; 3 Sutherland on Damages (3d Ed.) § 699; Rockford Wks. v. Tilden, 188 Mich. 80, 83, 154 N. W. 35; Follansbee v. Adams, 86 Ill. 13. Further, in this case, no one knows that, if the primer parts had been made and delivered promptly under the contract, plaintiff might not then have successfully completed its sale to its customer; and no one knows that, in case of manufacture and delivery under the contract, plaintiff could not have kept the primers until the difficulties with the Russian government contracts, then thought to be temporary, were adjusted, or could not have kept them and used them in making ammunition for some other government.

[6] 4. *The Defendant's Cross-Action.*—Defendant claimed that a

new contract was substituted for the old one, by which new contract it was to make the primer parts out of other materials and for another price, and claimed damages for breach of this contract. The issue of fact as to the making of such new contract was submitted to the jury, and its finding of substantial damages, in addition to the sum of the advance payment, amounts to a finding against the defendant on that issue. The matters argued with reference to the rights of the parties under the new contract thereby became immaterial.

Several other errors are alleged in subordinate matters, but we find nothing creating substantial prejudice.

The judgment must be affirmed.

HERSCHBERGER et al. v. WOODROW-PARKER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1921.)

No. 3486.

1. **Exchange of property** ⇨8(4)—**Misrepresentation as to quality of land not shown.**
In a proceeding to set aside an exchange of farm lands, burden of showing active misrepresentations as to quality of a certain part of the land *held* not sustained.
2. **Exchange of property** ⇨8(4)—**Misrepresentations as to boundary not shown.**
In an action to set aside an exchange of lands, plaintiff *held* not to have sustained the burden cast upon him of showing misrepresentations as to the location of the boundary.
3. **Exchange of property** ⇨3(1)—**Fiduciary relationship held to exist between plaintiff and agent for defendants.**
In an action to set aside an exchange of land, *held*, that there was a fiduciary relation between plaintiff and one representing defendants, which entitled plaintiff to know the nature and extent of the employment of the agent by defendant.
4. **Receivers** ⇨96—**Acts and knowledge of agent of receiver imputable to receiver.**
Acts and knowledge of an agent appointed by receiver to carry out an exchange of lands are imputable to the receiver.
5. **Exchange of property** ⇨3(1)—**Misrepresentation as to classification of soil held established.**
In an action to set aside an exchange of lands, wherein defendant's agent represented that there were 400 acres of plow land, when in fact there were less than 300 acres, *held*, that there was substantial misrepresentation of the quality and classification of the soil, warranting a rescission, though plaintiff went on the land.
6. **Exchange of property** ⇨3(1)—**Plaintiff had right to rely on statement of defendant as to acreage of plow land.**
One exchanging land with another through an agent of the latter had the right to assume that such agent knew the farm's acreage in certain qualities of land, and had the right to rely on a statement as to the number of acres that could be plowed.
7. **Vendor and purchaser** ⇨37(5)—**Knowledge of falsity of statement of fact immaterial.**
Material misrepresentations, though without knowledge of their falsity on the part of the vendor, if relied on by the vendee, give right of rescission in equity.

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

In the matter of the receivership of the Woodrow-Parker Company. Intervening petition by Amos S. Herschberger, by next friends, against the Woodrow-Parker Company and others, to set aside an exchange of farms and certain conveyances. Decree for defendants, and petitioners appeal. Reversed, with directions.

C. A. Seiders, of Toledo, Ohio, and James W. Mackey, of Marshall, Mich. (Charles A. Seiders, of Toledo, Ohio, James W. Mackey, of Marshall, Mich., and Don C. Corbett, of Clarion, Pa., on the brief), for appellants.

Frank M. Cobourn and Harold W. Fraser, both of Toledo, Ohio (Marshall & Fraser, Tracy, Chapman & Welles, Harold W. Fraser, Charles F. Chapman, and Frank M. Cobourn, all of Toledo, Ohio, on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This appeal grows out of this situation: Herschberger owned and operated a farm of about 245 acres in Maumee township, Allen county, Ind. (about 1½ miles from Antwerp, Ohio), upon which he resided. The Woodrow-Parker Company owned a farm, known as "Crystal Farm," located near Marshall, Mich. This company was under receivership; defendant Rothfuss, who lived at Toledo, Ohio, being the receiver, under appointment by the United States District Court below. Ewing, who lived at Antwerp, sought to interest Herschberger in an exchange of his farm for some cheap land in Northern Michigan, of which Ewing had the sale, and had arranged to take Herschberger to see this land. Albert Hirzel, a real estate agent at Antwerp, learning of this, proposed to Ewing that he interest Herschberger in the purchase of the Crystal farm, which was included in the list of the Woodrow-Parker Company lands given Hirzel as for sale. Hirzel telephoned the receiver, and learned that the Crystal farm could be had for about \$45,000. Hirzel and Jacob Buerkle wished to acquire the Herschberger farm through a trade for the Crystal farm. They agreed to pay Ewing a commission of \$2,000 if he made a deal. The Crystal farm was to be priced to Herschberger at \$61,000. It was understood that the latter wanted \$49,000 for his farm. Just before or during the trip to Michigan, Ewing told Herschberger of the Crystal farm and suggested looking it over. They arrived at the farm late in the afternoon of February 6th, and spent a little time there, just how much is in dispute. On the evening of that day, or on the morning of the next, Herschberger signed a memorandum, prepared by Ewing, agreeing to pay \$15,000 difference on a trade of the two farms. On the 7th Ewing wired Hirzel, according to previous arrangement, to come. Hirzel, by telephone, arranged with Dameron, who was the agent at Bryan, Ohio, for the Woodrow-Parker farms, to accompany him to Michigan; Rothfuss having so requested, telling Dameron that the price of the Crystal farm would be \$45,000. There was some talk between Ewing, Hirzel, Dameron, and Hersch-

berger on the evening of the 7th, and on the 8th the four were all at the Crystal farm and looked it over. The extent of Herschberger's personal examination is in dispute.

Before Hirzel and Dameron arrived, Ewing and Herschberger had inquired of neighbors regarding the farm. All spoke well of it. How many were thus applied to is in dispute. The result was that on the 8th of February the receiver, through Dameron, agreed in writing with Herschberger, subject to the approval of the court, to convey to Herschberger the Crystal farm at a price of \$61,000, and to take as part payment the Indiana farm at \$49,000, the \$12,000 difference to be secured by mortgage on the Crystal farm. On the same day Rothfuss, through Dameron, agreed in writing with Buerkle and Hirzel to convey to them Herschberger's Indiana farm at \$33,000, and to carry \$10,000 of the purchase price by way of a mortgage on the Indiana farm, subject to one for \$20,000 to be given by Hirzel and Buerkle. One week later the District Court approved the sale of the Crystal farm at \$45,000, including part cash, a second mortgage upon the Indiana farm of \$10,000, and a first mortgage upon the Crystal farm; the application for the order asserting an opportunity of selling the Crystal farm at \$45,000, and that the offer involved "the trading of a farm in Indiana consisting of 245 acres, which the receiver has arranged to sell, and upon the making of the trade the receiver would be paid" the cash and securities just mentioned. Three days later the receiver and Herschberger made an escrow agreement for the deposit in a bank at Antwerp of the receiver's deed for the Crystal farm, Herschberger's deed of the Indiana farm to "the party of the first part, or to whomsoever he shall designate," and his mortgage of \$12,000 to the receiver on the Crystal farm. Herschberger also agreed to deposit in the bank \$2,000 to guarantee the performance of his contract of February 8th; the deeds and securities to be exchanged when proper abstracts of title were furnished. The deed to the Indiana farm, as made by Herschberger, ran to the wife of Albert Hirzel, his brother Stephen, and Buerkle.

On February 27th the Woodrow-Parker Company conveyed the Crystal farm to Herschberger, and on March 5th the latter executed and delivered his \$12,000 mortgage to Rothfuss. Soon after, Herschberger's deed to the Indiana farm was delivered and possession of the farm offered. March 10th Herschberger went to Michigan, intending to take possession of the Crystal farm. Before doing so he learned for the first time that the receiver obtained but \$45,000 for the Crystal farm, and that Hirzel and his associates had paid but \$33,000 for the Indiana farm. He also learned then, or on that trip to Michigan, that Ewing had a \$2,000 commission contract. He thereupon attempted to repudiate the sale, and has never taken possession of the Crystal farm, nor recorded his deed thereto. The following May Herschberger was, on his wife's application, adjudged by the probate court for Calhoun county, Mich., to be mentally incompetent, and the wife and appellant Kilpatrick were appointed guardians. On May 17th the court below appointed the two guardians as next friends, and granted leave to file an intervening petition for relief respecting the trans-

action. A petition was filed, asking that the exchange of farms and the conveyances and securities connected therewith be canceled and set aside, as in fraud of Herschberger's rights, and for general relief. Upon hearing on pleadings and proofs, the intervening petition was dismissed, the receiver given judgment for specific performance, his title to the \$12,000 mortgage upon the Crystal farm held valid, Herschberger ordered to record his deed thereto, and the receiver's title quieted. This appeal is from that final decree.

The grounds relied upon for relief are (1) alleged misrepresentation and concealment of the character of the lands near the western boundary of the farm; (2) the location of the southern boundary; (3) misrepresentation as to the acreage of the crops, the nature and tillability of the soil, and the value of the farm; and (4) the methods alleged to have been used by defendants in bringing about the trade, including an asserted collusive arrangement between Hirzel and Dameron and Ewing, and other means charged to have been employed for unduly influencing and misleading Herschberger.

The District Judge was of opinion that there was no clear and convincing showing of fraud or imposition with respect either to the boundaries of the farm, its acreage or the quality of the soil; that both boundaries were clearly pointed out to Herschberger, and full opportunity given to examine the entire farm; and that the asserted false representations were not made by the receiver. The trial judge was also of opinion that the Michigan farm was worth substantially more than the Indiana farm, but that the amount of such excess in value was merely speculative. While regretting that the complete transaction which was to result in the conveyance of the farm by the receiver was not brought to the court's attention, yet the court felt that it had known fairly well the general nature of the transaction, to the extent that a triangular trade was involved, and that the Indiana farm was to be disposed of as part of the purchase price of \$45,000 for the Crystal farm, and that the court had thus not been imposed upon in the transaction. The judge was further of opinion that there was no showing that Herschberger was mentally weak or unable to protect himself, that he knew Ewing was to receive a commission for the sale, and so was put upon his guard, and that there was no satisfactory showing that he had been overreached.

[1] The significance of the alleged misrepresentation as to the quality of the land near the western boundary lies in the fact that this westerly strip consists of about 24 acres of rough, stony upland, not suitable for cultivation, but available only for pasture, and that adjoining it to the east is a tract of marsh land, containing about 77 acres, equally unavailable for cultivation. That part of the farm was about four-fifths of a mile wide, east and west. Herschberger's claim is that he was not taken where he could have a good view of this part of the farm; that there was but a mere pretense of showing that western part of the farm; counsel say, "Just enough said to lead him to believe that all the way over the ground was similar to that on which they then were," which was the best part of the farm. It is undisputed that Herschberger had opportunity to learn the character of

these two parcels. There is evidence tending to show that he was in sight of the marsh land at least, and that he could have seen the rough, stony land to the extreme west. The burden of showing active misrepresentation as to the quality of this western boundary land is not sustained.

[2] The matter of the southern boundary is more complex. The farm was about $1\frac{1}{2}$ miles in its greatest length north and south. There was a highway along the western boundary of so much of the farm as is involved in what has already been said. There was also a highway extending in a generally north and south direction through the entire farm, which was made up of several original farms, and had three sets of farm buildings adjoining this highway. The alleged misrepresentation as to the southern boundary is that Herschberger was told by Dameron that that boundary was a certain east and west road, below which there was in fact a tract of 105 acres, known as the Harrington farm, the greater part of which was marsh. Herschberger was advised that the three sets of buildings belonging to the farm were all painted blue, and if a certain windowless blue house was understood to belong to the Crystal farm there is no basis for the charge of misrepresentation. There was, however, adjoining the east and west road, and just north of the Harrington farm, a piece of about 2 acres belonging to one Lee; the house being painted white. If this house belonged to the Crystal farm, the three houses were accounted for. Herschberger asserts that he was told by Dameron that this Lee house belonged to the Crystal farm. Dameron and Hirzel both deny this allegation.

Ewing, when first a witness, testified that Herschberger asked that question, and that Dameron did not then reply to it; that Ewing had himself once thought that the east and west road referred to was the southern line, and was confused about it until shortly before the written contracts were made, when, as he testified, Dameron stated the true situation. Later in the trial it was shown that of his own motion Ewing had since his former testimony given plaintiff a written statement to the effect that, when the contract was being prepared, Herschberger asked Dameron several times if the blue house with the windows out was on the Crystal farm, and was told that it was not, and that neither himself nor Herschberger knew, prior to the signing of the contract, that the so-called Harrington farm was part of the Crystal farm, and that his first knowledge to that effect was after he returned with Herschberger in March to take possession of the Crystal farm. Upon re-examination Ewing qualified that in some respects, disputed the accuracy of the written dictation, and on the whole left his testimony in a most confused and unsatisfactory condition.

We do not think Herschberger has sustained the burden of showing actual misrepresentation of the location of the southern boundary; but we are convinced, from a consideration of all the testimony, that Herschberger did not understand when he signed the contract, nor indeed until his return in March, that the so-called Harrington farm was part of the Crystal farm, and that, had he known it, he probably would not have made the trade. The boundaries had been traced out on a map shown him, but that probably did not mean much to him. This

brings us to the question of the methods used to induce Herschberger to make the trade.

[3, 4] We are satisfied that Herschberger had originally no desire to dispose of his Indiana farm. It was a grain farm and unincumbered, and he apparently a successful farmer. The suggestion of looking at Michigan cheap lands came from Ewing, as did also the later suggestion of seeing the Crystal farm. We agree with the District Judge that Herschberger is not shown to have been weak-minded. He appears to have been a good judge of lands of the kind he was in the habit of working, but without real experience in stock farming, or with such lands as the Crystal farm is largely composed of. He had little education, had not gone beyond the third grade in school, wrote but little, and read slowly, and not easily. He was in the habit of relying greatly upon Ewing's advice and assistance, having employed him to straighten out some personal difficulties which apparently had worried Herschberger. Ewing evidently had great influence over Herschberger. Defendants had the right to employ Ewing to help bring about the trade, and the latter had the right to accept such employment; but in view of the relations between the two, Herschberger was entitled to know the nature and extent of that employment. Previous to the closing of the trade his only information was the statement by Ewing that the latter was to get a commission of \$100, and if the trade went through he should divide that with Herschberger. This statement did not merely neutralize the effect of knowledge of the existence of a commission; it would naturally induce a belief that Ewing was still trying to make the best bargain he could for Herschberger, and throughout the negotiations Ewing seems outwardly to have assumed that attitude.

Before the arrival of Dameron and Hirzel, he procured Herschberger's signature to the \$15,000 boot agreement, even before the Crystal farm had been thoroughly examined. He wired for Hirzel to come. He was with Herschberger almost constantly until the deal was perfected, even accompanying him to an evening meeting of the members of the church to which Herschberger belonged, known as "The Saints," and to which organization Ewing did not belong. After the return to Indiana, Ewing assisted or advised Herschberger in disposing of his personal property and helped him to drive his cattle to Michigan. He had also arranged to help Herschberger conduct the stock farm. These relations indicate an apparently fiduciary relation between the two. It is undisputed that it was not until the return journey to Michigan, to take possession of the Crystal farm, that Herschberger was informed of the amount of commission Ewing was to receive. Dameron, who represented the receiver, knew before he reached Michigan that Hirzel was to pay Ewing \$2,000 commission, and at Marshall Ewing tried to get Dameron to sign the commission agreement. Dameron knew that Hirzel and Buerkle were to take the Indiana farm, and that what they paid for that farm would depend on what was obtained for the Michigan farm. The more boot Herschberger paid, the lower the purchase price to Hirzel and Buerkle. During the active negotiations in Michigan, Dameron and Hirzel conferred

together from time to time as offers were made, and in the absence of Ewing and Herschberger. Each time an offer was made and refused, Ewing and Herschberger left the room and conferred together, while Hirzel stayed in the room with Dameron. The latter admits this; also that he suspended a conversation with Herschberger while he went to the other side of the room and talked with Ewing about the signing of the commission agreement.

There were thus in appearance two opposing camps. In reality Ewing was working for Hirzel to influence Herschberger. The record is convincing (we do not attempt to detail all the testimony) that Dameron must have known this, as well as the facts that Ewing had great influence over Herschberger, that the latter was relying greatly on Ewing's advice, and that Herschberger was ignorant of the actual commission agreement, and believed Ewing to be acting as his friend. We are also convinced that Dameron, representing the receiver, took the benefit of that relation and situation, and to that extent may fairly be said to have colluded with Hirzel and Ewing in bringing about the result reached. Dameron's acts and knowledge, of course, are imputable to the receiver. These considerations, however, are valueless, unless Herschberger was overreached in the transaction, and unless they assisted in that result. But we think he was overreached, and that that result was to a substantial extent brought about by the collusive arrangement and understanding referred to.

Without resorting to speculation, we are impressed that the Crystal Farm was worth much less than \$12,000 in excess of the value of the Indiana farm. While it had once been sold by the Woodrow-Parker Company for much more than \$45,000, it had been taken back on foreclosure of the purchase-money mortgage; and while there was testimony placing its value as high as \$61,000, and perhaps more, the estimates given by two experienced real estate dealers (witnesses for defendants) were from \$45,000 to \$48,000. The receiver had offered it at \$42,000 to the tenant who was occupying the land when the trade was made. The tenant would have bought, if he could have made suitable financial arrangements. On the other hand, 12 apparently qualified witnesses, mostly farmers and including two supervisors, produced by plaintiff, gave values ranging from \$30,000 to \$50,000; those of the supervisors being \$33,000 and \$35,000, respectively. The receiver was anxious to sell at \$45,000, and the court, after careful hearing, in which one of the parties interested in the Woodrow-Parker Company contended that the farm should sell for more than that amount, decided that a sale at that price was for the best interests of the estate. Making allowances for the difficulty in obtaining full value for receivership properties, we think that \$45,000 to \$50,000 was all that the farm is reasonably shown to have been worth in the market.

[5] As to the Indiana farm: Herschberger had purchased it in 1912 for \$26,500, and had put on \$3,000 of improvements. It plainly appears that during several years before 1919 farming lands in that part of Indiana had greatly advanced in value. Plaintiff asked \$200 an acre, or \$49,000. Several people acquainted with the farm placed

its value at that sum. Ewing says it was worth \$180 to \$200 an acre. On the other hand, several witnesses for defendants placed valuations ranging from \$140 to \$160 an acre. The valuations of Dameron, Buerkle, and the two Hirzels ranged from \$125 to \$150 per acre. Defendants' counsel concede in their brief that the Indiana farm was probably worth at the time of the trade "somewhere between \$35,000 and \$40,000." We are disposed to think that it was as well worth \$40,000 as was the Crystal farm worth \$45,000. Indeed, the receiver's application for approval of the sale of the Crystal farm at \$45,000 stated (as affecting the value of the proposed second mortgage on the Indiana farm) the information and belief that "the Indiana farm is worth approximately \$40,000." We have no doubt that, had Herschberger known that Hirzel and Buerkle were getting his farm for \$33,000, and that the receiver was thus obtaining but \$45,000 for the Michigan farm, the trade would never have taken place.

The question presented here is not merely one of market value; it involves the actual quality of the lands in the Crystal farm, as reflected in market value. The farm was valuable as a stock farm. In our opinion, however, the evidence shows a material overstatement by Dameron as to the nature and classification of the soil, tending to induce the trade and to Herschberger's prejudice. Herschberger says that Dameron stated that there were 400 acres of good plow land, and that the remaining was pasture land, about 80 acres of marsh. Ewing's version of Dameron's statement is 400 acres of farming land, and the remainder pasture. Dameron admits making the statement that there were 400 acres of plow land and approximately 200 acres of pasture land, probably 225.

We are impressed by the testimony of plaintiff's engineer and surveyor, whose careful examination, survey, and plat, made in July, 1919, showed about 227 acres covered by buildings and yards, highways, lanes, crops, meadow, and stubble; about 98 acres of upland pasture, "being land that is grown up in June grass principally" (a part only being tillable, because in small pieces and some of it stony and rough); about 72 acres of meadow pasture, "that is, pasture on land that is now used for pasture that had formerly been in tame hay"; about 216 acres of marsh (raising only marsh grass and not tillable), and about 4.6 acres of lake and pond. In his opinion there were about 282 acres of good, tillable land. He estimates the "tillable" land at 312 acres. Conley, the tenant, who had known the land many years, says that "280 acres is all that you can call plow land." While the 216 acres of marsh land was of value to a stock farm and was pasturable, except during very wet periods, we are impressed by Conley's testimony that cattle will not fatten on marsh grass. We think there was a substantial misrepresentation of the quality and classification of the soil.¹

¹ Misrepresentations as to the existing acreage of wheat and rye are asserted. The conflict is too great, and the effect too unimportant, in view of the conclusions we have reached, to justify determining where the truth lies.

[6, 7] Assuming, for the purposes, at least, of this opinion, that Dameron believed his representation to be true, we think that, as between the receiver and Herschberger, the former was presumed to know, and Herschberger had the right to assume that he knew, the farm's acreage and soil to the extent just discussed, and that, especially in view of all the circumstances and conditions attending the transaction, Herschberger was not bound to test out the correctness of such representations, which were of fact and not of opinion. In the courts of equity, both state (generally) and federal, material misrepresentations, though without knowledge of their falsity on the part of the vendor, if relied upon by the vendee (as the representations in question doubtless were) give right of rescission. *Joslyn v. Cadillac Automobile Co.* (C. C. A. 6) 177 Fed. 863, 867, 101 C. C. A. 77, et seq., where the distinction between the rules in law and equity is stated and numerous decisions of both state and federal courts are cited, including *McFerran v. Taylor*, 3 Cranch, 270, 281, 282, 2 L. Ed. 436; *Smith v. Richards*, 13 Pet. 26, 36 et seq., 10 L. Ed. 42; *Kell v. Trenchard* (C. C. A. 4) 142 Fed. 16, 23, 73 C. C. A. 202. We would not be justified in extending this opinion by discussing the numerous other matters presented by the respective sides as affecting the merits. We have, however, considered them all. In our opinion, Herschberger is entitled to a rescission of the trade.

It results from these views that the decree below should be reversed, and a new decree entered, setting aside the exchange. The many matters of detail respecting incumbrances and the protection of the rights of all parties involved will be committed to the District Judge.

STANDARD ROLLER BEARING CO. et al. v. HESS-BRIGHT MFG. CO.

(Circuit Court of Appeals, Third Circuit. September 30, 1921.)

No. 2604.

1. Corporations ⇨559 (1)—Appointment of receivers does not dissolve corporation, and action taken during receivership not void, but voidable.

The appointment of receivers for a corporation, with the usual injunction, does not dissolve the corporation, nor suspend its existence, and action taken by it during the receivership is not necessarily void; but if not in violation of the injunction, in hindrance of the administration of the estate, or in depletion of its property, it is voidable only at the election of a party injured thereby.

2. Corporations ⇨426 (7)—Unauthorized modification of contract held ratified by implication.

The officers of a corporation, then in the hands of receivers, without authority from the directors, but with the approval of a majority of the directors, stockholders, and creditors, and of the receivers, executed a modification of a contract giving the corporation rights under patents, thought to be for the benefit of the corporation. For more than a year the receivers operated under the modified contract, with substantial profit. An application by certain stockholders to set aside the action of the officers was withdrawn without objection by the corporation, which was made a

party thereto by name and was represented by counsel. *Held*, that the modified contract was ratified by implication, and that the corporation could not repudiate it after discharge of the receivers.

Davis, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Delaware; Hugh M. Morris, Judge.

Suit in equity by the Standard Roller Bearing Company and Brown Brothers & Co. against the Hess-Bright Manufacturing Company. Decree for defendant, and complainants appeal. Affirmed.

For opinion below, see 264 Fed. 516.

Edward D. Robbins, of New Haven, Conn. (Thomas G. Haight, of Jersey City, N. J., of counsel), for appellants.

Robert Fletcher Rogers, of New York City (Richard V. Lindabury, of Newark, N. J., Owen J. Roberts, of Philadelphia, Pa., and J. Edward Ashmead, of Newark, N. J., of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Although many issues were raised and tried below, we regard the controversy on review as narrowed to two major questions. We shall give in outline only enough of the facts to present these questions and show the reasons for our decision, relying on the opinion of the learned trial judge for a statement of the case in detail. 264 Fed. 516.

The Conrad patents, Nos. 822,723 and 838,303, cover at least two types of ball bearings containing a raceway in the rings through which the balls move in continuous surface contact. Hess-Bright Mfg. Co. v. Standard Roller-Bearing Co. (C. C.) 177 Fed. 435; Hess-Bright Mfg. Co. v. Fichtel, 219 Fed. 723, 135 C. C. A. 421. In the type known as "Type A" there is no side-entering slot through which balls can be introduced or forced into the raceway. In Type B there is such a slot. The German owner of the patents granted the Hess-Bright Manufacturing Company, defendant below, an exclusive license for the United States with the right to grant sub-licenses. This corporation then granted the Standard Roller Bearing Company, plaintiff below, an exclusive, non-assignable license, limited, however, to Type B bearings. The Standard Company operated under this license until, coming into financial difficulties, it went into the hands of receivers. Thereupon a question arose whether the license was personal to the Standard Company or extended to its receivers, and whether also there would be advantage to the creditors, in the demand made by war, if the receivers were to acquire the right to manufacture Type A bearings as well as Type B. After negotiations between the Hess-Bright Company on the one hand and the receivers and officers of the Standard Company on the other, the two corporations, on July 8, 1915, entered into an agreement under the hands of their respective officers, modifying the license agreement. This action of the Standard Company was taken with the approval of its receivers, the concurrence of a committee of its creditors, and the knowledge of a majority of its directors and stockholders, but without formal authority by its board of directors. By the agreement thus en-

tered into, known in this litigation as the "supplemental agreement," the terms of the original license were changed by extending to the Standard Company the right to make, use and sell bearings of both types but withdrawing from it the exclusive feature of the right which theretofore it had to make Type B bearings, and also by reforming the terms of the royalty whereby the Standard Company was to receive certain rebates, which later were paid to its receivers in an amount approximating \$30,000.

The receivers operated under the license so modified until August, 1916, when a creditors' committee, having evolved a scheme of reorganization, brought a petition to the court of the ancillary receivership asking for authority to execute a release of all rights of the Standard Company under the license and to sell and convey all its assets, property and franchises conformably with a plan of reorganization submitted.

In October, 1916, a stockholders' protective committee intervened and prayed for the removal of the ancillary receivers on the ground, among others, of alleged misconduct in assenting, improvidently and fraudulently, to the modification of the patent license. The outcome of these proceedings was that the court declined to grant the receivers authority to cancel the Hess-Bright license and did not adjudicate the validity of the supplemental agreement but ordered the sale of all assets of the Standard Company except the non-assignable license from the Hess-Bright Company.

Pending this transaction, the Marlin Arms Company (a Connecticut corporation whose name was afterward changed to Marlin-Rockwell Company) acquired ninety-nine and eight-tenths per cent. of the claims against the Standard Company upon terms which returned to its creditors about sixty-six cents on the dollar. This company then purchased, pursuant to a bid made by it and accepted by the court, all the physical assets of the Standard Company. The Marlin-Rockwell Company also acquired during the litigation ninety-nine per cent. of the stock of the Standard Company, whose sole asset after the sale of its physical property was the non-assignable, and therefore non-salable, license from the Hess-Bright Company and whatever rights that had accrued thereunder. Thereafter the receivers were discharged.

On December 9, 1918, the Standard Company, thus stripped of all its property except the license under the Conrad patents and thus newly owned and controlled, brought this suit against the Hess-Bright Manufacturing Company for infringement of the original agreement of license, praying an injunction and an accounting, on the theory that the supplemental agreement withdrawing from the Standard Company the exclusive feature of its right to make and sell Type B bearings was void because conceived and executed in a fraudulent conspiracy between the receivers and the Hess-Bright Company; that Woodward, signing the instrument as president of the Standard Company, had no authority from the board of directors to execute the agreement on the behalf of the company; that the contractual power of the Standard Company was suspended by the receivership and the injunction which accompanied it; that the receivers were without authority from the

court which appointed them either to make or concur in the agreement; and that, in consequence, the exclusive feature of the original license with reference to Type B bearings was preserved to the Standard Company as though the supplemental agreement had not been made, and that the grant of licenses by the Hess-Bright Company to other concerns infringed its license rights. The Hess-Bright Company by its answer denied the charge of fraud and claimed that the receivers of the Standard Company had the power to enter into the agreement and that thereafter the agreement was ratified by its directors and stockholders and was later approved by the court under whose direction the receivers were acting. The trial court found that the charge of fraud was not sustained; that the Standard Company was not deprived of its power to enter into an agreement modifying the terms of the original license either by reason of the appointment of receivers or the injunction which accompanied their appointment; and that, notwithstanding the agreement was entered into without antecedent authority it was afterward ratified by the corporation. Accordingly the bill was dismissed. The plaintiff took this appeal.

The main question at the trial (and here on appeal) is the validity of the supplemental license agreement. That question turns upon many others raised and decided, to all of which we have given careful consideration. In this discussion, however, we shall pass by the minor questions and come directly to what we regard to be the three major questions in the case. The first—and the one underlying the whole structure of the plaintiff's action—is that of fraud between the plaintiff's receivers and the defendant in entering into the supplemental agreement whereby, as it is alleged, the Standard Company was deprived of the trade advantage arising from the exclusive feature of its license and was shorn of large profits. This question, to which a large part of the record was devoted, dropped out of the case on appeal by the acquiescence of the Standard Company in the finding by the trial court that there was no fraud in the transaction. Thus there remains, with reference to the validity of the supplemental agreement, two questions. These relate, first, to the power of the Standard Company in the circumstances to enter into such an agreement; and, if it had, then second, whether, in fact, the Standard Company later ratified the agreement.

If valid execution of the supplemental agreement by the corporation's officers depends on antecedent authority by its board of directors, the case would stop here, for no such authority was given them. If the execution of the instrument by the officers of the corporation depends for its validity on the bare approval which two of the receivers gave it, here is an end to the case, for the approval of two, or of all the receivers did not confer upon its corporate officers power which they as such did not themselves possess. If the validity of the action of the corporation's officers rests finally on approval by the receivers, authorized by the court or later approved by the court, then again the case would go no further, for in the court's many orders we find, contrary to the insistence of the appellee, no such authority or approval. That the Standard Company was, by reason of being in receivership

and under the accompanying injunction, without power to enter into the agreement, which, without more, would be capable of valid enforcement, need not be decided. All these questions, earnestly argued, are aside from the principal one, which is, as we regard it, whether the agreement made in the circumstances is void or is merely voidable; that is, whether it is void in the sense of being wholly without force or effect, or voidable in the sense of being ineffectual until affirmed and ratified. *Downs v. Blount*, 170 Fed. 15, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076; *Toy Toy v. Hopkins*, 212 U. S. 542, 548, 29 Sup. Ct. 416, 53 L. Ed. 644; *Ewell v. Daggs*, 108 U. S. 143, 149, 2 Sup. Ct. 408, 27 L. Ed. 682.

[1] We are not persuaded that the corporation suffered an entire suspension of its functions and authority over its property by the appointment of receivers. True, acts done in violation of a receivership injunction may be void, but courts are inclined to hold them void only at the election of the injured party. *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441; *Union Trust Co. v. Southern Navigation Co.*, 130 U. S. 565, 570, 571, 9 Sup. Ct. 606, 32 L. Ed. 1043. Nor have we in mind a case where an act done in violation of such an injunction has been undone by a court upon the application of the wrongdoer. *Greenwald v. Roberts*, 4 Heisk. (Tenn.) 494. There is a broad distinction between acts of a corporation in receivership which are violative of an injunction, in hindrance of the administration of the estate, or in depletion of its assets, and conduct which depends for its validity on the life of the corporation. The appointment of a receiver does not dissolve the corporation or suspend its existence. *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595; *Du Pont v. Standard Arms Co.*, 9 Del. Ch. 315, 320, 81 Atl. 1089. It still is the same corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist, subject in their exercise, of course, to limitations arising out of the changed situation. *O. & M. Ry. Co. v. Russell*, 115 Ill. 52, 57, 3 N. E. 561; *Linn v. Dixon Crucible Co.*, 59 N. J. Law, 28, 30, 35 Atl. 2; *Rosenbaum v. U. S. Credit System Co.*, 61 N. J. Law, 543, 40 Atl. 591.

[2] As the officers of the Standard Company executed the supplemental agreement without formal corporate authority (though with the knowledge and acquiescence of a majority of the directors, stockholders and creditors), it is clear that the agreement, standing alone, is without legal force. But it is an agreement made for its own benefit by a corporation that was fully alive and has since continued to live. We are of opinion that this agreement is not, because of the lack of formal action by its board of directors, or because the corporation was in receivership, void in the sense of being a nullity, but that it was voidable and therefore capable, if made so by the corporation's subsequent action, of having full legal effect given to the rights and obligations embraced within its terms.

The remaining question is whether later the Standard Company ratified the supplemental agreement and thereby transformed it from a voidable to a valid undertaking.

There is no evidence of an express ratification. But the want of antecedent authority for a corporate act may be cured by ratification implied from subsequent conduct of the corporation, and this, we think, is what happened.

Aside from the implication arising from profits made and received from performance of the supplemental agreement, *Knowles v. Northern Texas Traction Co.* (Tex. Civ. App.) 121 S. W. 232; *United States L. & H. Co. v. J. B. V. Elec. Co.* (C. C.) 189 Fed. 382, there was acquiescence in the agreement on the part of the Standard Company for more than a reasonable time, under circumstances which afforded it an opportunity and imposed upon it the duty to disaffirm the transaction if it were so minded and to decline the money benefits which flowed from it. In the proceedings by which the receivers submitted to the court a plan of reorganization of the Standard Company, involving a release of the license and the sale of all its property, a committee of intervening stockholders, as we have before stated, attacked the supplemental agreement and petitioned the removal of the receivers because of their concurrence therein. A committee of creditors intervened, justifying the supplemental agreement and showing that it had been entered into with the approval of their committee and had resulted in substantial profit to the Standard Company. Before this issue could be tried, the petition of the stockholders attacking the supplemental agreement and praying for the removal of the receivers was dismissed by the court on the stipulation of the attorney for the stockholders and attorney for the receivers. The challenge to the validity of the supplemental agreement was thereby withdrawn. This was followed almost immediately by an order of the court, made under arrangement apparently satisfactory to all parties, for the sale of all the property of the Standard Company, except only the Hess-Bright license and another, on the bid of the same attorney who had previously appeared for the stockholders in the attack on the agreement. After the sale had been made, the purchase price paid, and the property conveyed, the receivers were discharged, leaving the Standard Company with the Hess-Bright license as its only asset. Then it was that the Standard Company, by this suit, first challenged the agreement. As pertinent to the question we are considering it should be noted that in all these transactions the Standard Company was brought into court by its corporate name and appeared there in its corporate capacity. It should also be noted that in these transactions, whose ultimate object obviously was the disposition of all the assets of the Standard Company and the winding up of all its affairs, the Standard Company acquiesced in the withdrawal of the attack on the supplemental agreement and thereafter remained silent. Then was its opportunity to repudiate the agreement. If it regarded the Hess-Bright license as an asset, valuable though not assignable, it should have, while its affairs were being closed out, asserted for the benefit of its creditors whatever rights it had under the license. Its failure to speak in repudiation of the agreement under circumstances which clearly called for action on its part, if objection it had, amounted, we think, to an implied ratification of the agreement. This constituted ratification by implication of a voidable agreement

which gave to the agreement the same legal force as though originally made under valid authority.

Finding no error in the proceedings, we direct that the decree below be affirmed.

DAVIS, Circuit Judge (dissenting). In the final analysis the decision in this case rests upon ratification. If the plaintiff in error, expressly or impliedly, ratified the contract, called the "supplemental agreement," that ends this appeal. The agreement was entered into, without the approval or permission of the court, by two ancillary receivers, who were former officers of the corporation but whose terms of office had expired. In violation of the court's order and without necessary antecedent authority, required by the by-laws, they pretended to act for the corporation and also for the court as receivers in executing this agreement. While it was not established that in making this contract there was legal fraud and the plaintiff in error had to abandon that allegation on this appeal, yet in the light of all the facts, this transaction, as well as some others, was, at least, questionable and certainly improvident. If the Standard Roller Bearing Company had been a "going concern" or an individual, the conclusion of this court (in my opinion) would be justified, but to hold that the corporation, under the disability placed upon it by the court's injunctive order, may ratify by implication because it obeyed that order is, in effect, penalizing obedience. This is a novel proposition and not sustained by any adjudicated case to which my attention has been called.

Therefore I am constrained to dissent from the conclusion of my colleagues.

**FIDELITY & DEPOSIT CO. OF MARYLAND et al. v. LEHIGH VALLEY
R. CO.**

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

Nos. 2670 to 2682.

1. Explosives ☞§—Instruction properly refused as imposing on carrier of explosives liability as insurer against accidents.

A requested instruction that a carrier of explosives, though complying with the regulations of the Interstate Commerce Commission, was under the duty to provide such additional means or measures of care "as might be necessary to prevent a fire or explosion" *held* properly refused, as imposing on the carrier liability as an insurer against accidents.

2. Explosives ☞§—Regulation requiring storage of explosives held not to apply to carload lots awaiting unloading for transshipment.

Section 1643 of the regulations of the Interstate Commerce Commission for the transportation of explosives providing that "suitable provision must be made, outside the station when practicable, for the safe storage of explosives," *held* not to apply to explosives in carload lots which had reached their destination and were awaiting unloading for transshipment on vessels.

3. Explosives ☞§—Duty of care in transportation of explosives.

In actions against a railroad company to recover damages caused by an explosion of munitions, resulting from fire which reached the munitions

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

(275 P.)

while in cars standing in defendant's terminal yards in a city awaiting transfer to vessels, instructions that defendant was under no legal duty to maintain fire hydrants or provide men and equipment to fight fire in its yards in addition to those furnished by the city *held* not erroneous, when clearly qualified by a statement of the rule that defendant's duty with reference to the custody of explosives was to exercise care commensurate with the risk of danger.

4. Appeal and error ⇐837(2)—Divergent verdicts of different juries do not evidence error in instructions.

The fact that different verdicts have been rendered by different juries on the same issues is not persuasive of erroneous instructions on the law, but rather tends to show that the issues were, because of conflicting inferences which might be drawn from the facts, peculiarly within the province of juries to determine, and that, having determined them, their verdicts must stand, in the absence of errors of law.

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

Actions at law by the Fidelity & Deposit Company of Maryland and twelve other plaintiffs against the Lehigh Valley Railroad Company, consolidated for trial. Judgments for defendant, and plaintiffs bring error. Affirmed.

Max M. Stallman, of Newark, N. J., James D. Carpenter, of Jersey City, N. J., Theodore McCurdy Marsh, of Newark, N. J., and Edwin F. Smith, of Jersey City, N. J., for plaintiffs in error.

George S. Hobart, of Newark, N. J., and Edgar H. Boles, Richard W. Barrett, and Nash Rockwood, all of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The Black Tom Terminal of the Lehigh Valley Railroad Company extends easterly on a peninsula from the New Jersey side of the Upper Bay of New York. It comprises, roughly speaking, a large number of warehouses situate on one side and a railroad yard surrounded by sea walls and bulkheads, with connecting piers and slips, on the other three sides. The yard is about eleven acres in extent and has twenty-six tracks. During the war the defendant carrier transported explosives to the seaboard in great quantities, bringing them to the yard of the Black Tom Terminal where they were unloaded and transferred to ships for export.

On the night of July 29, 1916, the defendant had in its yard eight cars of trinitrotoluol, ten or twelve cars of loaded shells, and a number of cars of other munitions, comprising thirty-three cars in all. Shortly after midnight, one of several detectives employed by the British Government stationed at one of the piers discovered a fire about the size of a man's hat at the side of one of the cars loaded with shells. Raising a cry of fire, he and his companions fled. After turning in an alarm to the Jersey City Fire Department, the employees of the defendant employed about the terminal retired to points of safety. The fire increased steadily, shells bursting and shrapnel scattering in all directions. When the fire engines arrived, about one half hour after the

fire was discovered, the danger was so great that the fire chief withheld his men from the fire. There followed two great explosions, destroying much property nearby and shattering plate glass of doors and windows in New York City and Jersey City.

Many suits for damages were brought in state and federal courts. In the instant actions, separately instituted but later consolidated and tried together, the complainants charged negligence to the defendant in the care of the explosives in its possession. The main question at the trial was the measure of the defendant's duty in the circumstances. The negligence charged was two-fold: First, that the defendant failed in its duty to exercise a high degree of care to prevent fires and detonations whereby munitions in its custody were exploded, specifying in this regard its failure to provide adequate fire-fighting apparatus; to employ a sufficient number of watchmen; to instruct them in the manner of fighting fire among explosives; and lastly, the refusal of the watchmen to make efforts to extinguish the fire after it had been discovered; and second, that the defendant failed in its duty to observe regulations of the Interstate Commerce Commission promulgated pursuant to the Acts of Congress of March 4, 1909, and June 18, 1910, 36 Stat. 539, c. 309 (Criminal Code, § 233 et seq., 35 Stat. 1134 [Comp. St. § 10403]), prescribing the care which a carrier should exercise in the transportation and storage of explosives.

The defense likewise was two-fold: First, that the defendant had complied with the regulations of the Interstate Commerce Commission as to transportation of explosives and in so doing had discharged its full duty; and second, that, in any event, it had exercised care and caution commensurate with the risk. The court ruled against the defense of complete performance of the defendant's duty by compliance with the cited regulations and laid down the rule that the defendant's duty with reference to the custody of explosives was the exercise of care commensurate with the risk of the danger.

The evidence on which the plaintiffs relied for recovery under the rule as charged was, in substance, that in the trackage part of the yard as distinguished from the warehouse part there were no fire hydrants, hose stations, or fire-fighting apparatus; that there were but four watchmen and no fire-fighting guards assigned to the yard; that the defendant had given no instructions to even this small number of yard employees as to how they should fight fire among explosives; and that these employees did nothing to extinguish the fire.

The defendant, in addition to showing compliance with the regulations of the Interstate Commerce Commission, produced evidence tending to show that, on the night of the fire, there was a 100,000 gallon gravity tank filled with water located between the warehouses and yard; that there was an electric pump with a capacity of 1,500 gallons per minute a short distance from the tank; that there were 24 three-way fire hydrants and 10 two-way hydrants located at various places upon the premises (not among the tracks because of its impracticability); and that there were 3,600 feet of standard fire hose on ten hose carts, a quantity sufficient to reach any part of the yard where the cars were, if attached to the nearest hydrants; and that the reason the men did

not fight the fire was because of fear in the face of constant shell explosions.

On this conflicting evidence it is obvious that juries of different minds might arrive at opposite conclusions. And this is what happened. The jury in the instant case, resolving the evidence in favor of the defendant, rendered verdicts accordingly. From the judgments entered the plaintiffs sued out these writs of error, bringing here for review questions which have to do more with the manner in which the court charged the law than with the law itself.

[1] The first matter pressed as error was the court's refusal to grant the plaintiffs' request to instruct the jury as follows:

"In so far as the regulations (of the Interstate Commerce Commission respecting a carrier's conduct in transporting high explosives) specified certain duties, the regulations are controlling, but if the circumstances were such as to reasonably require measures of care or protection not mentioned in the regulations, then it was the duty of the defendant to use, or employ, or provide such additional means or measures of care *as might be necessary to prevent a fire or explosion.*"

One of the special defenses which the defendant made at the trial was that the regulations of the Interstate Commerce Commission constituted the sole measure of its duty, and that, having complied with them, it was not required by law to do anything more. The trial court, in interpreting these regulations, regarded them as exclusive whenever they applied, refused to limit the duty of the defendant in the exercise of care to the matters therein prescribed, and broadly charged the defendant with the duty, as required at common law and by the settled law of the state, of exercising care commensurate with the risk of danger, the degree of care being high when the risk is great. *New Jersey Fidelity & Plate Glass Insurance Co. v. Lehigh Valley Railroad Co.*, 92 N. J. Law, 467, 105 Atl. 206; *Lehigh Valley Railroad Co. v. Allied Machinery Co. of America (C. C. A.)* 271 Fed. 900.

The trouble with the instruction which the plaintiffs requested and the court refused is that it did not lay down, as a rule of duty for the defendant, the measure of care which it should exercise with regard to the risk, but imposed upon the defendant an absolute duty to provide "means and measures of care," in addition to those prescribed by the regulations of the Interstate Commerce Commission, "as might be necessary to prevent a fire or explosion."

The distinction between the true rule of law and the request as framed is neither trivial nor technical; it is quite substantial. It was the subject of elaborate consideration by the Court of Errors and Appeals of New Jersey in *Mason v. Erie R. R. Co.*, 75 N. J. Law, 521, 68 Atl. 105. The distinction turns on the difference between the duty of a carrier to exercise reasonable care in providing facilities of protection in transportation as against a carrier's duty absolutely to insure transportation against accident. In other words, it marks the difference between a carrier's liability for negligence and its guaranty of safe carriage. The former inhered in the implied duty owed by the defendant to the plaintiffs, whether as carrier or warehouseman; the latter did not so arise and was not within the undertaking of the defendant.

Foley v. Brunswick Traction Co., 66 N. J. Law, 340, 50 Atl. 637. Without quoting at length from the elaborate and carefully balanced charge of the learned trial judge, we are of opinion that, on this question, the plaintiffs received all they were entitled to, and that, in consequence, they suffered from no error.

[2] Section 1643 of the regulations of the Interstate Commerce Commission provides that—

“Suitable provision must be made, outside the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage.”

The plaintiffs charge error to the court in granting the defendant's request for an instruction to the jury that this paragraph did not apply to it “under the evidence in this case, and therefore no verdict against the defendant can be based upon any alleged violation of such provision.” The evidence was that all explosives were in carload lots. They had arrived at their destination and were awaiting unloading for transshipment. No move had been made to unload or to store them. The section of the regulations of the Interstate Commerce Commission next preceding the one quoted deals in detail with the method of handling explosives at stations and transferring them to and from cars. We think the court committed no error in reading these sections together and in holding that section 1643, however interpreted in other respects, relates to the subject matter of section 1642, and that, in consequence, its provision *for storage* does not extend to explosives in carload lots.

The assignments of error, which together specify error in the court's charge on the issues of the defendant's negligence, deal with two matters: First, the fear and failure of its employees to fight the fire; and, second, the absence of facilities with which to fight it, even if they had been so minded. As to the first, it is clear that the charge of the court was correct and adequate. It was the usual instruction, giving, as the test of due care, the conduct of a reasonably prudent and cautious man under given circumstances, affected, as here, with conditions of emergency involving appalling danger which tended to deprive him of an opportunity for deliberate thought and called upon him for the exercise of courage which he might or might not possess.

[3] On the phase of negligence for lack of fire-fighting facilities, the defendant requested that the jury be instructed as follows:

“There was no legal duty resting upon the defendant in respect to its terminal at Black Tom to furnish fire hydrants in addition to those furnished by the City of Jersey City, the said terminal being within the limits of said municipality.”

The court gave the instruction but with the following modification:

“I so charge you, gentlemen, but there was a duty to use the care commensurate with the risk. You gentlemen must determine what that duty was, and what the care was, and what the risk was.”

The defendant also made this request:

“There was no legal duty resting upon the defendant in respect to its terminal at Black Tom to furnish men and equipment to extinguish fires in addition to the men and equipment of the municipality of Jersey City, within the limits of which the said Black Tom Terminal is.”

The court gave this instruction also but with the following modification:

"And what I have said with respect to the preceding request to charge I say to you now, that it is solely a question for you gentlemen to determine whether under all the circumstances of the case the defendant company used due care to prevent the occurrence and whether this occurrence, if you find it was caused by neglect, was the proximate cause of the injury to the plaintiffs in this case."

The substance of the error which the plaintiffs specify in these instructions is that, in so far as they were framed in the language of the defendant's requests, they withdrew from the jury the questions of negligence raised by the pleadings on the defendant's duty to furnish adequate fire protection both in men and equipment, and in so far as the requested instructions were modified by the court in giving them to the jury by stating broadly in each instance the defendant's duty to use care commensurate with the risk, the original error was not cured. If negligence there was, it must have been based on some legal duty which the defendant owed the plaintiffs to furnish fire hydrants and men in addition to the equipment and men furnished by the City of Jersey City, within whose limits its terminal was situated. Neither the attention of the court below, nor the attention of this court, has been directed to any law, prescribed by statute or ordinance, imposing such duty upon the defendant. A duty of this character may have existed, but if it did it was only because it arose from the rule requiring of the defendant care commensurate with the danger. The court repeatedly stated this rule to the jury, and left the jury to determine under the rule just what care with reference to facilities and men with which to fight fire was required of the defendant in the circumstances. This is not an instance where a court, having given instructions affected by error, sought to cure the error by later statements in the charge. It is an instance where the court charged there was no legal duty, in the sense of a duty prescribed by a given law, to do a specific thing. But the court made it clear in the very next sentence following each instruction, as well as in the body of the charge, that the duty which the law imposed upon the defendant was a care commensurate with the risk, reckoned in men and fire-fighting facilities, whatever they might be. We find no error in these instructions. On the contrary we find that in his statements of the rule, repeatedly made and differently phrased, the learned trial judge left the issues entirely with the jury, and in so doing he carefully and amply protected the plaintiffs' rights under the rule.

[4] In disposing of these writs it may be pertinent to state that the fact that different verdicts have been rendered by other juries on the same issues as were here submitted is not persuasive of erroneous instructions on the law given by the trial court in this case—or, indeed, in the other cases. These differing views of several juries on the same facts tend rather to convince one that the issues were, because of conflicting inferences to be drawn from the facts, peculiarly within the province of juries to determine, and that, having determined them, their verdicts must, in the absence of error of law, stand. New Jersey

Fidelity & Plate Glass Insurance Co. v. L. V. R. R. Co., 92 N. J. Law, 467, 105 Atl. 206; Id., 249 U. S. 600, 39 Sup. Ct. 258, 63 L. Ed. 796; Howell v. L. V. R. R. Co. (N. J.) 109 Atl. 309; Id., 253 U. S. 482, 40 Sup. Ct. 482, 64 L. Ed. 1024; Royal Indemnity Co. v. L. V. R. R. Co. (N. J.) 109 Atl. 745; Id., 253 U. S. 483, 40 Sup. Ct. 482, 64 L. Ed. 1024; Metropolitan Casualty Insurance Co. v. L. V. R. R. Co. (N. J.) 109 Atl. 743; Lehigh Valley Railroad Co. v. Allied Machinery Co. (C. C. A.) 271 Fed. 900.

We find no error in the trial below, and therefore direct that the judgments below be affirmed.

YELLOW CAB CO. v. EARLE.

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

No. 5743.

1. Appeal and error ⇨978 (1), 979 (1, 6)—**New trial** ⇨66, 68, 76(1)—**Denial of motion for new trial discretionary and not reviewable.**

Denial of a motion to set aside a verdict and grant a new trial, on ground it was not justified by the evidence, was contrary to law, and that the damages were excessive, was discretionary with the trial court, and not reviewable on writ of error.

2. Appeal and error ⇨263 (1)—**Alleged error in instruction, not excepted to, not considered.**

Specifications of error, in that the charge on the measure of damages was erroneous, is untenable, where no exception was taken to the charge.

3. Damages ⇨216 (1)—**Instruction on measure held not erroneous.**

An instruction on the measure of damages in a personal injury suit, though overstating the amount demanded in complaint and admonishing the jury that, if they made any award, it should not be on the basis of what they would take to have such an injury, but on that of reasonable compensation, taking into consideration the elements the court had before indicated, *held* not error.

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

Action by O. K. Earle against the Yellow Cab Company. Judgment for plaintiff, and defendant brings error. Affirmed.

That part of the instruction as to damages referred to in the opinion is as follows:

“Now, as to the amount of damages, gentlemen. They demand something like \$30,000 in this complaint; and if you feel that damages should be awarded, why, it is for you to say what that amount is. You will consider all those things I have indicated to you; but you must make the amount a fair and reasonable compensation to the party injured, as far as you can judge of such compensation in money. You must not make it on the basis of what you would take to have such an injury, what you would suffer such an injury for. I take it there isn't a man on this jury that would suffer an injury of this kind for any amount of money, however much might be offered them. The basis is a reasonable compensation in money for the injuries that the party has received; and in determining that reasonable compensation, you will take into consideration all the elements that I have indicated.”

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

J. Elmer Lehr, of Milwaukee, Wis. (John F. Dahl and George T. Simpson, both of Minneapolis, Minn., on the brief), for plaintiff in error.

J. T. Sullivan, of Waterloo, Ia. (W. H. McDonald and Shaw, Safford, Ray & Shaw, all of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and MUNG-ER, District Judge.

SANBORN, Circuit Judge. The plaintiff in the District Court, Mr. O. K. Earle, sued the Yellow Cab Company, a corporation, for \$18,675 damages, which he alleged were caused by the negligence of the defendant, in causing one of its cabs to be driven against and upon him at an unlawful speed as he was crossing one of the streets of the city of Minneapolis. The defendant admitted that there was a collision between the plaintiff, and one of its cabs at the time and place specified, but denied that the accident or injury was the effect of its negligence, and alleged that, if the plaintiff was injured thereby, his own negligence contributed to cause that injury. The case was tried by a jury, and resulted in a verdict and judgment for the plaintiff for \$9,700.

The defendant seeks a reversal of this judgment for five alleged errors during the trial, which it has assigned. The first is that the court instructed the jury that the laws of Minnesota did not permit a person to operate a motor vehicle, where the accident happened in the city of Minneapolis, at a greater speed than 10 miles per hour, and that the operation of such a vehicle at such greater speed at that place was prima facie evidence of the negligence of the operator. But the proof was that the place of this accident was in a closely built up portion of the city of Minneapolis. Section 2635 of the General Statutes of Minnesota of 1913, as amended, Supplement, page 268, declared that no person should drive a motor vehicle upon any highway of that state at a speed greater than is reasonable and proper, and that—

“If the rate of speed of any motor vehicle, operated on any public highway in this state, where the same passes through the closely built up portions of any incorporated city, town or village, or where the traffic is more or less congested, exceeds ten miles an hour for a distance of one-tenth of a mile, or if the rate of speed of any motor vehicle, operated on any public highway of this state, where the same passes through the residence portions of any city, town or village, exceeds fifteen miles an hour for a distance of one-tenth of a mile. * * * such rates of speed shall be prima facie evidence that the person operating such a motor vehicle is running at a rate of speed greater than is reasonable and proper.”

The place of the accident was in a closely built up portion of the city of Minneapolis. The court read this statute into its charge, and then said to the jury:

“Now, that is the law of this state with reference to speed. You will see that it is unlawful and prima facie evidence of negligence for the operator of a motor vehicle, the driver of a taxicab, to run that taxicab in the closely built up portions of a city like this at a speed greater than ten miles an hour for a distance of one-tenth of a mile”

—and then proceeded to reiterate and explain that statement. This part of the charge was in strict accord with the law and free from error, and this disposes of the first specification of error.

[1] The second, third, and fourth specifications are that the court erred in denying the motion of the defendant to set aside the verdict and grant a new trial (a) on the ground that it was not justified by the evidence; (b) on the ground that it was contrary to law; and (c) on the ground that the damages were excessive and appeared to have been given under the influence of passion and prejudice. But as the denial of a motion to set aside a verdict and grant a new trial on either of these grounds is discretionary with the trial court, and not reviewable on a writ of error in a federal appellate court, these specifications are futile. *Chicago, M. & St. P. Ry. v. Heil*, 154 Fed. 626, 629, 83 C. C. A. 400.

[2, 3] The fifth specification of error is that the charge upon the measure of damages was erroneous. But that specification is untenable, because no exception was taken to the charge on this subject, and because there was no error in that part of the charge.

Counsel for the defendant below, the plaintiff in error here, made a motion to strike the brief of the defendant below from the record for a lack of compliance therein with rules 24 and 26 of this court.¹ But as that brief has been thoughtfully considered, and the judgment must be affirmed on the merits of the case, a consideration of that motion is unnecessary; and it is denied.

Let the judgment below be affirmed.

THE NO. 17.

(Circuit Court of Appeals, Second Circuit. June 8, 1921.)

No. 201.

1. **Payment** ⇨17—Notes given held not to extinguish indebtedness.

In a proceeding in admiralty against a car float to recover for work and labor done and material furnished, a stipulation, whereby the claimant of the car float gave its notes for an amount agreed upon, and wherein it was provided that the stipulation was to become null and void on failure of claimant to pay any of the notes when due, did not extinguish the indebtedness, so as to make the claim of libellant against the claimant alone, and the court erred, on the claimant's default and bankruptcy, in not permitting libellant to proceed with its suit in rem, as if no such stipulation had been made.

2. **Admiralty** ⇨116—Appeal a new trial.

An appeal in admiralty is a new trial.

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

Libel in admiralty by the C. W. Hunt Company against Car Float No. 17, her tackle, etc.; Marine Operating Company, Inc., claimant. From an adverse decree and order, libellant appeals. Decree and order vacated.

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

¹ 188 Fed. xvi, xvii, 109 C. C. A. xvi, xvii.

Alfred Ekelman, of New York City (R. H. Hupper, of New York City, of counsel), for appellant.

Theodore L. Bailey, of New York City (J. W. Griffin, of New York City, of counsel), for respondent.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The C. W. Hunt Company, Inc., libeled car float No. 17 to recover for work and labor done and material furnished.

November 8, 1919, the Marine Operating Company, Inc., owner of the car float, stipulated with the libelant that its value for purpose of bonding was \$3,489.26, which was the amount claimed in the libel, and on the same day filed, together with the Ætna Casualty & Surety Company, a stipulation for costs in the sum of \$500, and another for value in the sum of \$3,489.26; the condition of the latter being:

"Now, therefore, the condition of this stipulation is such that if the claimant herein and the Ætna Casualty & Surety Company of Hartford, Conn., a corporation organized and existing under and by virtue of the laws of the state of Connecticut, duly authorized to do business in the state of New York, and having an office and usual place of business at No. 100 William street, borough of Manhattan, in the city of New York, the stipulators undersigned, shall abide by all orders of the court, interlocutory or final, and pay the amount awarded by the final decree rendered by this court, or by any appellate court, if any appeal intervene, then this stipulation to be void; otherwise, to remain in full force and virtue."

March 18, 1920, the libelant and claimant entered into the following stipulation:

"It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the libelant, C. W. Hunt Company, Inc., recover from the car float No. 17, her tackle, etc., the sum of thirty-three hundred (\$3,300) dollars, as the amount of its damage by reason of the matters set forth in the libel; and it is further stipulated that eight hundred (\$800) dollars of this amount be paid to libelant on or before March 20, 1920, and that the balance, to wit, twenty-five hundred (\$2,500) dollars, be paid to libelant by three promissory notes of Marine Operating Company, Inc., dated March 18, 1920, and payable as follows: Note for eight hundred fifty (\$850) dollars payable June 18, 1920; note for eight hundred fifty (\$850) dollars payable September 18, 1920; and note for eight hundred (\$800) dollars payable December 18, 1920, and, upon failure of claimant so to do, then this stipulation to become null and void, receipt of check and notes hereby acknowledged."

The claimant did not pay the note due September 18, 1920, and on September 30 a petition in bankruptcy was filed against it and receivers appointed. October 11 the District Court entered a decree for \$1,760.15 in favor of the libelant against the stipulators upon the foregoing stipulation. October 29 the Ætna Company moved in the District Court that the decree be vacated as to it, and the stipulation for value canceled so far as it was concerned, on the following ground:

"Upon information and belief that said Marine Operating Company, Inc., is now insolvent and in bankruptcy, petition having been filed and receiver appointed on September 30, 1920, and the proctors for libelant and claimant by entering into said stipulation of March 18, 1920, without the consent of said the Ætna Casualty & Surety Company, and extending the time for the claimant to pay the amount recoverable herein, if any, and waiving all defenses, have prejudiced said the Ætna Casualty & Surety Company and varied

the risk and departed from the conditions of the said stipulation for value and released said the Ætna Casualty & Surety Company from all liability thereunder."

November 23 the District Court granted the motion upon a different ground, saying:

"It appears to me that the meaning of this stipulation is that, if the check and notes were delivered to libellant on or before March 20th, the indebtedness is extinguished, and that the claim of C. W. Hunt Company, Inc., is against the Marine Operating Company, Inc., upon the promissory notes in question."

[1] We do not so construe the stipulation. On the contrary, the provision that, if any note were not paid when due, the whole stipulation was to become null and void, shows that the notes were not to extinguish the indebtedness. November 23 the order vacating the final decree was entered, the ordering part of which reads:

"Ordered, that the said motion be and the same hereby is granted, that the final decree entered herein on October 11, 1920, be and the same hereby is vacated and set aside, in so far as the same affects the Ætna Casualty & Surety Company, and that the stipulations for costs and value executed by the said Ætna Casualty & Surety Company herein be and the same hereby are canceled and discharged of record, and the stipulator, the Ætna Casualty & Surety Company, released from all liability thereunder."

[2] This left the decree good as against the claimant. The whole decree should have been vacated, and the libellant left to proceed with this suit in rem as if no such stipulation had been made. An appeal in admiralty being a new trial, the decree of October 11 and the order of November 23, 1920, are vacated, the claimant is given 20 days from the date hereof to file an answer, if so advised, and thereupon, or upon default, if no answer be filed, proofs may be taken in accordance with Supreme Court admiralty rule 45 (40 Sup. Ct. xvii) and our admiralty rule VII (267 Fed. viii).

GUNN v. STANDARD OIL CO.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1921.)

No. 5640.

1. Master and servant ⇨286(11)—Negligence in using defective truck held for jury.

In an auto truck driver's action against employer for injuries sustained when the truck left the highway, employer's negligence in using a truck with defective steering gear and defective brakes *held* a question for the jury.

2. Master and servant ⇨289(15)—Contributory negligence of truck driver held for jury.

In an auto truck driver's action against employer for injuries sustained when a truck with defective steering apparatus left the highway and rolled down the embankment after he turned off beaten path to pass another automobile, contributory negligence *held* a question for the jury.

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

Action by William F. Gunn against the Standard Oil Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

George A. McGee, of Minot, N. D. (McGee & Goss, of Minot, N. D., on the brief), for plaintiff in error.

E. T. Conmy, of Fargo, N. D. (Young, Conmy & Young, of Fargo, N. D., on the brief), for defendant in error.

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

LEWIS, District Judge. Gunn was employed by the Oil Company and drove one of its auto trucks from about April 1, 1918, up to the 17th day of the following month. In the late afternoon of the day last named he was returning from a trip which he had made to the country for the purpose of delivering oil to defendant's customer, and while going down a hill on a winding road the truck left the highway, rolled down the embankment and Gunn was severely injured. He brought this action against the Oil Company to recover damages for those injuries, and charged in his complaint that defendant was guilty of negligence in furnishing him a truck in a defective and unsafe condition, that the steering gear would at times lock or stick so that the truck could not be guided, and also that the brakes at times could not be applied. At the close of the evidence on both sides the court, on motion of defendant, instructed a verdict in its favor, which Gunn has assigned as error.

[1, 2] There was substantial evidence to this effect: The truck was an old one, or at least had been in use for some time, on occasions when attempt was made to turn it in one direction it would go the opposite way, on occasions it could not be held in the road but would pass out to one side, it had no muffler, the supporting frame was broken or cracked on each side so that it sagged, thus shortening the brake rod underneath, the steering rod that goes through the steering arm crosswise between the two front wheels and holds the wheels in alignment had been out of repair, it was out of repair when the man who preceded Gunn was driving the truck, this man put in a rag and tightened it up, Gunn had found it difficult to steer it on three or four occasions prior to the accident, he testified that he complained to defendant's manager that he could not at times properly steer the truck, and on making the complaints the manager had sent the truck to a local repair shop, that the manager told him after it was repaired the last time that he thought it was all right, the steering rod was repaired on the 13th or 14th of May, and on the same day it was returned to the shop because the wheels were not in proper alignment, the steering rod was taken off again and fixed so the wheels were then in alignment, the rod was welded so it would not slip, Gunn told the repair man that the steering gear stuck or locked, the repair man said that it appeared to be all right, and if there was anything wrong in that respect it was in the worm in the housing, Gunn told the general manager what the repair man had said, and the general manager replied that he thought it was all right now, that Gunn should go on with

the truck and that he would wire to Fargo for a new part to remedy that defect if such existed, at the time the truck went over the bank with Gunn he had turned out of the beaten path on to the embankment side of the road to pass an auto which was standing partly in the beaten path but leaving a part of it unoccupied on the side on which Gunn turned out, as Gunn turned the truck to his right it headed obliquely toward the embankment, and when he undertook to steer the truck back to the beaten path the steering apparatus would not work, he immediately attempted to put on the brakes and they could not be applied, so the truck continued in its course and passed over the embankment with him in it.

The answer plead contributory negligence.

We have no doubt that the evidence raised disputed questions of fact as to whether defendant was guilty of the negligence charged in the complaint, and whether plaintiff was guilty of contributory negligence, as set up in the answer, both of which were properly determinable solely by the jury, and that the court committed prejudicial error when it passed upon those issues of fact and directed a verdict.

The late Judge HOOK, who presided at the argument in this case, concurred in the views that have been announced and in the result reached.

Reversed.

UNITED STATES v. WADDELL INV. CO.

(District Court, W. D. Missouri, W. D. January 26, 1921.)

No. 4972.

1. Internal revenue ⇨9—Interest on mortgages deposited with trustee income of loan company, though paid out to holders of mortgage certificates.

A loan and investment company, which loaned money and took back mortgages upon real estate, which, together with the notes secured thereby, it sold to its clients desiring investment, did not change its situation by placing such mortgages and notes with a trustee and issuing and selling mortgage certificates of convenient denominations, so far as the application of Act Cong. Aug. 5, 1909, c. 6, § 38, providing for a 1 per cent. excise tax on net income, was concerned, and the interest received by it from the trustee must be considered as part of its gross income, and its net income, or profits, was substantially the difference between the aggregates of interest so received and interest paid to the holders of the mortgage certificates, plus sums accruing from commissions, and such company improperly deducted from the net income shown in its return the amount of interest received from the mortgages, on the theory that it went directly to pay the interest on its first mortgage certificates, since the allowance of such deduction would have the effect, in substance, of permitting the corporation to deduct from the gross amount of its income interest paid on its bonded or other indebtedness to an amount exceeding its paid-up capital stock.

2. Internal revenue ⇨25—Assessment unnecessary, where tax is a fixed percentage.

Where a tax of a fixed percentage, like that imposed by the Excise Law of 1909, § 38, on corporations, is so definitely described in the statute that

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

its amount or value can be ascertained and determined on evidence by a court, a suit therefor will lie without assessment.

At Law. Action by the United States against the Waddell Investment Company. Judgment for plaintiff.

This is an action against the defendant to recover a special excise tax for the years 1909 to 1912, inclusive, with respect to carrying on and doing business by it, imposed and provided for in Act Cong. Aug. 5, 1909, c. 6, § 38. The plaintiff claims that the defendant was not lawfully entitled to deduct from its income interest received on mortgages and notes which it had placed with a trustee to secure payment of mortgage certificates issued to purchasers, for the reason that defendant was not a bank, banking association, or trust company, and for the further reason that defendant, in its return, under the heading "Deductions," and item 6 (a) of the printed form thereof, being, to wit, "Total amount of interest, January 1 to December 31, on bonded or other indebtedness to an amount not to exceed amount of paid-up capital at close of year," had already deducted from its gross income the total amount of interest paid by it within the year on its bonded or other indebtedness, to an amount of such bonded and other indebtedness, not exceeding its paid-up capital stock at the close of each year, and was therefore not lawfully entitled to deduct the sums in question from its gross income.

L. M. Haydon, Asst. U. S. Atty., of Springfield, Mo., for the United States.

J. C. Hargus, of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. The assessment against the defendant company was made under section 38 of the Act of Congress approved August 5, 1909, 36 Statutes at Large, p. 112, which provides:

"That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation," etc., "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation," etc., "received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation," etc.; "(fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof," etc.; "(fifth) all the amounts received by it within the year as dividends upon stock of other corporations," etc., "subject to the tax hereby imposed."

The defendant company was organized as what is known as a loan and investment company:

"To loan money on real estate and personal security; to buy, hold, own, sell, indorse, negotiate and execute bonds, and notes secured by mortgages and deeds of trust on real estate, and all kinds of negotiable paper, bonds, debentures and other evidence of debt, for itself and for others; to borrow money and to pledge its property as security for the repayment thereof; to issue and sell its debentures and certificates and secure the same by pledge of notes, bonds and other securities, real and personal; to buy, own, hold, sell, convey, improve and lease real estate for itself, and as agent on commission, and to act as agent for other persons, companies, corporations and associations, and to do a general loan and investment business."

Under its charter, originally, it loaned money, taking back mortgages upon farms and other real estate, which said mortgages together with the notes secured thereby it sold to its clients desiring investments. Subsequently, for convenience, as described by its president, it made a change in the form and procedure of such transactions, while retaining the essential nature of its business. It had found that investors often required loans in denominations which did not fit the size and denominations of the notes and mortgages it had for sale. Consequently it decided to issue and sell its own so-called first mortgage certificates of convenient denominations, and to place behind these, as security, with a trustee, the notes secured by mortgage which it had previously acquired, and which, in its former course of business, it had been its practice to sell. This was analogous to a debenture transaction. In practice, as well as in substance, it received through the trustee the interest upon its securities placed with the trustee, and paid out from such sources, and from its other sources of revenue, the interest accruing upon its first mortgage certificates sold by it to investors. Substantially, the difference between such aggregates of interest, plus sums accruing from commissions, constitutes its net income or profits.

[1] It still owns the securities placed with the trustee, subject to the purposes for which they were pledged, and the interest and income from such securities are its income and interest. There is no difference, in a legal sense, between its present situation and its former situation, so far as the application of this law is concerned. It has deducted from the net income shown in its return the amount of interest received upon these mortgages on the theory that it goes directly to pay the interest on its first mortgage certificates. It is sufficient to say that there is no identity between such payments, and formal identity could not affect the issue. The mortgage interest comes into its assets, and the interest upon certificates is paid out generally from such assets. The allowance of this claim would have the effect, in substance, of permitting the defendant company to deduct from the gross amount of its income interest paid on its bonded or other indebtedness to an amount exceeding its paid-up capital stock. Aside from all this, the income from such sources is income of the defendant corporation, and should be considered and treated as such for the purposes of this excise tax. The case, to my mind, presents no difficulty whatever, and it is accordingly ruled that the plaintiff should recover in this action upon the several counts for the amounts shown to be due under the provisions of the law.

[2] "Where a tax of a fixed percentage [like the one imposed by Excise Law of 1909 on corporations] is so definitely described in the statute that its amount or value * * * can be ascertained and determined, on evidence, by a court, a suit [therefore] will lie, without an assessment." United States v. Grand Rapids & I. Ry. Co. (D. C.) 239 Fed. 153.

THE SAM & PRISCILLA.

MILLS v. LINEN THREAD CO.

(District Court, D. Massachusetts. September 26, 1921.)

No. 1942.

1. Sales ⇨273 (1), 428—Manufacturer of seine held under Sales Act impliedly to warrant its fitness; breach of warranty prevents recovery and subjects to action for damages.

Under Massachusetts Sales Act, § 17, the seller of a purse seine, which it contracted to manufacture for a fishing vessel for use in mackerel fishing, held to impliedly warrant its fitness for such use, and not entitled to recover the price of the purse line, which was defective and repeatedly broke when the seine was first used, whether it made the line itself or purchased it from another, and also held liable for damages for breach of contract.

2. Admiralty ⇨14—Contract to furnish seine to fishing vessel held a maritime contract.

A contract to furnish a seine to a fishing vessel held a maritime contract, and a suit thereon within the admiralty jurisdiction.

In Admiralty. Suit by the Linen Thread Company against the schooner Sam & Priscilla, Alden A. Mills, claimant, and cross-suit by said Mills against the Linen Thread Company. Decree for respondent in first suit, and for libellant in second suit.

Michael F. Shaw, of Boston, Mass., for libellant.

Carlton W. Wonson, of Gloucester, Mass., for respondent.

MORTON, District Judge. By agreement of parties these cases were heard together. Most of the facts are not in dispute, and were covered by an oral agreement between counsel made in open court; there was no material conflict of evidence. The claimant in the first case admits that all the items sued for were delivered to and received by the schooner Sam & Priscilla, and are due and payable, unless the matters hereinafter set forth constitute a defense.

In February, 1919, Wollard & Brewster, agents for the schooner, ordered from the Linen Thread Company a purse seine for mackerel. The Thread Company, in accepting the order, wrote to them:

"We will coal-tar and rig complete in the usual manner, with corks, leads, rings and purse line."

In the memorandum of the contract the size of the purse line is stated "2-inch," which was proper, and the length "300 fathoms"; there were no further specifications of it. The contract was made and was

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

to be performed in Massachusetts. The price of the seine complete was about \$3,500. The purse line was selected by the Thread Company, and with the seine was duly delivered and placed on board the schooner. It was used occasionally during about six weeks in herring and pollock fishery. Then the schooner began mackerel fishing. The first time the seine was used for that purpose the purse line broke, allowing a good-sized catch of fish to escape. It was spliced, but broke again when fish were in the seine. After this had happened several times the schooner abandoned the trip chiefly on that account, and returned to port. The line was discarded and another purchased to take its place, which worked all right and lasted through the season.

The purse line was not manufactured by the Thread Company, but was purchased by it from the Plymouth Cordage Company, which is a reputable maker of such goods. Neither Wollard & Brewster, nor Mr. Mills, the owner of the schooner, knew whether the Thread Company made or bought it. They contracted with the Thread Company to furnish a perfect and complete seine with purse line, and relied on it to do so.

The claim of the schooner is that the line was defective and unfit for the purpose for which it was furnished by the Thread Company; that she is therefore not obligated to pay for it, and is entitled to recover as damages the loss which she sustained by reason of its unfitness. There is no evidence, except the testimony of Capt. Meade that the rope was "rotten," as to the character of the defects which caused it to break, whether obvious or not, nor as to what precautions, if any, the defendant took to ascertain whether the rope was suitable for the purpose for which it sold it. There was no express warranty of the purse line by the Thread Company. The claim of the libelant Mills, owner of the schooner, rests upon an implied warranty that the complete seine, including the purse line, was fit for the use for which it was sold, which was known to the Thread Company.

The testimony for Mills is that a purse line ought to last a season or more; that during the use before mackerel fishing was begun this line was properly cared for; and that complaint about it was made by the captain to the agents on his return from the mackerel trip and was passed on by them to the Thread Company, which refused to do anything on the ground that it (the Thread Company) did not manufacture the line, and did not guarantee articles not manufactured by it. Capt. Meade testifies—the evidence not being objected to as hearsay—that one Chisholm, from whom the replacement was bought, supplied a second-hand line, saying he did so "because there were so many poor new purse lines." Apparently war conditions caused more or less of the bolt rope manufactured and sold at this time to be of inferior quality. The line itself is not produced. There is no evidence whether its use in herring and pollock fishery and improper care might have so weakened it as to account for its condition when used later in mackerel fishing. While the evidence on the point cannot be regarded as very satisfactory, it seems to me that the purse line probably was defective when delivered by the defendant; that it was not reasonably fit for the

purpose for which it was furnished, which purpose was known to the defendant; and that it was not of merchantable quality.

[1, 2] The rights of the parties are determined by the Massachusetts Sales Act; and on these facts it is clear that the Thread Company is not entitled to recover the price of the purse line. Gen. Laws Mass. 1920, c. 106, § 17. Whether Mills is entitled to recover against the Thread Company for breach of the implied warranties of reasonable fitness and merchantability (Laws Mass., *supra*) depends upon whether his libel states a cause of action within admiralty jurisdiction. In suits on contracts that jurisdiction is dependent not upon arrest of the vessel, nor upon the relief sought, but upon the subject-matter of the contract sued upon, whether "maritime" or not. Benedict on Admiralty (4th Ed.) §§ 143, 145, and 147, collecting cases. In *The Hiram R. Dixon* (D. C.) 33 Fed. 297, Judge Benedict held that a contract to furnish nets to a fishing vessel was a maritime contract. The contract here in question was, in my opinion, of that character, and either party might sue upon it in the admiralty courts. The memorandum of it was made to Wollard & Brewster; but they acted in the transaction as agents of Mills, which was known to the Thread Company, and its salesman, Mr. Syer, testified that this "seine and accessories" were sold to Mr. Mills as owner of the *Sam & Priscilla*. Mills can maintain suit on the contract in his own name as a party to it.

Decrees may be entered disallowing the item for purse line in the Thread Company's libel, allowing the other items in it, and referring Mills' libel to an assessor to state the damages.

UNITED STATES v. AMERICAN LINSEED CO. et al.

(District Court, N. D. Illinois, E. D. November 3, 1921.)

No. 1490.

1. Monopolies ⇨24(2)—**Extent of burden of proof on government stated.**

In proceedings by the government against an alleged combination under the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), it is incumbent on the government to show illegal combination by the clear preponderance of the evidence, and, in absence of direct proof and in face of denial under oath, the government must show that what defendants did necessarily had the result of restraining trade, and, if depending on circumstantial evidence, must show that the circumstances are entirely inconsistent with the supposition of innocence.

2. Monopolies ⇨12(3)—**Association under open price plan held not obnoxious to anti-trust laws.**

An association of dealers in linseed oil under so-called "open price plan," with a bureau proposing to collect and furnish to the various members current quotations, record of sales, statistics as to stock on hand, crop conditions, and other information, with agreement by members to furnish information as to daily prices and to make no sudden change without notice; *held*, in absence of direct evidence of acts hurtful to trade, not a combination in restraint thereof contrary to the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830).

3. Evidence ⇨18—Judicial notice taken of price decline.

In proceedings against alleged combination in restraint of trade, the court may take judicial notice that a general decline in prices has been going on for several months.

4. Monopolies ⇨12(3)—Meaning of "stabilized market" in agreement of associated dealers defined.

The admission in books of defendant, charged with conspiring in restraint of trade contrary to the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), that the bureau furnishing news to the association brought about a "stabilized market," did not necessarily mean nothing other than uniform prices, but, in view of the circumstances, meant the obtaining and distributing of accurate information that would enable dealers better to understand the conditions of the market of the article dealt in, to the end that speculative hazards might be minimized or eliminated.

5. Monopolies ⇨24(2)—Evidence of opportunity to control prices not alone sufficient.

Evidence showing a combination of dealers in linseed oil under agreement to furnish and receive information as to prices, conditions of market, etc., showing opportunity alone for control of prices, was not sufficient.

In Equity. Proceeding by the United States against the American Linseed Company and others, under the Sherman Anti-Trust Act. Bill dismissed.

Henry S. Mitchell, and C. Stanley Thompson, Sp. Asst. Attys. Gen., and Charles F. Clyne, U. S. Dist. Atty., of Chicago, Ill., for the United States.

John Walsh and L. A. Spiess, both of Washington, D. C., and Eastman, White & Hawxhurst, of Chicago, Ill., for defendants Ankney Linseed Mfg. Co., Archer-Daniels Linseed Co., Minnesota Linseed Oil Co., Northern Linseed Oil Co., Red Wing Linseed Oil Co., Toledo Seed & Oil Co., Mann Bros. Co., Julian Armstrong, and Montague Ferry.

Reed, Meals & Eichelberger, of Cleveland, Ohio, for defendants Sherwin-Williams Co., National Lead Co., and Hirst & Begley Linseed Co.

Rounds, Hatch, Dillingham & Debevoise, of New York City, for defendant American Linseed Oil Co.

Willet M. Spooner, of Milwaukee, Wis., for defendant William O. Goodrich Co.

Alexander & Green, of New York City, for certain defendants.

William J. Matthews and Hugh T. Martin, both of Chicago, Ill., amici curiæ.

CARPENTER, District Judge. In this case the United States, pursuant to the powers and duties imposed upon it by the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830), challenged as a combination or conspiracy a contract between the defendants, linseed oil crushers, and the Armstrong Bureau.

The defendant Julian Armstrong, in October, 1918, organized the Linseed Oil Council and operated it as a member of the Armstrong Bureau. The purpose of the council and bureau was to collect and furnish to the various members current quotations on linseed oil, the

record of sales of oil, including prices, statistics as to stocks on hand, crop conditions at home and abroad, and other information of interest or value to the manufacturers of linseed oil. The Armstrong Bureau entered into contracts with certain of the defendants and agreed to furnish them the foregoing information for a consideration.

Pursuant to these contracts, the various subscribers daily reported their price lists to the bureau, and promptly sent word of any change. Other information was also furnished from time to time. The statements received and collected by the bureau were immediately sent out to all the members of the association.

The record discloses that the information collected and distributed by the bureau to its several members was of the kind which a sagacious business man secures, or endeavors to secure, in the operation of his enterprise. The information was true. The price lists furnished were made in the regular course of business, and offered in good faith to customers or prospective customers. There was no proof that the members of the association ever, at the bureau meetings or at any other place, discussed prices or made agreements with respect to prices, and there was no evidence that the prices asked by any of the subscribers were not in accordance with the market price of flaxseed, upon which the price of linseed oil was based.

Production was not limited during the period the bureau was in operation. There was no proof of division of territory. There was no proof that the prices asked by the individual defendants were not fixed by them upon their own judgment, considering all factors affecting supply and demand. There was no proof showing that any member was under the slightest obligation or constraint to ask higher prices or maintain prices.

The main argument for the United States is that the operation of the bureau tended towards a stabilization or uniformity of price on any given day, which was not due to competition, in accordance with economic law.

Many tables of statistics were offered in evidence and read to the court, from which there appeared at times a striking similarity in price, and that changes in prices were made by substantially all the members coincidentally.

It appears further that the price of linseed oil is controlled by the price of flaxseed, and that the flaxseed market is an open one in which there are wide fluctuations as well as inactive periods.

The government has not shown that there was artificial regulation of price, either by definite oral or written agreement or by tacit understanding.

Each individual crusher entering into a contract with the Armstrong Bureau specifically and expressly agreed that all information reported to the bureau or distributed by it should at all times be purely statistical and pertain only to past operations, and that the bureau should not be used to enable the constituent members to fix prices for the sale of linseed oil, cake, or meal; to limit the sale, production, or manufacture thereof; or to divide the territory in which it was to be sold.

[1] It is incumbent upon the government to show by the clear pre-

ponderance of the evidence that the defendants conspired to restrain interstate commerce. In the absence of direct proof of actual entering into of such a combination, and in the face of the denial under oath of the defendants that any such conspiracy or combination was entered into or made, the government must show that what the defendants did necessarily had the result of restraining trade, or, if it relies upon the circumstantial evidence to show that a conspiracy was actually entered into, it must show to the satisfaction of the court that the circumstances upon which reliance is placed are entirely inconsistent with supposition of innocence.

[2] The question involved is whether an association, such as the Armstrong Agency (sometimes called the "Open Price Plan"), is obnoxious to the anti-trust laws, whether or not there is anything inherently wrong in an agreement between producers in a certain line to furnish each other their prices and not to make any sale deviating from the price list without immediately notifying all the others.

Associations of merchants and manufacturers, boards of trade, and exchanges are of great antiquity. Evidently such associations were not aimed at by the Sherman Act, because they are not mentioned in the act. A distinction is sought to be drawn between the operations of an exchange and what was done by the defendants through the Armstrong Bureau. An exchange sends out reports of actual sales. The Armstrong Bureau gave out price lists. It is difficult to understand any ground for declaring one legal and the other illegal. Every producer or merchant desires to obtain for his goods the highest price he can get. The price which he charges is always the highest which he believes the traffic will bear. He cannot charge, ordinarily, more than his competitors. His competitors' price fixes the point above which he cannot go. When the merchant fixes the price at the level of his competitors, he is fixing it in competition with his rival just as much as though he had named a lower price. The competition of his rival has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors, he will naturally lower the price, and this will establish a new level. This is the essence of what constitutes competition.

Quotations established by the sales on an exchange establish the market value at the time of the sale, but not the market value the day after. The prices at which goods are offered for sale at any moment establish the market value at that moment.

In those lines of merchandising where there are no exchanges, the prices which producers and dealers put upon their goods constitute the market price. *Cliquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116. In the trial of that case the judge charged the jury as follows:

"The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

The above language was cited and approved by the Supreme Court in *Muser v. Magone*, 155 U. S. 240, at page 249, 15 Sup. Ct. 77, at page 81 (39 L. Ed. 135).

If it is lawful for dealers to get together in an exchange and provide for a dissemination of the prices obtained on actual sales, why should it be unlawful for those producers and dealers in lines where no public exchange has been established, to make some provision for disseminating information of market value or prices? To put it in another way, why should they be limited to the dissemination of the market prices of yesterday, but not those of to-day.

In order to obtain efficiency in business, as well as in any other human activity, it is necessary to have reliable, immediate, and adequate records. With the progress that has been made in the last century it is not to be expected that business alone stood still.

In the old days when at noon the business men of the community met in the village blacksmith shop, or in the evening met at the corner grocery, a man was supposed to carry in his head all the facts in regard to his business and never to disclose them to a competitor. Adequate systems of accounting had not been devised. Overhead as a cost element in operation was unheard of. Business was run by the rule of thumb. Such days have gone by. The commercial enterprise of to-day which is not so managed that its head can at any time know how large is his stock, the volume of his sales, the cost of his operation, and the amount of his profit and loss, sooner or later will be distanced by competitors.

It is because business is so much more complex, the volume so much greater, the margin of profit on single transactions so much less, that the merchants of to-day must have at instant command reliable and adequate information, immediately to be secured and more or less permanent in form. Business is no longer a game of chance, but a matter of scientific calculation.

A merchant cannot compete with another merchant unless he knows what he must compete against. A knowledge of what his competitor is charging is the first step in competition. It does not follow, because one man knows the price which his competitor is asking, and he then fixes the same price, that his action is by agreement. If his competitor charges a high price, he naturally will ask the same price if he thinks he can get it. It is absurd to imagine that every merchant does not endeavor to keep posted on the prices asked by his competitor. If he fails to keep posted, he will find himself losing money. If his prices are too high, his customers leave him. If too low, he fails to reap the profit to which he is entitled. The government cannot seriously contend that it is the duty of every merchant to guard against his competitor, finding out what he is charging. It would be an impossibility. Nor is it wrong for a merchant to endeavor to find out what his rivals are charging. If he cannot get it directly and easily, he will necessarily get it indirectly and at a great expense and slowly. He must know in order to conduct his business properly; nor does the public profit by the mistakes of a merchant charging too much on the one hand or too little on the other, for want of such information. The mistakes would in all probability fall equally on either side.

Quick and accurate information of what his competitors are charging naturally leads to uniformity in prices. But because one mer-

chant charges the same price that the other merchant charges, because he finds that he can get it, does not necessarily indicate that there is any agreement between them to charge the same price. As the Supreme Court said, in the Steel Case, 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121, a uniformity in price does not prove a conspiracy.

What applies to sales for present delivery, applies equally to sales for future delivery.

[3] Much has been made by counsel for the government of the fact that prices of oil went up along with the price of flaxseed; that afterwards when flaxseed declined sharply, the price of oil did not come down at the same rate, but declined at a much slower pace. The court will take judicial knowledge that for the past several months a decline in prices has been going on. The government has failed to show that the phenomenon of the price of oil declining at a slower rate than the price of flaxseed was not common in other lines, where the price of raw materials has fallen. That the price of the finished product on a declining market will fall at a slower rate than the price of the raw material is natural, and therefore expected. The price of the finished material, under conceded economic rules in the market where there is competition, will depend upon the supply and demand of the finished material. The drop in the price of the raw material does not affect the supply of the finished material. Time must elapse before the supply of finished material is increased by the low prices of raw material, and until the supply of finished material is increased, assuming that the demand remains constant, no decline in price may be expected. When the price of raw material starts to go up, less of the finished material will be produced, and stoppage or slowing up of the manufacture of the finished material will be at once reflected in an increased price.

The court should not construe the acts of the defendants to be illegal when it can, with equal facility, ascribe them to an innocent intention.

But it is charged by the government that the defendants themselves claim that the effect of the bureau was to stabilize prices. That is to say, as a result of accurate and instant knowledge on the part of producers, the price of linseed oil, instead of varying sharply from day to day, as shown by the sales made, assumed an average price without the deviations. If these deviations before had been the result of real competition, based on accurate knowledge by the producers of the real market conditions, then the government is far from sustaining its contentions. The defendants, however, have shown, and their evidence is uncontradicted, that the deviations before existing were caused by the individual producers endeavoring to meet prices of their competitors which had never been made; and it is common in the trade for buyers to make false representations as to the prices made by other producers. Surely, such a condition is not the one that the Sherman Act aims to foster.

[4] The government was greatly disturbed by a statement in the defendant Ferry's books that the Armstrong Bureau brought about a

stabilized market. This expression seems to have been a great bugaboo. Counsel for plaintiff would have the court believe that the term "stabilized market" means nothing other than uniform prices. Whatever the proper definition of the phrase, the record does not show that there was a stabilization or uniformity in prices.

The defendants contend, and I agree, that the term "stabilized market" means the obtaining and distributing of any accurate information that would enable crushers and buyers of linseed oil the better to understand the conditions of the flaxseed and oil market, to the end that the speculative hazards which formerly had worked injury to both seller and buyer would be minimized and eventually eliminated, and the economic law of supply and demand be more intelligently put into operation.

Complaint is made against what is called the "zone system" and differentials applying thereto. It is true the prices quoted had reference to certain well-defined territory, and the prices were accompanied by differentials to equalize the cost of railroad transportation. The record shows that these differentials were adopted after a thorough and intelligent investigation of freight rates from the base point to point of delivery, and the addition to the base price in the different zones was arrived at after a fair averaging of those freight rates into the designated territory.

Zoning for the purpose of fixing rates is not new. The Interstate Commerce Commission permits it in regulating the charges to be made by railroads. It is not a perfect system, and there is always a certain amount of discrimination to those who live on or near the dividing line between zones, and I have no doubt a few buyers of oil may have been to some extent penalized, but every buyer had the option of purchasing f. o. b. point of manufacture, or f. o. b. point of delivery, and I must assume that this buyer would choose that f. o. b. point which seemed the most to his advantage.

The charge of the government that the zone differentials were adopted in order that the price charged for oil would be artificially enhanced, and the defendant crushers consequently enriched, is not borne out by the evidence. There was no zone in which all the crushers did business, and the bulk of the finished product sold by the defendants was for delivery in zones carrying minimum freight differentials.

Counsel for the government seeks to draw an inference of guilt from the admission of defendants that the bureau allowed them to sleep nights. The only restraint which the rules of the bureau on their face impose is that the members agree not to deviate from their price lists without informing the other members at once by telegraph. At the close of each business day every member knew until the next day what the market was. It seems to me that the situation thus created is not dissimilar from that sustained by the United States Supreme Court in *Chicago Board of Trade v. United States*, 246 U. S. 231, 38 Sup. Ct. 242, 62 L. Ed. 683. It is very evident that the Supreme Court does not believe that the Sherman Act should prevent men from sleeping nights.

The Armstrong Bureau was organized solely for the purpose of furnishing information not only to the linseed oil crushers, but to those interested in every other industry. It was a bureau of intelligence, and one which makes for real rather than artificial competition in trade. There was no restriction placed upon any member. He was free to buy from and sell to whomever he chose. The bureau operated solely as to past transactions, and wherever there is freedom of contract on the part of the constituent members there cannot be a violation of the Sherman Act.

[5] The prosecution, down deep, evidently believes that an association of producers or merchants must necessarily be obnoxious to the Sherman Act because it affords an opportunity for the members to conspire to restrain trade.

Where there is such an association, it is perfectly natural for members to express themselves as to conditions and prices; in fact, that is what the association is formed for, and these expressions have been seized upon by counsel as evidence to show that a corrupt agreement was actually made.

To my mind some of these expressions are evidence that no such agreement was in fact made, if they are evidence of anything. It would be perfectly natural, among a meeting of oil men, for some one to say that he thought prices ought to be higher. The meaning conveyed by such an expression would be that the man was at a loss to understand why prices were not higher, taking into consideration the demand and supply and conditions of the trade. I might well say to-day that the weather ought to be cooler without laying myself open to the imputation that the temperature had been fixed by an agreement of mine.

Logic which assumes that because there is an opportunity to fix prices, therefore prices are fixed, is contrary to the genius and theory of our law. Every man is presumed to be innocent until he is proved to be guilty. If the Armstrong Bureau is to be dissolved merely because it afforded an opportunity for the members to fix prices, then this court, with equal propriety, could be asked to dissolve any lunch club where business men meet. This theory hardly warrants discussion, and I would not mention it had I not been gravely urged in this case, that such was the underlying thought of the prosecution. It is the ancient fallax—post hoc propter hoc.

The bill will be dismissed for want of equity.

BLOSSOM et al. v. ANKETELL et al.

(District Court, E. D. Michigan, S. D. October 31, 1921.)

No. 109.

1. Wills ⇐681(2)—Trustees held vested with absolute title after beneficiary's death.

Under a will creating a spendthrift trust for a daughter, *held* that, on the death of the daughter, the trustees retained absolute legal title to the trust property, with full discretion and power, subject only to the express terms of the trust, either to deliver the trust property to, or withhold it from, the spendthrift's children.

2. Perpetuities ⇐6(2)—Will held not attempt to impose restraint on power of alienation.

A will creating a spendthrift trust, and providing that the trustees, on the death of the spendthrift, should hold the property in trust for spendthrift's children, and to withhold as much thereof as they thought best until such time as they wished to surrender it to the children, *held* not an attempt to impose an unlawful restraint on, or suspension of, the power of alienation.

3. Wills ⇐680—Trust held active, and not passive.

A spendthrift trust created by a will, whereby trustees were to retain trust funds as long as they thought proper for the benefit of spendthrift's children after her death, *held* an active one, and not passive, after the death of the spendthrift.

In Equity. Bill by Harold M. Blossom and others against Thomas J. Anketell and others. Decree for defendants.

Stevenson, Carpenter, Butzel & Backus, of Detroit, Mich., and Irving Fish, of Milwaukee, Wis., for plaintiffs.

Walker & Spalding and Hinton E. Spalding, all of Detroit, Mich., for defendants.

TUTTLE, District Judge. This is a bill to construe a will. The case has been submitted to the court upon an agreed statement of facts and upon oral arguments and written briefs.

The testatrix, Julia H. Mills, made her last will in 1909. She then had two married daughters living, Elizabeth Anketell and Julia Blossom, the latter then being 32 years of age. Julia Blossom had two sons; Harold, who was then about 12 years of age, and Philip, then about 8 years old. The said Julia Blossom was, then and thereafter up to the time of the death of her mother, a spendthrift, and known as such to her mother. The testatrix, Julia H. Mills, died in 1913, leaving her said daughters and grandsons surviving her. About a year later, Julia Blossom died; her two said sons surviving her.

The material provisions of the said will, which remained unchanged as made, are as follows:

"I, Julia H. Mills, being of sound and disposing mind and memory, do make, publish and declare this to be my last will and testament.

"My father devised and bequeathed to my daughter Elizabeth one-fourth of his estate and to me one-half of it. After making his will, he expressed to me a desire that my youngest child Julia should have a share in his estate equal to that of her sister, but he did not desire to change his will on account of his age

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

and left it to me to carry out his wishes in this respect in such a way as would be to my daughter Julia's best interests and would place her as near as may be on an equality with her sister. In carrying out his wishes, which are also my own, I am anxious that my daughter Julia shall, after my death, be in such a position that she may not, through any indiscretion on her part, come to want or to be in straitened circumstances, and that her children shall likewise be provided for, I have concluded to place my estate in trust, as herein-after provided. I hope that my daughter Julia will feel that, in what I have done, I have acted for the best interest of herself and her children.

"I make the following disposition of my estate:

"First: I give, devise and bequeath all my estate, real, personal and mixed, of every nature and description and wherever located, to Thomas J. Anketell, my son-in-law, William Mayer, of Waterville, N. Y., and Homer Warren, of Detroit, Michigan, the survivors and survivor of them and their successors and assigns, as trustees and in trust for the uses and purposes herein specified.

"Second: I direct that my said trustees, out of my estate pay all of my just debts and funeral expenses. * * *

"Sixth: My said trustees and their successors in said trust are authorized and empowered:

"To take possession of my estate and manage and control the same during the continuance of the trust hereinafter provided for the life of my daughter Julia, in such manner as in their judgment shall be most conducive to the interests of those concerned therein, and pay all taxes, charges and expenses of management and maintenance thereof, including reasonable compensation to themselves.

"From time to time to sell and convey, lease, mortgage, improve and dispose of said property in such manner and on such terms as to them shall seem proper, the power of mortgage to be exercised either for the payment of debts, the improvement of any part of the property, or otherwise, as in their judgment shall be desirable to carry out their trust;

"To convert realty into personalty and personalty into realty, and to recon-vert the same;

"And generally to exercise as full powers of disposition and management over said property, consistent with the general purposes of the trust, as I might do if living.

"In setting apart the share of the residue of my estate hereinafter devised and bequeathed to my daughter Elizabeth, said trustee's shall appraise the entire of said residue, and set apart and convey to my said daughter Elizabeth, as and for said one-fourth ($\frac{1}{4}$), such portion or portions of said residue as shall in their judgment and in accordance with their said appraisal be one-fourth ($\frac{1}{4}$) of said residue in value; their determination and apportionment shall be final and conclusive. * * *

"Ninth: Subject to the payment of the debts and legacies hereinbefore provided for, I give, devise and bequeath to my daughter, Elizabeth Moss Mills Anketell, one-fourth ($\frac{1}{4}$) of the residue of my estate remaining after the payment of said debts and legacies, to be turned over to her at the expiration of two years from my death, or at the expiration of the trust hereby created during the life of my daughter Julia in the other three-fourths ($\frac{3}{4}$) of the residue of my estate, whichever event shall soonest occur, as and for her own property absolutely and forever. In the meantime, said one-fourth ($\frac{1}{4}$) interest shall remain a part of said trust estate, and said trustees shall semi-annually pay over to my said daughter Elizabeth one-fourth ($\frac{1}{4}$) of the net income of said estate.

"The other three-fourths ($\frac{3}{4}$) of the residue of my estate remaining after the payment of said debts and legacies and the income thereof, shall, during the life of my daughter, Julia H. Blossom, be used and applied by said trustees, so far as in their judgment may be necessary, for the support, maintenance and medical care of my said daughter, her children and the issue of any deceased child and the education of said children and of the issue of deceased children; and for the burial expenses of my said daughter and of any beneficiary of said trust who shall die before my said daughter's death.

"The trustees shall be the sole judges of the amount necessary to use for said purposes, the proportion thereof to be appropriated to each beneficiary,

and the method of application thereof: Provided, however, that while my said daughter Julia shall live, the said trustees, if the net income from said three-fourths residue in any year shall be five thousand dollars (\$5,000) or more, shall devote in that year at least four thousand dollars (\$4,000) of such income to said purposes, but if the net income in any year shall fall below five thousand dollars (\$5,000), they shall in that year devote to said purposes at least four-fifths of such income. In case the income in any year shall, in the judgment of the trustees, be inadequate for the purposes of said trust, the trustees may, for said purposes, use any part or parts of the principal of said trust fund, being said three-fourths ($\frac{3}{4}$) interest in the residue, or borrow the necessary amount on the security thereof, in their discretion. Advances so made shall be repaid out of future surplus income if practicable. Advances not so repaid and used for the benefit of any child of my said daughter, or of the issue of any deceased child, shall, at my said daughter's death, be charged against its share, together with interest at the rate of five per cent. per annum from the date of the advancement.

"After the death of my said daughter, Julia H. Blossom, the principal of said trust estate in said three-fourth ($\frac{3}{4}$) of the residue shall be divided into as many equal shares as there are children of my said daughter then surviving and deceased children who have lawful issue then surviving. One of such shares shall be held in trust by said trustees for each of said children and one share in equal proportions for the issue of each deceased child, with the same powers and duties to the beneficiaries respectively as are given said trustees in the trust hereinbefore created for the life of my said daughter. The trust for each of the two children, Harold M. Blossom and Philip M. Blossom, of my said daughter, shall continue during his life. * * * Provided, however, that the trustees may at any time after any child or any of the issue of any deceased child shall attain majority, though before the end of the trust for it created, if in their judgment it shall be for such child's interest, terminate the trust and turn over to it its share of the trust property. At the expiration of any of said trusts, which take effect after the death of my said daughter, the property covered thereby shall be turned over to the cestui que trust as and for his own property absolutely and forever."

While the arguments of counsel in their numerous and exhaustive briefs have covered a somewhat broad range, the crucial and ultimate question in dispute for the determination of which the present suit was instituted, between the plaintiffs, the aforesaid grandsons of the testatrix, and the defendants, the aforesaid trustees, is whether such plaintiffs are, as alleged in their bill herein, "by law entitled to the whole of the income, use and profit of the trust fund provided in the said will for their benefit as and when the same shall accrue from time to time," or whether, on the other hand, the defendants are correct in their contention, as stated in their answer, that "under the terms of the trust created by said will for the benefit of said complainants after the death of their mother the trustees had and have full discretion to determine the amount that should be used and applied for the benefit of said complainants and the method of its application, and that said complainants have not the right to receive or to have applied for their benefit from said trust fund any amounts except those which the trustees may from time to time determine necessary for the use for their benefit for the purposes provided in said will."

I find no ambiguity in the language of the will in this connection. It is clearly provided by the terms of such will that after the payment of certain debts and legacies, three-fourths of the residue of the estate is devised and bequeathed to the trustees named, with the ample powers mentioned, first, and during the life of the daughter of the

testatrix, for the benefit of such daughter and her children, and then, upon the death of said daughter, to be held in trust in equal shares; by said trustees, for each of her surviving children, "with the same powers and duties to the beneficiaries respectively, as are given said trustees in the trust hereinbefore created" for the life of said daughter. The trust for each of the two children is to continue during his life, subject to the right and power of the trustees at any time after either child shall attain his majority, though before the end of the trust for him created, "if in their judgment it shall be for such child's interest," to terminate the trust and turn over to such child its share of the trust property. "At the expiration of any of said trusts," which took effect after the death of Julia Blossom, the property covered thereby shall be turned over to the beneficiary as his own property absolutely and forever. The intention of the testatrix as expressed by this language is, in my opinion, sufficiently plain. Julia Blossom having died, leaving the two sons surviving her, the trustees hold one-half of the trust property for each son as beneficiary, "with the same powers and duties to the beneficiaries, respectively, as are given said trustees" in the trust previously created for the life of their mother. The "powers and duties" thus referred to are, obviously, those conferred by the provisions of the sixth and ninth paragraphs of the will, hereinbefore quoted—that is, to take possession of the estate of the testatrix and manage and control the same in such manner as in their judgment should "be most conducive to the interests of those concerned" therein; to pay all taxes, charges and expenses of management and maintenance thereof, including reasonable compensation to themselves; from time to time to sell and convey, lease, mortgage, improve, and dispose of said property in such manner and on such terms as to them should seem proper, such power to be exercised either for the payment of debts, the improvement of any part of the property, or otherwise, "as in their judgment shall be desirable to carry out their trust"; to convert realty into personalty and personalty into realty, and to reconvert the same; and generally to exercise as full powers of disposition and management over said property, consistent with the general purposes of the trust, as the testatrix might do if living; to use the trust property, "so far as in their judgment may be necessary," for the support, maintenance, medical care, and education of said children, such trustees being the "sole judges of the amount necessary to use for such purposes, the proportion thereof to be appropriated to each beneficiary, and the method of application thereof," subject to certain provisos already mentioned. The trustees may, however, as previously pointed out, at any time after any child shall attain majority, though before the end of the trust for it created—that is, before its death—"if in their judgment it shall be for such child's interest, terminate the trust and turn over to it its share of the trust property * * * as and for his own property absolutely and forever."

[1] The language of the will leaves, in my opinion, no room to doubt that it was the wish and intention of the testatrix to vest the absolute legal title to the trust property in the trustees, for the period

and purposes recited, and to confer upon them full discretion and power, subject only to the express terms of the trust, either to deliver the trust property to, or to withhold it from, the plaintiffs herein, subject only to the express terms of the trust.

[2, 3] It is equally certain that there is here no attempt to impose an unlawful restraint upon, nor suspension of, the power of alienation, and no such effect, the estate granted being vested, and there being no violation of the rule against perpetuities; that the trust is an active one, and therefore not subject to execution as a passive, or naked, trust; that the testatrix was legally entitled to confer upon the trustees the broad, discretionary powers intrusted to them; and that such trust is not contrary to public policy nor subject to any objection to its validity presented to, or known by, this Court. *Shelton v. King*, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086; *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169 (C. C. A. 6); *Stier v. Nashville Trust Co.*, 158 Fed. 601, 85 C. C. A. 423 (C. C. A. 6); *Ballantine v. Ballantine*, 160 Fed. 927, 88 C. C. A. 109 (C. C. A. 3) *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; *Parker v. McMillan*, 55 Mich. 265, 21 N. W. 305; *Hunt v. Hunt*, 124 Mich. 502, 83 N. W. 371; *Ward v. Ward*, 163 Mich. 570, 128 N. W. 761.

In the language of the United States Supreme Court, speaking through Mr. Justice Lurton, in the case first cited:

"The trust is not dry, but is active, and must continue, if not invalid, until the time of payment arrives. Upon what principle, then, is a court of equity to control the trustee by compelling a premature payment? It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. *Lewin, Trusts* (2d Am. Ed.) 448; *Nichols v. Eaton*, 91 U. S. 716, 724, 23 L. Ed. 254, 256.

"There being in this case no ground for saying that there have arisen circumstances and conditions for which the testatrix made no provision, we may not control the trustee, if the postponement directed by the will does not offend against some principle of positive law or settled rule of public policy. There is no pretense of perpetuity. Creditors are in no way concerned. If the testatrix saw fit to have this fund accumulate in the hands of the trustees, and thereby postpone the enjoyment of her gift, why shall her will be disregarded? The restriction she imposed may protect her bounty against ill-advised investments and waste or extravagance. She did not undertake to guard against alienation, except in so far as the alienees will take subject to the same postponement of payment. * * *

"In the leading case of *Nichols v. Eaton*, 91 U. S. 716, 727, 23 L. Ed. 254, 257. Mr. Justice Miller, speaking of the unanimous voice of this court. * * * touching the theory that public policy forbids restraints upon the disposition of a testator's bounty. * * * said: 'Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.' * * *

"There is no reason for declaring the trust invalid. There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid."

It is not necessary, for the purposes of this suit, to determine any question as to the devolution or other disposition of the trust property in the event of the death of a beneficiary under this trust before the termination, otherwise, of such trust, and no opinion is expressed upon any such question, except as may be necessarily involved in the conclusions herein reached.

The contention of the plaintiffs, as stated in the language of the bill hereinbefore quoted, must be overruled, and that of the defendants, as so stated, sustained, and a decree will be granted in accordance with the terms of this opinion.

In re STANDARD-DETROIT TRACTOR CO.

(District Court, E. D. Michigan, S. D. October 31, 1921.)

No. 4333.

1. Bankruptcy \Leftrightarrow 165(1)—Payment in discharge of previously acquired lien by garnishment not a preference.

Under Bankruptcy Act, §§ 60a, 60b (Comp. St. § 9644), defining preference and the creation thereof by judgment, and under Comp. Laws Mich. 1915, § 13123, declaring a garnishee liable to the creditor from the time of the service of the writ to amount indebted, payment to a creditor from garnishees of a bankrupt within four months of the bankruptcy proceedings, but in discharge of a lien created by service on such garnishees long before such limited period, did not constitute a voidable preference, disqualifying petitioning creditor unless he surrendered it.

2. Bankruptcy \Leftrightarrow 166(2)—Intent as to preference derived from circumstances with regard to presumption as to consequences of acts.

In determining whether a bankrupt's intent to prefer a creditor is to be inferred from the facts and circumstances surrounding the transaction, court will bear in mind presumption that he intended the necessary consequences of his voluntary acts.

In Bankruptcy. In the matter of the alleged bankruptcy of the Standard-Detroit Tractor Company. On involuntary petition and answer thereto, involving issue of preference and acts of bankruptcy. Petition granted.

Clark, Emmons, Bryant, Klein & Brown, of Detroit, Mich., for petitioning creditors.

Goodenough, Voorhis & Long, of Detroit, Mich., for bankrupt.

TUTTLE, District Judge. This matter is before the court on the involuntary petition in bankruptcy herein and the answer of the bankrupt thereto. It is undisputed that the creditors of the bankrupt are less than 12 in number and that, except as hereinafter otherwise claimed, the necessary jurisdictional facts exist. A jury has been waived

and the issues involved submitted to the court for decision upon the facts agreed upon.

Two questions are presented, as follows:

(1) Did the petitioning creditor Overton receive from the bankrupt, within four months immediately preceding the filing of the petition in bankruptcy herein, a voidable preference which disqualifies him as a petitioning creditor until he surrenders such preference?

(2) Was the act of the bankrupt, in making, within the four months prior to the filing of the petition in bankruptcy against it, and while it was insolvent, a payment to one of its creditors, the First & Old Detroit National Bank, on an existing indebtedness, an intentional preference of such creditor, and therefore an act of bankruptcy, as alleged in said petition in bankruptcy?

[1] 1. With respect to the first question, the material facts and circumstances surrounding the receipt by said petitioning creditor of the payment alleged by the bankrupt to constitute such voidable preference are as follows: On September 7, 1917, said creditor instituted a suit against the bankrupt for the recovery of an alleged indebtedness, amounting to over \$30,000, and at the same time and in the same action obtained a writ of garnishment (issued and served on the garnishee defendants on said date) against certain debtors of the bankrupt, thereby garnisheeing and sequestrating in the hands of said garnishee defendants about \$500 due from them to said bankrupt. On April 8, 1919, said petitioning creditor obtained a judgment against the bankrupt in said action for the sum of \$32,008.34, and thereupon, and within four months immediately preceding the date of the filing of the petition in bankruptcy herein (which was May 27, 1919), recovered judgment against said garnishee defendants, and collected thereon, from such garnishee defendants, the amount theretofore garnisheed, namely, \$565.29, which sum he applied on his judgment against the bankrupt and still retains.

Section 60b of the Bankruptcy Act (Comp. St. § 9644) provides as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 60a, of the act (section 9644) defines a preference as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It is conceded by the petitioning creditor that, if he has received a voidable preference, he cannot maintain his petition without surrendering or offering to surrender such preference before adjudication. It is therefore unnecessary to consider the question whether such a creditor may file such a petition without making a surrender of any voidable preference, previously obtained, a question which, in view of the distinction between the proving and the allowance of a claim in bankruptcy, and the consequent difference between the meaning of the terms "provable" and "allowable," is not free from difficulty, and cannot, in my opinion, be regarded as authoritatively decided. *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591; *Lesser v. Gray*, 236 U. S. 70, 35 Sup. Ct. 227, 59 L. Ed. 471; *In re Gillette* (D. C.) 104 Fed. 769; *In re Herzikopf* (D. C.) 118 Fed. 101; *In re Hornstein* (D. C.) 122 Fed. 266; *In re Fishplate Co.* (D. C.) 125 Fed. 986; *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 80 C. C. A. 25 (C. C. A. 8); *In re Murphy* (D. C.) 225 Fed. 392; *In re Automatic Typewriter & Service Co.*, 271 Fed. 1 (C. C. A. 2).

Passing, then, to the question whether, upon the facts disclosed by the record, this petitioning creditor received a voidable preference prior to the time of the filing of his petition in bankruptcy, I am clearly of the opinion that such question must be answered in the negative. As already observed, the writ of garnishment resulting in the alleged preference was served upon the garnishee defendants long prior to the statutory four months' period. Section 13123 of the Michigan Compiled Laws of 1915 provides that—

"From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels and effects under his control, belonging to the principal defendant, or of any debt due or to become due from such garnishee to the principal defendant."

The effect, therefore, of the service of the writ of garnishment, was to fasten a lien upon the indebtedness of the garnishee defendants to the principal defendant in the garnishment proceedings, the bankrupt herein, and to thereby subject the property of such bankrupt, consisting of its right to recover such indebtedness, to the lien of such garnishment. *In re Ransford*, 194 Fed. 658, 115 C. C. A. 560 (C. C. A. 6). As this lien was created more than four months prior to the time of the filing of the bankruptcy petition, and is not shown to have been fraudulent, it cannot, of course, be held preferential or void, and, indeed, no such claim is advanced by the bankrupt. It follows that the payment of the amount thus sequestered, and held subject to the lien of the garnishment, was a payment pursuant to, and in discharge of, such previously acquired lien, and therefore did not constitute a preference within the meaning of the Bankruptcy Act, although made within the statutory four months period, as any advantage accruing to the one creditor, as well as any disadvantage caused to other creditors, by the transaction, resulted from the lien and not from the payment thereon and discharge thereof. *Fisher v. Zollinger*, 149 Fed. 54, 79 C. C. A. 76 (C. C. A. 6); *In re Reese-Hammond Fire Brick Co.*, 181 Fed. 641,

104 C. C. A. 371 (C. C. A. 3); Britton v. Union Investment Co., 262 Fed. 111 (C. C. A. 8).

[2] 2. Coming to the question concerning the alleged act of bankruptcy, section 3 of the Bankruptcy Act (Comp. St. § 9587) provides that an act of bankruptcy by a person shall consist, among other things, of his having, within four months prior to the time of the filing of a petition in bankruptcy against him, "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." It is charged in the petition that the bankrupt committed such an act of bankruptcy, in making a preferential payment to one of its creditors, as hereinbefore mentioned. It is undisputed that such payment was made within the statutory four months period, that it constituted a transfer of substantially all of the property of the bankrupt, that the bankrupt was insolvent at the time of such payment, and that just prior thereto it had knowledge that it was insolvent. It is, however, denied that the payment was made with intent to prefer the creditor receiving it.

The question, therefore, which is one of fact, presented in this connection, is whether such intent is to be inferred from the facts and circumstances surrounding the transaction, bearing in mind the principle, applicable here, that one is presumed, in the eyes of the law, to intend the necessary consequences of his voluntary acts. Without discussing in detail the undisputed facts, which would serve no useful purpose, I deem it sufficient to express my conclusion that such facts are fully sufficient to warrant the inference, and I so find, that the payment in question, which operated as a preference, was made with the intent, on the part of the bankrupt, to prefer the creditor receiving it over its other creditors of the same class, within the meaning of the Bankruptcy Act, and that therefore the bankrupt has committed the act of bankruptcy thus charged. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Johnson v. Wald*, 93 Fed. 640, 35 C. C. A. 522 (C. C. A. 5); *In re Bloch*, 109 Fed. 790, 48 C. C. A. 650 (C. C. A. 2); *Rex Buggy Co. v. Hearick*, 132 Fed. 310, 65 C. C. A. 676 (C. C. A. 8); *Naylon & Co. v. Christiansen Harness Mfg. Co.*, 158 Fed. 290, 85 C. C. A. 522 (C. C. A. 6); *In re Condon*, 209 Fed. 800, 126 C. C. A. 524 (C. C. A. 2).

It results that the prayer of the petition must be granted, and an adjudication ordered in accordance therewith.

In re WAYNE REALTY CO.

(District Court, N. D. Ohio, E. D. October 26, 1921.)

No. 7563.

1. Bankruptcy ⚡376—Section of Bankruptcy Act as to compositions strictly construed.

Bankruptcy Act, § 12 (Comp. St. § 9596), relating to compositions, is to be strictly construed, since it compels a dissenting creditor to accept the percentage offered by the majority, and deprives them of their remedies on the balance, and is in derogation of the common law.

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

2. Bankruptcy ⇨376—Theory of a “composition” stated.

Under Bankruptcy Act, § 12 (Comp. St. § 9596), providing for confirmation of a composition, after the “consideration to be paid by the bankrupt to his creditors” has been deposited as designated by the judge, the theory of a composition is a payment of, or a promise to pay to creditors, a certain definite amount or other consideration in lieu of a dividend derived from the sale of bankrupt’s assets, and it presupposes a consideration and a weighing by the creditors of the relative advantage of what is offered by the composition over what may be realized from the assets.

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

3. Bankruptcy ⇨376—Composition, not providing for deposit of consideration to be paid creditors, not confirmed.

Proposed composition, providing for the conveyance by the bankrupt corporation and three of its officers, against whom involuntary proceedings in bankruptcy were pending, of certain real estate to a trustee, to be administered and converted into money by trustee with the consent of a creditors’ committee, and authorizing trustee to borrow money and further encumber the property, and to determine the validity, extent, and priority of liens, and the validity and amount of claims, subject to reference, in case of dispute, to arbitration, will not be confirmed, since it does not provide for any consideration to be deposited in place designated by the judge and subject to his order, as required by Bankruptcy Act, § 12 (Comp. St. § 9596).

In Bankruptcy. In the matter of the Wayne Realty Company, bankrupt. On objection by Le Grande Chase, one of the creditors, to confirmation of the composition offered by the bankrupt. Confirmation denied.

Mooney, Hahn, Loeser & Keough, of Cleveland, Ohio (William C. Keough, of Cleveland, Ohio, of counsel), for bankrupt.

D. K. Henderson and Gott, Chamberlin & Bloomfield, all of Cleveland, Ohio, for objecting creditor.

Snyder, Henry, Thomsen, Ford & Seagrave, of Cleveland, Ohio, for petitioning creditors.

WESTENHAVER, District Judge. One of the creditors of the bankrupt objects to the confirmation of the composition offered by the bankrupt, on the ground that it is not to the best interest of creditors. Specifically, the objecting creditor claims, among other things, that the form of the composition is indefinite, incomplete, and impracticable for a number of reasons. (Paragraph 6, with 9 subdivisions, A to I).

The offer, briefly, is that the bankrupt, as well as three others, officers of bankrupt company, convey to a trustee named certain real estate; that the trustee administer this property—i. e., convert it into money by selling it—with the consent of a creditors’ committee, on time payments, secured by mortgage, if they so determine; that he may complete buildings thereon, borrowing money for that purpose, and encumber the property as security therefor, with the consent of a creditors’ committee; that said trustee may sell any notes or mortgages taken by him, and may compromise any claim against bankrupt or the others conveying the property to him. All general creditors, as well as lien claimants, of which there are many, are to file their

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

claims with the trustee, and he is to determine them, as well as the rights and priorities of creditors. In the event any of such creditors are dissatisfied, they may require reference to arbitration; said arbitrators to determine all issues of law and fact, their decision to be final. At the direction of the creditors' committee, the trustee shall bring action to clear title to any property. The trustee is allowed, with approval of creditors' committee, such expense as is necessary in the care, maintenance, preservation, and sale of the assets, and to receive reasonable compensation for his services; also the creditors' committee is to receive reasonable compensation. The arbitrators are to be paid by the parties to the dispute. The trustee is not to be liable to creditors for any damage or injury which they may suffer in any way in connection with the property. There are provisions in the offer which bind creditors of the bankrupt to release any claims they may have against the *three officers* of the bankrupt corporation. Dividends are to be declared pro rata to all general creditors, and payments upon valid liens are to be made when funds are in the hands of the trustee and they are approved by the creditors' committee. Involuntary petitions in bankruptcy are now pending against said *three officers* and it is claimed that they have made transfers of property in fraud of creditors of bankrupt.

A brief reference to the Bankruptcy Act upon the subject of compositions and the decisions thereunder will prove helpful. Section 12 of the act (Comp. St. § 9596) provides:

"(a) A bankrupt may offer * * * terms of composition. * * * (b) An application for the confirmation of a composition may be filed * * * after * * * the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge. * * * (d) The judge shall confirm the composition if satisfied that (1) It is for the best interests of the creditors. * * * (e) Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed."

[1] Since a composition is in derogation of the common law, and compels a dissenting creditor to accept the percentage accepted by the majority, and deprives them of their remedies on the balance, this section is to be strictly construed. Collier on Bankruptcy (12th Ed.) p. 313; Brandenburg on Bankruptcy, § 1195; Matter of Kinnane Co., 221 Fed. 762, 34 Am. Bankr. Rep. 119 (D. C., Ohio, Judge Sater). It is to be noted, first, that the "*consideration*" to be "*paid*" to creditors and the "*money*" to pay priority debts and costs are to be "deposited in such place as designated by" and "subject to the order of the judge."

[2] While the act uses the word "*consideration*," and not "*money*," as that which creditors are to be paid, there are reasons for holding that what is to be deposited must be money, the definite promise of payment of a definite sum or its equivalent, and, in any event, in a form susceptible of distribution direct to creditors. In other words, the theory of a composition is a *payment* or promise to pay to creditors of a certain definite amount or other consideration in lieu of a dividend derived from the sale of bankrupt's assets. It presupposes a consideration and a weighing by the creditors of the relative advantage of

what is offered by composition over what may be realized from the assets.

The Official Form No. 60 (89 Fed. lviii), prescribed by the Supreme Court, numerous decisions, as well as the words of text-writers on Bankruptcy Law, support this proposition. Official Form No. 60 for "Petition for Meeting to Consider Composition" reads:

"The above-named bankrupt respectfully represents that a composition of _____ per cent. upon all unsecured debts," etc.

Local federal rules (rule No. 13) require the petition for composition to be filed with the referee to be Official Form No. 60, and require the referee to call such meeting in accordance with Supplementary Form No. 6, which reads:

"Notice is hereby given that bankrupt has offered a composition of _____ per cent. * * *"

The same local rule (13) requires every offer of composition to follow Supplementary Form No. 7, which states the offer to be "a composition of _____ per cent. * * *"

Supplementary Form No. 5 and Supplementary Form No. 1 of the local rules refer to proceedings in composition and contain the words "composition of _____ per cent."

"The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts." Loveland on Bankruptcy, § 693.

Brandenburg on Bankruptcy, § 1198, says:

"The bankrupt must make an offer of specific terms upon which he shall have back his estate. * * *"

In section 1208 he says:

"The consideration is not, however, limited to money, but must be something equivalent thereto, which may ultimately be convertible into money, and extends to reasonably safe securities, or promises to pay such as a good business man would naturally accept in payment of merchandise sold."

Loveland on Bankruptcy, § 693, says:

"The statute does not declare of what the consideration must consist. Manifestly it should be of such a nature that it can be readily distributed by the judge. * * *"

See also Collier on Bankruptcy, p. 320, and Remington on Bankruptcy, § 2369.

In the matter of J. B. & J. M. Cornell Co. (D. C.) 186 Fed. 859, 26 Am. Bankr. Rep. 252, Judge Holt, in passing on a confirmation of a petition to sell, makes some observations which are pertinent upon the question of compositions. The buyer offered to organize a new corporation, and to give to various unsecured creditors the unsecured obligations of the new corporation or 25 per cent. in cash. He says:

"Nor can any bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation, and accept in settlement of his claim obligations of the new corporation, payable at a future date. There is no explanation in this bid of what the amount of the capital of the new corporation will be, or how it will be furnished, or how the money necessary

to carry on the business will be obtained; but the bid states that any new indebtedness which may be necessarily created by the corporation for money borrowed for any purpose shall have priority over all the certificates of indebtedness proposed to be given in settlement of the debts of the bankrupt. The proposition, therefore, is that a court of bankruptcy is to authorize a transfer of all the assets of the bankrupt to a corporation, and compel the creditors of the bankrupt to take the unsecured obligations of the new corporation, payable a long time in the future, and to have it in the power of the new corporation to create obligations which shall be a prior lien on its assets over its liability upon its obligations to the creditors of the bankrupt. I am clear that a court of bankruptcy has no power to authorize such a sale, and, if it had, I should deem it inexpedient to do so."

In *Kinhead v. Bacon & Sons*, 36 Am. Bankr. Rep. 390, 230 Fed. 362, 144 C. C. A. 504 (6 C. C. A.), Judge Knappen, considering the meaning of the composition section of the act, says:

"But the 'consideration to be paid by the bankrupt to his creditors' may or may not be cash. A bankrupt usually does not have enough ready money of his own to carry out a composition. The 'consideration to be paid' may be the bankrupt's notes, secured or even wholly unsecured, or his mere promise to pay in the future a given amount. 2 Loveland on Bankruptcy (4th Ed.) p. 1264. It is common knowledge that compositions sometimes contemplate the taking by creditors of stock or securities under a reorganization, as in the arrangement under consideration in *Re Kinnane* (D. C., Ohio) 34 A. B. R. 119, 221 Fed. 762. It is, we think, also clear that such 'consideration' need not be actually deposited with the Court. True, the statute requires that it 'be deposited in such place as shall be designated by and subject to the order of the judge,' thus plainly permitting a deposit of notes or other evidences of debt, secured or unsecured, with any approved depository."

In *Re Kinnane* (D. C.) 221 Fed. 762, 34 Am. Bankr. Rep. 119, Judge Sater considered a composition in some respects similar to the one before us. The bankrupt offered 40 per cent. cash and 5 per cent. additional in two months, payable in three and six months respectively. To secure the remaining 55 per cent. it was proposed to give to a trustee a third mortgage on all its real estate. This mortgage was subject to a first mortgage and other existing liens, as well as to a second mortgage to be given to two banks to secure them in their waiver of the 40 per cent. cash dividend, and to secure moneys advanced or to be advanced by them to finance the composition and the business. Judge Sater held that the proposed composition exceeded the limits imposed by the Bankruptcy Act and refused to confirm. Some of the language of his opinion is quite pertinent here, and may with profit be quoted at some length. After quoting from a section of *Loveland on Bankruptcy* (see supra), he says:

"A like rule prevailed under the act of 1867, as appears from the following found in *Blumenstiel on Bankruptcy* (1897) 421, 422: 'The composition must provide for a payment or satisfaction in money, as distinguished from merchandise, notes or other property; but the money thus to be paid may, by the terms of the resolution or offer, be made payable in installments due at stated periods, may be evidenced by promissory notes, and also be secured by a surety, indorser, or by a bond satisfactory to a committee or otherwise. In *re Lewis*, 14 N. B. R. 144; In *re Reiman & Friedlander*, 13 N. B. R. 128; In *re Hurst*, 13 N. B. R. 455. The payment must be in money eventually, and, though notes be given, there will be no satisfaction until they are paid. In case of nonpayment, the original debt revives.' * * *

"It is usual, when a composition is made, for each creditor separately to receive his portion, that he may thereafter manage and dispose of his property

as he pleases. In the instant case, it is not proposed to issue to the respective creditors any note, or certificate of indebtedness, or other instrument of either a negotiable or nonnegotiable character, to evidence the sums due them, respectively, which are secured by the mortgage. The precise interest which any creditor will have in the mortgage cannot be determined until it becomes known whether all of those who have filed claims, and all of those who have been scheduled, but have not yet filed their claims, accept the composition, nor can it then be determined, unless a computation be made by some one conversant with all the facts regarding acceptances. It is surmised that this fact is not necessarily a fatal defect in the company's offer; but allusion is made to it as one of the inconveniences and uncertainties of the offer. A creditor will not be able to avail himself of his security by indorsement or delivery, as might be done, were he to receive a note or certificate of indebtedness showing the sum due him, although he could, I think, make a valid assignment of his interest in the mortgage. His ability to make an assignment, however, would be hampered by the fact that, if a default should occur, the mortgage could not be foreclosed unless a majority of the creditors as to number and amount should so direct.

"The proposed plan does not segregate the rights of creditors, but compels them to negotiate with each other and determine at some future time on the policy to be pursued in enforcing their rights, should such become necessary. The nonassenting creditors will be compelled to enforce their rights through a person and at a time not of their own selection, and to contribute towards payment for such person's services. Under the statute, the legally provided majority of creditors may direct what portion of their claims the minority shall receive; but I know of no rule which permits such majority to exercise control over the property of the minority, or of any member of it, after the composition has been effected. The majority control terminates with the composition proceedings. The control given by the Act cannot be so projected into the future as to regulate the business conduct and property of another and restrain him from freely acting as regards his own. We have seen that, if a default should occur in the payment of the mortgage, the sum remaining due on each creditor's original claim revives. He may then lawfully proceed in his own way and without restraint to collect. Other creditors, for want of authority, may not say that he shall not do so. The proposed composition, therefore, exceeds the limits imposed by law."

[3] In the case before us, creditors, if the composition be confirmed, would be denied all rights to pursue their claims against bankrupt indefinitely, without any promise of any payment at any definite time. There is no limit of time set in which the trustee must fully administer. There is practically no way in which it may be determined just what consideration creditors are to be paid. Numerous liens are to be determined; costs of trustee, creditors' committee, and arbitrators are to be paid out of the fund. The trustee may borrow money and further encumber the property. Furthermore, the validity, extent, and priority of liens, as well as the validity and amount of claims of general creditors, are to be determined, not by the court, but by the trustee, or in case of dispute by arbitrators.

It is hardly conceivable that, in the face of the provision of the act, the consideration be deposited in a place designated by the judge and subject to *his* order, that a composition, by its terms placing the consideration irrevocably in the hands of a trustee designated, is within the meaning of the Bankruptcy Act. More emphatically does it seem inconceivable, in the face of a provision that the consideration shall be distributed as the judge shall direct, that it should be lawful that out of the consideration a trustee should be paid fees determined by a creditors' committee, a creditors' committee should be paid, and a trustee

should pass on the claims that are to share in the fund, and the liens that are to be held valid, a determination which may diminish, if not entirely destroy, the consideration, which supposedly has been deposited for creditors for pro rata distribution.

It is a fact, also, that lien claimants are not bound by the composition offer. They may institute suit and foreclose their liens. This presents another uncertainty as to what may become available to general creditors. The attempt to give to the trustee, named under the composition offer, property held by the three officers of the bankrupt corporation, against whom involuntary bankruptcy proceedings are now pending, is also a somewhat compelling reason for refusing confirmation. If those proceedings are pressed by their respective creditors and adjudication results, the bankruptcy court could clearly claim the property conveyed, if it is really theirs, as part of the assets in their estates.

In my opinion, the offer of composition is not in the interest of creditors, and does not comply with the provisions prescribed for compositions in the Bankruptcy Act. Confirmation is accordingly denied.

An exception may be noted in behalf of the bankrupt.

THE TURRETT CROWN.

VULCANITE ROOFING CO., Inc., v. COMMONWEALTH S. S. CO., Limited.

(District Court, E. D. Virginia. October 21, 1921.)

1. Carriers ⇨160—May require liability to be asserted and claim to be instituted within particular time.

A common carrier may limit or qualify his common-law liability by special contract as to the time within which the liability may be asserted and suit instituted, provided the limitation or qualification agreed on is just and reasonable, and does not exempt the carrier from losses or responsibilities arising from its own negligence.

2. Shipping ⇨142—Stipulation in bill of lading as to written notice of claim and commencement of suit within particular time held valid.

Stipulation in bill of lading, requiring written notice of claim to carrier before removal of goods from wharf, and commencement of suit to recover for loss or damage within 3 months after giving such notice, held valid.

3. Shipping ⇨142—Shipowner's opportunity to ascertain damage to cargo while repairing ship did not relieve shipper of obligation to give written notice of claim for damage sustained on subsequent voyage.

Where cargo was unloaded and ship repaired before completion of voyage, the fact that steamship owner had opportunity to ascertain extent of damage to cargo after cargo had been unloaded, pending the repair of the ship, did not relieve shipper from obligation of giving owner notice of claim of loss, ascertained on completion of voyage, after goods had been reloaded, a condition precedent to the commencement of suit to recover damage, where shipper had commenced suit for damage theretofore sustained while ship was being repaired.

4. Shipping ⇨142—Shipper's commencement of suit for damages during voyage held not to entitle him to bring other suit after completion of voyage, without notice of claim.

Where cargo was unloaded and ship repaired before completion of voyage, the commencement of suit to recover damages to cargo at the

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
275 F.—61

time when such repairs were being made did not entitle shipper to bring suit after completion of voyage for damage sustained during voyage, without giving shipowner notice of claim for such damage required by bill of lading, on theory that commencement of former suit dispensed with necessity of such notice, where the second suit was not instituted within 90 days after first suit, under provision of bill of lading requiring commencement of suit within 90 days after notice of claim.

In Admiralty. Libel in personam by the Vulcanite Roofing Company, Inc., against the Commonwealth Steamship Company, Limited, owner of the steamship Turrett Crown. Judgment of dismissal.

Harrington, Bigham & Englar, of New York, and Hughes, Little & Seawell, of Norfolk, Va., for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, and Baird, White & Lanning, of Norfolk, Va., for respondent.

WADDILL, Circuit Judge. This is a libel in personam to recover the sum of \$275,000 for alleged failure to deliver, and damage to, a cargo of roofing material, etc., under the following circumstances:

On or about the 15th day of February, 1918, the Patent Vulcanite Roofing Company, Inc., assignor under whom the libelant claims, entered into a contract of affreightment with the respondent to transport on the Turrett Crown a cargo of roofing material, nails, bitumen, steel, and roof machinery, from New York to Genoa, Italy. The vessel completed loading libelant's cargo at New York, consigned "to the order of Direzione del Genio Militare di Milano, Milan, Italy," issued bills of lading therefor to the shipper, and sailed for Genoa on the 25th of February, 1918. She encountered a heavy storm at sea, which resulted in damage to the ship and cargo, and necessitated her putting into Boston, and thence New York, where she arrived in March, 1918. While in New York, it became necessary, by reason of the ship's condition, to discharge the cargo. After the repairs were completed, in the month of July, 1918, the cargo was reloaded, with the exception of 3,515 rolls of roofing paper, which had been so damaged as to be unfit for shipment. The vessel arrived at Genoa on the 3d of August, 1918, where she discharged her cargo, a portion of which was delivered short, and the remainder badly damaged by contact with sea water and fuel oil, negligent handling, and improper stowage, as claimed by the libelant.

While the ship was in New York being repaired, the Patent Vulcanite Roofing Company, Inc., on or about the 3d of May, 1918, filed its libel in rem in the District Court for the Southern District of New York against the Turrett Crown, alleging damages to the cargo covered by the bills of lading to the extent of \$125,000. In this suit the respondent appeared as claimant of the ship, and upon filing a stipulation of value of \$100,000 the vessel was released. The respondent duly answered this libel, and that suit is now pending in said court. On the 20th of May, 1920, the libel in personam in this case was duly filed against the respondent steamship company, asserting a claim of \$275,000, and averred that the actual damage sustained by the cargo was \$375,000. In this action, a foreign attachment was sued out, and levied upon the Turrett Crown and other assets and credits found within the

jurisdiction of this court. Respondent filed its answer, denying liability, and especially set up the legal defense that under paragraph 1 of the bill of lading under which the cargo was shipped, which is as follows:

" * * * The carrier shall not be liable for any claim whatsoever unless written notice thereof shall be given to the carrier before removal of the goods from the wharf. No suit to recover for loss or damage shall in any event be maintainable against the carrier unless instituted within three months after giving of written notice as above provided. No agent or employee shall have authority to waive any of the requirements of this clause."

—libelant's action could not be maintained, as well for failure to give the notice required thereby as to institute suit within the three months period specified. To this defense libelant specially replied, averring that its suit was but a supplemental proceeding to the original libel instituted in the Southern District of New York in May, 1918, with a view of recovering extended damages, ascertained subsequent to the institution of that suit, and that the requirement of written notice should not avail the respondent, since it always had full knowledge of the damage done to the cargo. The validity of the clause in question and its applicability being thus put in issue by the pleadings, the case is now before the court on motion of the respondent to dismiss.

Two questions are presented for the court's consideration: First, the validity of the restrictive clause limiting the time for the institution of the suit; second, whether the libelant or its assignor was relieved from giving written notice of claim as required by the bill of lading, and the effect, if any, the institution of the suit in the Southern District of New York had thereon.

[1, 2] 1. The validity of the clause in question agreed upon between the parties, prescribing the time within which suit should be instituted for breach of the contract, has been so long and definitely settled as not now to admit of serious controversy. The right of a common carrier to limit or qualify its common-law liability by special contract, as respects the time within which the same may be asserted and suit instituted, is manifest, provided the limitation or qualification agreed upon be just and reasonable, and does not exempt such carrier from losses or responsibilities arising from its own negligence. No inherent objection can be validly maintained against this limitation of time, since it is but a continuation of the policy of the statute of limitations intended to effect prompt settlement of controversies, and thus prevent innumerable injustices likely to arise from delay. As was aptly said by Mr. Justice Strong in *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, the leading case on the subject, as applicable to contracts of affreightment:

"It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required."

Authorities to sustain this are *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556, supra; *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Phoenix Insurance Co. v. Erie & W. Transporta-*

tion Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; Ginn v. Ogdensburg Transportation Co., 85 Fed. 985, 29 C. C. A. 521; Ingram v. Weir (C. C.) 166 Fed. 328; The Persiana, 185 Fed. 396-398, 107 C. C. A. 416. The cases of Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386, 19 L. Ed. 257, and Missouri, Kansas & Texas R. Co. v. Harriman, 227 U. S. 669, 672, 33 Sup. Ct. 397, 57 L. Ed. 690, will be found to be of especial interest. The first case, a decision by Mr. Justice Field, involved restrictive provisions like those here, as applicable to insurance policies; and the second, an opinion by Mr. Justice Lurton, related to liability imposed upon interstate carriers for loss or damage under the Carmack Amendment, Hepburn Act June 29, 1906 (Comp. St. §§ 8604a, 8604aa).

[3] 2. Was the libelant, or its assignor, relieved from the obligation to give the required notice of its claim of loss, as a condition precedent to maintaining its suit, and was there anything in the circumstances that excused or exonerated it from complying with the requirement to give the notice? Two suggested reasons are given for the failure: (a) That under the circumstances of this case no notice was necessary or required, as the respondent had full notice and opportunity of notice of the libelant's damage by reason of the location of the damaged cargo pending the ship's repairs; and (b) that the suit in rem in the court of New York, involving the question of damages to the cargo, was of itself sufficient notice. Neither of these positions, in the court's view, are well taken. The respondent's opportunity of knowledge of the damage to the cargo during the ship's repair in New York was in any event limited to the damage then sustained, and the suit instituted to recover \$125,000 on that account would, at least, be supposed to be in full of such damages, and of the libelant's claim. That suit was instituted in May, 1918. Subsequently, in July, 1918, the cargo was reloaded at New York, and then transported to Genoa, where delivery was made to the consignee in the month of August following. Full opportunity was thus afforded to inspect the cargo and observe its condition, and failure to do so cannot be excused, especially if it was the purpose to institute another suit for additional damages to the one already brought and pending in New York. Manifestly, the libelant's claim that it did not ascertain the full extent to which it had been damaged until shortly before the institution of this suit, some two years after delivery and acceptance by it of the cargo, would not constitute a valid excuse for failure to give the notice required in order to maintain the suit.

[4] Does the suit in New York afford notice of the claim in the suit here, instituted more than two years after that suit? To ask this question is to answer it. Whatever rights of amendment the libelant may have in that case, if any, need not be considered here, as plainly, if that suit constituted the notice required, this suit should have been brought within 90 days from that time, and not more than 2 years thereafter. Moreover, that suit, so far from being notice of this suit, should have the very contrary effect, as the respondent had the right to

suppose that the suit as brought covered the libellant's damage, and, without the notice, this suit cannot be maintained.

To what extent this case can be considered as supplemental to the New York suit, or that suit can be relied on as a basis to support this, has frequently been the subject of consideration, at least indirectly. The effect state legislation authorizing new suits within a specified time after the abandonment of the old suit has upon special clauses like the one under consideration has been often considered, with the result, certainly so far as federal decisions are concerned, that almost invariably the agreement of the parties has been held to control, even in the face of the statute. In *Riddlesbarger v. Hartford Insurance Co.* 7 Wall. 386, at page 391, 19 L. Ed. 257, supra, Mr. Justice Field, speaking for the Supreme Court, said:

"The statute of Missouri, which allows a party who 'suffers a nonsuit' in an action to bring a new action for the same cause within one year afterwards, does not effect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and as a consequence from its exceptions also. The action mentioned, which must be commenced within the 12 months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract."

Following this decision are *O'Laughlin v. Insurance Co. (C. C.)* 11 Fed. 280; *Harrison v. Hartford Fire Insurance Co. (C. C.)* 67 Fed. 298; *The Persiana*, 185 Fed. 396-398, 107 C. C. A. 416, supra; *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462, 34 Am. Rep. 550; *Guthrie v. Connecticut Indem. Ass'n*, 101 Tenn. 649, 49 S. W. 829; *Melson v. Phenix Ins. Co.*, 97 Ga. 722, 25 S. E. 189.

The court's conclusion upon the whole case is that the respondent's motion to dismiss should be granted, and an order to that effect will be entered on presentation.

THE NEVADA. THE CAPE CHARLES. THE CAR FLOAT NO. 14.

(District Court, E. D. Virginia. October 21, 1921.)

1. Collision ⇄95(4)—Vessel which continued to back toward piers after assenting to signal of approaching tug for starboard passage held at fault.

Vessel, which continued to back across channel toward piers after assenting to tug's request for starboard passage, thereby narrowing the space between its stern and the piers, held at fault for the collision with the tug's car float, caused by narrowness of passage between the vessel's stern and the piers.

2. Collision ⇄19—Vessel must be plainly at fault, if other vessel's fault was sufficient in itself to bring about collision.

Where one vessel is guilty of fault sufficient in itself to bring about the result, the other should not be lightly called on to participate therein, un-

less for obvious and plain violation of the laws of navigation in bringing about the collision.

3. Collision ⚡95(2)—Tug attempting to pass between piers and stern of steamship held at fault for collision with steamship.

Ocean-going tug, which continued at full speed toward passage between piers and stern of steamship, though steamship did not at first answer the tug's signal for starboard passage under Rules to Prevent Collisions of Vessels, art. 18, rule 1 (Comp. St. § 7892), and though the steamship, notwithstanding subsequent assent to other signal, continued to back toward piers, thereby narrowing the passage, *held* at fault for collision with steamship, in view of rules 3 and 9 and General Prudential Rules, arts. 27 and 29.

4. Collision ⚡144—Damages divided, where both vessels are at fault.

Where collision was brought about by the combined negligence of two vessels, they should be held to divide the damages resulting therefrom.

In Admiralty. Libel by Frederick Hansen, master of the steamship Nevada, against the steam tug Cape Charles, owned by the New York, Philadelphia & Norfolk Railroad Company, and Car Float No. 14, in which defendant owner brings cross-libel against the steamship Nevada. Damages divided.

Hughes, Little & Seawell, of Norfolk, Va., for libelant.

Willcox, Cooke & Willcox and Hughes, Vandeventer & Eggleston, all of Norfolk, Va., for respondents.

WADDILL, Circuit Judge. The collision, the subject of these proceedings, occurred on the morning of November 2, 1920, in the Elizabeth river, Norfolk, Va., at Lambert's Point, off the Norfolk & Western Railroad Company piers. The Nevada, in whose behalf, as well as that of the cargo, the first libel was filed, was a Danish steamship, 362 feet long, 50 feet beam, and 24 feet deep, and the respondent tug Cape Charles and car float No. 14 was part of the fleet of the New York, Philadelphia & Norfolk Railroad Company, plying between Cape Charles and Norfolk, engaged in transporting railroad cars between those points. The Cape Charles was an ocean-going tug, 125 feet long, and the barge or car float 316 feet long, drawn on a hawser of 30 fathoms, according to the respondent, and considerably longer, as claimed by the libelant.

On the morning in question, the Nevada, laden with coal, was anchored on the western bank of the cut channel at Lambert's Point, off the piers, heading upstream, and about 7:45 hove anchor, and began to maneuver with a view of making her course down the river. While thus engaged the Cape Charles with its tow was proceeding up the river, en route to Norfolk, when the starboard bow of the barge collided with the starboard quarter of the Nevada, causing considerable damage. Each of the vessels in collision seek to place the blame for the accident on the other. So far as the Nevada is concerned, if the facts bore out her contention, she would be presumably blameless; but so far as the tow is concerned, upon its own showing, it is difficult to relieve it from at least partial responsibility in bringing about the disaster.

First. The claims of the Nevada will be considered. She insists that, while maneuvering for her departure down channel from her place of anchorage, with her stern towards Lambert's Point, and her bow pointing across and somewhat down the channel, the tide running ebb, she received a signal of two blasts from the Cape Charles, indicating her desire to pass astern the Nevada, between the latter and the Lambert's Point coal piers, which signal was assented to; that at this time the engines of the Nevada were working ahead, with her helm to port, and the ship making headway to the westward and northward, thus taking her away from the course desired to be taken by the tow; that after this exchange of signals the tow continued on its course with apparently an undiminished speed of seven or eight miles an hour, intending to pass under the stern of the Nevada, that is, between the Nevada's stern and the piers, and although the tug passed in safety, the barge for some unknown reason, failed to follow the tug and clear the stern of the Nevada, and caused the collision.

The sole question, so far as the Nevada is concerned, if her statement be true, is whether sufficient passageway was allowed for the tug-boat to pass. She was then, as she claims, 250 to 300 feet out in the channel from the piers; her engines having been full speed astern for some four minutes, and the ship making slight headway to the westward and northward side of the channel, the tug and tow having been first observed when some half a mile away.

Manifestly, no collision could have occurred under those conditions, save by the tug and tow crossing from the eastern side of the channel, and running into the Nevada. The tow insists that the Nevada did not proceed to the northward and westward of the channel, but, even after giving assent to the tug's request for a starboard passage, she continued backing across to the eastward of the channel, so narrowing and prescribing the space between the stern of the Nevada and the piers, as to make impossible the passage of the car float, though the tug managed to escape by a few feet from colliding with the ship.

[1] Upon the correct determination of this question of fact the case turns, certainly so far as the ship is concerned, and the court's conclusion is that the evidence overwhelmingly establishes fault against the ship, namely, that she did not, even after giving her assent to the tug's signals, continue on her course forward. On the contrary, it is quite clear that she was then moving backwards through the water, and so continued approximately until the collision, and at that time the space between the Nevada and the piers was less than 100 feet. The Nevada admits that the nearest she came to the pier was from 75 to 80 feet, which was doubtless after assenting to the starboard signals; and had the ship been moving forward at the time these signals were given, even assuming that at that moment the vessels were 75 to 80 feet off the piers, there would probably have been no collision, and certainly there would have been none, if at the time of giving such assent, the ship was 250 to 300 feet from the piers. The manner of the collision, that is, by the car float bounding from the ship into the nearby piers, shows the narrowness of the space between the ship and the piers.

Moreover, the existence of this narrow space is overwhelmingly established by the testimony.

It thus appearing that no collision would have occurred according to the ship's own testimony, and that she crowded the course of the oncoming tow after assenting to its proposed maneuver, makes clear her liability primarily for the collision, as there could be no excuse justifying the Nevada taking up the entire passageway of the channel. That leaves open for consideration only the determination of whether or not the tug and tow should be held liable for their participation in the same.

[2, 3] Second. Having held that the Nevada was primarily liable for the collision, the tug and tow's connection therewith will now be considered, and while sight should not be lost of the rule that, where one vessel is guilty of fault sufficient in itself to bring about the result, the other should not be lightly called upon to participate therein, unless for obvious and plain violation of the laws of navigation in bringing about the same. Having due regard to this doctrine, and with an inclination strongly tending to favor the tug and tow in the circumstances, as the ship's navigation was entirely inexcusable, if not reckless, still it is difficult for the court upon the tug's own testimony to hold it blameless for what occurred. The navigators of the tug admit observing the Nevada maneuvering across the channel, approximately half a mile away. They first sounded a blast of two whistles (article 18, rule I, of Rules to Prevent Collisions of Vessels [Comp. St. § 7892]), indicating a desire to pass to starboard, to which no answer was made. A second signal of two blasts was given, and not answered. Then the tug sounded danger signals, to which no reply was received, and the ship apparently continued its backward movement. The tug again sounded two blasts, making the third request for the starboard passage, to which the Nevada gave its assent by answering with two whistles. Whereupon the tug continued on its course, attempting to effect the starboard passage under the stern of the Nevada, which, as before stated, the tug did safely, but the car float collided with the ship. The space between the stern of the Nevada and the piers, through which the car float had to pass, was not over 50 to 75 feet, and the Nevada was then, according to the tug, moving slightly astern. While the tug might have been misled by the maneuvering of the Nevada at the time it made its first request for the starboard passage, supposing the ship would move forward and not backward, it was broad daylight, and the tug saw, or was charged with knowledge (article 18, rule IX) that the ship was moving backward and not forward; and, moreover, it was doing a dangerous thing in attempting to cross the stern of the backing ship.

This doubtful maneuver was attempted a second time, without reply from the ship to the tug's signal. Thereupon danger signals were given, which should have been sounded upon the ship's failure to respond to the first passing signal, certainly if the tug did not understand the intention of the ship (article 18, rule III), but it was not done until after the second failure of the ship to respond, at which time the tug should, if necessary, have slackened speed, or stopped, or reversed, if

good seamanship so required, even in the absence of any specific rule directing her to do so. No response was made by the ship to the distress signals of the tug; yet, with knowledge of impending danger, and the necessity for taking every precaution to avoid collision or the risk thereof, the tug again renewed its request for the starboard passage, and, upon the same being assented to by the Nevada, made an ineffectual effort to pass under her stern, with the result, which should have been foreseen, that, while the tug passed clear, collision with the barge, whose hawser had been cast off, quickly followed. The undisputed testimony is that the tug and tow were making between 7 and 8 miles an hour, some of the evidence being that it was 7 or 8 knots. There is no claim that the tug at any time slowed down, or did anything to lessen its speed, but, on the contrary, proceeded headlong into a confessedly narrow space, from which there was no chance of escape.

The court's conclusion upon the whole case is that, while it feels that the tug might have been misled in the assumption that the steamship would move out of its way, it took chances in this respect, contrary to well-known maritime regulation and practice, and when it did so, especially after knowing of the danger ahead, without abating its speed or altering its course, it cannot escape liability for in part bringing about the collision. Good seamanship would have forbidden this course, and the General Prudential Rules (articles 27 and 29) prescribed for the government of navigators were apparently entirely lost sight of and ignored.

It seems clear to the court that, at least after sounding danger signals, the tug's efforts thereafter to pass the ship starboard to starboard, in the then nearness of the vessels one to the other, although assented to by the ship, was reckless and hazardous.

The court has proceeded upon the theory that the General Prudential Rules prescribed for the government of navigators should control this case, read in the light of rules 1, 3, and 9 of article 18. There is much force in the suggestion that the crossing rules, especially articles 19, 21, 22, and 23, apply, in which event the fault of the tug and tow, for in part bringing about the collision, would be even more palpable than under the prudential rules, and those cited in connection therewith, as governing the case.

[4] It follows, from what has been said, that the collision was brought about by the combined negligence of the Nevada and the tug and tow, and they should be held to divide the damages resulting therefrom. An order to that effect will be entered on presentation.

THE RICHMOND. THE HAWARDEN. NEW v. UNITED STATES.

(District Court, E. D. Virginia. October 21, 1921.)

1. Collision ⚡91—Held fault of steamer.

Where steamer, proceeding down a river at seven knots an hour without a lookout, collided with schooner coming up the river, *held*, the steamer was solely responsible for collision, in view of Inland Rules of Navigation, arts. 20, 21, 22, 23, 27, 29 (Comp. St. §§ 7859-7862, 7866, 7868).

2. Evidence ⚡77(5)—Failure to produce members of crew as witnesses may be considered.

In a collision case, the failure of a ship to produce members of her crew, who could or should have been able to throw light on the case of the collision, is noteworthy.

In Admiralty. Libel by George H. New, master of the schooner Richmond, against the United States, owner of the steamship Hawarden. Decree for libellant.

Baird, White & Lanning, of Norfolk, Va., for libellant.
D. Lawrence Groner, U. S. Atty., of Norfolk, Va.

WADDILL, Circuit Judge. The libel in this case was filed to recover damages sustained in a collision between the schooner Richmond and the steamship Hawarden, which occurred about 2:15 o'clock on the evening of the 26th of June, 1920, in the Elizabeth river, Norfolk, Va., at a point approximately midway between the Norfolk & Western Railway coal piers at Lambert's Point, and the Engineer pier at the Army Supply Base, above Lambert's Point. The schooner was a three-masted vessel, 155 feet long, 26 feet 6 inches beam, and 9 feet deep, heavily laden, and the Hawarden a large steamship, owned by the United States, 416 feet long, 53 feet beam, and 9,400 tons dead weight capacity, partially loaded with some 200 tons of cargo. At the time of the collision, the Richmond, with all sails set, was coming into the harbor of Norfolk, with a view of anchoring on the anchorage ground for small vessels between the above-named piers, and to the eastward of the channel, and the Hawarden was proceeding to sea, en route for New York, to complete its cargo. The weather was fair, tide slack, and the wind blowing a moderate breeze of 14 miles an hour from the north, with nothing to disturb the free use of the channel, save that, slightly below the scene of the collision, two barges, the Nanticoke and the Winstead, were anchored together on the flats to the immediate eastward of the cut channel, the barge Hock, an unusually large barge, also anchored on the flats just above, and to the southward of the other two barges, her stern extending somewhat into the channel, and the barge Champlain, in tow of the tug Elsie, coming down the channel, further to the southward of the Hock, and navigating at an angle partially in and largely out of the cut channel.

[1] The schooner's case is that while proceeding up the river, with a view of coming to anchor, upon rounding the black buoy just above

Lambert's Point merchandise piers, leaving the same close on her port hand, she took her course under a starboard helm to bring her round the stern of the Hock, intending to anchor slightly above that barge; that after making this departure she observed the steamship Hawarden straightening out from the Engineer pier, taking her course down the channel, and proceeding at a rapid rate of speed, the two vessels being approximately head on, or nearly so; that the schooner was making only some two or three knots an hour, and proceeding strictly on her course to the anchorage grounds, relying on the ship, the burdened vessel, charged with the duty of avoiding collision and the risk thereof, to keep out of the way; that as the schooner came close to and rounded the Hock, for the first time she observed the barge Champlain in tow of the tug Elsie, lashed alongside, proceeding down the river in such a position that the three vessels—the Richmond, the tug and tow, and the Hawarden—would pass about abreast of the Hock, the anchored barge, and in very close proximity to it; that the schooner's view of the tug and tow had been obstructed by the barge Hock, though they were at all times in plain view of the Hawarden. Upon perceiving the danger, and the impossibility of the Richmond holding her course without colliding with the tug and tow, or running into the anchored barge, the schooner sought to avoid collision by porting, and slackening the spanker, believing that the steamship would keep out of the way, or at least slacken her speed, or stop, or reverse. But she did neither, and continued under a starboard helm, without slackening speed, or stopping, or reversing, or giving any warning whatever, causing the Richmond and Hawarden to come in collision; the steamship's starboard bow striking the schooner's stem and headgear with great force.

The Hawarden's case is that on the evening in question, upon coming out from the Engineer pier to approximately mid-channel, she took her departure down channel to go to sea, bearing on the eastward of the channel; that when she had gone a distance of about 1,500 feet she observed the Richmond sailing up the harbor, on a course to the westward side of the channel, practically head on, but slightly on the Hawarden's port bow; that the course of the two vessels was then port to port, without risk of collision; that while thus proceeding, and when they were about a ship's length apart, the Richmond suddenly hard-astarboarded, throwing herself immediately across the ship's course; that the Hawarden starboarded, and the Richmond passed her bow in safety, but she again suddenly put her wheel hard aport, and ran into the steamship, striking her some 25 feet abaft the stem on the starboard side, tearing away the schooner's bowsprit, and other portions of her rigging. The Hawarden insists that there was no danger to the schooner, had she continued on her course on the port to port passage, as the whole channel way was virtually open to her to the westward, and that she would have avoided danger under the starboard maneuver she attempted to make, but for changing her course the second time, under her port helm, and that she could have avoided the collision, either with the Hock or the tug and tow, by proper and timely maneuvering on her part.

The positions taken by the vessels are the very antithesis, one of the other, and it is impossible to determine the case on its merits, without deciding which view is to be accepted. Each vessel took evidence to support its contention, the same being directly in conflict in all essential particulars, and the contest in this respect will also have to be solved.

The Hawarden's Case will be first considered. Did the collision come about as claimed by the ship, and was it possible that it could have so occurred? It seems to the court, upon full consideration of the entire testimony, after giving much thought and consideration to the same, that it did not, and could not have happened as the steamship claims. The schooner would not likely have been guilty of such obviously foolish and reckless navigation, the claim being that while she was sailing safely on the western side of the channel, and away from danger of collision with the down-coming steamship, she suddenly, and at a time it would have been extremely perilous to have done so, hard-astarboarded, and ran immediately across the bows of the fast-approaching powerful steamship. Had this been done, which maneuver courts of admiralty have frequently said is highly improbable, and generally not true (*Haney v. Balto. S. P. Co.*, 23 How. 287, 291, 293, 16 L. Ed. 562; *The Laurreta Speddin* [C. C. A. 4th Circuit] 184 Fed. 283, 285, 106 C. C. A. 425; *The Curtin* [D. C.] 205 Fed. 989, 990, affirmed 217 Fed. 245, 133 C. C. A. 519; *The Surf* [D. C.] 230 Fed. 485, 489), it is inconceivable that the schooner would have taken a second chance to be run over, by suddenly putting her wheel to port, and running into the starboard side of the steamship, after passing under her bow. This would have been even more reprehensible conduct; besides, it would have been next to impossible, within the distance between the vessels, and the speeds they were running, one approximately seven knots and the other three knots an hour, to have effected these maneuvers. Such a thing as the schooner running across the course of the steamer, and striking her starboard bow with her bowsprit, might have happened, had the Richmond been making across the course of the steamship under a starboard helm, with a view of going to anchor, as claimed by her; but to suppose it could have occurred with the two vessels running approximately at right angles, and the sailing vessel to have suddenly swerved a second time, and run around and into the starboard bow of the steamship, is not conceivable.

Upon the steamship's own showing, she cannot escape responsibility for this collision, assuming the vessels were passing as claimed by her, and that the schooner suddenly starboarded and crossed her course. Merely starboarding, which is all she says she did, was possibly the very worst thing for her to have done. It is true, it avoided the violation of the rule which forbade her crossing ahead of the course of the sailing vessel; and it is equally clear that it was a reckless and dangerous thing to have done, bearing in mind her obligation to avoid even the risk of collision. With the vessels only the length of the ship apart, she should have done more than starboarded (*The Manaway* [D. C.] 257 Fed. 476, 477); she should have slackened her speed, stopped, or reversed, and given danger signals, indicating

the situation as it existed. Had she done so, she would not have had to depend upon her inability to do something effectual to avoid the risk of collision, after the sailing vessel made, according to the ship's claim, the second effort to run into her, by porting her wheel. The vessels at this last-named period were virtually in collision, and what was done at that time by the schooner and the steamship should be treated as error in extremis.

Moreover, the court is persuaded that this alleged sudden change of course to starboard on the part of the Richmond never occurred at all, as it is manifest she could not have made the movements claimed by the Hawarden between the time the Richmond was, as is claimed, on a passage port to port, and the collision. This distance was approximately a quarter of a mile, and the ships were making between them 10 to 12 knots an hour, which would take about a minute and a quarter to cover the intervening space. It is evident that the Richmond was proceeding all the time after she rounded the black buoy, and made her departure for the anchorage grounds, under a starboard helm; and when the navigators of the Hawarden observed her proceeding to starboard, she was on this course, and they were mistaken in supposing that she was making a sudden and erratic change of course. This view is strongly borne out by the fact that the ship's navigators did not observe the presence of the schooner until the ship had proceeded on her course some three lengths, or 1,300 feet, approximately one-half of the entire stretch to be navigated, which greatly lessened the distance within which the vessels' movements could and should have been observed, and strengthens the view that the ship's navigators may have entirely misconceived the real movements of the schooner.

In considering the ship's navigation in connection with the collision in question, sight should not be lost of other breaches of the rules of navigation, which did or might have entered into bringing about the same:

(a) She was navigating without a lookout, depending on those on the bridge, charged with other and important duties and responsibilities, namely, the master, third officer, and pilot (the third officer being at the wheel), to discharge this duty, no one being specifically assigned thereto. The absence of a lookout is always serious, especially on a large ship navigating in a crowded harbor; and the probabilities are that on this occasion the steamship would not have proceeded approximately a quarter of a mile without observing the incoming schooner in an open roadstead, had there been a proper lookout. *The George W. Childs* (D. C.) 67 Fed. 269; *The Dorchester* (D. C.) 163 Fed. 781; *The Curtin* (D. C.) 205 Fed. 989; *Barge No. 4—The Delmar* (D. C.) 248 Fed. 823, 827-828, and cases cited; *Id.* (C. C. A. 4th Cir.) 257 Fed. 42, 168 C. C. A. 254.

(b) It was negligence on the part of those actually in charge of the navigation of the ship not to have seen and observed the approaching schooner earlier.

(c) The ship was proceeding at a dangerous rate of speed, namely, seven knots an hour, considering the circumstances under which she

was then surrounded, the presence of other shipping in the channel or near thereto, and passing in and out of the same, which resulted, as might have been foreseen, in her becoming involved with others lawfully occupying and navigating the channel, and as to all of which vessels the steamship was the burdened vessel, charged with the responsibility of avoiding the risk of as well as the collision itself.

[2] Moreover, the failure of the ship to produce members of her crew, who could or should have been able to throw light upon the cause of the collision, is noteworthy, *Kirby v. Tallmadge*, 160 U. S. 379, 16 Sup. Ct. 349, 40 L. Ed. 463; *The Georgetown* (D. C.) 135 Fed. 854, 855, 859; *The Luckenbach* (D. C.) 144 Fed. 980; *The M. E. Luckenbach* (D. C.) 174 Fed. 265, 269 (C. C. A. 4th Cir.); *Id.* 178 Fed. 1004, 101 C. C. A. 663. Only the ship's master, and two men who were aft, and knew nothing material as to the occurrence, and the pilot, were called by her to testify. Neither the third mate, who was at the wheel, nor any of those working on the forecastle head, nor those from the engine room, were produced. The evidence of those from the engine room would have been most important, as bearing upon the ship's movements.

The schooner's case will now be considered. If the court is right in its conclusion that the schooner did not make the sudden starboard maneuver across the course of the steamship, and which seems clear, her alleged conduct in that respect need not be referred to. Her course, upon rounding the spar buoy off and to the south of the merchandise piers at Lambert's Point, leaving the same close on her port side, to enable her to proceed round the stern of the Hock to anchor, would have been, as she says she was, under starboard helm. This the court thinks the testimony establishes, and that she encountered no trouble until, upon approaching the Hock, she observed the tug *Elsie* and the barge *Champlain*, her view of which had been obstructed by the stern of the Hock, in such position in the channel as made imminent a collision between herself, the Hock, the *Elsie* and her tow, or the steamship. In this situation, the schooner properly ported her helm, as the only thing she could do, but which resulted in collision with the steamship, instead of one of the other vessels: the schooner striking the steamship on her starboard bow, slightly abaft of her stem, with her bowsprit. The steamship at the time was swinging to starboard, and attempted to stop, but too late to avert the collision. The schooner's conduct in porting and colliding with the ship is made an assignment of fault, and it is insisted that she could have proceeded safely to anchor, or so navigated as to have brought her up into the wind, and made anchorage unnecessary, without porting her wheel. These criticisms of the schooner's navigation, are not well founded.

The court's conclusion upon the whole case is that whatever either of the vessels may have done at this juncture would be error in extremis, and that, at the time the schooner discovered the onward coming tug and tow and the steamship in the position she was, she was not in fault for the accident, that what was done by her master was in the exercise of his best judgment under the circumstances, and that it by no means follows that he could have averted the disaster by adopt-

ing the course suggested by the ship. The schooner, the sailing vessel, after making her departure for the anchorage grounds at the black buoy off Lambert's Point piers, was charged, as between herself and the Hawarden, only with the duty of keeping her course and speed, and especially she had the right to assume that the steamship, unincumbered, proceeding down the harbor over an open space of approximately half a mile, would know of and have observed her presence, and have so navigated as to avoid risk of collision, and of crossing or crowding her on her course, Inland rules of navigation governing this case are:

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel, shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Comp. St. §§ 7859-7862, 7866, 7868.

See *Haney v. Balto. S. P. Co.*, supra, 23 How. 289, 292, 293, 16 L. Ed. 562; *Carroll*, 8 Wall. 302, 306, 19 L. Ed. 392; *The Chatham*, 52 Fed. 396, 399, 3 C. C. A. 161 (C. C. A. 4th Cir.); *The E. Luckenbach*, (C. C. A. 4th Cir.) 93 Fed. 841, 35 C. C. A. 628; *The Richmond* (D. C.) 114 Fed. 208, 210, 213, and cases cited; *The Delmar* (D. C.) 125 Fed. 130, 132, and cases cited; *The Lauretta Spedden* (C. C. A. 4th Cir.) supra, 184 Fed. 283, 106 C. C. A. 425; *The Manaway* (D. C.) 257 Fed. 476, 477; *Laboyteaux*, *Rules of the Road at Sea*, 147, 148, 149.

The steamship did not observe these regulations. She knew, and the schooner did not, of the presence of the *Elsie* and the *Champlain*, as they were navigating in close proximity to her starboard, coming down from the Engineer pier. She knew, and was charged with knowledge, of the presence of the *Hock* at anchor, and of the other two barges near thereto, at the time closely on the eastern side of the channel; and there was no excuse for the ship, with the entire channel otherwise open, to have so navigated as to have thrown her into a position of danger with these several anchored, incumbered, and moving vessels, with all of which, as before stated, she was charged with avoiding collision, or the risk thereof. Her negligence in this respect brought about the collision with the schooner, without neglect or fault, so far as the court can see, on the part of the schooner or any of the vessels mentioned.

What has been said of the failure of the ship to call witnesses also applies to the schooner, which failed to call either of the two seamen navigating the schooner, along with the master. Whether they would have known anything is not clear; but the court is influenced in passing upon the schooner's conduct, and in reaching its conclusion as to the events bringing about the collision, largely by the fact that the evidence of the schooner's master is strongly supported by the independent testimony of the witnesses called by the schooner from the Hock, the Elsie, and the Champlain. The evidence of a witness from the Winstead was taken, but thrown out on objection for lack of notice to take the same. These witnesses from the first three vessels seem intelligent, were near by, and in position to see just what occurred, and they are positive and clear in their statements as to how the accident happened, and fully sustain the schooner's case.

It follows from what has been said that the Hawarden was solely responsible for the collision, and a decree to that effect will be entered on presentation.

UNITED STATES v. LYDECKER et al.

(District Court, W. D. of New York. August 2, 1921.)

No. 2510.

1. Criminal law ⇨517(1)—Confession admissible only where voluntarily given.

A confession may be used as evidence against the defendant where freely and voluntarily given by defendant with knowledge that he was not required to do so, but cannot be used as evidence where procured by intimidation, promises of leniency, force, and duress, the extortion of a confession by such means being violative of defendant's constitutional rights.

2. Criminal law ⇨532(1)—Confession not returned to defendant or suppressed before trial.

A confession will not be returned to defendant or suppressed before trial on theory that it was extorted from him in violation of his constitutional rights, the voluntary or involuntary character of the confession depending upon facts to be ascertained at the time of the trial.

3. Criminal law ⇨518(1)—That defendant was not warned did not render confession inadmissible.

A confession if voluntary is admissible although defendant was not warned or advised that he had the right to remain silent.

4. Criminal law ⇨531(2), 736(2)—Evidence admissible to show confession involuntary; voluntary character of confession a jury question.

That confession was made to officer while defendant was in custody, without the aid of counsel or drawn out by cross-questioning by officers assisted by Pinkerton detectives, and that defendant was confined in police station and on the following day was requestioned, were matters bearing on voluntary character of confession and all facts and circumstances are to be taken into account on this view of the government's denials did not render the confession involuntary as a matter of law.

5. Criminal law ⇨781(5)—Court, having admitted confession claimed to have been involuntarily made, should submit the question to jury, with direction to disregard it if involuntary.

The court, having admitted defendant's confession as against contention that it was involuntarily made, should submit the question to the

jury, with the direction to disregard it if upon the entire evidence they are satisfied it was not a voluntary act of the accused.

6. Criminal law §627½—When defendant will be permitted to inspect grand jury minutes.

Inspection of grand jury minutes should only be had where it clearly appears that the indictment was found solely upon incompetent or illegal evidence, or in willful disregard of the accused's rights.

7. Searches and seizures §7—Intent to waive constitutional rights against illegal seizure must be shown by clear and positive testimony.

The intent to waive constitutional freedom from search and seizure must be shown to have been intended by clear and positive testimony.

8. Searches and seizures §5—Illegally seized papers and documents returned to defendant.

Books and papers, illegally seized from defendant's custody by post office inspector in violation of the Constitution guaranteeing freedom from search and seizure, will be returned to the defendant on his application therefor before trial.

9. Criminal law §395—Evidence obtained from illegally seized papers not admissible.

Testimony, obtained by the government from papers and documents illegally seized from defendant in violation of his constitutional right, will not be admitted.

Ralph B. Lydecker and Chauncey E. Weir were indicted, and the former petitions to require the United States to show cause why the indictment should not be quashed. Denied, but papers seized ordered returned.

Francis E. Kerwin, Assistant United States Attorney, of Buffalo, N. Y.:

Frank C. Ferguson, and Andrew B. Gilfillan, both of Buffalo, N. Y., for petitioner.

HAZEL, District Judge. On the petition of the defendant Lydecker the United States was required to show cause why the indictment against the defendants should not be quashed on the ground: First, that books and papers were illegally seized from the custody of the petitioner by Post Office Inspector Mulherin; and, second, that an incriminating confession was extorted from him prior to his arrest. It is demanded that the illegally seized papers and documents, together with the confession, should be returned to the petitioner, or the confession suppressed, and inspection of the grand jury minutes had by the defendants.

The affidavit of the petitioner tends to show that a confession or written admission of a conspiracy to defraud the United States, signed by him, was procured by intimidation, promises of leniency, force, and under duress, in violation of his constitutional rights, and that such confession and seizure of papers was and is the basis of the indictment.

It is claimed that the affidavits in opposition show that the petitioner confessed and admitted his participation in the fraud of the United States freely and voluntarily, without any threats or promises to induce the confession.

[1] If the petitioner's version of the restraint and cross-questioning and promises is true, his constitutional rights unquestionably were

flagrantly violated. There is no doubt that when a defendant freely and voluntarily confesses or admits his complicity in crime, with knowledge that he is not required to do so, his confession and admissions may be used as evidence against him. The paramount question always is whether a defendant freely and voluntarily confessed or admitted his crime or participation therein.

[2] On the theory that the moving affidavits disclose a violation of petitioner's constitutional rights it is insisted that under the doctrine of *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, *Adams v. N. Y.*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, *Wiggins v. U. S. (C. C. A.)* 272 Fed. 41, and *Gouled v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. —, the confession must be returned to the petitioner or suppressed before trial. But the authorities cited do not so hold. In them the court dealt with the unlawful seizure of books and papers or other subjects of evidence illegally taken, but they do not, either expressly or by implication, require the return of a signed confession, even though made in violation of constitutional rights. Although it is true that seizing one's books and papers and extorting a confession of crime to be used on the trial are both violations of fundamental rights, yet these personal rights and guaranties are not controlled by the same evidential rule. The principle of return of documents and property illegally taken from the accused is based upon the assumption that their seizure was due to an unreasonable and unlawful search and seizure, made without due process of law, while a confession or the admission of crime is usually an oral narration or expression, not infrequently reduced to writing by the officer or person to whom the confession or admission is made, and retained by him for use at the trial. Such a confession may be impeached upon the trial; and, unless it is shown by the government to have been freely and voluntarily made without inducements, threats, or promises of any kind, it will not be received as evidence. The learned counsel for the defendant concedes that whether a confession was voluntarily made or not depends upon the particular facts of each case, and that the facts are usually involved in doubt until they have been ascertained. But this may only occur at the trial.

[3-5] In *Wilson v. U. S.*, 162 U. S. 623, 16 Sup. Ct. 895, 40 L. Ed. 1090, it is ruled that the fact that an accused was in custody does not render his confession involuntary, nor is it necessary that he should have been warned that what he said would be used against him. It is sufficient if the confession was voluntarily made, though he was not warned or advised that he had the right to remain silent. Not to have had the aid of counsel, or that the confession was made to an officer while in custody, or drawn out by cross-questioning put to the accused, and that Pinkerton detectives and other police officers were called in to assist in the questioning or to be present, or that he was confined in the police station and on the next day requestioned, are all matters bearing upon his asserted involuntary incriminating statement. All the facts and circumstances are to be taken into account, but, in view of

the denials on behalf of the government, do not require that the petitioner's statement be held to have been involuntary as matter of law. *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Sparf v. U. S.*, 156 U. S. 54, 715, 15 Sup. Ct. 273, 39 L. Ed. 343; *Bram v. U. S.*, 168 U. S. 558, 18 Sup. Ct. 183, 42 L. Ed. 568. The rule in case of conflict as to whether a confession is or is not voluntary, if the court determines its admissibility, is to submit the question to the jury with the direction to disregard it if upon the entire evidence they are satisfied it was not a voluntary act of the accused. *Wilson v. U. S.*, supra.

The case of *U. S. v. Kallas* (D. C.) 272 Fed. 742, does not support defendant's broad contention. There a hearing had been had before a United States Commissioner, who held the accused for indictment. Upon examining the evidence, on application for a writ of habeas corpus, and before indictment, the court held that the confession of the accused should not have been received by the Commissioner, on the ground that it was in violation of his constitutional rights, and since there was no independent evidence to sustain the charge the relator was released from custody.

[6] Do the circumstances disclosed herein entitle the defendants to inspect the grand jury minutes? Inspection of grand jury minutes should only be had as the adjudications uniformly hold, where it clearly appears that the indictment was found solely upon incompetent or illegal evidence, or, as Judge Wallace said in *U. S. v. Farrington* (D. C.) 5 Fed. 343, "in willful disregard of the rights of the accused." It is not questioned that aside from the confession there was competent evidence before the grand jury as a basis for the charge. In view of the circumstances as disclosed herein I would incline towards permitting an inspection of the minutes for the purpose of ascertaining whether the confession alone was the basis for the indictment, but it appears that no grand jury minutes were kept, and the United States attorney stated at the argument that there was competent evidence before the grand jury additional to the confession. An order for the inspection of the grand jury minutes would appear useless, and is therefore denied, while the question as to whether the confession was obtained in violation of constitutional rights is reserved until the trial.

[7-9] The next question arises over the seizure of the papers and documents by and with petitioner's consent as the government claims, but without his consent and by compulsion as claimed by the petitioner. It is contended in opposition to the return that as the post office inspector was not an officer of this court, a summary order, directing the return of seized papers and documents, should not issue against him. The cases of *In re Chin K. Shue* (D. C.) 199 Fed. 282, and *In re Weinstein* (D. C.) 271 Fed. 5, do not require a denial of the request. In the *Shue* Case the customs inspector seized the books and papers under a search warrant authorized by section 3056, R. S. (Comp. St. § 5769), and it was held that the seizure was not in a judicial proceeding, and the collector's custody would only be regarded as the custody of the court after forfeiture proceedings were taken. In the *Weinstein* Case the evidence seized was to be used before a board of special inquiry in

the Department of Labor, and not a proceeding in the District Court. Here the papers and documents were seized for the purpose of using them as evidence to sustain the charge against the defendant, and on the hearing of this motion it appeared that the seized papers were impliedly in the custody of the United States Attorney. Indeed he offered to return them in open court. It is questionable, in view of the circumstances as narrated by the petitioner, whether assenting to the visit by the post office inspector to his home for the purpose of seizing such papers and letters operated as a waiver of his constitutional freedom from search and seizure. Before it can be held that he waived any of his constitutional rights, the court should be able to find that the intention of waiver is sustained by clear and positive testimony. *U. S. v. Kelth* (D. C.) 272 Fed. 490. Owing to the uncertainty in my mind as to whether the petitioner intended to waive his rights in this relation, I think the papers and letters seized and copies, if there are any in existence, should be returned. It does not appear that any testimony was gleaned from them which became the basis of the indictment, but if any testimony is offered at the trial that is believed by the petitioner to have been obtained from illegally seized papers, the evidence is subject to rejection. *Fitter v. U. S.*, 258 Fed. 567, 169 C. C. A. 507, and see *Gouled v. U. S.*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. — (at end of opinion).

The motions of the petitioner are denied except that the papers seized are required to be returned to him.

Ex parte CAPLIS (two cases).

(District Court, W. D. Texas, San Antonio Division. April 4, 1921.)

Nos. 3286, 3287.

1. **Army and navy** ⇨5—**Civil status can be changed only by law.**
Status of civilian can be changed to that of soldier only by virtue of some law of the United States.
2. **Army and navy** ⇨20—**Notice required for induction into service under first Selective Service Regulations; "notify."**
The word "notify," in section 133 of the first Selective Service Regulations, requires the adjutant general to give notice to or make known to the party called into service the day and hour on which he is to appear; the word both in legal significance and by Webster's definition meaning to "give notice" to, or "make known," and the mailing of such notice creates presumption of delivery, which is conclusive, unless contrary is shown.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notify.]
3. **Notice** ⇨5—**"Constructive notice" defined.**
Notice is of two kinds, actual and constructive; "constructive notice," being a creature of the statute, is ineffectual unless provided for by statute, and having the same effect as actual notice. It means notice imputed to one not having actual notice; an inference of notice not rebuttable, a conclusive presumption that cannot be controverted (citing Words and Phrases, First and Second Series, Constructive Notice).

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

4. Army and navy ⇔20—Civilian held not inducted into military service by mailing of notice prior to amended regulations.

Where a registrant's status is to be changed from that of civilian to soldier by mailing him the order of induction into the military service, under the provisions of section 133 of the first Selective Service Regulations, he is entitled to actual notice when the presumption raised by mailing is rebutted, and therefore, if the order is not in fact received, through mailing, and the presumption of notice be rebutted, induction into the military service has not been effected; but the amended Selective Service Regulations of September 16, 1918, providing that the mailing of the order of induction constituted constructive notice of its terms, the effect of which is to change the status of a delinquent registrant civilian to that of a soldier, and under it a civilian may be inducted into military service by either actual or constructive notice.

Habeas Corpus. Petitions by Thomas Caplis, Jr., and by Joseph Caplis against Col. John W. Heard, United States Army. Hearing on order to show cause why the writs should not issue. Ordered that respondent deliver petitioners to the United States marshal to await further orders of the court.

Terrell, Davis, Huff & McMillan, of San Antonio, Tex., for petitioners.

Hugh R. Robertson, U. S. Atty., and Leo Brewer, Asst. U. S. Atty., both of San Antonio, Tex., for respondent.

WEST, District Judge. The cases will be considered together, as they are controlled by the same facts and the same questions of law. The petitioners were charged, by indictment filed in December, 1918, in the United States District Court at Shreveport, La., with conspiring to evade the provisions of the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2019a, 2019b, 2044a-2044k) on or about June 9, 1917. The respondent's return shows that the petitioners were held by the military authorities at Ft. Sam Houston under a charge of conspiracy to desert from the army. A question of jurisdiction is presented—whether the petitioners are civilian citizens of the United States or whether they are soldiers of the army of the United States. The following are the facts:

[1] Petitioners registered under the terms of the Selective Service Act on June 5, 1917. Within five days after having registered they left the United States, and remained absent until long after the Armistice. Their whereabouts were unknown; their mother testifying that she did not know where they were. On December 29, 1917, and likewise on January 4, 1918, questionnaires, as provided by the rules and regulations of the Selective Service Act, were mailed by their local board at Benton, La., to them at their home address, Taylortown, some 30 miles distant. These questionnaires were never returned to the local board. There is evidence to the effect that they were destroyed by members of the Caplis family. The local board placed each of the petitioners in class 1, posted and mailed notices of such classification, and made the required report of delinquency to the Adjutant General of the state of Louisiana, who thereafter duly issued an order, described in section

133 of the Selective Service Regulations as the "order into military service." This order appeared on a post card, "form 1014," directing that, unless certain conditions were performed, which were not in fact performed, "you shall be in the military service of the United States on and after April 2, 1918, at 10 o'clock p. m." The record from the Adjutant General's office shows that this form 1014, embodying the order referred to, was mailed to each of the petitioners on March 19, 1918, and addressed to Taylortown, La., being the address given by petitioners when they registered. At the time of issuance and mailing of this order, both petitioners had long since fled the country. Neither has been discharged from the military service, if either can be said to be or to have been in the military service. If they are soldiers, their status as civilians must have been changed by some law of the United States.

Directing attention to the provisions of the Selective Service Act, and the regulations promulgated by the President thereunder, under which these parties must necessarily have been inducted into the military service, if at all, it appears that on June 5, 1917, petitioners reported at the designated point in Louisiana—Benton—and duly registered. No claim is made that mere registration inducted them into the military service. The next forward step toward entry into the military service was the mailing of the questionnaires by the local board of Benton to each petitioner in December, 1917, and January, 1918. At that time the petitioners had fled the country, and the questionnaires were never received by them. Because of their failure to return these questionnaires they were classed by the local board as delinquents. The word "delinquent," in the Selective Service Regulations, is applied to the registrant who is derelict in his duties so far as registering and reporting for duty is concerned, and the word "desertion" is applied to the runaway registrant after having been inducted into the military service. In that sense the inquiry is whether these parties were delinquents, or whether they are soldiers, or deserters after having been inducted into the military service. No claim is made that the failure to return the questionnaires constituted an induction of these registrants into the military service, or constituted them soldiers; but the respondent does claim these registrants were inducted into the military service because of the post card order "form 1014" mailed by the Adjutant General of the state of Louisiana to each of the petitioners on March 19, 1918, and contends that, though the parties did not actually receive the post card, order form 1014 notice, nevertheless by reason of the force and effect of the Selective Service Act and the regulations promulgated thereunder, they became and were involuntarily inducted into the military service, and became soldiers.

The Adjutant General of the state of Louisiana was acting under section 133, First S. S. R., when he issued his order of induction. The President, under date November 8, 1917, by proclamation, first promulgated the rules and regulations to carry into effect the provisions of the Selective Service Act. These were amended by the subsequent proclamation of September 16, 1918. A copy of section 133 is inserted next hereunder, showing the text of the section as it existed from No-

vember 8, 1917, until its amendment September 16, 1918; the amendment being shown by the underlined portions, the balance being the original text of the first proclamation:

Amendment ·
Sept. 16, 1918: "Section 133. Adjutant General to order delinquents to report; and notice to registrant.—Upon receipt of form 1013 (p. 233), the Adjutant General of the state shall forthwith notify on form 1014 (sec. 286, p. 234) the persons named therein to report to him for instructions by mail, telegraph, or in person not later than a day and 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. A copy of form 1014 (p. 234), showing the names of registrants under words "Delinquent order number," shall also be sent at the same time to the registrant's local board for its information; and the fact and date of mailing form 1014 shall be entered in column 5 of form 1013A (sec. 318, p. 270).

Actual
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.

Amendment
Sept. 16, 1918:
Constructive
Notice "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; and either the entering of such date after the name of any such registrant on form 1013A, or the mailing to any such registrant of form 1014, shall constitute the giving of notice to such registrant that from and after the day and hour named in form 1014 he will be in the military service of the United States."

It is apparent that the provisions of this section must be strictly complied with by the Adjutant General if the changed status and new duties imposed upon the citizen are to be fixed by a conclusive presumption of notice, rather than by actual notice. The only duty and obligation placed on the citizen by the act and the President's proclamation was to present himself on June 5, 1917, to the local board of his precinct for the purpose of enrollment. The proclamation further advised the country that, merely because some of its citizens had been called on to register, the ordinary avocations and pursuits were to be continued, and the usual course of life and business in the country was not, by reason of the registration, to be interfered with. Young men affected were especially warned not to surrender their occupations. Millions registered who were never called. The registrant was advised he was liable to be called, and if he willfully committed any act which interfered with any obligation, he might become subject to sections 37, 125, and 337 of the Criminal Code of the United States, but in no case did the act, proclamation, or regulation automatically change his status as a citizen.

In *Ex parte Henry*, 253 Fed. 209, Geiger, District Judge, Eastern District of Wisconsin, concerning the status of the registrant citizen, says:

"That the law [Selective Service Law] contemplates continued existence of civil authority in all of the states until such time when it shall unmistakably be indicated that ordinary civil authority is superseded. And it is not incumbent upon the courts to ascribe to Congress an intention by this law to supersede a status which attached to an individual prior to the time of its attempted application to that individual. * * * I am unwilling to give the law that effect, because it ascribes to Congress an intention which it would have effectuated other than through legislation disclosing merely the ranges of ages and the additional direction that those within those ages should be *liable* to be drawn. Congress intended to recognize the continued existence of the civil authority of the states and the nation, and, necessarily, to recognize the continued status which individuals might have acquired by virtue of the exertion of such continued civil authority, and when it appears, as it appears here, that the individual called was lawfully in the custody of the state, in the exercise of its civil authority to prevent or to vindicate infractions of its criminal law, it should not be said that Congress intended that that status should be superseded."

The Selective Service Act was passed by Congress with full cognizance and appreciation of the Fifth and Sixth Amendments of the Constitution, and without any attempt to abridge the rights, privileges, and guaranties of those two amendments. It is elementary that, before any change of status of the citizen affecting his relations with society, the state or nation, certain definite procedure must be put in motion to accomplish such results. For instance, the marriage relation, the change from that of the single man to that of being married; the dissolution of the marriage relation; aliens seeking admission to the United States; seeking to become a citizen; status of an alien and his deportation. It is useless to multiply instances. In all these cases affirmative action of some kind is provided by law, or regulations, with notice to the person to be affected. The Congress and the President, in passing the act and proclamations, the rules and regulations for the enforcement of the act, had in mind the provisions of the Constitution as to due process of law. It has been declared constitutional. *Selective Draft Law Cases*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856.

The terms of the act itself did not bring about this change of status. Registrants were not even required to remain in their permanent place of residence, and it was not until November 29, 1917, that registrants were required to notify the local board of their change of post office address, which, it will be noted, was long after these petitioners had fled the country. With reference to the question of residence, Circuit Judge Morrow, in *United States v. Wheeler* (D. C.) 254 Fed. 615, says:

"The act did not require registrants under the act to remain in their permanent homes and actual places of legal residence until drafted into the military service of the United States, nor did the selective service regulations prescribed by the President of the United States make such a requirement; but, on the contrary, the location of the registrant elsewhere than at his permanent home and actual place of legal residence at the time of his call into the military service was provided for in such regulations, and the absence from home of the registrant in no way prejudiced his rights under the act or under the regulations of the President."

What character of notice is provided by the regulations to be given to a registrant to be inducted into the military service? It will be observed that the provisions as to notice in section 133, appearing in the

first proclamation, are published in the rules and regulations dated November 8, 1917, providing by its last paragraph that "from and after the day and hour specified" in the order form 1014, by which the Adjutant General was "to notify the registrant by mail, telegraph, or in person, that such person shall be in the military service of the United States," and that the amendment or revision of these rules and regulations, of date September 16, 1918, amended the last paragraph and provided, among other things, that the mere fact of mailing to the registrant the order form 1014 should constitute notice, and that "from and after the date * * * he would be in the military service of the United States." In other words, at the time, March 19, 1918, the Adjutant General gave the notice as required in the regulations, the fact of mailing, etc., was not affirmatively declared to be notice, whether the registrant received it or not, as it subsequently was in the amended Selective Service Regulations of September, 1918.

Section 7 of the first proclamation, S. S. R., provides for constructive notice to registrants. This section refers purely to the mailing of the questionnaire as provided by section 92, and in paragraph D of that section it is provided that mailing of such notice, etc., shall constitute the giving of notice to the registrant, and all concerned, and charges the registrant with notice of the day upon which the duty is to be performed, etc., regardless of whether or not that mailed notice is actually received.

After the mailing of the questionnaire and its return by the registrant to the local board, he was classified, and, if placed in class 1, was subject to induction into the military service. Induction by the local board was accomplished by the mailing of a notice, form 1028, to the last known address of registrant under the procedure as set forth in section 157, S. S. R. The section as to notice provides as follows:

"From and after the day and hour thus specified each registrant shall be in the military service of the United States, and the mailing to any such registrant of the order into military service shall constitute the giving of notice to him, and that from and after such day and hour he will be in the military service of the United States."

[2] These provisions as to notice required to be given to a registrant were contained in the first published Selective Service Regulations, and the fact that the same effect as to notice was not at that time given to the same character of notice in section 133 provokes the inquiry as to what effect the failure to do so would have. Under provisions of section 133, First S. S. R., would it be necessary for the Adjutant General to give actual notice to the party, or would the mailing to his address, of itself, be sufficient to induct the party into the military service, where it was affirmatively shown that the mailed notice had not been received? The word "notify," both in legal significance and by Webster's definition, means "to give notice" to, or "to make known." The word "notify" in section 133 requires the Adjutant General to give notice to or to make known to the party called into the service "of the day and hour * * *" upon which he is to appear. The mailing of such a notice creates the presumption of delivery, which is conclusive unless the contrary is shown. *Wigmore on Evidence*, § 95; *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.

The Adjutant General complied with the provision of the statute as to mailing, but the evidence conclusively shows that neither of the parties received such mailed notice; nor is there any evidence to show or contention made that they received notice from any other source or character. Section 133 as it stood as of the date the notices were mailed to these registrants made no provision for constructive service by conclusive presumption of receipt of the notice mailed, whether actually received or not. To change the status of the individual from citizen to soldier, and give an effect to the mailing of the notice not then provided by the law, would require the court to enter the field of legislation to do something that the law should have provided for, and did so provide at a subsequent date. The mailing would be ineffectual, unless he received the notice. Induction could not follow, unless the mere mailing of the notice as provided in the subsequent regulations had the effect of raising the conclusive presumption of receipt, whether actually received or not. That the involuntary induction provided in sections 7 and 157, S. S. R., both specifically provide for involuntary induction, whether the notice was received or not, and the fact that in the amended and revised proclamation provisions were inserted that did conform to these requirements, is persuasive that the President wished to correct an error of the former procedure, and close a gap which enabled the registrant to avoid military service, even though by such avoidance they rendered themselves liable to punishment under the civil law. Whether the Congress or the President had the power to provide for the involuntary induction by means of a notice, such as referred to, whether received or not, is not before the court in this case, because the regulation at the time in question contained no such provision.

[3] What is constructive notice? The few cases maintain without exception the declarations of the early English cases on the subject. These have been approved by the Supreme Court of the United States in *Simmons Creek Coal.Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, and *Burck v. Taylor*, 152 U. S. 653, 14 Sup. Ct. 696, 38 L. Ed. 578. They hold in effect that notice is of two kinds—actual and constructive; that constructive notice is a creature of the statute, and is ineffectual unless provided by statute; has the same effect as actual notice; means notice imputed to one not having actual notice; an inference of notice not rebuttable; a conclusive presumption that cannot be controverted. For cumulative authorities, see *Ruling Case Law*, vol. 20, p. 342, and *Words and Phrases* under the subject head of "Constructive Notice." Assuming that the Selective Service Regulations have the force and effect of a statute, it is to be noted that section 133, First S. S. R., did not provide that the notice by mail would be effective as constructive notice, though it did so by subsequent amendment. If the presumption of notice by mail is rebutted, as it is in the present case, then, applying the definition of constructive notice, there is no ground upon which the claim that the provisions of section 133, First S. S. R., without the amendment, could be given effect as constructive notice; that is to say, imputing notice to one not having actual notice.

The case of *Farley v. Ratcliff*, 267 Fed. 682, a decision rendered by the Circuit Court of Appeals for the Fourth Circuit July 6, 1920, is the only case which bears upon the question of involuntary induction by purely constructive service. That was a case under section 157, First S. S. R., by the local board, on form 1028. The facts in that case showed that the chairman of the local board testified he did not know whether the petitioner ever got the notice or not; the registrant's post office being some 20 miles away. Despite the fact that the regulations provided that the proof of mailing and entry of a certain date of mailing was all that was required to cause induction, the court, in commenting upon his testimony, says this of itself entitled the petitioner to discharge from answering the crime of desertion. The court further says:

"If, as a matter of fact, he never received notice, and knew nothing of its issuance, his liability of any offense is a matter of serious doubt, and least of all could it be said that the mailing of a notice he did not receive, and did not know of, inducted him into the military service, and, for his failure to respond, that he was a deserter therefrom."

The *Farley* Case, however, was based upon a consideration of the question of the extent of the jurisdiction of the court-martial, and as to whether or not the crime of desertion had been specifically set forth. This case, therefore, may not be considered as a direct authority upon the point named, but it is the only authority that goes so far.

Consideration has been given to the *Bergdoll* Cases. The first of these, styled "*Matter of Grover C. Bergdoll v. Military Commander, Governor's Island*" (Learned Hand, District Judge, March 5, 1920, no written opinion). The question of notice of induction does not appear to have been considered an issue by Judge Hand. He refers casually to the fact that notice was given as prescribed by section 133 of the S. S. R. The facts in that case did not show affirmatively whether the mailed notice was received or not, but from a consideration of the facts concerning the same defendants in other cases against them, two judges have stated that there was no question raised as to the notice not having been received. It is not clear that Judge Hand decided that under the first Selective Service Regulations, prior to amendment September, 1918, the mailed order alone was sufficient to bring about induction, whether received or not.

Another case, *United States v. Erwin Bergdoll* (opinion by District Judge John C. Pollock, Kansas City) 274 Fed. 458 (April, 1921), refers to the effect of mailing of notice under section 133, First S. S. R. In that case the court says:

"I am convinced the same must be presumed to have been by him received, in the absence * * * of any positive showing to the contrary."

Extraneous facts dehors the record, showing respondent's authority, were heard and considered by the court, and from these facts the court concludes:

"There can be no doubt whatever but that petitioner did receive actual personal notice of the orders inducting him into service."

Another case, *United States v. Erwin Bergdoll and Grover C. Bergdoll*, by Oliver B. Dickinson, District Judge, Eastern District of Pennsylvania, on motion for new trial, 272 Fed. 498: The facts show that notices were mailed to Grover Bergdoll from July 29, 1918, to August 8, 1918, and notices to Erwin Bergdoll from April 29, 1918, to May 9, 1918. Among other questions considered by the court was whether Erwin and Grover Bergdoll had been inducted into the military service, and whether notice should be given to them of the orders bringing about the change of their status from civilian to soldier. The court says:

“He [Erwin Bergdoll] was entitled to notice [of the day on which he must report for service]. This was his right. No question is raised, however, in the instant case, that the notice was not given and received. When notice was given him of his selection, he had 10 days during which he kept his status as a civilian. This, also, was his right. Until the expiration of the 10 days he could not have committed a military offense, because he was not in the military service. It is to be observed that his status was changed when and as changed by the * * * law, and not the ruling of the board.”

These cases on the question of involuntary induction by constructive notice required are of doubtful aid, because of vital differences in the facts between those cases and the one at bar. In the Bergdoll Case (1) there was no evidence offered to show that the Bergdolls had *not* received the induction order forms mailed to them, and (2) the court finds that the Bergdolls had *actual notice* of the orders. In the present case the evidence was conclusive that the Caplis brothers (1) had not received the induction order mailed to them; nor (2) had they received actual notice thereof.

From the foregoing it results:

[4] Where a registrant's status is to be changed from that of civilian to soldier, by mailing him the order of induction into the military service under the provisions of section 133, First S. S. R. (November 8, 1917), he is entitled to actual notice when the presumption raised by mailing is rebutted. Therefore, if the order is not in fact received, through mailing, and the presumption of notice be rebutted, induction into the military service has not been effected. He is still a registrant civilian, not a soldier subject to military court-martial.

On the other hand, section 133, Second or Amended S. S. R. (Sept. 16, 1918), provides that the effect of the mailing of the order of induction is to raise against the registrant the conclusive presumption of notice of the induction order, whether received or not. This is constructive notice, the effect of which is to change the status of the delinquent registrant civilian to that of soldier. Consequently this section as amended provides for induction into the military service by either actual notice or constructive notice.

The court's order will be that the respondent deliver the petitioners to the United States marshal to await further orders of the court.

A. O. ANDERSEN & CO., Inc., v. SUSQUEHANNA S. S. CO., Inc.

(District Court, E. D. Virginia. October 21, 1921.)

1. Admiralty ⚡36—Counterclaim must arise out of same subject-matter.

While courts of admiralty afford relief to defendants properly impleaded before it having as a defense counterclaim, or recoupment, the transaction so sought to be litigated must depend on and arise out of the maritime undertaking which is the subject-matter of the original litigation.

2. Admiralty ⚡6—Mere fact that ship is involved does not give admiralty jurisdiction.

The mere fact that a ship is involved, or that transactions in litigation relate to matters connected with or in which a ship may have been used, will not enable one to procure relief either originally in a court of admiralty or to set the same up as a defense in a cause properly pending therein.

In Admiralty. Libel by A. O. Andersen & Co., Inc., against the Susquehanna Steamship Company, Inc., for breach of charter party. Decree for libelant.

Duncan & Mount, of New York City, and Baird, White & Lanning, of Norfolk, Va., for libelant.

Cass & Apfel, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, Circuit Judge. This is a libel in personam, with "foreign attachment," against the respondent to recover damages for alleged breach of contract of charter party, entered into between the libelant, as agent, under authority from the owners of the steamship Lydia, and the respondent, on the 29th day of December, 1919, whereby the steamship Lydia was let to the Susquehanna Steamship Company, Inc., to transport a cargo of sugar from "one or two north side ports or one or two south side ports of Cuba (charterer's option) to either Rotterdam or Amsterdam, Holland, one port of discharge (charterer's option)." The third paragraph of said charter party is as follows:

"3. And to pay to A. O. Andersen & Co., Inc., in United States gold coin, or its equivalent, at New York, N. Y., ten (10) days after receipt of master's cable advice that vessel has loaded and bills of lading had been signed, free of discount, commission, or insurance to said party of the first part or agent, for the use of the vessel during the voyage aforesaid, thirty dollars (\$30.00) net per ton of 2,240 lbs. bill of lading weight. Susquehanna Steamship Company bill of lading form No. 226 to be used in connection with this shipment."

Under the terms of this charter party, the Lydia was tendered to the respondent on the 7th of February, 1920, and finished loading her cargo of 4,928 tons of sugar on the 15th of February, 1920. The libelant was duly advised by the ship's master of the loading of the ship and the issuance of bills of lading according to the provisions of the charter party, of which fact the libelant, on the 16th of February, notified the respondent, and that the freight hire of \$147,867.45 would be due and payable to the libelant under the terms of the charter of February 26, 1920. Upon failure to pay the amount after due demand therefor, this libel was filed; the libelant suing out an attachment, which

was levied upon the steamship *Susquehanna*, owned by the respondent, found within the jurisdiction of this court.

There seems to be no dispute on the facts as to the execution of the charter party, the loading of the cargo, and transportation of the sugar, and of the failure to pay the freight to the libelant, as demanded, and these facts were substantially admitted by the answer, which, however, set up affirmative matter briefly as follows: That the owner of the *Lydia* had chartered her to one *Grotios* on September 12, 1919, for six months; that the libelant guaranteed the hire, and later repudiated its obligation; that thereupon the *Lydia Steamship Company, Inc.*, and the libelant, on the 29th of November, 1919, agreed that the libelant should assume the *Grotios* charter, and the ship was delivered under this agreement; that the libelant failed to disburse the ship as required, and to pay her hire, and turned her back to the *Lydia Steamship Company, Inc.*, before the libel was filed, and before that time the *Lydia Steamship Company, Inc.*, assigned its claim to respondent; that the *Lydia* was owned by the *Lydia Steamship Company, Inc.*, and that that company and the respondent company were principally owned by Joseph and Frank Auditore, they being the principal stockholders and officers in both companies. The pleadings set forth other matter, but the same is in amplification or repetition of the above facts.

The libelant excepted to the sufficiency of the answer, and insisted that, under the undisputed testimony and plain terms of the charter, the sum sued for was due, and the libelant was entitled to a decree therefor, and that, under the admitted facts, the equitable defense interposed in the nature of set-off could not be maintained in admiralty, it clearly appearing that the *Lydia Steamship Company's* alleged claim arose under other and different contracts or undertakings than the one in suit, and between different parties; that the charter party upon which the libelant sues in this case was wholly independent of the transactions sought to be injected herein, and under it the services contracted for having been rendered, and the freight money not paid, the defense sought to be interposed constituted no valid answer to the libelant's demand. The exceptions to the answer were therefore sustained (*W. R. Grace & Co. v. Luckenbach S. S. Co.* [D. C.] 248 Fed. 953, 258 Fed. 49, affirmed [C. C. A.] 267 Fed. 676), with leave to answer over. This was the conclusion reached by the United States District Court for the Southern District of New York, where a suit between the same parties as here and Frank and Joseph Auditore as individuals, to recover the same freight money, was also instituted. 275 Fed. 355. Judge Learned Hand in that case filed a written opinion, giving reasons for his decision. Pursuant to leave granted herein, on the overruling of the exceptions, the respondent filed an amended answer, setting up substantially the same defense as before, and, among other things, that the libelant, in chartering the *Lydia* to respondent company, acted on behalf of the *Lydia Steamship Company, Inc.*, and had only a revocable license to act for that company in the hire of said ship, and that prior to the institution of this suit the libelant by its own acts had terminated the agency with the steamship company, including its right, license, or privilege to col-

lect the money sued for herein, and that the Lydia Steamship Company had likewise revoked said agency, including the right to collect the charter hire in question. The answer further averred that the entire balance of the charter hire claimed by the libelant had been fully paid and discharged and accounted for by the respondent to the Lydia Steamship Company, Inc., and that no part of the hire for the ship remained unpaid.

[1] The case was submitted to the court on the merits, and pleadings, proofs, and documentary evidence offered, and interrogatories to the respondent company and answers thereto, and the court's judgment is that the defense set up in the amended answer is substantially the same as that interposed to the original answer, and as to which libelant's exceptions were sustained, and that the same does not constitute a valid defense to this action. As a set-off the defense interposed to the payment of libelant's claim cannot be pleaded in a court of admiralty. The statutory authority authorizing such pleas applies only to courts of common law and equity, and not to courts of admiralty. *Willard v. Dorr*, 3 Mason, 161, Fed. Cas. No. 17,680; *O'Brien v. 1,614 Bags of Guano* (D. C.) 48 Fed. 726, 729, 730; *Emery Co. v. Tweedie Trading Co.* (D. C.) 143 Fed. 144; *Benedict's Admir.* (4th Ed.) § 392, and cases cited; *Hughes, Admir.* (2d Ed.) p. 412, § 200, and cases cited. Neither can the respondent's defense by way of recoupment or counterclaim, attempted to be pleaded to defeat the libelant's right of recovery, be interposed; for, while courts of admiralty afford relief to those properly impleaded before it, having such defense, still the transactions so sought to be litigated must depend upon and arise out of the maritime undertaking, the subject-matter of the original litigation. *Bowker v. United States*, 186 U. S. 135, 140, 141, 22 Sup. Ct. 802, 46 L. Ed. 1090; *United Trans. Co. v. N. Y. & B. Tr. Line* (C. C. A. 2d Cir.) 185 Fed. 386, 107 C. C. A. 442; *Howard v. 9,889 Bags of Malt* (D. C.) 255 Fed. 917, 918; *Benedict's Admir.* (4th Ed.) § 392, and cases cited; *Hughes, Admir.* (2d Ed.) p. 412, § 200, and cases cited.

The alleged cause of action sought to be affirmatively brought in this case, would extend this simple suit to collect unpaid freight money into endless litigation, involving the rights of a third party not before the court, which in no manner bears upon whether the freight money sued for is due and owing by the respondent under the charter party in suit. On the contrary, it relates to the rights and liabilities of the libelant and such third party, the Lydia Steamship Company, Inc., arising out of contracts and agreements entered into between them in relation to the steamship Lydia, antedating the charter party in suit. To permit the bringing in of these matters would not only result in endless confusion, and necessarily cause great delay, but set a precedent that would seriously impede courts of admiralty in affording prompt relief to litigants in cases where time is of the utmost importance.

[2] Moreover, it may be seriously questioned whether the relief sought can be afforded in an admiralty court. Assuming that the respondent's claims are meritorious, they seem to relate to mere partnership or common-law agreements of agency, and the settlement of

accounts thereunder. The bare fact that a ship is involved, or that the transactions relate to matters connected with, or in which a ship may have been used, will not enable the respondent to procure relief, either originally, in a court of admiralty, or to set the same up as a defense in a cause properly pending therein. *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249; *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235; *Hughes, Admir.* (2d Ed.) §§ 6, 7, pp. 20, 21. What the respondent is in effect attempting to do here is that, confessedly owing freight money for which it is sued under the plain terms of the charter party in suit, it has seen fit to procure assignments of disputed claims against the libelant from third parties, growing out of other transactions between the libelant and such third parties, and is endeavoring to defeat libelant's recovery by use of those disputed claims. In a word, with a lawsuit on hand, it has bought up another, with which it is seeking to offset the former, with no good reason to warrant such action, unless it be that the corporation making the assignment and the respondent corporation have a common stock ownership. Surely this cannot be the case.

In conclusion, the court's opinion is that, as well upon the facts as under the law, the libelant is entitled to recover against the Susquehanna Steamship Company, Inc., for the amount sued for. A decree to that effect will be entered on presentation.

UNITED STATES v. MOORE et al.

(District Court, S. D. New York. October 27, 1920.)

Monopolies ↻9—Payment of brokerage fees by steamship companies not interstate or foreign commerce.

The payment by steamship companies of commissions or brokerage fees on shipments secured through freight brokers, who act as agents for shippers is not interstate or foreign commerce, and an indictment against steamship companies doing business through the port of New York and members of the Steamship Freight Brokers' Association charging a conspiracy in restraint of interstate and foreign commerce, based on an alleged agreement that the steamship companies will allow a brokerage fee only to members of the association, which is limited in numbers, but which does not allege that the steamship companies refuse shipments from any other broker or shipper, or that there is any agreement restraining competition in rates, *held* not to charge any offense under the Sherman Anti-Trust Act, § 3 (Comp. St. § 8822).

Criminal prosecution by the United States against Walter Moore and others. On demurrer to indictment. Demurrer sustained.

Francis G. Caffey, U. S. Atty., of New York City (Henry A. Guiler and Rush H. Williamson, Sp. Assts. U. S. Atty., both of New York City, and Ryland W. Joyce, Sp. Asst. U. S. Atty., of Washington, D. C., of counsel), for the United States.

Burlingham, Veeder, Masten & Fearey, Bullowa & Bullowa, Kirlin, Woolsey, Campbell, Hickox & Keating, Coudert Bros., Duncan & Mount, Gilbert & Gilbert, Haight, Sandford, Smith & Griffin, Har-

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

rington, Bigham & Englar, Louis Hess, Lord, Day & Lord, Hunt, Hill & Betts, Loomis, Barrett & Jones, Noble, Morgan & Scammell, and Joseph P. Nolan, all of New York City (Van Vechten Veeder, A. S. Gilbert, and Vine H. Smith, all of New York City, of counsel), for defendants.

MAYER, District Judge. The indictment contains two counts; the first charging conspiracy from January 1, 1917, to restrain, and the second charging conspiracy to monopolize, trade and commerce, contrary to the so-called Sherman Anti-Trust Law (26 Stat. 209).

The second count is entirely devoid of merit, and fails upon any theory, to set forth facts sufficient to constitute a crime. It was disposed of on the argument and further reference to that count is unnecessary.

The first count of the indictment, when stripped of formal allegations and allegations, immaterial to the basic questions to be decided, comes down to a very narrow compass and a very modest set of fractions. It is alleged that 50 per cent. of the foreign trade and commerce, which was, or becomes in due course of business, interstate trade or commerce, moves to or passes through the port of New York; that 30 per cent. of this 50 per cent. is handled by freight brokers and forwarders; that of the said 30 per cent., upwards of 80 per cent., is handled by about 75 freight brokers and forwarders, who are members of an association known as the Steamship Freight Brokers' Association, and that practically all of the 50 per cent. of the foreign trade and commerce, above referred to, is transported by the steamship companies who are made the defendants. In other words, the freight brokers or forwarders, who are denounced by the indictment, handle 12 per cent. of the foreign trade and commerce to and from the United States and 24 per cent. of the commerce passing through the port of New York. The first figure is readily arrived at by taking 30 per cent. of 50 per cent., which is 15 per cent. and then 80 per cent. of 15 per cent., which is 12 per cent.; the second, then, is 24 per cent.

The defendants are 38 steamship lines, four corporations which are members of the Steamship Freight Brokers' Association, 17 individual defendants, who are described as being either officers or agents of the steamship companies or officers or members of the Steamship Freight Brokers' Association. After the allegations, usual and familiar in such indictments, the indictment sets forth "the divers means and methods, among others, by which objects of said conspiracy were intended by the defendants to be, and were to be, accomplished." Some of these alleged "means and methods" convey no information. Thus, the allegation, "holding meetings of representatives of virtually all of defendant steamship companies, the most important of which are members of the said Trans-Atlantic Associated Freight Conferences, and all the principal freight brokers or forwarders at the port of New York, members of said Steamship Freight Brokers' Association," means nothing.

It is unnecessary, in prosecutions under the Sherman Act, to allege overt acts, and therefore allegations of fact must go to the very substance of the charge. Referring to holding meetings, as quoted supra,

the indictment might just as well have alleged that the defendants were members of a social club, a business association, or a political party. The court has no judicial knowledge as to the Trans-Atlantic Associated Freight Conferences, nor any knowledge of its transactions. There is not a single allegation showing any restraint of trade or commerce, either interstate or with foreign nations, or conspiracy so to restrain, unless it be unlawful for the steamship companies concerned to limit the number of brokers to whom they will pay commissions or a so-called brokerage fee.

There is an allegation which might be worth considering, if it meant what a hurried reading might suggest, and that is the allegation as to "agreeing that the freight rates offered or quoted by the authorized agents of the said steamship companies should be observed, adhered to, and maintained." What this amounts to, as may be readily ascertained from the context, and, as was frankly admitted by counsel for the government on the argument, is this: That the defendants have agreed that, if steamship company A fixes a price of \$1 per ton for a certain class of freight, then the brokers or forwarders who are members of the Steamship Freight Brokers' Association shall not sell that cargo space for more or less than \$1 per ton. The same applies to steamship company B, or steamship company C, or the rest of the alphabet.

There is no suggestion—and this was also frankly admitted upon the argument by counsel for the government—that these defendants, or any of them, have any agreement involving a control of freight rates or their price in any manner, shape, or form. Steamship Company A may charge \$1 per ton for a certain class of freight, if it pleases, and steamship company B may charge 95 cents per ton for the same class of freight. As to freight rates, the steamship companies, so far as the indictment discloses, are entirely free to indulge in the sharpest competition. The restriction upon the freight brokers is obviously intended to prevent them from speculating in freight accommodations at the expense of the shipper, and to prevent one shipper from getting space on the same vessel for less than another, or, per contra, from one shipper being charged more than another. Such a result, so far as affects shippers, calls for approval rather than indictment.

With these allegations thus disposed of, what the indictment, when read most favorably to the government, comes down to is this: That the steamship companies named have agreed that they will allow a brokerage fee only to the members of the Steamship Freight Brokers' Association, and that the membership of this association is limited, and that as a necessary consequence the steamship companies refuse to allow a brokerage fee to anybody but members of the Steamship Freight Brokers' Association. There is no suggestion in the indictment that this is a device for rebates, or underhand or discriminatory transactions, but, on the contrary, it affirmatively appears that no member of the Steamship Freight Brokers' Association shall divide his brokerage with any person other than a fellow member of the association, or, in other words, that he shall not divide his brokerage, either with the steamship company or with the shipper.

Counsel both for the government and the defense agree that the

broker is the agent of the shipper, and not of the steamship company. The question, then, is whether the payment by the steamship companies of a commission or brokerage fee is foreign or interstate trade and commerce, within the meaning of the Sherman Anti-Trust Law. Brokerage, by whomsoever paid, is merely an aid or facility whereby shipment may be more easily and readily accomplished. It is in no sense interstate or foreign trade or commerce.

In *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; the railway agent was employed in soliciting passenger traffic for his road. Being the agent of the carrier, acting solely on its behalf, he was engaged in interstate commerce. In the case at bar, however, the broker, so called, is the agent of the shipper. There is no allegation that the steamship company has refused freight from any source or at a different rate, whether from the shipper direct or from a person not a member of the Steamship Freight Brokers' Association. The sole allegation, in effect, is that no agent of a shipper, other than a member of the Steamship Freight Brokers' Association has received or will receive a brokerage fee. In order to sustain this count of the indictment it must appear that the business in which the members of the Steamship Freight Brokers' Association are engaged constitutes interstate trade or commerce. That it does not would seem to be apparent without a citation of authority; but it is well enough to refer by way of analogy to *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128, *Hopkins v. U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 40 Sup. Ct. 385, 64 L. Ed. 649, and particularly to the opinion of Judge Augustus N. Hand in *Sullivan v. Associated Billposters and Distributors of the United States* (D. C.) 272 Fed. 323, filed September 30, 1919.

Further elaboration is unnecessary; for it is quite clear for the reasons outlined (and more could be stated, if necessary) and on the principles considered in the cases cited (and more could be added, if necessary) that the first count fails to set forth facts constituting a crime.

The demurrer is therefore sustained in all respects, and an order in accordance herewith may be submitted on five days' notice.

DETROIT HOTEL CO. v. BRADY, Collector of Internal Revenue.

(District Court, E. D. Michigan, S. D. October 25, 1921.)

No. 5744.

1. Internal revenue ⇨⁹—**Hotel company held subject to corporation tax, as "carrying on or doing business."**

A corporation organized under Comp. Laws, Mich. §§ 9017, 9018, to purchase land and "construct thereon a modern fireproof hotel, and to operate, manage or lease, mortgage, or sell the same," which, immediately after its organization, acquired land and constructed a hotel thereon, which was immediately leased to an operating corporation, which paid a

⇨⁹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

rental dependent on profits, *held* subject to the corporation excise tax as "carrying on or doing business," within Corporation Excise Tax Act, § 38.

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

2. Internal revenue Ⓒ38—Action to recover taxes not maintainable against collector's successor.

Action to recover internal revenue taxes as illegally collected does not lie against the successor of the collector to whom the taxes were paid; the successor not having received the taxes, so as to be liable, under Rev. St. § 3220 (Comp. St. § 5944).

At Law. Action by the Detroit Hotel Company against James J. Brady, Collector of Internal Revenue, First District of Michigan. Judgment for defendant.

Angell, Turner & Dyer, of Detroit, Mich., for plaintiff.

John E. Kinnane, U. S. Dist. Atty., of Bay City, Mich., for defendant.

TUTTLE, District Judge. This is an action in assumpsit to recover from the defendant, as collector of internal revenue, the amount of certain taxes paid, under protest, to his predecessor in office by the plaintiff corporation, such taxes having been exacted, wrongfully as plaintiff claims, under the Corporation Excise Tax Law. Act Cong. Aug. 5, 1909, c. 6, § 38, 36 Stat. at L. 11, 112. After the payment of said taxes plaintiff made the statutory claim for refund thereof, and, on the rejection of such claim by the Commissioner of Internal Revenue, brought this action, alleging that—

"by reason of the wrongful act of said collector, defendant, in assessing and compelling payment of the above-described taxes, this plaintiff has suffered damage in a large amount, to wit, the sum of \$1,783.89, and thereupon said defendant, in consideration of the premises, undertook and promised plaintiff to repay to it said sum upon request, yet said defendant has disregarded his promises, and has not, though often requested so to do, paid said sum, or any part thereof, to the plaintiff's damage in the sum of \$3,000, and therefore it brings this suit."

The facts not being in dispute, a jury was waived and the cause submitted to the court upon a stipulation of facts, supplemented by a transcript of certain testimony taken in open court.

The two questions raised and argued by the parties are: (1) Whether plaintiff, at the time involved, was doing business as a corporation, and therefore subject to the Corporation Excise Tax Act; and (2) whether, if these taxes were improperly exacted by the predecessor in office of the defendant collector, they can be recovered from said defendant in this action.

[1] 1. The material facts, which are undisputed, include the following: Plaintiff was incorporated under Act 232 of the Michigan Public Acts of 1903, which provided (section 1) for the organization of corporations "for the purpose of carrying on any manufacturing or mercantile business, or any union of the two, * * * or for carrying on any other lawful business," with certain exceptions not material here.

Section 2 of the act provided that the articles of association of every such corporation should state—

“distinctly and definitely, the purpose or purposes for which the corporation is formed, and it shall not be lawful for said corporation to divert its operations, or appropriate its funds to any other purpose.” Sections 9017 and 9018 Michigan Compiled Laws of 1915.

The purposes for which the plaintiff was incorporated, in 1905, were stated in its articles of association as follows:

“To purchase suitable land in the city of Detroit, Michigan, and construct thereon a modern fireproof hotel, and to operate, manage or lease, mortgage, or sell the same.”

Immediately after its organization, the plaintiff acquired land and proceeded to construct thereon a hotel building; the latter being completed in 1907. This hotel was immediately leased by the plaintiff to another corporation, which operated it for several years (including 1910, 1911, and 1912, the years for which the taxes in question were assessed and paid) under a lease from the plaintiff, on which the lessee paid to plaintiff an annual rental, dependent in amount upon the extent of the lessee's profits from the operation of the hotel, such rental being payable in monthly installments “at the office of” the plaintiff corporation in Detroit, and the latter was, by said lease, given the right to “inspect the books and accounts of the lessee at all reasonable times.” Shortly thereafter the plaintiff added five stories to the building as originally constructed and a new lease was then entered into for an increased rental. From time to time various loans were negotiated by plaintiff to obtain the funds necessary to pay the cost of construction of the hotel and of the addition thereto; such loans being secured by mortgages authorized by proper corporate action. Further funds were obtained by an increase in the capital stock of the plaintiff corporation. Plaintiff has filed the annual reports required by the Michigan statutes. Aside from the foregoing, the activities of plaintiff corporation during the years covered by the taxes in question have been, in the language of the stipulation of facts on file, “only such as were incident to the receipt of rent from its lessee and distributing the same for interest charges and as dividends.”

I am satisfied that the acts and activities of the plaintiff during the years mentioned constituted “the carrying on or doing business by such corporation,” within the meaning of section 38 of the Corporation Excise Tax Act, and that therefore the taxes in question were properly assessed and paid. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428.

[2] 2. Notwithstanding the learned and able argument of counsel for the plaintiff, I cannot avoid the conclusion that, even if it be assumed that the taxes involved herein were unlawfully exacted from plaintiff by the predecessor in office of the defendant collector, yet plaintiff cannot maintain this action for the recovery thereof from the defendant. True it is that, if these taxes were illegally collected, plaintiff would be entitled to recover them from the United States in an action

brought directly against the United States. *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825. This action, however, was not brought against the United States, but against the collector of internal revenue in office at the time of the commencement of such action, who, as already observed, was not the collector to whom the taxes in question were paid.

While the defendant is in the pleadings herein designated as collector of internal revenue, it is clear, as is indicated by the language of the declaration hereinbefore quoted, that this action is brought against him personally, to recover from him money alleged to have been wrongfully received by him from plaintiff, giving rise to an obligation on his part to repay such money to the plaintiff. *Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; *United States v. Emery, Bird, Thayer Realty Co.*, supra; *Sage v. United States*, 250 U. S. 33, 39 Sup. Ct. 415, 63 L. Ed. 828; *Roberts v. Lowe, Collector* (D. C.) 236 Fed. 604; *Philadelphia, Harrisburg & Pittsburgh R. R. Co. v. Lederer, Collector*, 242 Fed. 492, 155 C. C. A. 268 (C. C. A. 3). This liability of a collector is recognized, if not created, by section 3220 of the Revised Statutes (Comp. St. § 5944). Defendant, however, never having received any of these taxes, cannot, under any statutory provision or theory of law known to this court, be required to pay the amount thereof to the plaintiff in the present action. *Roberts v. Lowe*, supra; *Philadelphia, Harrisburg & Pittsburgh R. R. Co. v. Lederer*, supra.

Various statutory provisions are invoked and discussed by plaintiff in support of its contentions to the effect that its "complaint is really against the United States official, in substance against the United States, and the personal element is eliminated." No statute, however, is referred to, and I know of none, which provides for a recovery from one collector of internal revenue, in an action in *assumpsit* brought against him, of taxes not paid to, nor received by, him, at least where an action has not been first properly brought against the collector receiving the taxes and thereafter duly revived against his successor in office. The absence of any such statute is, of course, fatal to recovery upon the theory thus advanced.

It results that a judgment must be entered against the plaintiff and in favor of the defendant of no cause of action.

VACUUM OIL CO. v. LUCKENBACH S. S. CO., Inc., et al.

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

Shipping ⇨141 (1)—Commandeered ship relieved from carrying out contract.

Owner of ships were relieved of their obligations under contracts of affreightment, providing that carrier should not be liable for loss occasioned by restraint of princes, etc., where they were commandeered by the government in time of war.

In Admiralty. Libel in personam by the Vacuum Oil Company against the Luckenbach Steam Ship Company, Incorporated, and another. Decree for respondents.

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

Barry, Wainwright, Thacher & Symmers, of New York City, and Baird, White & Lanning, of Norfolk, Va., for libelant.

Carter & Carter, of New York City, and Harry E. McCoy, of Norfolk, Va., for respondents.

WADDILL, Circuit Judge. This is a libel in personam to recover for loss arising from the breach of three certain contracts of affreightment, entered into between the libelant and the respondent, on the 24th of September, 1916, the contracts briefly being that respondent would furnish freight room and transport for the libelant 300,000 cases of refined petroleum, naphthas, and/or turpentine, from New York to certain named ports in Australia and New Zealand, at the price of \$1 per case, with the right of the shipowner to call for 10 per cent. additional. These contracts contemplated the loading of the 300,000 cases as follows: 100,000 during the month of January, 1917; 100,000 during February; and 100,000 during March. The libelant claims that the respondent failed to transport 140,162 cases, which necessitated its paying an advanced freight rate of 46 cents per case, to wit, \$64,474.52, for the recovery of which amount this libel was filed.

During the running of the contracts, as shown by libelant's letter of January 16, 1917, and respondent's reply of the 24th, an agreement for certain extensions of the time limits of the contracts was made, naming the vessels to carry the oil, and the approximate date of shipment; that is to say, on February 25th the steamship Julia Luckenbach was to take on board 150,000 cases; early in May, the steamship Edward Luckenbach was to take 86,137 cases; and in June the steamship Florence Luckenbach was to take 86,138 cases. Pursuant to such extension, the Julia Luckenbach sailed for Australia about the 25th of February, 1917, carrying 127,117 cases, and subsequently the steamship Edgar F. Luckenbach carried 44,635 cases, and the steamship Austral Plane carried 3,565 cases, making a total of 177,117 for the three vessels. The cargo to be transported early in May, of 86,137 cases, was not carried, nor was that of the like shipment in June; the respondent's claim being that both the steamships Edward and Florence Luckenbach were commandeered by the United States government, as contemplated by the excepting clauses of the contracts of affreightment entered into between the parties, and that the Julia Luckenbach, while on her February voyage to Australia, was also commandeered and taken possession of by the government on her return to this country.

The libelant, on the other hand, insists that under the terms of the contract entered into by the libelant, as well as the modification or extension thereof by the letters of the 16th and 24th of January, above referred to, the defense of "restraint of princes" cannot and should not avail the respondent as to any of the vessels, and in any event that respondent is liable for the failure of the Julia Luckenbach to carry in the month of February only 127,117 cases, a shortage of 22,883 cases, on the 150,000 case shipment. These defenses will be considered in the order named:

First. Can the defense of restraint of princes be interposed? The original contract of the 24th of September, 1916, contains these clauses:

"This contract shall be subject to the maritime rules of the New York Produce Exchange. * * *"

Subdivision 2 of rule 8 of said rules reads:

"It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control * * * wheresoever occurring * * * by arrest and restraint of princes, rulers or people."

The original contract also contained this limitation:

"This contract is subject to all the terms and conditions of the line bill of lading"

—referring to the bill of lading of the Luckenbach Steamship Company.

The bill of lading issued by the company, under the head of "Causes for Which Carrier should Not be Liable," in section 20, reads:

"* * * Any loss or damage arising from any of the foregoing causes, namely, * * * restraints of government."

Section 36:

"When loading transport * * * or delivery is prevented in consequence of * * * war."

The conclusion of the court is that the clauses above quoted, embodied in and made part of the agreement between the parties, can have but one meaning, viz. that where the carrying out of the contract was frustrated and prevented by causes beyond the control of the shipowner, or by war, or by restraint of the government in its governmental authority in connection with war, such shipowner was excused from carrying out the contract, and exempted from liability arising as a consequence thereof. These provisions were in general use and acceptance in contracts of affreightment, and during the life of this contract were of vital importance to the shipping world, as all maritime undertakings necessarily had to be subordinated to the demands of the country in which such contracts were made.

Secondly. Considering the three ships and their cargoes in the order named; that is, the Florence Luckenbach for June, the Edward Luckenbach for May, and the Julia Luckenbach for February: The Florence Luckenbach was to have taken 86,138 cases in June. She was commandeered on the 21st of that month, and required to be delivered to the government on the 22d of the same month in the port of New York. This prevented her from carrying her allotment of cargo within the time she was required to take the same, in the month of June.

The Edward Luckenbach was to have taken 86,137 cases early in May. These are the circumstances in which this ship was placed: At the time of the extension agreement of the 16th and 24th of January, 1917, she was in Australian waters, having left this country on December 24, 1916, and in due course was en route to this country, calling at the ports named in the contract for freight, to take this

cargo, of which return the libelant had notice. She did not reach Philadelphia until the 25th of May, 1917, and her final port of destination, New York, until June 1, 1917, where, on the 4th of June, she was commandeered by the government. This action of the government, in seizing the vessel as stated, in the court's view relieved her owner from liability for her failure to carry the cargo.

The last case is that of the *Julia Luckenbach*, which sailed under the extension contract on the 25th of February, 1917, carrying 127,117 cases. While she was abroad on the voyage, notice of her commandeering by the government was given, and immediately upon her return to this country she was taken by the government, as, indeed, was all of the floating property of the respondent company. This action relieved the *Julia Luckenbach* from liability, upon her return to this country, for the balance of the 150,000 cases she was to have carried.

The libelant insists, however, that respondents are liable for their original failure to take the entire shipment of 150,000 cases, and instead carried 127,117, and that her commandeering should not serve to release her from her breach of contract at that time. There is force in this contention. The same depends, however, not upon the right to claim exemption as a result of the taking of the vessel by the government, but upon the facts as to why she failed to carry the cargo at the time. This question of fact is not entirely clear from the record; still the court is convinced, from a careful examination of the letter of the 19th of January from the respondent to the libelant, and the reply of the latter to the former on the 21st, that what was done in connection with carrying the reduced quantity was for the accommodation of the libelant, and because of its failure and inability then to furnish the full cargo.

It follows from what has been said that the libelant is not entitled to recover, and a decree may be accordingly entered, dismissing the libel.

In re GANNON.

(District Court, D. Maine. October 24, 1921.)

No. 13665.

Bankruptcy ⇨318(2)—To recover for bankrupt's refusal to receive goods purchased, goods must have been tendered and resold on rejection.

On bankruptcy of grain trader, those who had sold him grain could not establish a claim for damages for his refusal to accept the grain, without showing both an actual tender to him, and, on his refusal to accept, a resale to fix the market price, as bearing on damages; a mere bookkeeping entry, by the sellers, of the difference between the market and contract price, not being sufficient to show damages actually sustained.

In Bankruptcy. In the matter of the bankruptcy of Lewis F. Gannon. Proofs of claim of the Maine Grain Company and others were disallowed by the referee, and they petition for review of the orders of disallowance. Orders affirmed.

Andrews & Nelson, of Augusta, Me., for bankrupt.
Stephen S. Lancaster, of Augusta, Me., for trustees.
Clement F. Robinson, Carroll S. Chaplin, and W. B. Drummond,
all of Portland, Me., for creditors.
Arthur Ritchie, of Belfast, Me., for Waldo Trust Co. and City National Bank.

HALE, District Judge. This case comes before the court upon the petition of the Maine Grain Company, the Portland Grain Company, and the Paris Flouring Company, creditors of the bankrupt, for review of orders of the referee in bankruptcy, disallowing parts of their proofs of claim against the bankrupt's estate.

The proof of debt, in each of the first two cases named, alleges that the consideration of the debt was goods sold to the bankrupt at his request, according to the statement attached, acceptance of which was refused, whereupon the creditor was obliged to dispose of the goods in the open market at the prices set forth in the statement, to its damage as set forth.

In the case of the Paris Flouring Company, the allegation is that the consideration was for goods sold and delivered. In other respects, the proof is substantially like the proof in the other cases.

These petitioners had grain contracts with Gannon in the summer of 1920, for the delivery of grain at his place of business at Albion, Me., in carload lots. Under these contracts the seller, in each case, was bound to sell and deliver grain at certain times, for prices specified, and the bankrupt was bound to accept delivery thereof at the time, and pay the price. When the time of shipment, as provided in certain contracts, arrived, it became the duty of the seller to tender delivery and the duty of the buyer to accept delivery.

The testimony shows that, prior to the time the respective deliveries were to be made under the contracts, each creditor took up with the bankrupt the matter of delivery and was requested by the bankrupt to postpone delivery, which request was acquiesced in by the creditors. The market kept falling. The financial condition of the defendant grew worse, up to early February, 1921, when Mr. Nelson, attorney for the bankrupt, came to Portland and notified the creditors that the bankrupt was not in a position to accept any more deliveries, and that bankruptcy was imminent. Thereupon the Portland Grain Company and the Maine Grain Company canceled their contracts on their books, and so notified the bankrupt. No objection was made by Gannon. The petitioners insist that there was never any actual cancellation of the contract, that it was not the intention of the parties that the contract was to be canceled; and that it makes no difference what the transaction was called; that, at the time of the alleged cancellation, the petitioners charged the bankrupt on their books with the loss occasioned by his refusal to take the grain, and so did not treat the contracts as having been made void.

I cannot sustain this contention. The testimony induces the belief in my mind that there was a valid cancellation of these contracts early in February; and that the petitioners had no further right to charge

to the bankrupt the losses occasioned by the breach of the contract. And I so find. But, whether they had such right or not, they did not proceed to make any actual tender of the goods to the bankrupt. They found that, if they insisted upon their contracts, they would probably be dealing with a bankrupt, and get only a small percentage of their claims. The petitioners in their proofs allege that, upon the bankrupt's refusal to accept the goods, it was their duty to dispose of the goods in open market, and to look to the bankrupt for the balance due on the contract, after deducting what they actually obtained for the goods in open market. Instead of doing this, they rely upon showing what they think they could have got for the goods in open market, and then entering upon their books the difference between the contract price and the market price, as the damages caused by the breach of contract. In case of a carload actually shipped to Wiscasset, upon refusal of the bankrupt to accept the grain, the goods were actually sold; and the difference between the contract price and the market price, as obtained by the sale, was properly charged; and this part of the claim of one of these creditors has been allowed by the referee.

The proofs of debt properly assume that, upon the bankrupt's refusal to accept the goods, it was the duty of the creditors to dispose of the goods in open market, and to sue for the difference between the contract price and the market price at the time of sale. This rule is followed in a leading case in Maine, *Tufts v. Grever*, 83 Me. 407-411, 22 Atl. 382, 383, where, in speaking for the court, Chief Justice Peters says:

"The general rule is familiar, that for the vendee's failure to receive and pay for the goods he has contracted for, the vendor may recover the difference between the market value at the time and place stipulated for delivery and the contract price, together with the expenses of reselling the property."

The court thus assumes, in that case, that the difference between the contract price and the market price is to be obtained by an actual sale. I cannot sustain the petitioner's contention, in the case before me, that they have a right to merely enter upon the books the difference between the contract price and the market price at that date. Even though they had contracted for grain in the West, which they were prevented from selling to the bankrupt under the contract, they have not parted with any goods; and I cannot think that the court should sustain a claim which is based upon a merely putative or bookkeeping loss. In the case of the Paris Flouring Company, it is urged that there was no cancellation of the contract in February. There is testimony tending to show that there was such cancellation. But, whether the contract was canceled or not, the creditor did not actually offer its goods for delivery, and then sell the goods at the market value. But, as in the case of the other creditors, the Paris Flouring Company entered in its books the difference between the contract price and the market price at that date, without actually tendering delivery and afterwards selling the goods. Whether there was cancellation of this contract or not, what I have already said with reference to the effect of failing to tender delivery applies as well to the Paris Flouring Company as to the other creditors.

The learned counsel for petitioners have cited *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. In this case the Supreme Court enforces the rule of the English Court that, after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it. In the case before me, I cannot hold that the petitioners have actually suffered. They have not parted with their goods. Their losses are book account losses. They have not brought their action—or, what is the same thing, made their proofs of debt—for a square breach of the contract, but practically upon the account annexed, alleging their consideration to be for goods sold, or goods sold and delivered. This is not precisely the way the case arose in *Roehm v. Horst*.

With respect to all the petitioners, my conclusion is that the order of the referee, disallowing the claim in each case, is affirmed.

UNITED STATES v. RAY & SCHULTZ.

(District Court, E. D. Michigan, S. D. October 31, 1921.)

No. 7448.

1. Intoxicating liquors ⇨248—Affidavit held insufficient to warrant search warrant, as based on belief, and not facts.

An affidavit that affiant had good reason to and does believe that named persons on certain premises were engaged in unlawful sale and in possession of intoxicating liquors, and that on said premises in the possession of said persons was a certain large quantity of intoxicating liquors used in connection with the sale thereof, was insufficient to warrant a search warrant, under the Fourth Amendment of the Constitution and National Prohibition Act, tit. 2, § 25, as not being based on a sworn statement of facts tending to show a probable cause that proper ground for such warrant existed.

2. Intoxicating liquors ⇨255—Liquors unlawfully seized returned, on showing improper issuance of seizure warrant.

Intoxicating liquors, seized on unlawful search under an improperly issued search warrant, not supported by proper affidavit, will be returned on petitioner showing the facts.

Proceeding by the United States, in the matter of seizure of certain liquor, against Ray & Schultz and others. On petition by the named defendants for an order for the return of liquors. Petition granted.

Stein, McClear & Sarbaugh, of Detroit, Mich., for petitioner.
John E. Kinnane, of Bay City, Mich., U. S. Dist. Atty.

TUTTLE, District Judge. This is a petition by the above-named defendant, praying for an order for the return of certain liquor alleged to have been seized upon a search warrant improperly and unlawfully issued, in violation of the rights of petitioner under the federal Constitution. It is charged that the District Attorney for this district proposes to use said liquor at the trial of the petitioner in this cause in vio-

lation of said constitutional rights. It is alleged that the search warrant in question was insufficient and void for various reasons mentioned in the petition and discussed in the brief filed on behalf of petitioner.

[1, 2] The principal ground upon which the validity of such search warrant is challenged is that it was not issued upon probable cause, in that the affidavit in support thereof did not allege the necessary jurisdictional facts. The question presented is whether such affidavit was sufficient in law to justify the issuance of said search warrant. The affidavit referred to was in the following language:

"Before the subscriber, a United States commissioner in and for the Eastern district of Michigan, at the city of Detroit, in said district, personally appeared J. W. Jordan, chief federal prohibition agent, Detroit, Michigan, who, being duly sworn, deposes and says:

"1. That he has good reasons to believe and does believe that in and upon and by the use of certain premises and within said premises, to wit, at the premises located on West Jefferson avenue, being the Riverview Hotel building, occupied by one J. W. Beaton and John Doe, a fraud upon the government of the United States has been and is being committed; that is to say, that the said J. W. Beaton and John Doe and other persons connected with and assisting in the conduct and management of said place and resorting therein, whose names are to this affiant unknown, upon and by the use of the premises aforesaid, are engaged in the unlawful sale and possession of intoxicating liquors, in violation of the National Prohibition Act.

"2. That in and upon the premises aforesaid, and particularly in the Riverview Hotel building aforesaid, and in the possession of the said J. W. Beaton and John Doe and other persons unknown, is a certain large quantity of intoxicating liquors used in connection with the sale thereof, the exact kind and quantity of same being to this deponent at this time unknown.

"Wherefore this affiant prays that a search warrant may issue, authorizing him to search the said premises pursuant to the statute in such case made and provided."

The Fourth Amendment to the federal 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."

Section 25 of title 2 of the National Prohibition Act (41 Stat. 315) contains the following provision:

"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 no property rights shall exist in any such liquor or property. 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."

Section 2 of the same title provides that officers authorized to issue warrants of arrest "are authorized to issue search warrants under the limitations provided in title XI of the act approved June 15, 1917." The title of the act of June 15, 1917, just referred to, provides, in section 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496 $\frac{1}{4}$ b), that "a search warrant may be issued * * * when the property was used as the means of committing a felony." Section 3 of said act (section 10496 $\frac{1}{4}$ c) is as follows:

"A search warrant can not 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 4 (section 10496 $\frac{1}{4}$ d) provides that:

"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 5 (section 10496 $\frac{1}{4}$ e) reads thus:

"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."

It is, of course, entirely clear that under the constitutional, as well as the statutory, provisions thus applicable the sufficiency and validity of the search warrant under consideration must be tested and determined by the result of the inquiry whether it was based upon a sworn statement of *facts* tending to show probable cause for the belief that proper ground for the issuance of such search warrant existed, or whether, on the other hand, the latter was based merely upon statements, although sworn to, of *belief*.

Turning to the language of the affidavit in question, it is plain that the first paragraph thereof states merely the belief of the affiant and is wholly insufficient as a basis for the issuance of the search warrant sought, or, in fact, of any search warrant. Ripper v. United States, 178 Fed. 24, 101 C. C. A. 152 (C. C. A. 8); Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338 (C. C. A. 7).

Coming to a consideration of the second paragraph of the affidavit, it is, of course, obvious that, in so far as it is dependent upon or connected with the language of the first paragraph, it is subject to the objection applicable to the latter, as just stated, and is equally void as the basis of a search warrant. It is also apparent that, standing alone and unaided by the context, the words comprising this second paragraph are too indefinite and uncertain to satisfy the legal requirement of a statement of facts tending to show probable cause for believing that the ground for the issuance of a search warrant existed. It does not contain any allegation that the liquor referred to was intended for use in violating the National Prohibition Act, or that it had been or was being used for that purpose, or as the means of committing a felony, nor are any facts stated charging or describing any element of any known crime. An examination of the entire affidavit is convincing that all of it was based upon mere belief. It necessarily follows that the search warrant issued thereon was fatally defective and void.

It therefore becomes unnecessary to consider the other grounds upon which the sufficiency of the search warrant is attacked, as, for the reason pointed out, the prayer of the petition must be granted.

PARHAM v. STANDARD OIL CO. OF LOUISIANA.

(District Court, N. D. Mississippi, E. D. September 17, 1921.)

1. Master and servant ⇨347—Louisiana Compensation Act constitutional. The Workmen's Compensation Law of Louisiana is constitutional.
2. Master and servant ⇨358—Louisiana Compensation Act effective against employé, in absence of express stipulation.

The Workmen's Compensation Act of Louisiana becomes effective by operation of a legal presumption under section 3 as against an employé who begins work without expressly stipulating against the provisions of the act, and can thereafter be terminated only by written notice given not less than 30 days prior to the accident to either party, under paragraph 4.

3. Master and servant ⇨359—Election by minor's father after accident held in time, under Louisiana Compensation Act.

Where employé was under the age of 18 years and was without a curator or tutor, and where neither the father, mother, nor the court terminated the operation of the Workmen's Compensation Act of Louisiana as to the employé, on the employé's behalf, prior to the accident, under section 3, par. 6, the father may, even after the injury, elect, on the employé's behalf, to make the act inoperative as to such employé, under section 16, providing that, in case injured employé is a minor at the time when the right to terminate the operation of the act accrues to him, no limitation of time shall run so long as he has no curator or tutor; section 3, par. 4, requiring written notice to terminate operation of the act not less than 30 days prior to accident, being inapplicable in such case.

4. Master and servant ⇨358—Suit by minor's father held an election under Louisiana Compensation Act.

Father of injured employé under 18 years of age, who was without tutor or curator, by filing suit against employer, exercised the right on behalf of the employé to terminate the operation of the Workmen's Compensation Act of Louisiana, written notice provided for in section 3 being unnecessary, since the law does not require the doing of an idle or useless thing.

At Law. Action by Roy P. Parham against the Standard Oil Company of Louisiana. On demurrer to complaint. Demurrer overruled.

W. D. & J. R. Anderson, of Tupelo, Miss., for plaintiff.

Green & Green, of Jackson, Miss., and Leftwich & Tubb, of Aberdeen, Miss., for defendant.

HOLMES, District Judge. [1] The Workmen's Compensation Law of the state of Louisiana (Act No. 20 of 1914, as amended by Act No. 243 of 1916 and Act No. 38 of 1918) is constitutional. Paragraph 3 of section 3 of this law is broad and sweeping enough in its terms to embrace a minor under the age of 18 years, and consequently the plaintiff in this case, who entered the employment of the defendant without expressly stipulating against the application of said section 3, is bound by its provisions unless he relieves himself from the presumption of section 3 as provided by paragraphs 4 and 6. Admittedly no such election to terminate the provisions of paragraph 3 was exercised by the plaintiff in the manner provided by paragraph 6 prior to the injury. Paragraph 4 of section 3 provides that any agreement or election for the operation of the provisions of the act may be terminated by either party to the contract of hiring giving written notice to the other party

not less than 30 days prior to the accident that the provisions of the act shall not apply.

[2] It seems very clear, under said paragraph 3, that when an employé begins work without expressly stipulating against the provisions of the act, it becomes effective by operation of a legal presumption. After the act takes effect as to any employment, it can only be terminated by "written notice given not less than 30 days prior to the accident to the other party." Of course the act cannot be "terminated" unless its operation has previously begun. The right to terminate the operation of the act is "a right, privilege or election" which accrues to the employé under the act, but by paragraph 4 of section 3 this termination must take place by written notice not less than 30 days prior to the accident. This is a limitation of time provided in the act within which the right to terminate the operation of the act shall expire. It applies to all persons over the age of 18 years mentally competent to act for themselves and to all minors and persons non compos mentis who have a curator or tutor, but, under section 16, "in case an injured employé is mentally incompetent or a minor" at the time when the right to terminate the operation of the act accrues to him, "no limitation of time" shall run so long as such incompetent has no curator or tutor.

The plaintiff in this case is an injured employé and a minor under the age of 18 years without a curator or tutor. It is, therefore, difficult to see why, under said paragraph 6, his father cannot elect, even after the injury, to terminate the provisions of the act with reference to his injury when section 16 provides that in case an injured employé is a minor at the time when any right, privilege, or election accrues to him under the act, his duly qualified curator or tutor may, in his behalf, claim and exercise such right, privilege, or election, and that "no limitation of time" shall run so long as such minor has no curator or tutor. The only limitation of time on the right to terminate is that provided in said paragraph 4. It is worthy of comment that notice to terminate an agreement to work under the act requires 30 days' time prior to the accident under paragraph 4, but an employé who has given notice to his employer, or an employer who has given notice to his employé, that he elects not to be subject to the provisions of the act, may waive such election, under paragraph 5, "by a notice in writing *which shall take effect immediately.*"

This shows an intention on the part of the lawmakers to facilitate the operation of the act. In the first place, under said paragraph 3, in the incipency of the employment, the burden of preventing the act from operating is placed upon the party objecting to its provisions, and inaction on the part of both gives effect to the act. In the second place, when the act has once taken effect by any agreement or election, express or implied, it requires written notice not less than 30 days prior to the accident to the other party that the provisions of the act shall no longer apply. But, on the other hand, under said paragraph 5, when one of the parties has elected not to be under the act, he may waive such election by a notice in writing which shall take effect immediately. In other words, under paragraph 5, such waiver of an elec-

tion not to come under the act might take place even after the injury and would take effect immediately. Thus the operation of the act is favored by making its provisions optional at all times, unless some of the parties to the employment give written notice either at the time of the contract of hiring or not less than 30 days prior to the accident that the act shall not apply, but the right to terminate the operation of the act after the accident has occurred is saved only in favor of injured employes who are mentally incompetent or minors without curators or tutors.

The language of section 16, standing alone, might include a minor over the age of 18 years, but paragraph 6 of section 3 clearly shows an intention to emancipate such a minor in so far as his right of election or termination or waiver is authorized by the act.

[3, 4] I conclude, therefore, that as neither the father, mother, nor the court had exercised on behalf of the plaintiff the right of termination under paragraph 6 prior to the accident, and as the plaintiff neither has nor had any tutor, that the father may exercise this right after the accident, and that by filing suit he has exercised it and rendered unnecessary giving written notice, as the law never requires the doing of an idle or useless thing.

The demurrer will be overruled.

REBMANN v. DELAWARE, L. & W. R. CO.

(District Court, W. D. New York. September 30, 1921.)

No. 1987.

1. Railroads ⇨350 (22)—Contributory negligence of automobile occupant with view obstructed held for jury.

In action for death of occupant of automobile, struck by train at crossing, where jury could reasonably infer, from the evidence, that ordinary care in approaching the track had been exercised by the deceased, or that his vision was obscured by the railroad station, that he was not warned of the approach of the train and was free to proceed and cross track, the question of whether deceased, while approaching track, could have seen the approaching train if he had looked in the direction from which it came and had a view of the tracks, *held* a question for the jury, in view of Code Civ. Proc. N. Y. § 841-b.

2. Railroads ⇨350 (9)—Negligence in not warning traveler with obstructed view held for jury.

In action for death of occupant of automobile, struck by train at crossing, where jury could reasonably infer from the evidence that ordinary care in approaching the track had been exercised by the deceased, or that his vision was obscured by the railroad station, that he was not warned of the approach of the train, and was free to proceed and cross track, the question of whether a reasonable warning was given by the railroad of the approach of the train was a question for the jury.

3. Death ⇨99 (4)—\$30,000 damages to wife and children held excessive.

\$30,000 damages to 34 year old wife and 14 and 10 year old children, for death of 37 year old husband and father, with life expectancy of 29.64 years, whose annual earning capacity did not exceed \$1,800, with nothing to indicate increase in earnings, *held* excessive, and reduced to \$20,000.

At Law. Action by May Rebmann, as executrix of Philip Rebmann, deceased, against the Delaware, Lackawanna & Western Railroad Company. Verdict for plaintiff, and defendant moves for a new trial. Motion granted, unless plaintiff files stipulation consenting to reduction of amount of verdict.

Hamilton Ward, of Buffalo, N. Y., for plaintiff.

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y. (Evan Hollister, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. This is a motion for a new trial by the defendant, on the ground that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law, and also that the verdict was grossly excessive and should be set aside.

[1, 2] The evidence in my judgment required submitting the case to the jury as to whether the plaintiff's intestate was guilty of contributory negligence, and though at the trial I expressed some doubt on this point, and as to the sufficiency of the evidence and circumstances surrounding the accident, I am nevertheless of the present opinion that the question of freedom from contributory negligence of the required less evidence because of the change in the New York statute (section 841-b, Code Civ. Proc.), which puts the burden of proof as to contributory negligence of the person killed on the defendant. The weight of authority is that; in the absence of evidence, the presumption is that one approaching a railroad crossing carefully looked and listened, since his safety is involved. *Director General v. Ganzinger* (C. C. A.) 269 Fed. 552. It was for the jury to determine, in view of the evidence in the case, whether the deceased, while approaching the railroad track in an automobile, could have seen the approaching train, if he had looked in the direction from whence it came and had a view of the tracks, and also whether seasonable warning was given by defendant of the approach of the train. *Hines v. Hoover* (C. C. A.) 271 Fed. 645. And see opinion by Judge Ray in *Quereau v. Lehigh Valley R. Co.* (D. C.) 270 Fed. 826.

There are many New York state adjudications to a similar effect. In *Mullen v. Schenectady R. Co.*, 214 N. Y. 300, 108 N. E. 412, for example, the Court of Appeals of this state, in discussing the facts and law, said:

"The question of the intestate's freedom from contributory negligence is one of greater difficulty, though less evidence is required than would be if he were alive and able to testify. * * * The rule so long relaxed by the courts in death cases has, since the accident and since the trial of this action, been changed by statute, and the burden imposed on the defendant in such cases. * * * There is, of course, no evidence that he looked; but the evidence tends to indicate that he did not look in the direction of the car after he started to cross the tracks. Was he bound as matter of law to do so?"

The learned court proceeded to say that that question depended upon the information and circumstances, and that it was not one for decision as a question of law. So, in the present case, the situation was one where the jury could reasonably infer that ordinary care in approaching the track had been exercised by the deceased and his companion,

or that their vision was obscured by the railroad station, and, not being warned of the approach of a train, that they were free to proceed ahead and cross the track. See, also, *Sackheim v. Pigueron*, 215 N. Y. 62, 109 N. E. 109, and *Carr v. Pennsylvania R. Co.*, 225 N. Y. 44, 121 N. E. 473.

The motion for new trial on the first ground stated is denied.

[3] The verdict, however, was so large that it may fairly be presumed that the jury entertained a prejudicial feeling in the matter, due not improbably to sympathy for the wife and children of the deceased. It appeared from the evidence that the annual earning capacity of the deceased did not at any time exceed \$1,800, and it is somewhat doubtful whether he received over \$1,500, a sum used for the support and maintenance of himself and his family. He was 37 years of age, with a life expectancy of 29.64 years, and there was no disclosure to indicate any probability of an increase in his annual earnings at any future time. His wife was 34 years old, and his two children 14 and 10. In fixing the award the jury was required to take into account, not only the earning power of the amount awarded as damages, but the life expectancy of the deceased, together with the pecuniary benefits to the children until they reached a self-supporting age. The amount of the verdict, viz. \$30,000, if properly invested, say at 6 per cent. per annum, would net \$1,800; but in my opinion the jury did not make any reduction for the personal expenses of the deceased, or have in mind that the children as they advanced in years would earn something, or that his responsibility for their education and maintenance would later terminate. The verdict demonstrated, I think, not only a failure to make these proper deductions, but the amount of interest on the recovery, if the principal were judiciously invested, would be larger than the income he would have earned, had he lived, and at the end of the life expectancy plaintiff would still have the principal intact. Such outcome requires a diminution of the recovery to conform to the facts.

There must be a new trial, unless the plaintiff shall, within 20 days, stipulate to reduce the verdict to sum of \$20,000 as of the date of the rendition thereof, and \$475 additional for funeral expenses. If the stipulation is not filed as required, then my determination is that the verdict is against the weight of evidence upon the question of damages, and is excessive, and in that event there must be a new trial.

UNITED STATES v. SMOLLER et al.

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

No. 2-A, June Term, 1921.

Bail ⇨79 (1)—Partial remission of penalty where no "willful default."

Rev. St. § 1020 (Comp. St. § 1684), allowing remission in whole or in part of penalty on forfeiture of recognizance, where there has been no "willful default," is remedial, and should be liberally construed, and the words "willful default" mean more than a default arising from ignorance, inexperience, inattention, thoughtlessness, or even carelessness and neg-

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

ligence, and indicate a default knowingly, intentionally, and deliberately made; hence, where accused's default was attributable to ignorance or inattention, or at most to negligence, and he later appeared and was sentenced, but the government was put to some expense and inconvenience by the default, that portion of the penalty exceeding \$100 would be remitted.

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

Scire facias on recognizance by the United States against Isadore Smoller and Anthony Corleto. Application by Anthony Corleto for remission of whole or part of the penalty of the recognizance. Application granted in part.

John F. Lynn, of Wilmington, Del., for applicant.
James H. Hughes, Jr., U. S. Atty., of Wilmington, Del.

MORRIS, District Judge. Isadore Smoller, as principal, and Anthony Corleto, as surety, entered into a recognizance conditioned for the appearance of Smoller at the September term, 1920, of this court to answer a criminal charge made against him. Smoller did not appear at that term and the recognizance was forfeited. He appeared, however, at the last term, pleaded guilty, and was sentenced. The surety thereupon made this application under section 1020, U. S. R. S. (Comp. St. § 1684), for the remission of the whole or a part of the penalty of the recognizance. That section provides:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

Sentence having been imposed, and it being conceded "that public justice does not otherwise require the same penalty to be enforced," the basic question involved is whether the default of Smoller was "willful," within the contemplation of the statute, for, if willful, the application must be denied. *U. S. v. Robinson*, 158 Fed. 410, 85 C. C. A. 520. No case defining the meaning of the word "willful" as used in the statute in question has been called to my attention; but, as the statute is remedial in character (*U. S. v. Jenkins*, 176 Fed. 672, 100 C. C. A. 224, 20 Ann. Cas. 1255), it should receive a construction that will freely give, and not thwart, the relief intended by Congress to be afforded thereby. Viewed from that aspect, I am of the opinion that the words "willful default" mean more than a default arising from ignorance, inexperience, inattention, thoughtlessness, or even carelessness and negligence, and that they indicate a default knowingly, intentionally, and deliberately made.

As appears from the evidence adduced in support of the present application, Smoller's default was not knowingly and intentionally made, but was attributable to ignorance and inattention, or at most to negligence. Hence I am convinced that it is within the power and discretion of the court to remit the whole or a part of the penalty. The ob-

ject of the recognizance being, "not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused * * * and not proved to be guilty" (U. S. v. Feely, 25 Fed. Cas. 1055, No. 15,082), by securing the appearance of the accused for trial otherwise than by imprisonment, the default in this case not having been willful, and the defendant having later appeared and been sentenced, it is manifest that public justice does not require the full penalty of the recognizance to be enforced, and that a remission should be made; but, as the government was put to some expense and inconvenience by reason of the default, I am of the opinion that only that portion of the penalty in excess of \$100 should be remitted.

UNITED STATES v. FREDERICK E. ATTEAUX CO., Inc.
SAME v. ATTEAUX.

(District Court, D. Massachusetts. September 26, 1921.)

No. 1708.

Process ⇨131—Court without power to permit entry of writ after close of term at which returnable.

A federal court held without power to permit entry of the writ in an action at law, which was returnable to a term four years past, but which was not entered on return day because of a stipulation of counsel that it might be entered late.

At Law. Actions by the United States against the Frederick E. Atteaux Company, Inc., and against Frederick E. Atteaux. On motions by the United States for leave to enter writs late. Denied.

The United States Attorney.

Francis M. Carroll, of Boston, Mass., for defendants.

MORTON, District Judge. This is a motion for leave to enter at the next term of this court two writs, each dated November 7, 1917, served personally on November 19, 1917 (the defendants' real estate being also attached), and returnable to this court at the December term, 1917. In both writs the United States of America is plaintiff; in one of them F. E. Atteaux Company, Inc., a corporation, is defendant; in the other, Frederick E. Atteaux personally. Both defendants object to the allowance of the motion. The facts are not in dispute and are as follows:

At the time when the writs were brought the defendant Atteaux was under indictment in this court in respect of the same transactions which, in part at least, form the basis of these actions. In this situation it was agreed between the defendants' counsel and the United States attorney that the writs should not be entered on the return day. Beyond this the terms of the agreement are not in evidence. The following indorsement appears on each writ:

"November 30, 1917. It is hereby agreed on behalf of the defendant that the within writ may be entered late."

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

These agreements were signed, "Francis M. Carroll, Attorney for Frederick E. Atteaux," and "Francis M. Carroll, Attorney for F. E. Atteaux & Co., Inc." What further negotiations, if any, took place between the parties is not in evidence. On February 28, 1921, the indictment against Atteaux was disposed of by the entry of *nolle prosequi*; and on September 16, 1921, this motion was filed. There is no evidence that the defendants have changed their positions or are worse off in defending the cases by reason of the delay, beyond such difficulties as would presumably arise from the lapse of four years in defending a claim of which reasonable notice had been given. The claim which the government desires to present is, if well founded, a meritorious one. If the court has power to permit the writs to be entered at this time, the motion ought in my opinion to be granted.

In *Dudley v. Keith*, 153 Mass. 104, 26 N. E. 442, the question was whether the court had power to permit the entry in January of a writ which was returnable on the first Monday of November preceding. It was held that the court had not such power. While the opinion rests to a considerable extent upon ancient Massachusetts statutes running back to 1665, which, of course, are not binding on this court, nevertheless I think that the same conclusion would probably follow as to any court having fixed terms. The closing of a term operates to put certain matters beyond the jurisdiction of the court; for instance, judgments entered during the term cannot be reopened, except to a very limited extent, after the term has adjourned. It is, to say the least, doubtful whether, at common law, a writ returnable at a certain term could be entered, even with the assent of the court, at a later term.

It is not a question of limitation, as counsel for the government contend, but rather that the writ becomes void, because not returned into court at the term to which it belongs, and cannot thereafter be revived. The attachments of real estate made on these writs certainly ought not to become effective against purchasers for value who have relied on the nonentry of the writs as discontinuances of the actions and abandonment of the attachments.

The question whether the writs can be entered lies at the very threshold of the cases, and it ought to be finally settled before the parties are put to the burden and expense of a trial on the merits. I therefore rule upon the facts hereinbefore stated that the court had no power to grant this motion, and for this reason only it is denied.

SYMONS v. SYMONS et al.

(Court of Appeals of District of Columbia. Submitted January 5, 1921. Decided June 6, 1921. Rehearing Denied October 3, 1921.)

No. 3413.

1. Divorce ⇐129(1)—Proof of adultery must be clear and convincing.
In an action for absolute divorce on the ground of adultery, proof of adultery must be clear and convincing.
2. Divorce ⇐129(16)—Evidence held to establish adultery.
In an action for absolute divorce on the ground of adultery, evidence held to establish adultery.
Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.
Action by William L. Symons against Helen Dent Symons and another. Decree for defendants, and plaintiff appeals. Reversed.

Andrew Wilson, of Washington, D. C., for appellant.
J. Lewis Smith, Louis A. Dent, and Wharton E. Lester, all of Washington, D. C., for appellees.

HITZ, Acting Associate Justice. This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill for absolute divorce, and naming a corespondent. There are 18 assignments of error, all but the first, which covers the denial of the relief prayed for, relating to the exclusion of evidence offered by appellant or the admission of testimony over his objection.

[1] The statement of evidence presents a question of fact as to whether the cause of action is established. The principles governing the determination of a case like this are well established by the decisions of this court, and require the proof to be clear and convincing.

[2] With these principles in mind, we have carefully examined the testimony, and are constrained to hold that a case entitling the appellant to the decree prayed for has been established, and no good purpose would be accomplished by a review of the evidence. It follows that the decree appealed from must be reversed, at the cost of the appellee Frederick Eichelberger, and the cause remanded to the court below, with instructions to enter a decree granting the appellant a divorce a vin. mat. from the appellee Helen Dent Symons, the costs to be paid by said Eichelberger.

It appears that the husband and wife have two female children, aged respectively 15 and 13 years. The record indicates that they are in a school at the expense of the appellant. In the decree to be entered by the court below as above directed provision should be made for the maintenance of these children by the appellant in such custody as the court may determine that their welfare requires, regard being had to the rights of the mother with respect to visitation.

SMYTH, Chief Justice (dissenting). The court, without any review of the evidence, sets aside the decree of the trial court, which heard the plaintiff, defendant, and many other witnesses, testify, and had, therefore, an opportunity, which we have not, to study them as they gave their testimony, and brands the appellee Symons, the mother of two female children, aged respectively 15 and 13, as an adulteress. Regard for the feelings of the woman will not support this course, for the finding of the court that she is an adulteress must be more mortifying than anything that could be properly said in such a review. Both the defendant and corespondent emphatically deny any improper relations. Not a particle of evidence appears in the record which justifies anything more than a strong suspicion.

Consider, for instance, the Virginia Beach trip, upon which so much stress is laid. Defendant's father and herself met the corespondent on the boat going to Norfolk. She and her father occupied adjoining staterooms, between which the door was open all night. At Norfolk she never saw the corespondent out of her father's presence, except for a few hours, during which time she and the corespondent rode on a trolley to Virginia Beach, a short distance away, where they went in bathing. They were seen there by persons who afterwards testified in the case, and no one says there was anything improper in their conduct during that period. They returned to Norfolk by trolley early in the afternoon and joined defendant's father. When it was time for them to leave for Washington, it was found that defendant could not get a stateroom. She was required to be at home the next day. Corespondent had a stateroom and turned it over to her, and he, with many others, slept in the saloon cabin. The father did not return with them. He testified that the corespondent was "a friend of both families," and he felt no uneasiness in placing his daughter in his hands. Both the defendant and the corespondent deny that the latter was in the stateroom at any time when defendant was there, and deny any improper relations during the trip, and no one contradicts them. A good deal is said concerning the name "M. C. Dent" written on corespondent's stateroom card. It is the name of defendant's father, and was placed there by his direction and for legitimate reasons, so he said. It is on testimony of this character that the woman is condemned.

Recently this court, in a like case (*Topham v. Topham*, 50 App. D. C. 229, 269 Fed. 1013), spoke thus:

"Twenty-six years ago this court, in *Glennan v. Glennan*, 3 App. D. C. 333, 22 Wash. Law Rep. 473, a similar case, said: 'In order to sustain a charge which not only brings lasting shame and disgrace to the wife, but also to her innocent children, the proof must be clear and satisfactory. Strong suspicion, or circumstances of suspicion, are not sufficient.' The rule then enunciated has been the guide of the trial court and alluded to as the settled policy of this court. *Krous v. Krous*, 41 App. D. C. 200, 41 Wash. Law Rep. 834; *McKitrick v. McKitrick* (Nov., 1919) 49 App. D. C. 109, 261 Fed. 451."

Apply that law here, and this woman has not been proven guilty. The record undoubtedly shows that she was guilty of many acts of in-

discretion with the correspondent, but acts of that character do not necessarily prove adultery. If they did, there would be many cases of adultery, where such a thing was not thought of by the actors.

Believing that the decree should be affirmed, I dissent.

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.

GAINES v. CLARK et al.

(Court of Appeals of District of Columbia. Submitted October 12, 1920. Decided June 26, 1921. Rehearing Denied October 3, 1921.)

No. 3329.

1. Equity ⇨114—Wide discretion vested in chancellor in permitting intervention.

Wide discretion is vested in the chancellor in permitting or refusing leave to intervene in equity, but this discretion is not absolute.

2. Equity ⇨114—When party must be allowed to intervene.

If a party seeking intervention in equity will not be left without a remedy, granting or refusal will usually be deemed discretionary with the court; but if the party seeking intervention shows ownership in or a lien against the res which is the subject of the litigation, and he is without remedy elsewhere to protect his right, the court should not refuse leave to intervene.

3. Mortgages ⇨436—Abuse of discretion to refuse to allow intervention.

In a suit to subject land to payment of notes secured by deed of trust, it was abuse of discretion to refuse intervention to a third person, claiming that he was owner in fee as tenant in common of an undivided one-half interest, and that the debt had been paid, and asking to be permitted to protect his estate by payment of the amount found to be due, if any was due even though such third person acquired his interest by purchase pending litigation.

4. Equity ⇨114—Application to intervene should not be disposed of upon legal technicality.

An application to intervene in equity should not be denied upon a legal technicality, and should not be denied merely because applicant was negligent in making his application for leave; but, being made before decree, leave should be granted on condition that evidence already taken shall be considered as taken in applicant's case, subject to his right to recall and cross-examine such witnesses as testified, and to produce such further testimony as he may be advised.

Appeal from the Supreme Court of the District of Columbia.

Bill by William A. Clark against the United States Realty Company and others, in which Nathaniel L. Gaines, trustee, petitioned to be allowed to become a party. From an adverse decree, intervener appeals. Reversed and remanded.

Dan Thew Wright, of Washington, D. C., for appellant.
C. C. Tucker and Evans Browne, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. Appellee William A. Clark, the alleged owner of two promissory notes aggregating \$17,500, secured by a deed of trust on certain real estate in the District of Columbia, filed an amended and supplemental bill in equity in the Supreme Court of the District November 9, 1915, to establish the notes, which were alleged to have been lost, and for a decree for the sale of the real estate and payment of the alleged indebtedness. The defendants to this action were the United States Realty Company, a corporation, the United States Trust Company, a corporation, Henry H. Gilfry and John W. Peters, trustees, and the Munsey Trust Company, a corporation.

The deed of trust was made by Walter A. Brothers to defendants Gilfry and Peters, trustees, on April 26, 1901. On the same date, Brothers, by warranty deed, conveyed the land in question to appellee William A. Clark and one Arthur E. Randle—

"to have and to hold the said land, premises, and appurtenances, unto and to the only use of the parties of the second part, their heirs and assigns forever, as tenants in common, to each an undivided one-half interest subject to a certain deed of trust given by the party of the first part to secure a debt of \$17,500, dated April 26, 1901, and duly recorded among the land records of the said District, which debt the parties of the second part hereby assume and agree to pay as part of the consideration hereof."

On August 20, 1903, Randle and wife, by special warranty deed, conveyed to the United States Realty Company their undivided one-half interest in the lands in question, together with certain other lands described in the deed to the realty company.

On June 6, 1919, appellant, Nathaniel L. Gaines, trustee, petitioned the court to be allowed to become a party and to intervene in the pending suit of Clark for the sale of the lands under the Brothers deed of trust. In his intervening bill, Gaines alleges:

"That he is a citizen of the United States, a resident of the District of Columbia, and brings this bill as trustee appointed by the Supreme Court of the District of Columbia in the place and stead of Paul K. Shuler, trustee, under a certain deed of trust dated the 15th day of June, A. D. 1917, by and between the United States Realty Company of Washington, D. C., Incorporated, and Paul K. Shuler of South Carolina. Your petitioner, Nathaniel L. Gaines, trustee, and the plaintiff, William A. Clark, are the owners as tenants in common and in fee simple of the real estate described in paragraph 3 of the plaintiff's (William A. Clark's) amended bill herein filed."

It is averred in the bill that the deed of trust to secure the notes sued upon is a cloud upon the title; that he (Gaines) is informed and believes that the notes have been paid, but that, if it be found as a fact that they have not been paid, he tenders himself ready and willing to pay any balance that may be found to be due upon said notes. He prays that the court ascertain if the notes have been paid, and, if so, decree cancellation of the notes and deed of trust, but if a balance be

found unpaid, the court decree payment by Gaines to Clark of one-half of the amount found due and a release of the deed of trust in so far as it affects the interest of Gaines, trustee; or, in the alternative, upon payment to Clark of any sum found to be due, Clark be ordered to transfer and assign his interest in the notes and deed of trust to Gaines, trustee.

Upon hearing, the court denied the petition of appellant and entered a decree for the full amount sued upon and for the sale of the property under the deed of trust. From the decree, this appeal was taken.

[1, 2] Wide discretion is vested in the chancellor in permitting or refusing leave to intervene in a proceeding in equity. But this discretion is not absolute. If the party seeking intervention will not be left without a remedy in the suit in which leave to intervene is sought, the granting or refusal will usually be deemed discretionary with the court. But, if the party seeking intervention shows ownership in or a lien against the res which is the subject of litigation, and he is without remedy elsewhere to protect his right, the court should not refuse leave to intervene.

"Applications for leave to intervene are of two kinds. In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries. In the other the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause. In this latter class the right to intervene is absolute, and the rejection of the petition is a final adjudication, and therefore appealable." *United States Trust Co. v. Chicago Terminal T. R. Co.*, 188 Fed. 292, 110 C. C. A. 270.

The right is absolute where the intervener shows an interest in the subject-matter of the litigation, and the refusal to permit intervention would result in the denial of certain relief.

"In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief." *Credits Commutation Co. v. United States*, 177 U. S. 311, 316, 20 Sup. Ct. 636, 638 (44 L. Ed. 782).

[3] In the present case, appellant avers in his bill, and the case was presented to the court upon the theory, that he is the owner in fee, as tenant in common, of an undivided one-half interest in the real estate sought to be subjected to the payment of a claim which he avers has been paid. He is here seeking intervention to be heard upon the question of the existence of the indebtedness, and, if such be found to exist, to be permitted to protect his estate by the payment of the amount found to be due. If his claim to intervene is beset with no infirmity, his right cannot be denied.

But it is urged that he has no standing, since he bought the property pending the litigation to which he now seeks to become a party. The company through which he derived title was a party defendant in the original suit, and has suffered judgment to be taken against it. A person thus in privity with one of the parties may generally procure control of the suit by substitution. Hence there is reason for the rule that a person is not entitled to intervene, unless it would have been proper

when the action was commenced. The right of intervention, therefore, has been denied to persons acquiring an interest in the subject-matter of the litigation after the commencement of the action. *Schaferman v. O'Brien*, 28 Md. 565, 92 Am. Dec. 708. But we think the preponderance of modern authority is that a purchaser, or one acquiring an interest, *pendente lite*, is entitled to intervene. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; *Walker v. Sanders*, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276, 300, and note.

[4] We are of opinion that, though appellant has been negligent in making his application for leave to intervene, inasmuch as it was made before decree was entered, the matter is one that should not be disposed of upon a legal technicality. The case presented is on its face a good one, and appellant should be given an opportunity to prove it. Leave to intervene, we think, should be granted upon the condition, however, that the evidence taken in the original suit, in so far as it bears upon appellant's case, shall be considered as taken therein, subject to his right to recall and cross-examine such of the witnesses as testified therein, and to produce such further testimony as he may be advised. This procedure is approved in *Leary v. United States*, 224 U. S. 567, 576, 32 Sup. Ct. 599, 56 L. Ed. 889, Ann. Cas. 1913D, 1029.

The decree is reversed, with costs, and the cause remanded for further proceedings.

Reversed and remanded.

MEMORANDUM DECISIONS

ATHAN et al. v. NATIONAL SAVINGS & TRUST CO. (Court of Appeals of the District of Columbia. Submitted February 10, 1921. Decided June 6, 1921.) No. 3434. Appeal from the Supreme Court of the District of Columbia. Proceeding by the National Savings & Trust Company, executor, etc., of Joseph Gerrers, deceased, against Mike Athan and another. From a judgment for plaintiff, defendants appeal. Affirmed. Julius I. Peyser and George E. Edelin, both of Washington, D. C., for appellants. Roger J. Whiteford and Charles W. Darr, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a landlord and tenant proceeding, in which the landlord, National Savings & Trust Company, applied to the rent commission to recover possession of the premises in question. The commission found for the landlord. It then proceeded in the municipal court and secured judgment for possession on the findings of the rent commission. On appeal, the Supreme Court sustained the municipal court. From the judgment this appeal was taken. On the above statement, 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.

ARMINIUS CHEMICAL CO. v. ACME MFG. CO. (Circuit Court of Appeals, Fourth Circuit. July 5, 1921.) No. 1893. In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond. Action at law by the Acme Manufacturing Company against the Arminius Chemical Company. Judgment for plaintiff, and defendant brings error. Affirmed. For prior opinion, see 264 Fed. 27. Certiorari denied 256 U. S. —, 42 Sup. Ct. 55, 66 L. Ed. —. Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge. C. V. Meredith, of Richmond, Va., and R. L. Gordon, Jr., of Louisa, Va. (Meredith & Meredith, of Richmond, Va., and Gordon & Gordon, of Louisa, Va., on the brief), for plaintiff in error. T. D. Savage, of Norfolk, Va., for defendant in error.

PER CURIAM. The opinion of this court on a previous appeal, *Acme Mfg. Co. v. Arminius Chemical Co.*, 264 Fed. 27, is the law of the case, in accordance with which another trial has been had, and the resulting judgment should be affirmed, unless the facts now before us are materially different. It is enough to say, without reviewing the evidence, that careful comparison discloses no substantial variance. On the vital issues the proofs at the second trial were essentially the same as at the first. The case is therefore governed by our former decision. Affirmed.

BERGER et al. v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. April 26, 1921.) No. 2710. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John Tucker, and J. Louis Engdahl were convicted of violating the Espionage Act, and they bring error. Reversed and remanded, with directions, pursuant to Supreme Court's answers to certified questions. 255 U. S. 22, 41 Sup. Ct. 230, 65 L. Ed. —. Seymour Stedman, of Chicago, Ill., Henry F. Cochems, of Milwaukee, Wis., and Henry F. Cash, for plaintiffs in error. Joseph B. Fleming, of Chicago, Ill., for the United States. Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. The plaintiffs in error were under indictment in the United States District Court for the Northern District of Illinois, charging them with a violation of an act of Congress of June 15, 1917, known as the Espionage Act (Comp. St. 1913, Comp. St. Ann. Supp. 1919, §§ 10212a-10212h). When their case was called for trial they made a motion, supported by an affidavit of prejudice of the judge, which is fully set out in the opinion of the Supreme Court of the United States, hereinafter referred to. The motion was overruled and the petition denied. The judge proceeded with the trial, which resulted in a conviction, and the action of the court in overruling the motion and denying the petition and presiding at the trial has been here assigned as error. This court, desiring the advice and instruction of the Supreme Court of the United States, certified to said court the following questions: "(1) Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the act which provides for the filing of affidavit of prejudice of a judge? (2) Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit? (3) Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?" Upon consideration of said questions, the court, by opinion rendered January 31, 1921, and printed in 255 U. S. 22, 41 Sup. Ct. 230, 65 L. Ed. —, made the following answers thereto:

"It is the opinion of this court that the first question certified must be answered in the affirmative, that the second question certified must be answered that, to the extent indicated in the opinion, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit; and that the third question certified must be answered in the negative"—which answers have been certified to this court. By reason of the error in the record, as indicated in the an-

swers of the Supreme Court, the judgment is reversed, and the cause remanded to the District Court for further proceedings in harmony with said findings of the Supreme Court.

EXPORTERS OF MANUFACTURERS' PRODUCTS, Inc., v. BUTTERWORTH-JUDSON CO. (Circuit Court of Appeals, Second Circuit. June 17, 1921.) No. 235. In Error to the District Court of the United States for the Southern District of New York. Action by the Exporters of Manufacturers' Products, Inc., against the Butterworth-Judson Company. Judgment for defendant, and plaintiff brings error. On motion to strike bill of exceptions. Question certified to the Supreme Court. See, also (D. C.) 265 Fed. 907. Before WARD, HOUGH and MANTON, Circuit Judges.

This cause came here on a writ of error to a judgment in favor of the Butterworth-Judson Company in an action at law in the District Court for the Southern District of New York. Judgment resulted from the verdict of a jury and thereupon plaintiff in error took a writ. The stated terms of the trial court, as prescribed by act of Congress, begin each month on the first Tuesday thereof; but a general rule of that court provides as follows: "For the purpose of taking any action which must be taken within the term of the court at which final judgment or decree is entered, each term of court is extended for ninety days from the date of entry of the final judgment or decree." In respect of this case the 90-day period above provided for, and therefore the term at which the final judgment in question was entered, expired on the 24th of February, 1920. On March 1, 1920, a written stipulation was executed between the attorneys for the parties hereto in the words following: "It is hereby stipulated and agreed by and between the parties hereto that the November term of the United States District Court for the Southern District of New York be extended to April 6, 1920, for the purpose of settling and filing the bill of exceptions herein." On or before the 6th of April, 1920, but long after the 24th of February, 1920, the plaintiff in error proposed a bill of exceptions. Thereupon the trial judge, over the objection of defendant in error and on the faith of the stipulation above quoted, settled and signed the bill of exceptions annexed to the writ of error herein and now in this court. Defendant in error then moved in this court for an order striking from the record the bill of exceptions so settled as above set forth, on the ground that the same had been settled, signed, and made a part of the record herein in contravention of law, in that the term had expired. Upon consideration of this motion a question of law arises concerning which this court desires the instruction of the Supreme Court in order properly to decide the cause.

Question certified: Is the bill of exceptions so as above set forth settled, signed, and certified to this court in contravention of law, in that the term had expired before the same was offered for settlement? In accordance with the provisions of section 239, U. S. Judicial Code (Comp. St. § 1216), the foregoing question of law is by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court.

H. G. WARD, Circuit Judge.

CHARLES M. HOUGH, Circuit Judge.

MARTIN T. MANTON, Circuit Judge.

McHENRY v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 19, 1921.) No. 3719. In Error to the District Court of the United States for the Northern District of Texas; Robert T. Ervin, Judge. Criminal prosecution by the United States against E. W. McHenry. Judgment of conviction, and defendant brings error. Affirmed. W. F. Weeks and Tarlton Morrow, both of Wichita Falls, Tex., for plaintiff in error. Henry

(275 F.)

Zweifel, U. S. Atty., and Ben P. Allred, Asst. U. S. Atty., both of Fort Worth, Tex. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment is affirmed.

SPEARMAN v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 19, 1921.) No. 3740. In Error to the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Jr., Judge. Criminal prosecution by the United States against G. T. Spearman. Judgment of conviction, and defendant brings error. Affirmed. V. M. Clark, of Houston, Tex. (Quitman Finlay and Turnley & Clark, all of Houston, Tex., on the brief), for plaintiff in error. D. E. Simmons, U. S. Atty., and D. A. Simmons, Ass't U. S. Atty., both of Houston, Tex. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment in this case is affirmed.

THE WALTER B. POLLOCK. (Circuit Court of Appeals, Second Circuit. June 1, 1921.) No. 234. Appeal from the District Court of the United States for the Eastern District of New York. Libel by the Bouker Contracting Company against the steam tug Walter B. Pollock, her engines, etc., the Egerton Towing Company, claimant, and others. Decree for libelant, and claimant appeals. Affirmed. Harrington, Bigham & Englar, of New York City (Vine H. Smith, of New York City, of counsel), for appellant. Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelant appellee. Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for respondents appellees. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. This case involves pure questions of fact and examination of the record discloses nothing that would justify us in disturbing Judge Chatfield's findings. The decree is affirmed.

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and
Prior Reporter Volume Index-Digests

ACCORD AND SATISFACTION.

See Compromise and Settlement.

ADMINISTRATION.

See Executors and Administrators.

ADMIRALTY.

See Collision; Salvage; Seamen; Shipping;
Maritime Liens.

I. JURISDICTION.

⊕6 (U.S.D.C.Va.) Mere fact that ship is involved does not give admiralty jurisdiction.—A. O. Andersen & Co. v. Susquehanna S. S. Co., 989.

⊕14 (U.S.D.C.Mass.) Contract to furnish seine to fishing vessel held a maritime contract.—The Sam & Priscilla, 937.

II. REMEDIES IN PERSONAM AND IN REM.

⊕36 (U.S.D.C.N.Y.) Counterclaim must be based on same contract, or arise out of same cause of action, as original libel.—The Jane Palmer, 719.

⊕36 (U.S.D.C.Va.) Counterclaim must arise out of same subject-matter.—A. O. Andersen & Co. v. Susquehanna S. S. Co., 989.

IX. APPEAL.

⊕116 (U.S.C.C.A.N.Y.) Appeal a new trial.—The No. 17,930.

⊕118 (U.S.C.C.A.Md.) Finding of fact on conflicting evidence not reversible, unless clearly erroneous.—Dempsey v. Eastern Transp. Co., 350.

X. COSTS.

⊕124 (U.S.C.C.A.N.Y.) Cost of stipulation included in costs.—The Stifinder, 271.

AGENCY.

See Principal and Agent.

ALIENS.

III. IMMIGRATION.

⊕46 (U.S.D.C.Cal.) Alien wife of native-born citizen if afflicted with dangerous con-

275 F.—65

tagious disease not entitled to admission.—Ex parte Leong Shee, 364.

ANIMALS.

See Carriers, ⊕212.

ANTI-TRUST LAWS.

See Monopolies, ⊕9-24.

APPEAL AND ERROR.

See Criminal Law, ⊕1036-1172.

For review of rulings in particular actions or proceedings, see also the various specific topics.

I. NATURE AND FORM OF REMEDY.

⊕14(2) (U.S.C.C.A.III.) Order relating to carrying out decree entered on mandate is reviewable by appeal.—In re L. P. Larson, Jr., Co., 535.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

⊕80(1) (U.S.C.C.A.N.Y.) Leave to apply for further relief does not prevent finality of decree.—American Engineering Co. v. Metropolitan By-Products Co., 40.

⊕82(2) (U.S.C.C.A.N.Y.) Leave to apply for further relief does not prevent order modifying the decree from being appealable.—American Engineering Co. v. Metropolitan By-Products Co., 40.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

⊕173(1) (U.S.C.C.A.N.Y.) Defenses not pleaded below not considered.—Scott v. W. R. Grace & Co., 340.

⊕173(2) (U.S.C.C.A.N.Y.) Point not considered below not considered on appeal.—Gans S. S. Line v. Wilhelmsen, 254.

⊕173(9) (U.S.C.C.A.N.Y.) Defense of res judicata, not presented below, not considered.—De Rees v. Costaguta, 172.

(C) Exceptions.

↪263(1) (U.S.C.C.A.Minn.) Alleged error in instruction, not excepted to, not considered.—Yellow Cab Co. v. Earle, 928.

XVI. REVIEW.

(A) Scope and Extent in General.

↪837(2) (U.S.C.C.A.N.J.) Divergent verdicts of different juries do not evidence error in instructions.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., 922.

↪843(2) (U.S.C.C.A.Neb.) Court will determine constitutional questions on appeal only when absolutely necessary.—Allen v. Omaha Live Stock Commission Co., 1.

↪863 (U.S.C.C.A.Neb.) Appellate court will not consider merits on appeal from order granting preliminary injunction.—Allen v. Omaha Live Stock Commission Co., 1.

(F) Discretion of Lower Court.

↪978(1) (U.S.C.C.A.Minn.) Denial of motion for new trial discretionary and not reviewable.—Yellow Cab Co. v. Earle, 928.

↪979(1) (U.S.C.C.A.Minn.) Denial of motion for new trial based on insufficiency of evidence discretionary and not reviewable.—Yellow Cab Co. v. Earle, 928.

↪979(6) (U.S.C.C.A.Minn.) Denial of motion for new trial based on excessive damages discretionary and not reviewable.—Yellow Cab Co. v. Earle, 928.

(G) Questions of Fact, Verdicts, and Findings.

↪994(2) (U.S.C.C.A.Ill.) Credibility of witnesses for jury.—Hines v. Smith, 766.

↪996 (U.S.C.C.A.Ill.) Persuasiveness of facts and inferences for jury.—Hines v. Smith, 766.

↪1009(3) (U.S.C.C.A.Ark.) Findings and decree on conflicting evidence presumed correct.—Road Improvement Dist. No. 2 of Conway County v. Missouri Pac. R. Co., 600.

↪1009(3) (U.S.C.C.A.Neb.) Findings of trial court on conflicting evidence presumptively correct.—U. S. v. Delatour, 137.

(H) Harmless Error.

↪1031(2) (U.S.C.C.A.Ind.) In absence of bill of exceptions it will not be presumed that overruling of demurrer to paragraph of answer was not prejudicial because of evidence to sustain other part of answer.—Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., 794.

↪1031(2) (U. S. C. C. A. N. Y.) Permitting amendment changing cause of action held error, and error presumed prejudicial.—American Mills Co. v. Hoffman, 285.

↪1048(5) (U. S. C. C. A. N. Y.) Permitting questions calling for irrelevant testimony held error though negative answer was given.—American Mills Co. v. Hoffman, 285.

↪1068(3) (U.S.C.C.A.Mo.) Plaintiff not entitled to recover held not harmed by instructions.—Fels v. East St. Louis & S. Ry. Co., 881.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(D) Reversal.

↪1174 (U.S.C.C.A.W.Va.) Order granting preliminary injunction modified on condition of execution of substitute bond.—Dalton-Kelly Coal Corporation v. Taplin, 191.

(F) Mandate and Proceedings in Lower Court.

↪1203(7) (U.S.C.C.A.Ill.) Authority of master on an accounting limited by terms of decree.—In re L. P. Larson, Jr., Co., 535.

ARMY AND NAVY.

↪5 (U.S.D.C.Tex.) Civil status can be changed only by law.—Ex parte Caplis, 980.

↪20 (U.S.D.C.Tex.) Notice required for induction into service under first Selective Service Regulations; "notify."—Ex parte Caplis, 980.

Civilian held not inducted into military service by mailing of notice prior to amended regulations.—Id.

ASSESSMENT.

See Highways, ↪138; Taxation, ↪500; Municipal Corporations, ↪521.

ASSUMPTION OF RISK.

See Master and Servant, ↪217.

ATTORNEY AND CLIENT.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

↪20 (U.S.C.C.A.Ga.) Attorney for party may act as attorney for receiver.—J. C. Turner Lumber Co. v. Toomer, 678.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

↪79(1) (U.S.D.C.Del.) Partial remission of penalty where no "willful default."—U. S. v. Smoller, 1011.

↪79(1) (U.S.D.C.N.Y.) Remission of penalty of forfeited recognizance denied to defendant, making willful default.—U. S. v. O'Leary, 202.

BAILMENT.

See Pledges.

↪18(4) (U.S.D.C.Mich.) Possessory lien lost by causing levy of attachment.—Fidelity & Deposit Co. of Maryland v. Johnson, 112.

↪31(1) (U.S.C.C.A.N.Y.) Bailee presumed to have been negligent on return of property in a damaged condition.—The John Carroll, 302.

BANKRUPTCY.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS

↪4 (U.S.D.C.Ill.) Bankruptcy Act to be liberally construed.—In re Parker, 868.

For cases in Dec.Dig. & Am.Dig. Key-No, Series & Indexes see same topic and KEY-NUMBER

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(A) Jurisdiction and Course of Procedure in General.

↪20(2) (U.S.D.C.Ga.) Receiver in bankruptcy has priority over receiver of state court in certain matters.—In re Couch Cotton Mills Co., 496.

Rights of receiver appointed by state court are superior to the rights of receiver in bankruptcy where proceedings in state court were begun first.—Id.

Rule of comity applies to case made by original bill in state court, but not as to amendment making substantially new case after bankruptcy proceeding.—Id.

↪20(2) (U.S.D.C.Ga.) Receiver in bankruptcy has a right superior to receiver appointed by state court.—In re Beaver Cotton Mills, 498.

(B) Voluntary Proceedings.

↪43 (U.S.D.C.Ga.) Appointment of a receiver for corporation by state court does not deprive directors of power to file voluntary bankruptcy proceedings.—In re Beaver Cotton Mills, 498.

Voluntary petition in bankruptcy by corporate directors *held* not fraudulent.—Id.

↪49 (U.S.D.C.Ga.) Minority stockholder *held* entitled to intervene in voluntary bankruptcy proceedings started by directors of corporation.—In re Beaver Cotton Mills, 498.

↪51 (U.S.C.C.A.Ga.) Stockholder *held* not entitled to have adjudication in bankruptcy of corporation set aside.—Alexander v. Farmers' Supply Co., 824.

(C) Involuntary Proceedings.

↪57 (U.S.D.C.Fla.) Conveyance not made to hinder or delay creditors not "act of bankruptcy."—In re C. W. Bartleson Co., 390.

Prior conveyance by bankrupt solvent at date of filing petition not "act of bankruptcy."—Id.

↪60 (U.S.D.C.Fla.) Creditors' agreement *held* not general "assignment for benefit of creditors" within Bankruptcy Act.—In re C. W. Bartleson Co., 390.

↪60 (U.S.D.C.Ohio) Inability to pay debts maturing *held* "insolvency," and appointment of receiver an act of bankruptcy "because of insolvency."—Hilb v. American Smelting & Refining Co., 384.

Receivership under state law because of insolvency an act of bankruptcy.—Id.

↪61 (U.S.D.C.N.Y.) Resolution of corporation sufficient to warrant adjudication.—In re Mohawk Weaving Mills, 589.

↪70 (U.S.D.C.Ill.) Business trust known as a "common-law trust," "pure trust," or "Massachusetts trust" is subject to adjudication as bankrupt; "any unincorporated company."—In re Parker, 868.

↪77 (U.S.D.C.N.Y.) Small current claims not counted in computing number of creditors.—In re Branche, 555.

↪81(2) (U.S.D.C.Ill.) Involuntary petition need not give details as to insolvency.—In re Parker, 868.

↪81(2) (U.S.D.C.Ill.) Involuntary petition not bad for alleging partnership.—In re Parker, 868.

↪81(3) (U.S.D.C.Ill.) Involuntary petition need not set forth claim with particularity.—In re Parker, 868.

↪81(4) (U.S.D.C.Ill.) Details of acts of bankruptcy need not be minutely particular.—In re Parker, 868.

↪99 (U.S.D.C.Ill.) Controverted facts resolved in petitioner's favor on motion to dismiss.—In re Parker, 868.

↪100(1) (U.S.C.C.A.Iowa) Adjudication not specifying particular act of bankruptcy not completely conclusive.—Carter v. Whisler, 743.

(D) Warrant and Custody of Property.

↪108 (U.S.D.C.Fla.) Affidavit of creditor's attorney *held* insufficient for issuance of warrant to seize bankrupt's property.—In re The Hub, 400.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(A) Appointment, Qualification, and Tenure of Trustee.

↪120 (U.S.C.C.A.Mass.) Trustee not disqualified by distance of residence alone.—Petition of Safran, 819.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

↪136(1) (U.S.C.C.A.Iowa) Partner not served *held* subject to jurisdiction in ancillary proceedings in other district, but entitled to be heard as to partnership and acts of bankruptcy.—Carter v. Whisler, 743.

↪140(3) (U.S.D.C.Ga.) Advance payment by buyer *held* property of bankrupt seller, and not held in trust by bankrupt.—In re Superior Motor Truck Co., 623.

↪143(12) (U.S.D.C.N.C.) Insured's right to change beneficiary not "property" capable of transfer.—In re Pittman, 686.

↪149 (U.S.C.C.A.Iowa) Trustee vested with partnership property, wherever situated.—Carter v. Whisler, 743.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

↪161(2) (U.S.D.C.N.C.) "Chattel mortgage" *held* invalid as preference; "pledge."—In re Pittman, 681.

↪165(1) (U.S.C.C.A.Ill.) Payments for current supplies *held* not preferential.—In re Marley-Morse Co., 832.

↪165(1) (U.S.D.C.Mich.) Payment in discharge of previously acquired lien by garnishment not a preference.—In re Standard-Detroit Tractor Co., 952.

↪166(2) (U.S.D.C.Mich.) Intent as to preference derived from circumstances with regard to presumption as to consequences of acts.—In re Standard-Detroit Tractor Co., 952.

↪172 (U.S.C.C.A.Va.) Validity of bankrupt's deed of trust cannot be attacked by parties who were not creditors at time of its execution.—Perron v. Scott, 46.

⊖182 (U.S.C.C.A.Md.) Pledge of stock by donee of bankrupt *held* ineffective against trustee.—Commercial Nat. Bank of Washington, D. C., v. Shriver, 12.

⊖184(1) (U.S.D.C.Fla.) Writing *held* to constitute valid mortgage.—In re Hallbauer, 125.

⊖184(1) (U.S.D.C.Fla.) Mortgage on car in salesroom of bankrupt *held* invalid against trustee.—In re Hallbauer, 126.

⊖184(2) (U.S.C.C.A.Ga.) Unrecorded assignment of bond for title subordinate to lien of judgment creditor.—Bank of Madison v. Bell, 275 F. 835.

⊖184(2) (U.S.C.C.A.Ill.) Person, lending money used in canceling bonds, *held* an unsecured creditor.—In re Rogers Palace Laundry Co., 829.

(D) Administration of Estate.

⊖224 (U.S.D.C.Ga.) Referee *held* to have jurisdiction to vacate improvident order and enforce restitution of property delivered thereunder.—In re Dunaway, 591.

⊖255 (U.S.D.C.Ala.) Trustee should not assume lease which will delay settlement of estate.—In re Lindy-Friedman Clothing Co., 453.

(E) Actions by or Against Trustee.

⊖287(1) (U.S.C.C.A.Ill.) Creditor charged with preference *held* entitled to plenary trial.—In re Rockford Produce & Sales Co., 811.

Trial on trustee's petition to recover preference *held* not a summary proceeding; "summary proceeding."—Id.

⊖288(1) (U.S.C.C.A.Ill.) Creditor *held* to have consented to trial as to preference on petition and rule.—In re Rockford Produce & Sales Co., 811.

⊖288(1) (U.S.C.C.A.N.D.) Summary proceeding not available to trustee to recover bankrupt's assets held by bankrupt's landlord.—Johnson v. Doebler, 822.

⊖293(1) (U.S.C.C.A.Iowa) Court may seek other court out of jurisdiction.—Carter v. Whisler, 743.

⊖293(2) (U.S.C.C.A.Ill.) Federal court *held* to have jurisdiction to try issue of preference.—In re Rockford Produce & Sales Co., 811.

(F) Claims Against and Distribution of Estate.

⊖314(1) (U.S.D.C.Cal.) Relative creditor may file claim and participate in dividends.—In re McClelland, 576.

⊖314(1) (U.S.D.C.Fla.) Loan to bankrupt of proceeds of insurance policy on life of deceased brother, of whose estate he was administrator, *held* provable, though made by his mother, and homestead exemption set apart to him.—In re Long, 119.

⊖318(2) (U.S.D.C.Me.) To recover for bankrupt's refusal to receive goods purchased, goods must have been tendered and resold on rejection.—In re Gannon, 1001.

⊖330 (U.S.D.C.Ohio) Proof of claim containing power of attorney *held* not effectively executed.—In re Saslaw, 587.

⊖340 (U.S.D.C.Cal.) Claim by relative carefully scrutinized.—In re McClelland, 576.

Claim for money lent bankrupt by sister allowed.—Id.

⊖342½ (U.S.D.C.Cal.) Conclusions of referee not binding on court, where evidence is not conflicting.—In re McClelland, 576.

⊖346 (U.S.C.C.A.Wis.) State *held* entitled to preference for income tax; "all taxes"; "legally due and owing."—In re F. G. Borden Co., 782.

⊖346 (U.S.D.C.N.Y.) Court has jurisdiction to liquidate taxes claimed by United States.—In re Anderson, 397.

⊖360 (U.S.D.C.Pa.) Creditor's attorney *held* "duly authorized" to receive and indorse dividend check.—In re Brashear, 481.

IV. COMPOSITION.

⊖376 (U.S.D.C.Ohio) Section of Bankruptcy Act as to compositions strictly construed.—In re Wayne Realty Co., 955.

Theory of a "composition" stated.—Id.

Composition, not providing for deposit of consideration to be paid creditors, not confirmed.—Id.

⊖384 (U.S.D.C.Mass.) Composition approved, where creditors did not object.—In re Crosby, 880.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

⊖396(3) (U.S.D.C.N.C.) Trustee *held* to have no interest in insurance policy payable to wife.—In re Pittman, 686.

⊖404(2) (U.S.D.C.N.Y.) Bankrupt may be discharged from debts not scheduled in prior proceeding.—In re Baker, 511.

⊖407(1) (U.S.D.C.N.Y.) Delay in prosecuting petition *held* to bar right to discharge.—In re Reisler, 65.

⊖407(5) (U.S.C.C.A.Ill.) Statements by bankrupt *held* not to warrant refusing discharge.—In re Gould, 827.

⊖413(9) (U.S.C.C.A.Ga.) Application for discharge need not be pressed, pending motion to vacate adjudication—Bank of Elberton v. Swift, 834.

VI. APPEAL AND REVISION OF PROCEEDINGS.

(A) Superintendence and Revision.

⊖440 (U.S.C.C.A.Iowa) Order *held* not subject to appeal.—Carter v. Whisler, 743.

⊖440 (U.S.C.C.A.Tenn.) Determination of attorney's fee *held* only step in administration of bankrupt estate, and not applicable.—Stokes v. Sedberry, 894.

⊖442 (U.S.C.C.A.Tenn.) No complaint of allowance to trustee for expenses.—Stokes v. Sedberry, 894.

⊖446 (U.S.C.C.A.Tenn.) Discretion of trial judge as to attorney's fee not reviewed on petition to revise.—Stokes v. Sedberry, 894.

(B) Appeal.

⊖467 (U.S.C.C.A.Ill.) Findings against bankrupt's right of discharge *held* not to be disturbed, if supported by evidence.—In re Gould, 827.

VII. COSTS AND FEES.

⊖474 (U.S.C.C.A.Tenn.) Counsel fees not payable out of surplus on setting aside fraudulent conveyance.—Stokes v. Sedberry, 894.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

Bankrupt and wife not bound by agreement that attorney's fee should be paid out of surplus on setting aside fraudulent conveyance.—*Id.*

↪482(1) (U.S.C.C.A.Tenn.) Value of service of attorney determined at final settlement.—*Stokes v. Sedberry*, 894.

Recovery under quantum meruit under champertous contract.—*Id.*

↪482(2) (U.S.C.C.A.Tenn.) Order of referee as to attorney's fee held invalid.—*Stokes v. Sedberry*, 894.

Liberal fee to attorney suing on contingent basis.—*Id.*

↪484 (U.S.D.C.N.Y.) Expenses of receivership under involuntary proceeding fall on petitioners, where respondents are solvent.—*In re Hurlburt Motors*, 62.

Estate of respondents in involuntary proceeding, found solvent, liable in first instance for receiver's expense to extent of profits.—*Id.*

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

↪80(10) (U.S.D.C.N.Y.) Bonds held purchased outright by banking and bond house, so that state issuing bonds not entitled to accounting by receiver of bond house.—*Beaver Board Companies v. Imbrie*, 431.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

↪112 (U.S.D.C.Cal.) Banks chargeable with knowledge of officers.—*Lineker v. Dillon*, 460.

BILLS AND NOTES.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(C) Assignment or Sale.

↪320 (U.S.D.C.Fla.) Set-off not defense against "holder not in due course"; "defense."—*Worden v. Gillett*, 654.

BRIBERY.

↪1(1) (U.S.C.C.A.N.Y.) One not officer of United States may be liable.—*McGrath v. U. S.*, 294.

↪1(2) (U.S.C.C.A.N.Y.) Person not appointed as provided in constitutional provision not "officer of the United States."—*McGrath v. U. S.*, 294.

Income tax inspectors held "officers of the United States."—*Id.*

↪6(4) (U.S.C.C.A.N.Y.) Indictment held to set forth matter before defendants in official capacity; "prosecution."—*McGrath v. U. S.*, 294.

CARRIERS.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(B) Interstate and International Transportation.

↪38 (U.S.C.C.A.S.C.) That a fraud was committed by defendant in the name of a corporation in obtaining delivery of car not a defense.—*Boyd v. U. S.*, 16.

↪38 (U.S.C.C.A.S.C.) Indictment for falsifying accounts of interstate carrier held sufficient.—*Kennedy v. U. S.*, 182.

Evidence held to sustain conviction for falsifying records of carrier.—*Id.*

Memoranda kept by clerk held part of carrier's records.—*Id.*

II. CARRIAGE OF GOODS.

(E) Delay in Transportation or Delivery.

↪100(1) (U.S.C.C.A.Kan.) Strike cannot exempt from payment of demurrage charges.—*Sinclair Refining Co. v. Schaff*, 769.

(H) Limitation of Liability.

↪160 (U.S.D.C.Va.) May require liability to be asserted and claim to be instituted within particular time.—*The Turrett Crown*, 961.

III. CARRIAGE OF LIVE STOCK.

↪212 (U.S.C.C.A.Wyo.) Misdelivery by carrier constitutes conversion.—*Payne v. Card*, 26.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

↪233 (U.S.C.C.A.Mo.) Relation of passenger depends on contract.—*Fels v. East St. Louis & S. Ry. Co.*, 881.

↪247(3) (U.S.C.C.A.Mo.) Plaintiff, who ran after car and seized it as it started, not a passenger.—*Fels v. East St. Louis & S. Ry. Co.*, 881.

(D) Personal Injuries.

↪280(1) (U.S.C.C.A.Ill.) Not an insurer.—*Payne v. Cohlmeier*, 803.

↪306(1) (U.S.C.C.A.S.C.) Neither railroad company nor Director General responsible for dangerous condition of track laid in a camp by the military authorities.—*Heise v. Davis*, 326.

↪317(5) (U.S.C.C.A.Ill.) Held entitled to show condition of cars the day after injury by derailment.—*Payne v. Cohlmeier*, 803.

↪321(3) (U.S.C.C.A.Ill.) Instruction held erroneous, as making carrier of passengers an insurer.—*Payne v. Cohlmeier*, 803.

CHANCERY.

See Equity.

CHATTEL MORTGAGES.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

↪47 (U.S.C.C.A.Ga.) Description held too indefinite.—*Brown v. Camp*, 612.

CITIES.

See Municipal Corporations.

CLASS LEGISLATION.

See Constitutional Law, ↪229-235.

COLLISION.

I. RULES AND PRECAUTIONS FOR PREVENTING COLLISIONS IN GENERAL.

↪11 (U.S.C.C.A.N.Y.) Rules rigorously enforced.—*The Stifinder*, 271.

↻14 (U.S.D.C.Md.) Blunder, though excusable, no defense, if master without license.—The City of Baltimore, 490.

↻19 (U.S.D.C.Va.) Vessel must be plainly at fault, if other vessel's fault was sufficient in itself to bring about collision.—The Nevada, 965.

III. STEAM VESSELS MEETING OR CROSSING.

↻37 (U.S.C.C.A.N.Y.) Tug in fault for collision between tow and crossing steamer.—The Lexington, 279.

IV. STEAM VESSELS AND SAIL VESSELS.

↻43 (U.S.C.C.A.N.Y.) Steam vessel to keep out of way of sailing vessel.—The Stifinder, 271.

↻44 (U.S.C.C.A.N.Y.) Sail vessel should hold her course as to care toward steam vessel.—The Stifinder, 271.

↻48 (U.S.C.C.A.N.Y.) Burden on vessel to justify departure from rules.—The Stifinder, 271.

↻49 (U.S.C.C.A.N.Y.) Strong case must be made out against sailing ship colliding with steamer.—The Stifinder, 271.

Steamer colliding with sailing vessel *held* in fault.—Id.

VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

↻77 (U.S.C.C.A.N.Y.) Steamer to keep lookout.—The Stifinder, 271.

IX. FOG OR THICK WEATHER.

↻82(2) (U.S.D.C.Va.) Difficulty of navigating without sufficient headway not excuse for failure to stop engines and navigate with caution on hearing fog signal of other vessel.—The Walter D. Noyes, 690.

X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

↻90 (U.S.C.C.A.N.Y.) Narragansett Bay not "narrow channel."—The Lexington, 279.

↻91 (U.S.D.C.Va.) *Held* fault of steamer.—The Richmond, 970.

↻95(2) (U.S.D.C.Mass.) Privileged vessel not in fault for keeping her course and speed.—Commonwealth & Dominion Line v. Seaboard Transp. Co., 617.

↻95(2) (U.S.D.C.Va.) Tug attempting to pass between piers and stern of steamship *held* at fault for collision with steamship.—The Nevada, 965.

↻95(4) (U.S.D.C.N.Y.) Steamer and tow meeting in Hell Gate.—The Calvin Austin, 836.

↻95(4) (U.S.D.C.Va.) Vessel which continued to back toward piers after assenting to signal of approaching tug for starboard message *held* at fault.—The Nevada, 965.

↻100(2) (U.S.D.C.Va.) Ship navigated by unlicensed master down narrow channel in fog, at full speed, without proper lookout, without stopping engine on hearing fog signal of approaching vessel, *held* at fault.—The Walter D. Noyes, 690.

Ship navigated in narrow channel, in dense fog, *held* at fault for collision caused by its failure to stop engine and proceed with caution, on hearing fog signal of other vessel.—Id.

↻102 (U.S.D.C.Md.) Overtaking and overtaken vessel *held* both at fault.—The City of Baltimore, 490.

↻102 (U.S.D.C.N.Y.) Passing schooner and ferryboat leaving slip.—The S. A. Carpenter, 716.

XI. SPECIAL CIRCUMSTANCES AND ERRORS IN EXTREMIS.

↻108 (U.S.C.C.A.N.Y.) Acts of sailing vessel, in agony of collision with steamer, immaterial.—The Stifinder, 271.

XII. SUITS FOR DAMAGES.

(D) Damages.

↻127 (U.S.D.C.N.Y.) *Held* not proximate cause of a personal injury occurring 30 minutes later.—The Roman Prince, 712.

↻144 (U.S.C.C.A.N.Y.) Contributory fault must be clearly shown.—The Lexington, 279.

↻144 (U.S.D.C.Va.) Rule as to division of damages applied, where negligence on both vessels operating to moment of collision.—The Walter D. Noyes, 690.

↻144 (U.S.D.C.Va.) Damages divided, where both vessels are at fault.—The Nevada, 965.

(E) Trial or Hearing, Judgment, and Review.

↻154 (U.S.C.C.A.N.Y.) Admiralty rule promulgated after collision not necessarily controlling.—The Stifinder, 271.

COMMERCE.

II. SUBJECTS OF REGULATION.

↻33 (U.S.C.C.A.S.C.) Interstate shipment remains such until delivered by carrier to consignee.—Boyd v. U. S., 16.

Interstate shipment to order *held* not delivered by carrier.—Id.

↻33 (U.S.D.C.N.Y.) Goods shipped between points in same state, but passing through another state, are moving in "interstate commerce."—U. S. v. Yohn, 232.

III. MEANS AND METHODS OF REGULATION.

↻57 (U.S.D.C.Ala.) Provisions of Alabama Shrimp Act *held* void as imposing restraint upon interstate commerce.—Elmer v. Wallace, 86.

COMMERCIAL PAPER.

See Bills and Notes.

COMPROMISE AND SETTLEMENT.

↻20(2) (U.S.C.C.A.Va.) Failure to perform agreement for settlement of pending suit restores parties to original status.—Olympia Shipping Corporation v. Morse Dry Dock & Repair Corporation, 199.

CONDEMNATION.

See Eminent Domain.

CONSPIRACY.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

↻27 (U.S.C.C.A.Mo.) Overt act need not be criminal.—Manning v. U. S., 29.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

⊕27 (U.S.C.C.A.N.Y.) Indictment *held* sufficient.—Wilson v. U. S., 307.

(B) Prosecution and Punishment.

⊕43(5) (U.S.C.C.A.Mo.) Defective indictment not aided by averment of overt act.—Manning v. U. S., 29.

⊕43(5) (U.S.D.C.Pa.) Charge in indictment cannot be aided by statement of overt acts.—U. S. v. Beiner, 704.

⊕43(6) (U.S.D.C.Pa.) Indictment *held* insufficient.—U. S. v. Beiner, 704.

CONSTITUTIONAL LAW.

For validity of statutes relating to particular subjects, see also the various specific topics.

II. CONSTRUCTION OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⊕46(1) (U.S.C.C.A.Neb.) Court will determine constitutional questions only when absolutely necessary.—Allen v. Omaha Live Stock Commission Co., 1.

⊕47 (U.S.C.C.A.Okl.) Validity of statute tested by what may be done under it.—Moore v. Otis, 747.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

⊕54 (U.S.D.C.N.Y.) Fixing compensation for property taken for public use is judicial question and not for congress to determine.—National City Bank of New York v. U. S., 855.

(B) Judicial Powers and Functions.

⊕70(3) (U.S.D.C.Mich.) No judicial interference with classification of corporations for taxation, unless purely arbitrary.—Republic Acceptance Corporation v. De Land, 632.

(C) Executive Powers and Functions.

⊕79 (U.S.D.C.N.Y.) Fixing compensation for property taken for public use is judicial question and not for executive officers to determine.—National City Bank of New York v. U. S., 855.

VII. OBLIGATION OF CONTRACTS.

(B) Contracts of States and Municipalities.

⊕126 (U.S.D.C.Mich.) State may levy license tax on corporation previously granted permission to carry on business without impairing the obligation of contract.—Republic Acceptance Corporation v. De Land, 632.

⊕143 (U.S.C.C.A.Okl.) Law providing for diversion of funds and discharge of existing assessments *held* to impair the obligation of contract.—Moore v. Otis, 747.

Existing laws part of municipal bond contract.—*Id.*

X. EQUAL PROTECTION OF LAWS.

⊕229(1) (U.S.D.C.Mich.) State statute, imposing excise tax on corporations according to capital and surplus, *held* not unconstitutional as violating equal protection clause.—Republic Acceptance Corporation v. De Land, 632.

⊕235 (U.S.D.C.Conn.) Connecticut *Jitney Act held* not unconstitutional as denying equal protection of laws.—Lane v. Whitaker, 476.

XI. DUE PROCESS OF LAW.

⊕283 (U.S.D.C.Mich.) State statute, imposing excise tax on corporations according to capital and surplus, *held* not unconstitutional as denying due process clause.—Republic Acceptance Corporation v. De Land, 632.

⊕284(1) (U. S. C. C. A. Ark.) Legislative assessment of benefits *held* void, as denying due process.—Road Improvement Dist. No. 2 of Conway County v. Missouri Pac. R. Co., 600.

⊕286 (U.S.D.C.N.Y.) Tax statute not unconstitutional as taking property without due process of law because not applicable to Porto Rico.—Porto Rico Coal Co. v. Edwards, 104.

⊕292 (U.S.D.C.Conn.) Connecticut *Jitney Act held* not unconstitutional as denying due process of law.—Lane v. Whitaker, 476.

CONTINUANCE.

⊕49 (U.S.D.C.Ind.) Properly refused for production of evidence where defendant refused to preserve status quo.—Borderland Coal Corporation v. International Organization of United Mine Workers of America, 871.

CONTRACTS.

See Bills and Notes; Compromise and Settlement; Covenants; Exchange of Property; Frauds, Statute of; Sales; Vendor and Purchaser.

I. REQUISITES AND VALIDITY.

(B) Parties, Proposals, and Acceptance.

⊕29 (U.S.C.C.A.N.Y.) Whether several papers constituted written contract question of fact.—W. R. Grace & Co. v. Nagle, 343.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

⊕143 (U.S.C.C.A.N.Y.) As made by parties cannot be altered by court.—Adamson v. Alexander Milburn Co., 148.

⊕143 (U.S.C.C.A.N.Y.) Construed as a whole.—Gans S. S. Line v. Wilhelmsen, 254.

⊕147(2) (U.S.C.C.A.N.Y.) Construed according to intention of parties to be deduced from language used.—Adamson v. Alexander Milburn Co., 148.

(B) Parties.

⊕184 (U.S.C.C.A.N.Y.) Both joint and several obligations may arise from the same contract.—In re John B. Rose Co., 409.

(E) Conditions.

⊕221(3) (U.S.C.C.A.N.Y.) Money payable notwithstanding failure of contingency due to defendant.—Adamson v. Alexander Milburn Co., 148.

V. PERFORMANCE OR BREACH.

⊕282 (U.S.C.C.A.N.Y.) Rejection of work required to have been done to satisfaction of particular person cannot be arbitrary.—Adamson v. Alexander Milburn Co., 148.

COPYRIGHTS.

I. NATURE AND ACQUISITION.

↪4 (U.S.C.A.III.) News not subject of copyright.—Chicago Record-Herald Co. v. Tribune Ass'n, 797.

↪20 (U.S.C.C.A.N.Y.) Photographer taking pictures gratuitously for his own benefit entitled to copyright.—Lumiere v. Pathé Exchange, 428.

↪24 (U.S.D.C.N.Y.) "Proprietor" equivalent to "assign."—Public Ledger v. New York Times, 562.

Contract held not an assignment of literary property which carried the right to copyright.—Id.

↪33 (U.S.D.C.N.Y.) Proprietor has no right of renewal.—Fox Film Corporation v. Knowles, 582.

Neither executor nor legatee of author, as such, has right of renewal.—Id.

III. INFRINGEMENT.

(A) What Constitutes Infringement.

↪53 (U.S.C.C.A.N.Y.) What infringement consists in.—Wilson v. Haber Bros., 346.

↪57 (U.S.C.C.A.III.) Copyrighted news item held infringed.—Chicago Record-Herald Co. v. Tribune Ass'n, 797.

↪58 (U.S.C.C.A.III.) What constitutes substantial part of copyrighted article not determined alone by measurement.—Chicago Record-Herald Co. v. Tribune Ass'n, 797.

(B) Actions.

↪74 (U.S.C.C.A.N.Y.) Conditions precedent to suit for infringement.—Lumiere v. Pathé Exchange, 428.

↪83 (U.S.C.C.A.N.Y.) Kewpie doll held infringed.—Wilson v. Haber Bros., 346.

CORPORATIONS.

See Banks and Banking; Carriers; Municipal Corporations; Railroads.

I. INCORPORATION AND ORGANIZATION.

↪29(2) (U.S.C.C.A.Neb.) As against a collateral attack organization held sufficient to validate deed to corporation.—U. S. v. Delator, 137.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(D) Transfer of Shares.

↪149 (U.S.C.C.A.Md.) Pledgee of stock without present consideration not a bona fide holder.—Commercial Nat. Bank of Washington, D. C., v. Shriver, 12.

V. MEMBERS AND STOCKHOLDERS.

(B) Meetings.

↪198 (U.S.D.C.Fla.) A creditors' agreement reciting a prior voting trust agreement held effective, whether actually signed and executed by a committee of creditors and the corporation or not.—In re C. W. Bartleson Co., 390.

VII. CORPORATE POWERS AND LIABILITIES.

(B) Representation of Corporation by Officers and Agents.

↪415 (U.S.D.C.Mass.) Directors may mortgage all of corporation's property.—William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co., 206.

Authority to president to give mortgage limited to debt specified.—Id.

↪426(7) (U. S. C. C. A. Del.) Unauthorized modification of contract held ratified by implication.—Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 916.

(D) Contracts and Indebtedness.

↪477(1) (U.S.C.C.A.N.Y.) Void provision in agreement held severable so as not to affect right of mortgagee to enforce lien.—American Engineering Co. v. Metropolitan By-Products Co., 34.

↪484(3) (U.S.C.C.A.N.Y.) Generally without power to become guarantor.—In re John B. Rose Co., 416.

Directors cannot authorize guaranty which is ultra vires.—Id.

Guaranty by corporation held void as ultra vires.—Id.

Corporation must control another to make it a subsidiary.—Id.

VIII. INSOLVENCY AND RECEIVERS.

↪547(1) (U.S.D.C.Mass.) Liens given on any property in possession of creditor held not to extend to property constructively in its possession.—William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co., 206.

Possession under mortgage held not attributable to other claimed liens.—Id.

↪559(1) (U.S.C.C.A.Del.) Appointment of receivers does not dissolve corporation, and action taken during receivership not void, but voidable.—Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 916.

↪559(5) (U.S.D.C.Mass.) Invalid claim not validated by decree reserving rights on surrender of property to receivers.—William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co., 206.

IX. REINCORPORATION AND REORGANIZATION.

↪579(2) (U.S.C.C.A.N.Y.) Lessor creditor held entitled to follow assets after reorganization sale to recover subsequently accruing rentals.—Howard v. Maxwell Motor Co., 53.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

↪617(2) (U.S.D.C.N.Y.) On dissolution property vests in stockholders.—Gardiner v. Automatic Arms Co., 697.

↪623 (U.S.D.C.N.Y.) Directors of dissolved corporation held not necessary parties to suit by stockholders to recover property.—Gardiner v. Automatic Arms Co., 697.

Stockholders of dissolved corporation may sue to recover property fraudulently transferred by directors.—Id.

↪630(3½) (U.S.D.C.N.Y.) Dissolved corporation not indispensable party to suit by stockholders.—Gardiner v. Automatic Arms Co., 697.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

XII. FOREIGN CORPORATIONS.

- ↪642(1) (U.S.C.A.Mich.) Foreign corporation, contracting for manufacture in Michigan of certain articles, held not "doing business" for state.—Michigan Lubricator Co. v. Ontario Cartridge Co., 902.
- ↪648 (U.S.D.C.Mich.) Compliance with statute and receipt of certificate by foreign corporation constituted contract.—Republic Acceptance Corporation v. De Land, 632.
- ↪661(2) (U.S.C.A.Mich.) Michigan statutes forbid recovery by foreign corporation under contract contemplating performance of its part in state.—Michigan Lubricator Co. v. Ontario Cartridge Co., 902.
- ↪665(1) (U.S.D.C.Cal.) Not subject to suit in foreign jurisdiction in which it is not doing business.—Miller v. Minerals Separation Limited, 380.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTERFEITING.

- ↪8 (U.S.C.A.Ill.) Alteration of bank note to be material need not be such as to deceive experienced and prudent persons.—Hill v. U. S., 187.
- ↪16 (U.S.C.A.Ill.) Indictment for having in possession counterfeit notes must allege guilty knowledge.—Hill v. U. S., 187.
- Indictment for passing spurious Federal Reserve bank note held sufficient.—Id.
- Indictment for passing altered Reserve bank note need not set out copy of note before alteration.—Id.
- Photographic copy of altered bank note may be used in indictment.—Id.
- ↪18 (U.S.C.A.Ill.) To warrant conviction for passing altered bank note it must be shown to have been genuine before alteration.—Hill v. U. S., 187.

COUNTIES.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(D) Torts.

- ↪148 (U.S.C.A.Ill.) Not liable for mob violence within city.—Conto v. Franklin County, 806.

COURT RULES CITED.

Equity Rule 58.—275 F. 624.

COURTS.

See Criminal Law, ↪97.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(D) Rules of Decision, Adjudications, Opinions, and Records.

- ↪102(1) (U. S. D. C. Mich.) District Court may pass on motion to dismiss bill to restrain state officers from enforcing statute.—Republic Acceptance Corporation v. De Land, 632.

VII. UNITED STATES COURTS.

(A) Jurisdiction and Powers in General.

- ↪262(4) (U.S.C.A.Ark.) Federal court of equity has power to prevent taking by state of

property without due process of law.—Road Improvement Dist. No. 2, of Conway County v. Missouri Pac. R. Co., 600.

↪262(4) (U.S.D.C.Ind.) Federal District Court may enjoin those within its district from furthering conspiracy against trade in another district.—Borderland Coal Corporation v. International Organization of United Mine Workers of America, 871.

↪264(1) (U.S.D.C.Mich.) Federal court has jurisdiction of all questions, where federal question involved.—Republic Acceptance Corporation v. De Land, 632.

↪273 (U.S.C.C.A.N.Y.) No accounting in federal court against person brought in as having a lien in absence of partnership.—De Rees v. Costagata, 172.

↪280 (U.S.D.C.Cal.) Jurisdictional allegations in complaint may be controverted by affidavit.—Miller v. Minerals Separation Limited, 380.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

↪282(1) (U.S.D.C.Mich.) Bill to enjoin enforcement of state statute as violative of federal Constitution arises under Constitution and laws of United States.—Republic Acceptance Corporation v. De Land, 632.

↪282(3) (U.S.D.C.N.C.) Federal court may enjoin enforcement of void state judgment.—Seaboard Air Line Ry. Co. v. Fowler, 239.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

↪303(2) (U.S.D.C.Mich.) Federal court has jurisdiction to restrain state officers from enforcing unconstitutional statute.—Republic Acceptance Corporation v. De Land, 632.

↪307(2) (U.S.D.C.Cal.) Interpleader statute does not give District Court jurisdiction of a citizen of District of Columbia.—Mutual Life Ins. Co. of New York v. Lott, 365.

District of Columbia is not a "state" within section 1 of article 3 of the Constitution.—Id.

↪318 (U.S.D.C.N.Y.) Party not indispensable may not be dismissed from suit by amendment.—Gardiner v. Automatic Arms Co., 697.

(D) Jurisdiction Dependent on Amount or Value in Controversy.

↪328(3) (U.S.D.C.Ga.) Value of right of way and future maintenance of side track not considered in determining jurisdiction of court.—Western & A. R. R. v. Railroad Commission of Georgia, 128.

(E) Procedure and Adoption of Practice of State Courts.

↪340 (U.S.C.C.A.N.Y.) Amendment in federal courts governed by federal statute.—American Mills Co. v. Hoffman, 285.

↪340 (U.S.D.C.Pa.) State act requiring filing of warrant of attorney not applicable to bankruptcy proceedings.—In re Brashear, 481.

↪343 (U.S.C.C.A.R.I.) Necessary defendant may be joined by amendment, if not ousting jurisdiction.—Atwood v. Rhode Island Hospital Trust Co., 513.

⊕344 (U.S.C.C.A.Va.) Federal court may allow amendment changing form of action.—Mims v. Reid, 177.

Court held authorized to permit amendment of process to conform to declaration.—Id.

⊕344 (U.S.D.C.Minn.) Validity of service on foreign corporation dependent on its doing business in the state.—Stephan v. Union Pac. Ry. Co., 709.

⊕347 (U.S.C.C.A.Va.) Federal courts may follow state statutes permitting amendments.—Mims v. Reid, 177.

⊕351 (U.S.D.C.N.Y.) Federal court may grant an action at law pursuant to state statute.—Donnelly v. Anderson Brown & Co., 438.

⊕354 (U.S.C.C.A.N.Y.) Federal court judgment must determine entire controversy.—McElligott v. Kissam, 545.

(F) State Laws as Rules of Decision.

⊕369(3) (U.S.C.C.A.Okl.) In protecting contract rights, decisions of state courts not necessarily followed.—Moore v. Otis, 747.

(J) District Courts.

⊕426 (U.S.D.C.Del.) Liquidated balance less than \$10,000 for coal requisitioned under Lever Act recoverable only under Tucker Act.—Dexter & Carpenter v. U. S., 566.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

⊕474 (U.S.D.C.Ga.) Time of filing proceeding governs in determining priority in appointment of receivers.—In re Couch Cotton Mills Co., 496.

(B) State Courts and United States Courts.

⊕508(3) (U.S.D.C.N.C.) Federal court may enjoin enforcement of void state judgment.—Seaboard Air Line Ry. Co. v. Fowler, 239.

COVENANTS.

IV. ACTIONS FOR BREACH.

⊕108(1) (U.S.C.C.A.Mo.) Where sale is by government subdivisions, excess of acreage in one will not avail against failure of title of another.—McGinley v. Martin, 267.

⊕125(4) (U.S.C.C.A.Mo.) Damages for failure of title to part of land sold in gross is value of part lost and not proportion of price.—McGinley v. Martin, 267.

CREDITORS' SUIT.

⊕33 (U.S.D.C.N.Y.) Receiver may contest mortgage.—American & British Securities Co. v. American & British Mfg. Corporation, 121.

CRIMINAL LAW.

See Bail. ⊕79; Bribery; Conspiracy, ⊕27-43; Counterfeiting; Embezzlement; Grand Jury; Homicide; Indictment and Information; Larceny; Prostitution.

III. PARTIES TO OFFENSES.

⊕59(5) (U.S.C.C.A.Pa.) Aider and abettor must have knowledge of offense.—Rizzo v. U. S., 51.

IV. JURISDICTION.

⊕97(1) (U.S.C.C.A.Colo.) District where overt act is committed has jurisdiction in conspiracy prosecution.—Lucas v. U. S., 405.

VII. FORMER JEOPARDY.

⊕167 (U.S.D.C.Ohio) Former acquittal or conviction to constitute bar, but court must have jurisdiction.—U. S. v. Ratagczak, 558.

⊕168 (U.S.D.C.Ohio) Former acquittal or conviction to constitute bar, may be upon warrant and without jury.—U. S. v. Ratagczak, 558.

⊕196 (U.S.C.C.A.Mo.) Test of former jeopardy.—Manning v. U. S., 29.

Acquittal on one charge of conspiracy held bar to prosecution on second charge.—Id.

⊕200(6) (U.S.C.C.A.Colo.) Acquittal on one indictment held not inconsistent with conviction on another, based on the same transaction.—Lucas v. U. S., 405.

⊕201 (U.S.D.C.Ohio) Conviction under state statute not bar to prosecution under federal statute for same act.—U. S. v. Ratagczak, 558.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

⊕242(4) (U.S.D.C.Pa.) Indictment must charge offense to authorize removal of prisoner to another district.—U. S. v. Beiner, 704.

X. EVIDENCE,

(D) Materiality and Competency in General.

⊕394 (U.S.C.C.A.S.C.) Evidence illegally obtained is inadmissible.—Holmes v. U. S., 49.

⊕395 (U.S.C.C.A.III.) Liquor taken from ice box without search warrant inadmissible.—Berry v. U. S., 680.

⊕395 (U.S.C.C.A.S.C.) Evidence obtained by unlawful search inadmissible.—Dukes v. U. S., 142.

⊕395 (U.S.D.C.N.Y.) Liquor unlawfully seized is not admissible in evidence.—Connelly v. U. S., 509.

⊕395 (U.S.D.C.N.Y.) Evidence obtained from illegally seized papers not admissible.—U. S. v. Lydecker, 976.

(I) Opinion Evidence,

⊕493 (U.S.C.C.A.III.) Opinion that liquid was beer held no basis for conviction.—Berry v. U. S., 680.

(K) Confessions.

⊕517(1) (U.S.D.C.N.Y.) Confession admissible only where voluntarily given.—U. S. v. Lydecker, 976.

⊕518(1) (U.S.D.C.N.Y.) That defendant was not warned did not render confession inadmissible.—U. S. v. Lydecker, 976.

⊕531(2) (U.S.D.C.N.Y.) Evidence admissible to show confession involuntary.—U. S. v. Lydecker, 976.

⊕532(1) (U.S.D.C.N.Y.) Confession not returned to defendant or suppressed before trial.—U. S. v. Lydecker, 976.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

XII. TRIAL.

(A) Preliminary Proceedings.

↪619 (U.S.C.C.A.Colo.) Consolidation of cases for trial *held* proper.—Lucas v. U. S., 405.

↪627½ (U.S.D.C.N.Y.) When defendant will be permitted to inspect grand jury minutes.—U. S. v. Lydecker, 976.

(F) Province of Court and Jury in General.

↪736(2) (U.S.D.C.N.Y.) Voluntary character of confession a jury question.—U. S. v. Lydecker, 976.

↪753(2) (U.S.C.C.A.S.C.) In absence of motion to strike evidence illegally obtained, directed verdict for defendant is proper.—Holmes v. U. S., 49.

(G) Necessity, Requisites, and Sufficiency of Instructions.

↪781(5) (U.S.D.C.N.Y.) Court, having admitted confession claimed to have been involuntarily made, should submit the question to jury, with direction to disregard it if involuntary.—U. S. v. Lydecker, 976.

↪799 (U.S.C.C.A.S.C.) Comments of court on argument of counsel *held* not error.—Kennedy v. U. S., 182.

(J) Custody, Conduct, and Deliberations of Jury.

↪854(7) (U.S.C.C.A.Colo.) Permitting separation of jury *held* not improper.—Lucas v. U. S., 405.

↪865(1) (U.S.C.C.A.Colo.) Instructing jury as to duty to agree *held* not improper.—Lucas v. U. S., 405.

XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

↪1036(8) (U.S.C.C.A.Ark.) Sufficiency of evidence cannot be first challenged on appeal.—Bonner v. U. S., 614.

(D) Record and Proceedings Not in Record.

↪1090(1) (U.S.C.C.A.N.Y.) Rulings brought into record only by bill of exceptions.—McGrath v. U. S., 294.

↪1090(5) (U.S.C.C.A.N.Y.) Bill of exceptions unnecessary to consideration of indictment.—McGrath v. U. S., 294.

↪1090(15) (U.S.C.C.A.N.Y.) Bill of exceptions unnecessary to consideration of judgment.—McGrath v. U. S., 294.

↪1092(9) (U.S.C.C.A.Kan.) After term and expiration of time as previously extended, no power to extend time to present bill of exceptions.—Pierre v. U. S., 352.

↪1094 (U.S.C.C.A.Kan.) Writ not dismissed for absence of bill of exceptions where overruling demurrer to indictment is assigned as error.—Pierre v. U. S., 352.

↪1116 (U.S.C.C.A.N.Y.) Where no bill of exceptions and record fails to show that demurrer was filed or ruled upon, sole question is whether indictment is sufficient.—McGrath v. U. S., 294.

(G) Review.

↪1144(3) (U.S.C.C.A.N.Y.) Presumed that defect in indictment was cured by instructions.—McGrath v. U. S., 294.

↪1144(13) (U.S.C.C.A.N.Y.) Presumed that evidence was sufficient.—McGrath v. U. S., 294.

↪1159(6) (U.S.C.C.A.Ill.) Conviction, based largely on circumstantial evidence, not disturbed.—Cornick v. U. S., 374.

↪1168(1) (U.S.C.C.A.S.C.) Conviction legal on one count which warrants sentence not reversed for error in rulings on evidence.—Kennedy v. U. S., 182.

↪1169(12) (U.S.C.C.A.Colo.) Error in admission of confession cured by subsequent evidence.—Lucas v. U. S., 405.

↪1172(1) (U.S.C.C.A.S.C.) Conviction legal on one count which warrants sentence not reversed for error in rulings on instructions.—Kennedy v. U. S., 182.

CUSTOMS DUTIES.

VII. VIOLATIONS OF CUSTOMS LAWS.

↪122 (U.S.D.C.Va.) Ship liable for penalty for bringing in smoking opium not shown on manifest; absence of intent being no defense.—The Ivor Heath, 67.

DAMAGES.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(C) Proceedings for Assessment.

↪216(1) (U.S.C.C.A.Minn.) Instruction on measure *held* not erroneous.—Yellow Cab Co. v. Earle, 928.

DEATH.

II. ACTIONS FOR CAUSING DEATH.

(E) Damages, Forfeiture, or Fine.

↪99(4) (U.S.D.C.N.Y.) \$30,000 damages to wife and children *held* excessive.—Rebmann v. Delaware, L. & W. R. Co., 1009.

DEEDS.

See Mortgages.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

↪94 (U.S.C.C.A.Mo.) Previous agreements merged in delivered deed, in absence of ground for reformation.—McGinley v. Martin, 267.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Wills.

DISCOVERY.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examinations of Parties and of Other Persons.

↪37 (U.S.D.C.N.Y.) Plaintiff *held* entitled to an order for examination of defendants for the purpose of framing complaint.—Donnelly v. Anderson Brown & Co., 438.

DISMISSAL AND NONSUIT.

See Equity, ↪363.

DIVORCE.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

↪129(1) (D.C.) Proof of adultery must be clear and convincing.—Symons v. Symons, 1015.
 ↪129(16) (D.C.) Evidence held to establish adultery.—Symons v. Symons, 1015.

(F) Judgment or Decree.

↪168 (U.S.C.C.A.N.D.) Validity of nunc pro tunc final decree by court having jurisdiction not subject to collateral attack.—Knight v. Knight, 196.

DOCKS.

See Wharves.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, ↪283-292.

EMBEZZLEMENT.

↪28 (U.S.C.C.A.Cal.) Counts held to sufficiently describe property embezzled by bank officer.—Williams v. U. S., 129.
 ↪29 (U.S.C.C.A.Cal.) Count of indictment held sufficient.—Williams v. U. S., 129.

EMINENT DOMAIN.

II. COMPENSATION.

(A) Necessity and Sufficiency in General.

↪69 (U.S.D.C.N.Y.) War power does not abrogate constitutional guaranties of Fifth Amendment.—National City Bank of New York, v. U. S., 855.

(C) Measure and Amount.

↪131 (U.S.D.C.N.Y.) "Just compensation" is fair market value.—National City Bank of New York v. U. S., 855.
 ↪131 (U.S.D.C.Ohio) Compensation measured by market value, if there is a market, notwithstanding government regulation, floods, etc., affecting market.—C. G. Blake Co. v. U. S., 861.
 ↪136 (U.S.D.C.S.C.) Anticipated use of property held too speculative for consideration.—Seaboard Air Line Ry. v. U. S., 77.
 ↪147 (U.S.D.C.Pa.) Just compensation for taking of leasehold determined.—National Laboratory & Supply Co. v. U. S., 218.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

↪202(1) (U.S.D.C.S.C.) Evidence admissible on question of damages for taking.—Seaboard Air Line Ry. v. U. S., 77.

EQUITY.

See Creditors' Suit; Discovery; Injunction; Subrogation.

III. PARTIES AND PROCESS.

↪96 (U.S.C.C.A.R.I.) Presence of necessary party not indispensable for federal court pro-

ceeding as to the other parties with suit to avoid clause of will.—Atwood v. Rhode Island Hospital Trust Co., 513.

↪114 (D.C.) Wide discretion vested in chancellor in permitting intervention.—Gaines v. Clark, 1017.

When party must be allowed to intervene.—Id.

Application to intervene should not be disposed of upon legal technicality.—Id.

IV. PLEADING.

(A) Original Bill.

↪140 (U.S.D.C.Del.) Interrogatories must be founded on allegations of bill.—Hartford v. Cleveland Automobile Co., 590.

(F) Amended and Supplemental Pleadings and Revivor.

↪269 (U.S.D.C.Cal.) Parties allowed to amend claims to conform to new information.—Wilson v. Union Tool Co., 624.

VII. DISMISSAL BEFORE HEARING.

↪363 (U.S.D.C.Mich.) Allegations of complaint treated as true on motion to dismiss.—Republic Acceptance Corporation v. De Land, 632.

EQUITY RULES.

See Court Rules Cited.

ERROR, WRIT OF.

See Appeal and Error.

ESTATES.

See Executors and Administrators; Perpetuities; Wills.

EVIDENCE.

See Criminal Law, ↪394-532; Discovery; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

I. JUDICIAL NOTICE.

↪18 (U.S.D.C.Ill.) Judicial notice taken of price decline.—U. S. v. American Linseed Co., 939.

II. PRESUMPTIONS.

↪76 (U.S.C.C.A.Okl.) Failure of party to testify may be considered against him.—One Buick Automobile v. U. S., 809.

↪77(5) (U.S.D.C.Va.) Failure to produce members of crew as witnesses may be considered.—The Richmond, 970.

↪86 (U.S.C.C.A.N.Y.) "Presumption of law" defined.—In re John B. Rose Co., 409.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

↪100 (U.S.C.C.A.Iowa) When plaintiff's case depends on circumstantial evidence, evidence liberally admitted.—Northwestern Mut. Life Ins. Co. v. Johnson, 757

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

↪113(21) (U.S.D.C.Ohio) Compulsory sales and purchases not indicative of true market value.—C. G. Blake Co. v. U. S., 861.

(D) Materiality.

↪147 (U.S.C.A.Mo.) Testimony of various car men that they did not see plaintiff attempt to board street car *held* admissible.—Fels v. East St. Louis & S. Ry. Co., 881.

V. BEST AND SECONDARY EVIDENCE.

↪158(28) (U.S.C.C.A.N.Y.) Tally and receipts *held* best evidence.—Scott v. W. R. Grace & Co., 340.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

↪397(5) (U.S.C.C.A.N.Y.) Formal document of partnership not enlarged or varied by parol.—De Rees v. Costaguta, 172.

(D) Construction or Application of Language of Written Instrument.

↪450(8) (U.S.C.C.A.Ill.) Sales contract *held* unambiguous, and not subject to extraneous evidence, and to permit call for shipment of 15,000,000 gallons of oil, but not more than 1,000,000 gallons per month—American Steel Foundries v. Indian Refining Co., 800.

↪460(11) (U.S.C.C.A.Ind.) Parol evidence not admissible to vary quantity of goods sold.—Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., 794.

↪461(3) (U.S.C.C.A.Ga.) Parol evidence inadmissible against trustee to show intent as to indefinitely described mortgaged property.—Brown v. Camp, 612.

XII. OPINION EVIDENCE.

(D) Examination of Experts.

↪553(2) (U.S.C.C.A.Ill.) Omission of fact from hypothetical question *held* error.—Payne v. Cohlmeier, 803.

EXCHANGE OF PROPERTY.

↪3(1) (U.S.C.C.A.Ohio) Fiduciary relationship *held* to exist between plaintiff and agent for defendants.—Herschberger v. Woodrow-Parker Co., 908.

Misrepresentation as to classification of oil *held* established.—Id.

Plaintiff had right to rely on statement of defendant as to acreage of plow land.—Id.

↪8(4) (U.S.C.C.A.Ohio) Misrepresentation as to quality of land not shown.—Herschberger v. Woodrow-Parker Co., 908.

Misrepresentations as to boundary not shown.—Id.

EXECUTION.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

↪158(1) (U.S.D.C.Cal.) Bank *held* to have intentionally aided judgment debtor in removing tangible assets beyond reach of process.—Lineker v. Dillon, 460.

Purchaser of judgment debtor's land *held* without sufficient knowledge of fraudulent character of transaction to be in contempt.—Id.

Granting of stay discretionary with court.—Id.

Aiding judgment debtor in removing property beyond reach of process during stay of execution *held* contempt.—Id.

Court authorized to punish as in contempt persons who aided judgment debtor in removing property beyond reach of process during stay of execution.—Id.

Persons who aid judgment debtor in disposing of her property subject to judgment lien, *held* guilty of contempt.—Id.

Persons in contempt for aiding judgment debtor in removing property required to pay judgment creditor amount lost.—Id.

↪174 (U.S.D.C.Cal.) Rights of parties to remain in statu quo during stay of execution.—Lineker v. Dillon, 460.

EXECUTIVE POWER.

See Constitutional Law, ↪79.

EXECUTORS AND ADMINISTRATORS.

See Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

↪29(2) (U.S.C.C.A.Iowa) Appointment of administrator not subject to collateral attack.—Northwestern Mut. Life Ins. Co. v. Johnson, 757.

XII. FOREIGN AND ANCILLARY ADMINISTRATION.

↪524(1) (U.S.C.C.A.Iowa) Foreign administrator cannot sue in Iowa.—Northwestern Mut. Life Ins. Co. v. Johnson, 757.

EXPLOSIVES.

↪8 (U.S.C.C.A.N.J.) Instruction properly refused as imposing on carrier of explosives liability as insurer against accident.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., 922.

Regulation requiring storage of explosives *held* not to apply to carload lots awaiting unloading for transshipment.—Id.

Duty of care in transportation of explosives.—Id.

FOOD.

↪15 (U.S.D.C.Ohio) False statements in circulars in package not violation of Food and Drugs Act.—U. S. v. Newton Tea & Spice Co., 394.

Proviso in Food and Drugs Act *held* not to furnish refuge for false representation as to nature of contents of package.—Id.

Statement on label that article was substitute for eggs not one of opinion.—Id.

Representations as to result to be obtained *held* to constitute misbranding of food.—Id.

↪20(1) (U.S.D.C.Ohio) Information as to false representation in label *held* sufficient.—U. S. v. Newton Tea & Spice Co., 394.

FOREIGN CORPORATIONS.

See Corporations, ↪642-665.

FORMER JEOPARDY.

See Criminal Law, ⇨167-201.

FRAUD.

See Frauds, Statute of; Fraudulent Conveyances.

FRAUDS, STATUTE OF.**VII. SALES OF GOODS.****(B) Acceptance of Part of Goods.**

⇨89(3) (U.S.D.C.Pa.) Requests by buyers granted by seller *held* not acceptance.—Northwestern Consol. Milling Co. v. Rosenberg, 878.

⇨90(2) (U.S.D.C.Pa.) Requests by buyers granted by seller *held* not receipt of goods taking contract out of statute.—Northwestern Consol. Milling Co. v. Rosenberg, 878.

⇨90(4) (U.S.C.C.A.N.Y.) Statute *held* satisfied as to sales contract by a delivery and acceptance thereunder as an acceptance of goods.—W. R. Grace & Co. v. Nagle, 343.

(C) Giving Earnest or Part Payment.

⇨95(1) (U.S.C.C.A.N.Y.) Statute *held* satisfied as to sales contract by a delivery and acceptance thereunder as a part payment.—W. R. Grace & Co. v. Nagle, 343.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⇨118(1) (U.S.D.C.Pa.) Sale contract evidenced by unsigned memorandum not taken out of statute by application by buyers for shipping permit.—Northwestern Consol. Milling Co. v. Rosenberg, 878.

IX. OPERATION AND EFFECT OF STATUTE.

⇨120 (U.S.D.C.Del.) Sales contract not in writing, invalid in state where made, *held* not to support action in another jurisdiction, where in similar law not in force.—Franklin Sugar Refining Co. v. Holstein Harvey's Sons, 622.

FRAUDULENT CONVEYANCES.**III. REMEDIES OF CREDITORS AND PURCHASERS.****(K) Disposition of Property or Proceeds.**

⇨319 (U.S.C.C.A.Tenn.) Attorney fees payable out of debts recovered.—Stokes v. Sedberry, 894.

GRAND JURY.

⇨8 (U.S.C.C.A.Cal.) Statute relating to "jurors" *held* applicable to grand as well as petit jurors.—Williams v. U. S., 129.

Failure to enter court's order directing clerk and jury commissioner to place names in jury box did not affect legality of grand jury.—*Id.*

⇨31 (U.S.C.C.A.Ill.) May be continued beyond term at which summoned.—Elwell v. U. S., 775.

⇨36 (U.S.C.C.A.Ill.) Willful refusal to obey order to answer questions *held* contempt.—Elwell v. U. S., 775.

HARMLESS ERROR.

See Appeal and Error, ⇨1031-1068; Criminal Law, ⇨1168-1172.

HIGHWAYS.**IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.**

⇨122 (U.S.C.C.A.Ark.) Legislative assessment of benefits *held* arbitrary and void.—Road Improvement Dist. No. 2 of Conway County v. Missouri Pac. R. Co., 600.

⇨138 (U.S.C.C.A.Ark.) Power delegated to make special assessments is judicial in nature and can be exercised only after hearing.—Road Improvement Dist. No. 2 of Conway County v. Missouri Pac. R. Co., 600.

HOMICIDE.**VI. INDICTMENT AND INFORMATION.**

⇨140 (U. S. C. C. A. Kan.) Indictment for threats to take life of President must state to whom or in whose presence threats were made.—Pierre v. U. S., 352.

HUSBAND AND WIFE.

See Divorce.

IMMIGRATION.

See Aliens, ⇨46.

IMPROVEMENTS.

See Municipal Corporations, ⇨348-521.

INDIANS.

⇨35 (U.S.C.C.A.Okl.) Evidence *held* admissible in proceeding to forfeit automobile.—One Buick Automobile v. U. S., 809.

Failure of claimant of automobile to testify might be considered against him.—*Id.*

⇨38(2) (U.S.D.C.Cal.) Selling liquor to Indian a "felony."—Ex parte Margrave, 200.

INDICTMENT AND INFORMATION.

See Homicide, ⇨140.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

⇨52(1) (U.S.D.C.Ohio) Information need not be upon oath where defendant voluntarily appears.—U. S. v. Newton Tea & Spice Co., 394.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⇨61 (U.S.C.C.A.Ill.) Not necessary to allege matter of judicial notice.—Hill v. U. S., 187.

⇨110(13) (U.S.C.C.A.Cal.) Count charging bank officer with abstracting described rates from credits of bank *held* sufficient.—Williams v. U. S., 129.

⇨111(1) (U.S.C.C.A.Mo.) Indictment for conspiracy to violate narcotic act need not negative exceptions.—Manning v. U. S., 29.

⇨121(2) (U.S.C.C.A.N.Y.) Federal court has power to order bill of particulars.—Wilson v. U. S., 307.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

⇨202(5) (U.S.C.C.A.N.Y.) Imperfect statement in indictment cured by verdict.—Wilson v. U. S., 307.

INJUNCTION.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

⊖26(3) (U.S.D.C.N.Y.) Equity will not restrain prosecution of action solely because of existence of cross-claims which cannot be pleaded therein.—Susquehanna S. S. Co. v. A. O. Anderson & Co., 355.

(E) Public Officers and Boards and Municipalities.

⊖74 (U.S.C.C.A.Neb.) Equity has jurisdiction to review action of executive officer, in absence of statutory provision for review.—Allen v. Omaha Live Stock Commission Co., 1.

⊖85(2) (U.S.C.C.A.Neb.) May be granted to restrain prosecutions by federal officers under unconstitutional statute.—Allen v. Omaha Live Stock Commission Co., 1.

⊖85(2) (U.S.D.C.Ala.) State officers may be enjoined from enforcing void statute.—Elmer v. Wallace, 86.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

⊖132 (U.S.C.C.A.N.Y.) Not per se subject of suit in equity.—De Rees v. Costaguta, 172.

⊖136(2) (U.S.C.C.A.Mo.) Employer held entitled to preliminary injunction to restrain threatened interference with contracts of employees.—Kinloch Telephone Co. v. Local Union No. 2 of International Brotherhood of Electrical Workers, 241.

⊖144 (U.S.C.C.A.Neb.) Bills held to entitle complainants to preliminary injunction.—Allen v. Omaha Live Stock Commission Co., 1.

⊖144 (U.S.C.C.A.N.Y.) Sufficiency of alleged cause may be challenged.—De Rees v. Costaguta, 172.

INSOLVENCY.

See Bankruptcy.

INSTRUCTIONS.

See Criminal Law, ⊖736-799; Trial, ⊖193-284.

INSURANCE.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

⊖136(4) (U.S.C.C.A.Iowa) Policy held not delivered.—Bradley v. New York Life Ins. Co., 657.

Insured's local agent held not agent of insured to receive delivery of policy.—Id.

⊖137(4) (U.S.C.C.A.Iowa) First premium held not paid.—Bradley v. New York Life Ins. Co., 657.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

⊖182 (U.S.C.C.A.N.Y.) Policy issued to two corporations held not to create joint and several liability for premiums.—In re John B. Rose Co., 409.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO VOID OR FORFEIT POLICY.

⊖400 (U.S.C.C.A.Iowa) Policy incontestable for suicide after two years.—Northwestern Mut. Life Ins. Co. v. Johnson, 757.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(A) Marine Insurance.

⊖475 (U.S.D.C.N.Y.) Marine contract held not valued policy.—J. Aron & Co. v. U. S. Lloyds, 442.

XVI. RIGHT TO PROCEEDS.

⊖582 (U.S.D.C.Mont.) Seller not entitled to share in insurance taken for purchaser.—Donlan & Henderson v. Turner, Dennis & Lowrey Lumber Co., 71.

XVIII. ACTIONS ON POLICIES.

⊖659(2) (U.S.C.C.A.Iowa) Letters of insured held admissible to show intent, as bearing on issue of death.—Northwestern Mut. Life Ins. Co. v. Johnson, 757.

INTERNAL REVENUE.

⊖2 (U.S.C.C.A.N.Y.) Estate tax is an "excise tax," and not a "direct tax" on property, and is constitutional.—McElligott v. Kissam, 545.

⊖2 (U.S.D.C.Ga.) Statute requiring registration of stills not repealed by National Prohibition Act.—Duvall v. Dyché, 440.

⊖2 (U.S.D.C.N.Y.) National and local income taxes do not constitute double taxation.—Porto Rico Coal Co. v. Edwards, 104.

Tax statute not unconstitutional because not applicable to Porto Rico.—Id.

⊖2 (U.S.D.C.N.Y.) Provision for civil remedy and criminal punishment held valid.—Pummilli v. Riordan, 846.

Provisions of Internal Revenue Act for collections held not repealed by National Prohibition Act.—Id.

⊖5 (U.S.D.C.N.Y.) Not entitled to rights of citizens of another jurisdiction.—Porto Rico Coal Co. v. Edwards, 104.

⊖7 (U.S.D.C.Ill.) Trust agreement held to create association subject to income tax.—Chicago Title & Trust Co. v. Smietanka, 60.

⊖7 (U.S.D.C.N.Y.) Income derived from Porto Rico not exempt from excess profits tax.—Porto Rico Coal Co. v. Edwards, 104.

Taxation of state corporation not affected by laws relating to Porto Rico where its business is located.—Id.

State corporation doing business in Porto Rico held subject to income tax.—Id.

⊖7 (U.S.D.C.N.Y.) Bequest to executors held "compensation for personal services" taxable as income.—U. S. v. Vanderbilt, 109.

⊖7 (U.S.D.C.N.Y.) Attorney's fees paid in litigation for control of stock not a "necessary expense in carrying on business."—Laemmlé v. Eisner, 504.

⊖7 (U.S.D.C.N.Y.) Bequests held not taxable income.—Gavit v. Irwin, 643.

⊖7 (U.S.D.C.Pa.) Computation of "invested capital" of corporation for purpose of excess

profits tax.—Castner, Curran & Bullitt v. Lederer, 221.

↪8 (U.S.C.C.A.N.Y.) Estate of decedent includes property in which he had a joint interest.—McElligott v. Kissam, 545.

↪8 (U.S.D.C.La.) Widow's usufruct of husband's share of community property not deductible for purpose of estate tax.—Liebman v. Fontenot, 688.

↪9 (U.S.D.C.Mich.) Hotel company held subject to corporation tax, as "carrying on or doing business."—Detroit Hotel Co. v. Brady, 995.

↪9 (U.S.D.C.Mo.) Interest on mortgages deposited with trustee income of loan company, though paid out to holders of mortgage certificates.—U. S. v. Waddell Inv. Co., 934.

↪25 (U.S.D.C.Mo.) Assessment unnecessary, where tax is a fixed percentage.—U. S. v. Waddell Inv. Co., 934.

↪27(1) (U.S.C.C.A.Ill.) Liberty Bonds, converted to 4¼ per cent. bonds less than six months before death, not receivable at face value to pay transfer tax.—Smietanka v. Ullman, 814.

↪28 (U.S.D.C.N.Y.) Collection of taxes and penalty for illegal manufacture and sale cannot be enjoined.—Pummilli v. Riordan, 846.

Existence of other license as defeating tax and penalty cannot be determined on application for injunction, which does not lie, to restrain collection.—Id.

↪38 (U.S.D.C.Mich.) Action to recover taxes not maintainable against collector's successor.—Detroit Hotel Co. v. Brady, 995.

↪42 (U.S.C.C.A.S.C.) Liquor held secured by illegal search.—Dukes v. U. S., 142.

↪47 (U.S.C.C.A.S.C.) Prosecution must prove that whisky charged to have been illegally removed from distillery was untaxed.—Dukes v. U. S., 142.

INTOXICATING LIQUORS.

VI. OFFENSES.

↪134 (U.S.C.C.A.Ill.) Liquid must be beer as defined by Volstead Act to constitute a violation of act.—Berry v. U. S., 680.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

↪247 (U.S.D.C.Mass.) Seizure of liquor held under permit held unlawful.—Francis Drug Co. v. Potter, 615.

↪248 (U.S.D.C.Fla.) Affidavit changed to apply to different premises held invalid.—U. S. v. Armstrong, 506.

↪248 (U.S.D.C.Mich.) Affidavit held insufficient to warrant search warrant, as based on belief, and not facts.—U. S. v. Ray & Schultz, 1004.

↪249 (U.S.D.C.Fla.) Search warrant changed to apply to different premises held invalid.—U. S. v. Armstrong, 506.

↪249 (U.S.D.C.N.Y.) Liquor cannot be seized without warrant.—Connelly v. U. S., 509.

↪251 (U.S.D.C.Pa.) Evidence held insufficient to sustain claim to seized liquors.—In re Disposition of Certain Intoxicating Liquors, 852.

↪255 (U.S.D.C.Mass.) Commissioner without power to order return of liquor seized.—Francis Drug Co. v. Potter, 615.

↪255 (U.S.D.C.Mich.) Liquors unlawfully seized returned, on showing improper issuance of seizure warrant.—U. S. v. Ray & Schultz, 1004.

↪255 (U.S.D.C.N.Y.) Liquor, where unlawfully seized, must be returned to owner.—Connelly v. U. S., 509.

IRRIGATION.

See Waters and Water Courses, ↪222.

JEOPARDY.

See Criminal Law, ↪167-201.

JOINT ADVENTURES.

↪4(4) (U.S.D.C.Mont.) Division of expenses in carrying out agreement.—Donlan & Henderson v. Turner, Dennis & Lowrey Lumber Co., 71.

JUDGMENT.

See Execution.

For judgments in particular actions or proceedings, see also the various specific topics. For review of judgments, see Appeal and Error.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

↪570(6) (U.S.C.C.A.Va.) Order of discontinuance on stipulation of the parties is not judgment nor bar.—Olympia Shipping Corporation v. Morse Dry Dock & Repair Corporation, 199.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

↪651 (U.S.C.C.A.N.Y.) Consent decree interpreted as an agreement.—Wilson v. Haber Bros., 346.

XV. LIEN.

↪760 (U.S.D.C.Cal.) Of federal court in California a lien on judgment debtor's land in a county, though transcript is not filed with recorder thereof.—Lineker v. Dillon, 460.

JUDICIAL POWER.

See Constitutional Law, ↪70.

JURY.

See Criminal Law, ↪854-865.

LANDLORD AND TENANT.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

↪47 (U.S.D.C.Ala.) Intention of grantor governs in construction of lease.—In re Lindy-Friedman Clothing Co., 453.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

↪76(1) (U.S.D.C.Ala.) Restrictions in lease against subletting valid.—In re Lindy-Friedman Clothing Co., 453.

↪76(3) (U.S.D.C.Ala.) Provision in lease requiring formal execution of transfer held not waived.—In re Lindy-Friedman Clothing Co., 453.

↪77 (U.S.D.C.Ala.) Verbal transfer of lease held not effective against landlord.—In re Lindy-Friedman Clothing Co., 453.

(D) Termination.

↪101½ (U.S.D.C.Ala.) Provision in lease for forfeiture in case of bankruptcy of lessees held to apply to corporation assignee.—In re Lindy-Friedman Clothing Co., 453.

LARCENY.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

↪1 (U.S.D.C.N.Y.) Goods shipped between points in same state, but passing through another state, are moving in "interstate commerce."—U. S. v. Yohn, 232.

LEASE.

See Landlord and Tenant.

LEGISLATIVE POWER.

See Constitutional Law, ↪54.

LIENS.

See Maritime Liens.

LIMITATION OF ACTIONS.

II. COMPUTATION OF PERIOD OF LIMITATION.

(H) Commencement of Action or Other Proceeding.

↪127(5) (U.S.C.C.A.Mass.) Amendment held not new case, barred by limitation under federal Employers' Liability Act.—Boston & M. R. R. v. Sullivan, 890.

LIQUOR SELLING.

See Intoxicating Liquors.

LOST INSTRUMENTS.

↪8(1) (U.S.C.C.A.W.Va.) Recording raises presumption of proper execution, consideration, delivery, and acceptance.—Huntington Development & Gas Co. v. Ashworth, 43.

↪8(3) (U.S.C.C.A.W.Va.) Evidence held to prove that lost deed contained reservation of minerals.—Huntington Development & Gas Co. v. Ashworth, 43.

MARITIME LIENS.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(B) Under Statutory Provisions.

↪21 (U.S.D.C.N.Y.) Putative lienor not bound to inquire as to authority to bind ship.—The Muskegon, 117.

275 F.—66

↪25 (U.S.C.C.A.N.Y.) "Other necessities" in statute does not include services of stevedore.—The Muskegon, 348.

↪25 (U.S.D.C.N.Y.) Services of master stevedore not "necessaries," within Maritime Lien Act of 1910.—The Muskegon, 117.

II. CREATION, OPERATION, AND EFFECT.

↪43 (U.S.C.C.A.Va.) Failure to pay notes for settlement of libel for repairs restores parties to original status.—Olympia Shipping Corporation v. Morse Dry Dock & Repair Corporation, 199.

MARRIAGE.

See Divorce.

MASTER AND SERVANT.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(B) Tools, Machinery, Appliances, and Places for Work.

↪110 (U.S.C.C.A.Ill.) Bell "appurtenance" within federal Boiler Inspection Act.—Hines v. Smith, 766.

Boiler Inspection Act liberally construed.—Id.

Hand operated bell insufficient under Boiler Inspection Act.—Id.

↪111(1) (U.S.C.C.A.Mass.) Placing gondola car in train with drop end unfastened held negligence.—Boston & M. R. v. Sullivan, 890.

(F) Risks Assumed by Servant.

↪217(20) (U.S.C.C.A.Mass.) Risk of negligence in placing gondola car in train with drop ends unfastened held not assumed.—Boston & M. R. v. Sullivan, 890.

(H) Actions.

↪285(5) (U.S.C.C.A.Ill.) Proximate cause of injury by locomotive with defective bell held for jury.—Hines v. Smith, 766.

↪285(11) (U.S.C.C.A.Wis.) Proximate cause of injury to inspector omitting blue signal held for jury.—Dahlen v. Hines, 817.

↪286(11) (U.S.C.C.A.N.D.) Negligence in using defective truck held for jury.—Gunn v. Standard Oil Co., 932.

↪286(32) (U.S.C.C.A.Wis.) Negligence as to air inspector held for jury.—Dahlen v. Hines, 817.

↪287(1) (U.S.C.C.A.N.H.) Negligence in directing servant to operate dangerous machine alone held for jury.—Atlantic Corporation v. Harris, 721.

↪289(15) (U.S.C.C.A.N.D.) Contributory negligence of truck driver held for jury.—Gunn v. Standard Oil Co., 932.

↪289(27) (U.S.C.C.A.N.H.) Contributory negligence in operating machine alone held for jury.—Atlantic Corporation v. Harris, 721.

↪289(35) (U.S.C.C.A.Wis.) Existence of blue signal rule held question for jury.—Dahlen v. Hines, 817.

↪289(39) (U.S.C.C.A.Wis.) Proximate cause of injury to inspector omitting blue signal held for jury.—Dahlen v. Hines, 817.

VI. WORKMEN'S COMPENSATION ACTS.**(A) Nature and Grounds of Master's Liability.**

↪347 (U.S.D.C.Miss.) Louisiana Compensation Act constitutional.—Parham v. Standard Oil Co. of Louisiana, 1007.

↪351 (U.S.C.C.A.III.) Employee may reject federal Compensation Act.—Payne v. Cohlmeier, 803.

↪358 (U.S.D.C.Miss.) Louisiana Compensation Act effective against employé, in absence of express stipulation.—Parham v. Standard Oil Co. of Louisiana, 1007.

Suit by minor's father held an election under Louisiana Compensation Act.—Id.

↪359 (U.S.D.C.Miss.) Election by minor's father after accident held in time, under Louisiana Compensation Act.—Parham v. Standard Oil Co. of Louisiana, 1007.

(C) Proceedings.

↪398 (U.S.C.C.A.III.) Illinois Injuries Act limitation held inapplicable to "subrogated" employer's claim under Compensation Act against wrongdoer for workman's death.—Star Brewing Co. v. Cleveland, C., C. & St. L. Ry. Co., 330.

MILITARY LAW.

See Army and Navy.

MONEY RECEIVED.

↪16 (U.S.D.C.N.Y.) Persons through whom money was received are not necessary parties.—Calumet & Hecla Mining Co. v. Equitable Trust Co., 552.

MONOPOLIES.**II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.**

↪9 (U.S.D.C.Ind.) Mining and loading coal for interstate shipment held within protection of the Sherman Anti-Trust Act.—Borderland Coal Corporation v. International Organization of United Mine Workers of America, 871.

↪9 (U.S.D.C.N.Y.) Payment of brokerage fees by steamship companies not interstate or foreign commerce.—U. S. v. Moore, 992.

↪12(1) (U.S.D.C.Ind.) Sending money to destroy competition in another state, whether spent for food or for arms, and the "check-off system," held subject to injunction.—Borderland Coal Corporation v. International Organization of United Mine Workers of America, 871.

↪12(3) (U.S.D.C.Ill.) Association under open price plan held not obnoxious to anti-trust laws.—U. S. v. American Linseed Co., 939.

Meaning of "stabilized market" in agreement of associated dealers defined.—Id.

↪24(2) (U.S.D.C.Ill.) Extent of burden of proof on government stated.—U. S. v. American Linseed Co., 939.

Evidence of opportunity to control prices not alone sufficient.—Id.

MORTGAGES.

See Chattel Mortgages.

X. FORECLOSURE BY ACTION.**(E) Parties and Process.**

↪436 (D.C.) Abuse of discretion to refuse to allow intervention.—Gaines v. Clark, 1017.

MUNICIPAL CORPORATIONS.

See Counties.

IX. PUBLIC IMPROVEMENTS.**(C) Contracts.**

↪348 (U.S.D.C.N.Y.) Action at law on surety contractor's bond maintainable only in name of obligee.—B. F. Sturtevant Co. v. Fidelity & Deposit Co. of Maryland, 114.

(E) Assessments for Benefits, and Special Taxes.

↪521 (U.S.C.C.A.Okl.) Interest collected on delinquent paving assessments held to belong to holders of certificates.—Board of Com'rs of Pottawatomie County, Okl., v. Close Bros. & Co., 608.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**(A) Streets and Other Public Ways.**

↪703(1) (U.S.D.C.Conn.) States, under police power, may regulate use of streets.—Lane v. Whitaker, 476.
Connecticut Jitney Act held constitutional.—Id.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**(C) Bonds and Other Securities, and Sinking Funds.**

↪955(1) (U.S.C.C.A.Okl.) Law providing for diversion of funds and discharge of existing assessments held unconstitutional, warranting injunction against enforcement at suit of holders of municipal bonds.—Moore v. Otis, 747.

NAVIGABLE WATERS.

See Wharves.

II. LANDS UNDER WATER.

↪37(8) (U.S.D.C.Cal.) After-acquired rights to land under water not inuring to grantee.—Dean v. City of San Diego, 228.

NEGLIGENCE.

See Master and Servant, ↪110-289; Railroads, ↪278-350.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

↪4 (U.S.C.C.A.N.Y.) Care must be in proportion to danger.—The John Carroll, 302.

III. CONTRIBUTORY NEGLIGENCE.**(D) Comparative Negligence.**

↪101 (U.S.C.C.A.Wis.) Contributory negligence of railroad employee reduces recovery.—Dahlen v. Hines, 817.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

II. GROUNDS.

(F) Verdict or Findings Contrary to Law or Evidence.

↪66 (U.S.C.C.A.Minn.) Denial of motion for new trial on ground that verdict is contrary to law discretionary.—Yellow Cab Co. v. Earle, 928.

↪68 (U.S.C.C.A.Minn.) Denial of motion for new trial on ground that verdict is not justified by evidence discretionary.—Yellow Cab Co. v. Earle, 928.

↪76(1) (U.S.C.C.A.Minn.) Denial of motion for new trial on ground that verdict is excessive discretionary.—Yellow Cab Co. v. Earle, 928.

NOTICE.

↪5 (U.S.D.C.Tex.) "Constructive notice" defined.—Ex parte Caplis, 980.

OBLIGATION OF CONTRACTS.

See Constitutional Law, ↪126-143.

OFFICERS.

See Receivers.

PARTIES.

For parties on appeal and review of rulings as to parties, see Appeal and Error.
For parties to particular proceedings or instruments, see also the various specific topics.

PARTNERSHIP.

I. THE RELATION.

(A) Creation and Requisites.

↪5 (U.S.C.C.A.N.Y.) Relation held not created by agreement.—De Rees v. Costaguta, 172.

↪17 (U.S.C.C.A.N.Y.) Intention controls as to relation.—De Rees v. Costaguta, 172.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

↪199 (U.S.C.C.A.Mont.) Partner cannot sue third party for conversion of his interest in partnership property.—Van Atta v. Montana Nat. Bank, 548.

↪210 (U.S.D.C.N.Y.) Suit against individual members of partnership in hands of receiver not permitted.—Beaver Board Companies v. Imbrie, 437.

PATENTS.

II. PATENTABILITY.

(A) Invention.

↪26(2) (U.S.C.C.A.Mo.) New combination of old devices may be patentable.—Sodemann Heat & Power Co. v. Kaufman, 593.

↪28 (U.S.C.C.A.Mo.) Patentable design must present new and pleasing effect.—Sodemann Heat & Power Co. v. Kaufman, 593.

↪36 (U.S.D.C.N.Y.) Evidence held not to show alleged prior machine was reduced to successful practice.—Victor Talking Mach. Co. v. John Wanamaker, New York, 448.

(C) Utility.

↪49 (U.S.D.C.N.Y.) Commercial success held to show utility, notwithstanding contrary expert testimony.—Victor Talking Mach. Co. v. John Wanamaker, New York, 448.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

↪109 (U.S.C.C.A.N.Y.) Absence of oath to new claims changing invention invalidates patent.—George Cutter Co. v. Metropolitan Electric Mfg. Co., 158.

↪112(3) (U.S.C.C.A.Mo.) Grant carries presumption of patentable novelty.—Sodemann Heat & Power Co. v. Kaufman, 593.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

↪118 (U.S.D.C.Conn.) Combination may be claimed which does not do useful work separately.—Menzer v. Kenworthy, 649.

↪129 (U.S.D.C.N.Y.) Employer of patentee estopped to deny invention.—Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation, 362.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) In General.

↪157(1) (U.S.C.C.A.Ill.) Patentee's definition of words, phrases, and terms accepted by court.—Rajah Auto Supply Co. v. Belvidere Screw & Machine Co., 761.

↪157(1) (U.S.C.C.A.Wis.) Patentee has right to be own lexicographer.—Advance Rumley Co. v. John Lauson Mfg. Co., 249.

(B) Limitation of Claims.

↪172 (U.S.D.C.Conn.) Claim not strictly interpreted.—Menzer v. Kenworthy, 649.

X. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights of Patentees in General.

↪183 (U.S.C.C.A.N.Y.) Offer and acceptance held to create a binding contract of sale of patent rights, and not merely an option.—Adamson v. Alexander Milburn Co., 148.

Whether there was a failure in performance of contract of sale held for jury.—Id.

Whether attorneys had sufficient time for agreement as to breadth and patentability of claims sold held for the jury.—Id.

Whether attorneys had agreed as to the breadth and patentability of claims of patents assigned held for the jury.—Id.

Failure of purchaser's attorneys to reach agreement as to breadth and patentability of claims made condition precedent to payment of consideration held no defense in action for consideration.—Id.

Purchaser could not refuse to pay consideration on attorneys' refusal to examine into merits or withholding of consent on unreasonable grounds.—Id.

(B) Assignments and Other Transfers.

- ⊕195 (U.S.D.C.Del.) Executory agreement to assign held not to operate as assignment.—Minerals Separation v. Miami Copper Co., 572.
- ⊕196 (U.S.C.C.A.N.Y.) Offer and acceptance held to create a binding contract of sale of patent rights, and not merely an option.—Adamson v. Alexander Milburn Co., 148.
- ⊕197 (U.S.D.C.Del.) "Assignment" must be in writing and with intent to pass present title.—Minerals Separation v. Miami Copper Co., 572.
- ⊕203 (U.S.C.C.A.N.Y.) Whether there was a failure in performance of contract of sale held for jury.—Adamson v. Alexander Milburn Co., 148.
Whether attorneys had sufficient time for agreement as to breadth and patentability of claims sold held for the jury.—Id.
Whether attorneys had agreed as to the breadth and patentability of claims of patents assigned held for the jury.—Id.
Failure of purchaser's attorneys to reach agreement as to breadth and patentability of claims made condition precedent to payment of consideration held no defense in action for consideration.—Id.
Purchaser could not refuse to pay consideration on attorneys' refusal to examine into merits or withholding of consent on unreasonable grounds.—Id.

(C) Licenses and Contracts.

- ⊕211(1) (U.S.D.C.Va.) Purchaser of article acquires privilege of using it in all parts of country.—Russell v. Tilghman, 235.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

- ⊕252 (U.S.D.C.N.Y.) Slight alteration in design held not to avoid infringement.—Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation, 362.

(C) Suits in Equity.

- ⊕283(1) (U.S.D.C.R.I.) Claim of inutility by infringer not favored.—Sampson v. Silverman, 128.
- ⊕285 (U.S.D.C.N.Y.) Where diversity of citizenship exists suit for infringement of patents may be joined with other equitable cause of action.—Gardiner v. Automatic Arms Co., 697.
- ⊕289 (U.S.C.C.A.III.) Laches not sufficient to bar rights of patentee as to future infringements.—Rajah Auto Supply Co. v. Belvidere Screw & Machine Co., 761.
Delay in commencement of infringement suit held not to constitute laches or establish estoppel.—Id.
- ⊕289 (U.S.C.C.A.N.Y.) Mere laches will not bar relief on final hearing in infringement suit.—Beattie Mfg. Co. v. Smith, 164.
- ⊕289 (U.S.D.C.Mich.) Discontinuance of suit without prejudice held not laches.—Victor Talking Mach. Co. v. Cheney Talking Mach. Co., 444.
- ⊕292 (U.S.D.C.Cal.) Defendant not required to answer interrogatories which might result in "penalty".—Wilson v. Union Tool Co., 624.

- ⊕292 (U.S.D.C.Del.) Interrogatories held not pertinent to issues made by bill for infringement.—Hartford v. Cleveland Automobile Co., 590.
- ⊕295 (U.S.C.C.A.N.Y.) Prima facie case free from reasonable doubt required to warrant preliminary injunction.—George Cutter Co. v. Metropolitan Electric Mfg. Co., 158.
- ⊕301(4) (U.S.D.C.Pa.) Preliminary injunction against infringement denied.—Richmond Screw Anchor Co. v. Bethlehem Steel Bridge Corporation, 585.
- ⊕310(1) (U.S.D.C.Cal.) Parties required to state exact rights claimed and interference therewith.—Wilson v. Union Tool Co., 624.
Parties required to give particulars as to exact claims, but not those calling for argument.—Id.
- ⊕310(7) (U.S.D.C.Cal.) Parties required to state exact rights claimed and interference therewith.—Wilson v. Union Tool Co., 624.
Parties required to give particulars as to exact claims, but not those calling for argument.—Id.
- ⊕311 (U.S.C.C.A.Mo.) Prior patents, not pleaded, not admissible as anticipations.—Sodemann Heat & Power Co. v. Kauffman, 593.
- ⊕312(1) (U.S.C.C.A.Conn.) Plaintiff in infringement suit must show profits made on sale of infringing article.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.
- ⊕312(1) (U.S.C.C.A.III.) Burden of proving laches and estoppel on defendant.—Rajah Auto Supply Co. v. Belvidere Screw & Machine Co., 761.
- ⊕314 (U.S.C.C.A.N.Y.) Question of infringement of design patent one of fact.—Wilson v. Haber Bros., 346.
- ⊕318(1) (U.S.C.C.A.Conn.) Complainant not entitled to royalties from sale of infringing article, where no profits realized.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.
- ⊕318(4) (U.S.C.C.A.Conn.) Only if entire market value of infringing article is attributable to patent device may patentee recover entire profits from sale thereof.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.
Owner of patent on wire tread cannot recover whole profit made by infringer on sale of tires, entire value of which is not attributable to such treads.—Id.
- ⊕318(5) (U.S.C.C.A.Conn.) Interest on profits from sale of infringing article allowable only from date of referee's report as to amount thereof.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.
- ⊕318(6) (U.S.C.C.A.Conn.) Royalty payments by infringer for use of other features used in infringing article should be deducted from profits from sale thereof awarded to owner of patent.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.
Profits from sale of tires without patented wire tread should be deducted from profits awarded to patent owner.—Id.
Advertising expenses should be deducted from profits from sale of infringing article awarded to patentee.—Id.
- ⊕319(1) (U.S.C.C.A.Conn.) Patentee's assignee cannot recover for lost sales because of infringement, where it sold no articles containing patented device.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

↪319(1) (U.S.C.C.A.N.Y.) Reasonable royalty to be paid by infringer determined.—Munger v. Perlman Rim Corporation, 21.
 ↪319(3) (U.S.C.C.A.Conn.) What constitutes wanton or deliberate infringement.—Metallic Rubber Tire Co. v. Hartford Rubber Works Co., 315.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

↪328.

UNITED STATES.

DESIGN.

- 43,680. Doll, held infringed, 275 F. 346.
 48,939. Radiator shield, held void, 275 F. 593.
 49,149. Radiator shield, held void, 275 F. 593.
 54,714. Frame for electric light shades, held valid and infringed, 275 F. 362.
 55,488. Collar holder, held valid and infringed, 275 F. 123.

ORIGINAL.

- 638,588. Demountable rim for automobile tires, claim 4, held valid and infringed, 275 F. 21.
 713,230. Inturning edges of collar blanks, held valid and infringed, 275 F. 164.
 812,371. Regulator for explosive engines, claims 1, 3, 5, and 13, held not infringed; claim 17, held invalid, 275 F. 249.
 814,786. Talking machine, claim 42, held valid and infringed, 275 F. 444; claims 2 and 42, held infringed and not anticipated; claim 36 held invalid, 275 F. 448.
 814,848. Amplifying horn for talking machines, claims 7 and 11, held valid, but not infringed, 275 F. 444; claims 7 and 11, held infringed, and not anticipated, 275 F. 448.
 825,856. Spark plug, held infringed, 275 F. 761.
 920,490. Metering panel board for electric power distribution, preliminary injunction held not warranted, 275 F. 158.
 925,561. Suspension of high-tension lines, held not infringed, 275 F. 213.
 972,272. Collar folding machine, held infringed, 275 F. 164.
 972,320. Collar folding machine, held valid, 275 F. 164.
 972,495. Collar folding machine, held valid, 275 F. 164.
 1,071,677. Collar folding machines, held valid and infringed, 275 F. 164.
 1,170,544. Radiator shield, held valid, 275 F. 593.
 1,230,750. Strip metal blocker, claim 1, held valid and infringed, 275 F. 649.

PAYMENT.

See Subrogation.

I. REQUISITES AND SUFFICIENCY.

↪17 (U.S.C.C.A.N.Y.) Notes given held not to extinguish indebtedness.—The No. 17, 930.

PERPETUITIES.

↪6(2) (U.S.D.C.Mich.) Will held not attempt to impose restraint on power of alienation.—Blossom v. Anketell, 947.

PLEADING.

See Equity, ↪140-269.

For pleadings in particular actions or proceedings, see also the various specific topics. For review of rulings relating to pleadings, see Appeal and Error.

I. FORM AND ALLEGATIONS IN GENERAL.

↪7 (U.S.D.C.Del.) One suing United States for balance owing for coal requisitioned under Lever Act need not allege necessity of taking, that being presumed.—Dexter & Carpenter v. U. S., 566.
 ↪8(2) (U.S.D.C.N.Y.) Allegation persons acted as agent for defendants is mere conclusion.—Calumet & Hecla Mining Co. v. Equitable Trust Co., 552.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

↪48 (U.S.D.C.Pa.) Statement of claim held sufficient.—Tidewater Portland Cement Co. v. Pottash Bros., 237.
 ↪63 (U.S.C.C.A.Ill.) Not necessary to specifically refer to statute.—Hines v. Smith, 766.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

↪235 (U.S.C.C.A.Tenn.) Order would justify amendment of petition nunc pro tunc.—Stokes v. Sedberry, 894.
 ↪249(1) (U.S.C.C.A.N.Y.) Amendment on trial changing form or nature of action not allowable.—American Mills Co. v. Hoffman, 285.
 ↪249(4) (U.S.C.C.A.N.Y.) Permitting amendment changing cause of action held error.—American Mills Co. v. Hoffman, 285

XI. MOTIONS.

↪343 (U.S.D.C.Pa.) Plaintiff held not entitled to judgment on pleadings.—Drew v. U. S. Shipping Board Emergency Fleet Corporation, 620.
 ↪350(3) (U.S.D.C.Pa.) Statement of claim held insufficient to warrant judgment for want of sufficient affidavit of defense.—Baldwin v. Guss, 877.

XII. ISSUES, PROOF, AND VARIANCE.

↪380 (U.S.D.C.Cal.) Attempt will be made to limit testimony to points in controversy.—Wilson v. Union Tool Co., 624.

PLEDGES.

↪11 (U.S.D.C.N.C.) Possession by pledgee essential to valid pledge.—In re Pittman, 681.

POST OFFICE.

III. OFFENSES AGAINST POSTAL LAWS.

↪48(4) (U.S.C.C.A.N.Y.) Indictment for using mails to defraud need not set out contents of letters mailed.—Wilson v. U. S., 307.
 Indictment for using mails to defraud sufficient.—Id.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PRESCRIPTION.

See Limitation of Actions.

PRINCIPAL AND AGENT.

See Attorney and Client.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(E) Notice to Agent.**

↻177(1) (U.S.C.C.A.Cal.) Notice to agent notice to principal.—U. S. v. Cooksey, 670

PROCESS.**II. SERVICE.****(E) Return and Proof of Service.**

↻131 (U.S.D.C.Mass.) Court without power to permit entry of writ after close of term at which returnable.—U. S. v. Frederick E. Atteaux Co., 1013.

PROSTITUTION.

↻1 (U.S.C.C.A.Pa.) Offense under White Slave Traffic Act is complete when transportation is accomplished.—Rizzo v. U. S., 51.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, ↻348-521.

PUBLIC LANDS.**II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.****(K) Remedies in Cases of Fraud, Mistake, or Trust.**

↻120 (U.S.C.C.A.Cal.) Burden on owner of land to establish defense of bona fide purchaser.—U. S. v. Cooksey, 670.

↻120 (U.S.C.C.A.Cal.) Evidence held to show fraud in obtaining patents.—U. S. v. Huntington, 674.

↻120 (U.S.C.C.A.Neb.) Clear and convincing evidence required for cancellation of patent for fraud or mistake.—U. S. v. Delatour, 137.

Evidence held insufficient to warrant cancellation of patent for fraud.—Id.

(M) Conveyances, Contracts, and Exemptions.

↻135(2) (U.S.D.C.Mont.) Transfer after final proof held valid.—Chadek v. Turcotte, 874.

↻138 (U.S.C.C.A.Cal.) Person having knowledge of fraudulent seeking of public lands held agent of defendants, claiming as bona fide purchasers.—U. S. v. Cooksey, 670.

V. SPANISH, MEXICAN, FRENCH, AND RUSSIAN GRANTS.

↻224½ [New, vol. 11A Key-No. Series] (U.S.D.C.Cal.) Pueblo lands passing to successor city determined by patent.—Dean v. City of San Diego, 228.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads.

RAILROADS.**I. CONTROL AND REGULATION IN GENERAL.**

↻5½ [New, vol. 6A Key-No. Series] (U.S.D.C.N.C.) Federal court may enjoin enforcement of void state judgment.—Seaboard Air Line Ry. Co. v. Fowler, 239.

II. RAILROAD COMPANIES.

↻33(2) (U.S.D.C.Minn.) Service on soliciting agent of foreign railroad company held invalid; "doing business within the state."—Stephan v. Union Pac. Ry. Co., 709.

X. OPERATION.**(D) Injuries to Licensees or Trespassers in General.**

↻278(3) (U.S.C.C.A.Iowa) Shipper falling from car held guilty of contributory negligence.—Birkestrand v. Chicago, M. & St. P. Ry. Co., 194.

(F) Accidents at Crossings.

↻350(9) (U.S.D.C.N.Y.) Negligence in not warning traveler with obstructed view held for jury.—Rebmann v. Delaware, L. & W. R. Co., 1009.

↻350(22) (U.S.D.C.N.Y.) Contributory negligence of automobile occupant with view obstructed held for jury.—Rebmann v. Delaware, L. & W. R. Co., 1009.

RECEIVERS.**I. NATURE AND GROUNDS OF RECEIVERSHIP.****(A) Nature and Subjects of Remedy.**

↻3 (U.S.C.C.A.N.Y.) Not per se subject of suit in equity.—De Rees v. Costaguta, 172.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

↻36 (U.S.C.C.A.N.Y.) Sufficiency of alleged cause may be challenged.—De Rees v. Costaguta, 172.

III. TITLE TO AND POSSESSION OF PROPERTY.

↻72 (U.S.D.C.Mich.) May recover property from adverse claimant only by plenary suit.—Fidelity & Deposit Co. of Maryland v. Johnson, 112.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.**(A) Administration in General.**

↻90 (U.S.D.C.N.Y.) Mere inaction not adoption of contract.—Menke v. Wilcox, 57.

Intention to adopt contract indicated by retaining assets.—Id.

Of exporter held not to have adopted his contract of purchase.—Id.

↻96 (U.S.C.C.A.Ohio) Acts and knowledge of agent of receiver imputable to receiver.—Herschberger v. Woodrow-Parker Co., 908.

(B) Supervision and Instructions of Court.

↻113 (U.S.C.C.A.Ga.) Order of court awarding compensation to receiver's counsel is an

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

approval of counsel's employment.—J. C. Turner Lumber Co. v. Toomer, 678.

(C) Receiver's Certificates.

↪128 (U.S.C.C.A.N.Y.) Prior lien creditors held not to lose right to foreclose by reason of acquiescence in issuance of receivers' certificates.—American Engineering Co. v. Metropolitan By-Products Co., 34.

Equities held in favor of prior lien creditors as against receivers' creditors.—Id.

VI. ACTIONS.

↪175 (U.S.C.C.A.Mass.) Employee's claim under federal Employers' Liability Act determinable on intervention in equity proceedings.—Boston & M. R. R. v. Sullivan, 890.

↪189 (U.S.C.C.A.N.Y.) When allowance of attorney's fees permitted.—American Engineering Co. v. Metropolitan By-Products Co., 40.

VII. ACCOUNTING AND COMPENSATION.

↪199 (U.S.C.C.A.Ga.) Final consent decree held to provide for attorney's fees.—J. C. Turner Lumber Co. v. Toomer, 678.

Evidence not necessary in fixing receiver's counsel's compensation.—Id.

REVENUE.

See Taxation.

REVIEW.

See Appeal and Error.

RISKS.

See Master and Servant, ↪217.

ROADS.

See Highways.

RULES OF COURT.

See Court Rules Cited.

SALES.

See Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

↪7 (U.S.D.C.Mont.) Contract relating to lumber held one of sale, and not of agency to sell.—Donlan & Henderson v. Turner, Dennis & Lowrey Lumber Co., 71.

↪32 (U.S.C.C.A.N.Y.) In case of contract by correspondence, written contract need not be evidenced by single paper.—W. R. Grace & Co. v. Nagle, 343.

↪32 (U.S.C.C.A.Or.) Complete contract held evidenced by telegrams and customs.—Story v. Stanfield, 401.

II. CONSTRUCTION OF CONTRACT.

↪71(4) (U.S.C.C.A.Ill.) Sales contract held not a "requirements contract."—American Steel Foundries v. Indian Refining Co., 800.

↪77(1) (U.S.C.C.A.Ill.) Pig iron contract as to price construed.—American Car & Foundry Co. v. East Jordan Furnace Co., 786.

↪82(1) (U.S.C.C.A.N.J.) Provision for approval of terms of payment by seller held not to continue open during the life of the contract.—McLain-Hadden-Simpers Co. v. Trent Rubber Co., 831.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

↪89 (U.S.C.C.A.Mich.) Manufacturer held to have broken contract to manufacture primers according to specifications, notwithstanding modification of contract.—Michigan Lubricator Co. v. Ontario Cartridge Co., 902.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

↪174 (U.S.C.C.A.Pa.) Refusal of seller to perform held not justified by delay of buyer in making payments.—Wood v. W. E. Sexton Co., 660.

VI. WARRANTIES.

↪273(1) (U.S.D.C.Mass.) Manufacturer of seine held under Sales Act impliedly to warrant its fitness.—The Sam & Priscilla, 937.

VII. REMEDIES OF SELLER.

(F) Actions for Damages.

↪384(2) (U.S.C.C.A.N.Y.) Measure of damages for breach of contract to receive difference between contract and market prices.—W. R. Grace & Co. v. Nagle, 343.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

↪416(2) (U.S.C.C.A.Mich.) Evidence as to cost of obtaining substitute held admissible, when offered.—Michigan Lubricator Co. v. Ontario Cartridge Co., 902.

Not pertinent that purchaser would have sustained loss on resale.—Id.

↪416(2) (U.S.C.C.A.Pa.) Evidence held immaterial in action for breach of contract.—Wood v. W. E. Sexton Co., 660.

↪418(7) (U.S.C.C.A.Pa.) Offer by seller to fill contract at advanced price held not to limit buyer's damages for breach.—Wood v. W. E. Sexton Co., 660.

(D) Actions and Counterclaims for Breach of Warranty.

↪428 (U.S.D.C.Mass.) Breach of warranty prevents recovery and subjects to action for damages.—The Sam & Priscilla, 937.

SALVAGE.

II. AMOUNT AND APPORTIONMENT.

↪34 (U.S.D.C.N.Y.) Award for assisting disabled destroyer.—The Progressive, 360.

SEAMEN.

↪11 (U.S.D.C.Va.) Statute relating to hospital expenses of alien seamen held to apply to aliens on American ship.—Castner, Curran & Bullitt v. Hamilton, 203.

⊖13 (U.S.D.C.Va.) American ship not required to return diseased seaman to foreign country.—Castner, Curran & Bullitt v. Hamilton, 203.

⊖29(1) (U.S.D.C.Mass.) Accident to quartermaster, oiling steering engine, held not caused by master's negligence.—The Nacoochee, 876.

SEARCHES AND SEIZURES.

⊖5 (U.S.D.C.N.Y.) Illegally seized papers and documents returned to defendant.—U. S. v. Lydecker, 976.

⊖7 (U.S.D.C.N.Y.) Intent to waive constitutional rights against illegal seizure must be shown by clear and positive testimony.—U. S. v. Lydecker, 976.

SET-OFF AND COUNTERCLAIM.

II. SUBJECT-MATTER.

⊖49(3) (U.S.D.C.Fla.) Set-off against principal not available in suit by agent; "defense;" "equity."—Worden v. Gillett, 654.

SHIPPING.

See Salvage; Wharves.

II. TITLE.

⊖32 (U.S.D.C.N.Y.) Mortgagee not liable for contracts of mortgagor.—Calumet & Hecla Mining Co. v. Equitable Trust Co., 552.

Complaint held not to allege notice to mortgagee of false representations by which money was secured from plaintiff.—Id.

III. CHARTERS.

⊖39 (U.S.C.C.A.N.Y.) Exceptions in charter parties protect both owner and charterers.—Gans S. S. Line v. Wilhelmsen, 254.

⊖40 (U.S.C.C.A.N.Y.) Delivery of vessel by one charterer to owner held not a condition precedent to owner's delivery to other charterer.—Gans S. S. Line v. Wilhelmsen, 254.

Overlap doctrine held inapplicable.—Id.

⊖52 (U.S.C.C.A.N.Y.) Closing of Panama Canal by Culebra slide not an "act of God."—Gans S. S. Line v. Wilhelmsen, 254.

"Act of God" due to natural causes, without human intervention.—Id.

Closing of Panama Canal because of Culebra slide held an "accident of canals."—Id.

Closing of canal held not to excuse subcharterer from delivery of chartered vessel at specified time.—Id.

⊖54 (U.S.C.C.A.N.Y.) Charterer secondarily liable for damage to boat by reason of wharf manager's negligence.—The John Carroll, 302.

⊖56 (U.S.C.C.A.N.Y.) Subcharterer required under indemnification clauses of charter parties to save charterer and owner from liability growing out of bills of lading issued on behalf of master.—Gans S. S. Line v. Wilhelmsen, 254.

⊖58(2) (U.S.C.C.A.N.Y.) Burden of proving impossibility on party pleading it.—Gans S. S. Line v. Wilhelmsen, 254.

⊖58(2) (U.S.C.C.A.N.Y.) Evidence held insufficient to overcome presumption of negligence of charterer.—The John Carroll, 302.

⊖58(3) (U.S.C.C.A.N.Y.) Measure of damages for nondelivery of vessel to charterer stated.—Gans S. S. Line v. Wilhelmsen, 254.

IV. MASTER.

⊖62 (U.S.C.C.A.N.Y.) Contract, evidenced by bills of lading issued by master of chartered ship, obligates owner as well as charterer.—Gans S. S. Line v. Wilhelmsen, 254.

VII. CARRIAGE OF GOODS.

⊖106 (U.S.C.C.A.N.Y.) Liability of vessel did not commence until receipt of goods on board.—Scott v. W. R. Grace & Co., 340.

⊖132(3) (U.S.C.C.A.N.Y.) Vessel must make delivery of goods admitted by bill of lading to have been received.—Scott v. W. R. Grace & Co., 340.

Burden on shipowner to show falsification of bill of lading.—Id.

⊖132(5) (U.S.C.C.A.N.Y.) Shipowner held to sufficiently prove that goods admitted by bill of lading were not received.—Scott v. W. R. Grace & Co., 340.

⊖141(1) (U.S.D.C.Va.) Commandeered ship relieved from carrying out contract.—Vacuum Oil Co. v. Luckenbach S. S. Co., 998.

⊖142 (U.S.D.C.Va.) Stipulation in bill of lading as to written notice of claim and commencement of suit within particular time held valid.—The Turrett Crown, 961.

Shipowner's opportunity to ascertain damage to cargo while repairing ship did not relieve shipper of obligation to give written notice of claim for damage sustained on subsequent voyage.—Id.

Shipper's commencement of suit for damages during voyage held not to entitle him to bring other suit after completion of voyage, without notice of claim.—Id.

IX. DEMURRAGE.

⊖174 (U.S.D.C.N.Y.) Implied promise by consignee, accepting cargo, to pay demurrage.—Yone Suzuki v. Central Argentine Ry. Co., 54.

⊖185 (U.S.D.C.N.Y.) Ship entitled to lien under bill of lading for demurrage at either port.—Yone Suzuki v. Central Argentine Ry. Co., 54.

Recital of prepayment of freight in bill of lading estops ship from asserting lien for freight against assignee of bill.—Id.

STATES.

VI. ACTIONS.

⊖191(2) (U.S.D.C.Ala.) Suit to enjoin officers from enforcing statute not one against state.—Elmer v. Wallace, 86.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

For statutes relating to particular subjects, see the various specific topics.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

158 (U.S.D.C.Mich.) Repeals by implication not favored.—Hiram Walker & Sons v. Lawson, 373.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

174, 175 (U.S.D.C.N.J.) Cover only matters included expressly or by necessary implication.—Garvan v. Marconi Wireless Telegraph Co. of America, 486.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 4.....394, 680, 1004
Amend 5.....775, 855
Amend. 14.....632
Art. 1, § 8, subsec. 11.....855
Art. 1, § 9, subsec. 4.....545
Art. 2, § 2.....294
Art. 3, § 2.....365

BANKRUPTCY ACT.

Act 1898, July 1, ch. 541, 30 Stat. 544.

Ch. 541.....384, 390, 686, 868
1(9).....481
3a(4).....384
§ 4, 5.....868
12.....955
12b.....880
25a.....743
§ 44-56.....819
47(4).....481
57.....587
58.....481
60a, b.....952
62.....894
64a.....397, 782
69.....400
§ 67e, 70e.....894

CRIMINAL CODE.

SEE PENAL CODE.

INTERSTATE COMMERCE ACT.

Act 1887, Feb. 4, ch. 104, 24 Stat. 379.

Ch. 104.....232
§ 20(7).....182

JUDICIAL CODE.

Act 1911, March 3, ch. 231, 36 Stat. 1087.

24(20).....566
57.....172
266.....632
268.....460
272.....481
276. Amended 1917, Feb. 3, ch. 27, 39
Stat. 873.....129
277.....129
284.....775

PENAL CODE.

Act 1909, March 4, ch. 321, 35 Stat. 1088.

37.....29, 307, 704
117.....294

§ 215.....307
§ 332.....29, 51
§ 335.....200

STATUTES AT LARGE.

1851, March 3, ch. 41, 9 Stat. 631.....228
1866, July 24, ch. 230, 14 Stat. 221.....241
1878, June 3, ch. 151, 20 Stat. 89, 90.
Amended 1892, Aug. 4, ch. 375, § 2, 27
Stat. 348.....670
1887, Feb. 4, ch. 104, 24 Stat. 379. See
Interstate Commerce Act.
1887, March 3, ch. 359, 24 Stat. 505.....566
1890, July 2, ch. 647, 26 Stat. 209.....939
1890, July 2, ch. 647, § 1, 26 Stat. 209...871
1890, July 2, ch. 647, § 3, 26 Stat. 209...992
1890, Aug. 19, ch. 802, § 1, art. 16, 26
Stat. 326.....690
1890, Aug. 19, ch. 802, § 1, arts. 20-23, 27,
29, 26 Stat. 327, 328.....970
1892, Aug. 4, ch. 375, § 2, 27 Stat. 348...670
1897, Jan. 30, ch. 109, § 1, 29 Stat. 506...200
1897, March 3, ch. 391, § 2, 29 Stat. 692..593
1897, June 7, ch. 4, § 1, art. 18, rules 1,
3, 9, 30 Stat. 100.....965
1898, July 1, ch. 541, 30 Stat. 544. See
Bankruptcy Act.
1902, June 17, ch. 1093, § 4, 32 Stat. 389.
Amended 1914, Aug. 13, ch. 247, 38 Stat.
686.....885
1906, June 30, ch. 3915, 34 Stat. 768...394
1906, June 30, ch. 3915, § 8(4), 34 Stat.
771.....394
1908, April 22, ch. 149, 35 Stat. 65.....890
1909, March 4, ch. 320, § 8, 35 Stat. 1077 562
1909, March 4, ch. 320, § 12, 35 Stat. 1078 428
1909, March 4, ch. 320, § 24, 35 Stat. 1080 582
1909, March 4, ch. 320, § 55, 35 Stat. 1086 428
1909, March 4, ch. 321, 35 Stat. 1088. See
Penal Code.
1909, Aug. 5, ch. 6, § 38, 36 Stat. 112....934, 995
1910, June 23, ch. 373, 36 Stat. 604....117
1910, June 23, ch. 373, § 1, 36 Stat. 604...348
1910, June 25, ch. 395, § 2, 36 Stat. 825..51
1910, June 25, ch. 412, § 7, 36 Stat. 840...811
1911, Feb. 17, ch. 103, § 2, 36 Stat. 913.
Amended 1915, March 4, ch. 169, § 1, 38
Stat. 1192.....766
1911, March 3, ch. 231, 36 Stat. 1087. See
Judicial Code.
1913, Feb. 13, ch. 50, § 1, 37 Stat. 670..232
1913, Oct. 3, ch. 16, § 2, subd. B, 38 Stat.
167.....643
1913, Oct. 3, ch. 16, § 2 subd. G(a), 38
Stat. 172.....60
1914, Jan. 17, ch. 9, § 8, 38 Stat. 277....67
1914, Aug. 13, ch. 247, 38 Stat. 686.....885
1914, Sept. 26, ch. 311, 38 Stat. 717....665
1914, Sept. 26, ch. 311, § 5, 38 Stat. 719..725
1914, Oct. 15, ch. 323, § 20, 38 Stat. 738...241
1914, Dec. 17, ch. 1, § 2, 38 Stat. 786....29
1915, March 4, ch. 169, § 1, 38 Stat. 1192 766
1916, Aug. 29, ch. 418, 39 Stat. 645.....566
1916, Sept. 7, ch. 458, 39 Stat. 742.....803
1916, Sept. 8, ch. 463, § 2a, 39 Stat. 758.
Amended 1917, Oct. 3, ch. 63, § 1200, 40
Stat. 329.....109
1916, Sept. 8, ch. 463, § 201, 39 Stat. 777 688
1916, Sept. 8, ch. 463, § 201, 39 Stat. 777.
Amended 1917, March 3, ch. 159, § 300,
39 Stat. 1002.....545

1916, Sept. 8, ch. 463, § 202(c), 39 Stat. 777..... 545
 1917, Feb. 3, ch. 27, 39 Stat. 873..... 129
 1917, Feb. 5, ch. 29, 39 Stat. 874..... 203
 1917, Feb. 5, ch. 29, § 22, 39 Stat. 891... 364
 1917, Feb. 22, ch. 113, 39 Stat. 929..... 365
 1917, March 2, ch. 145, § 9, 39 Stat. 954... 104
 1917, March 3, ch. 159, § 300, 39 Stat. 1002 545
 1917, Aug. 10, ch. 53, 40 Stat. 276..... 566
 1917, Aug. 10, ch. 53, § 5, 40 Stat. 277... 1
 1917, Aug. 10, ch. 53, § 10, 40 Stat. 279... 566, 855, 861
 1917, Aug. 10, ch. 53, § 25, 40 Stat. 284 566
 1917, Sept. 24, ch. 56 (§ 14 added 1918, April 4, ch. 44, § 6, 40 Stat. 505)..... 814
 1917, Oct. 3, ch. 63, § 201, 40 Stat. 303... 104
 1917, Oct. 3, ch. 63, § 1200, 40 Stat. 329 109
 1917, Oct. 6, ch. 106, 40 Stat. 411..... 486, 841
 1917, Oct. 6, ch. 106, §§ 5(a), 6, 40 Stat. 415..... 486, 841
 1917, Oct. 6, ch. 106, § 7(a-e), 40 Stat. 416-418..... 841
 1917, Oct. 6, ch. 106, § 7(c), (e), 40 Stat. 418..... 486
 1917, Oct. 6, ch. 106, § 9, 40 Stat. 419... 486, 841
 1917, Oct. 6, ch. 106, § 17, 40 Stat. 425... 841
 1918, April 4, ch. 44, § 6, 40 Stat. 505... 814
 1919, Feb. 24, ch. 18, §§ 230a, 261, 301a, 40 Stat. 1075, 1087, 1088..... 104
 1919, Feb. 24, ch. 18, § 326, 40 Stat. 1092 221
 1919, Oct. 28, ch. 85, 41 Stat. 305... 373, 440, 558, 680, 704, 846
 1919, Oct. 28, ch. 85, tit. 2, § 25, 41 Stat. 315..... 506, 509, 615, 1004
 1920, March 1, ch. 91, § 206g, 41 Stat. 462 239
 1920, Dec. 26, ch. 4, 41 Stat. 1082..... 203

REVISED STATUTES.

914..... 177, 285, 481
 954..... 177, 285
 1014..... 704
 1020..... 1011
 2309..... 67
 3005..... 373
 3220..... 995
 3258..... 440
 3296..... 142
 4401..... 690
 4884..... 235
 4898..... 572
 4920. Amended 1897, March 3, ch. 391, § 2, 29 Stat. 692..... 593
 5209..... 129
 5219..... 550
 5263 et seq..... 241

COMPILED STATUTES 1916 or 1918.

991(20)..... 566
 1039..... 172
 1243..... 632
 1243d..... 241
 1245..... 460
 1249..... 481
 1254..... 129
 1261..... 775
 1537..... 177, 285, 481
 1591..... 177, 285
 1606..... 460
 1674..... 704
 1684..... 1011

1974a..... 566
 4137..... 200
 4671-4673, 4988..... 670
 4703, 4713a-4714f..... 885
 5506..... 67
 5690..... 373
 5944..... 995
 5994..... 440
 § 6030, 6038, 6102, 6104..... 142
 6287h..... 29
 6336½b..... 688
 6336½c(c)..... 545
 7783..... 348
 § 7783-7787..... 117
 7854..... 690
 § 7859-7862, 7866, 7868..... 970
 7892..... 965
 8153..... 690
 § 8657-8665..... 890
 8592..... 182
 8603..... 232
 8631, 8639a..... 766
 8717-8728..... 394
 8801f..... 67
 8813..... 51
 8820..... 871, 939
 8821..... 939
 8822..... 939, 992
 8823, 8827-8830..... 939
 8836a-8836k..... 665
 8836e..... 725
 § 8932a-8932uu..... 803
 9428..... 235
 9444..... 572
 9466..... 593
 9524..... 562
 9533..... 428
 9545..... 582
 9576..... 428
 9585..... 481
 § 9585-9656..... 384, 390, 686, 868
 9596..... 880, 955
 9609..... 743
 9628-9640..... 819
 9631..... 481
 9641..... 587
 9642..... 481
 9644..... 952
 9646..... 894
 9648..... 397, 782
 9651..... 894
 9653..... 400
 9654..... 894
 9772..... 129
 9784..... 550
 10072 et seq..... 241
 10201..... 29, 307, 704
 10216..... 670
 10287..... 294
 10385..... 307
 10506..... 29, 51
 10509..... 200

COMPILED STATUTES 1918.

991a..... 365
 1253..... 129
 3115½e-3115½r..... 566
 3115½g..... 1
 3115½ii..... 855, 861
 3115½a-3115½j..... 486

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

3115½a et seq.....	841
3803ccc.....	104
4289¼a et seq.....	203
4289¼l.....	364
6336b(a).....	109
6336¾b.....	104
6336½b.....	545
6829o.....	814

COMBINED STATUTES SUPPLEMENT 1919.

991a.....	365
1253.....	129
§ 3115½e-3115½kk, 3115½l-3115½r.....	566
3115½g.....	1
3115½ii.....	855, 861
§ 3115½a-3115½j.....	486
3115½a et seq.....	841
3803ccc.....	104
4289¼a et seq.....	203
4289¼l.....	364
6336b(a).....	109
6336¾/16i.....	221
§ 6336½nm, 6336½z, 6336¾/16aa.....	104
6829o.....	814

PRESIDENT'S PROCLAMATION.

1917, Dec. 26, 40 Stat. 1733.....	566
-----------------------------------	-----

TREATIES.

Great Britain, 1871, July 4, 17 Stat. 863..	373
---	-----

ALABAMA.

LAWS.

1919, pp. 253, 254, §§ 7, 8, 12.....	86
--------------------------------------	----

ARKANSAS.

ROAD LAWS 1919.

Volume 1.

Pages 1040-1042, §§ 20, 21.....	600
---------------------------------	-----

SPECIAL AND PRIVATE LAWS.

1920 (Ex. Sess.) No. 308.....	600
-------------------------------	-----

CALIFORNIA.

CODE OF CIVIL PROCEDURE.

§ 671a added by Laws 1917, p. 142.....	460
§ 674.....	460

LAWS.

1911, p. 1357.....	228
1917, p. 142.....	460

CONNECTICUT.

LAWS.

1921, ch. 77.....	476
-------------------	-----

FLORIDA.

REVISED GENERAL STATUTES 1920.

§§ 2660, 4725, 4731.....	654
--------------------------	-----

ILLINOIS.

HURD'S REVISED STATUTES 1917.

Ch. 48, § 152.....	330
--------------------	-----

LAWS.

1887, p. 237.....	806
1905, p. 190.....	806
1905, p. 190, §§ 4.....	806
1913, p. 354, §§ 29.....	330

IOWA.

CODE 1897.

§ 3306.....	757
-------------	-----

CODE SUPPLEMENT 1913.

§§ 1334-1339.....	6
-------------------	---

LOUISIANA.

REVISED CIVIL CODE.

Art. 916.....	688
---------------	-----

LAWS.

1914, No. 20. Amended by Laws 1916, No. 243; Laws 1918, No. 38.....	1007
1914, No. 20, § 3.....	1007
1914, No. 20, § 3, subsecs. 4, 6.....	1007
1914, No. 20, §§ 16.....	1007
1916, No. 243.....	1007
1918, No. 38.....	1007

MASSACHUSETTS.

GENERAL LAWS.

Ch. 106, § 17.....	937
--------------------	-----

LAWS.

1903, ch. 437, §§ 4f, 19.....	206
-------------------------------	-----

MICHIGAN.

CONSTITUTION.

Art. 10, §§ 1, 3, 4, 6.....	632
Art. 12, § 1.....	632

COMPILED LAWS 1915.

§§ 9017, 9018.....	995
§§ 9063.....	902
§§ 9066.....	632
§§ 9068.....	902
§§ 11354.....	632
§§ 12370.....	902
§§ 13123.....	952

PUBLIC ACTS.

1921, Nos. 84, 85.....	632
1921, No. 85, § 4.....	632

MONTANA.

REVISED CODES.

§§ 5032, 5035, 5036.....	401
--------------------------	-----

NEBRASKA.

COBBEY'S ANNOTATED STATUTES 1909.

§ 4119.....	137
-------------	-----

NEW JERSEY.

COMPILED STATUTES 1910.

Volume 2.

Pages 1634-1637, §§ 53-60.....	697
--------------------------------	-----

NEW YORK.

CODE OF CIVIL PROCEDURE.

§ 841b.....1009
 §§ 870-886..... 438

CONSOLIDATED LAWS.

Ch. 20, § 125..... 855
 Ch. 33, § 230..... 121
 Ch. 39..... 437
 Ch. 41, §§ 85, 145..... 343

NORTH CAROLINA.

CONSTITUTION.

Art. 10, § 7..... 686

NORTH DAKOTA.

LAWS.

1917, ch. 230..... 550

OKLAHOMA.

COMPILED LAWS 1909.

§ 727..... 608

REVISED LAWS 1910.

§§ 7411, 7412. Amended by Laws 1919,
 ch. 130..... 747

LAWS.

1907-08, ch. 10, art. 1..... 747
 1919, ch. 130..... 747

PENNSYLVANIA.

PENNSYLVANIA STATUTES 1920.

§§ 19649-19726..... 878

LAWS.

1834, p. 354, §§ 71, 72..... 481
 1915, p. 543..... 878
 1915, p. 543, § 4..... 622

TENNESSEE.

SHANNON'S CODE.

§§ 6097, 6099..... 894

VIRGINIA.

CODE 1919.

Code, § 6103..... 177

WISCONSIN.

LAWS.

1919, ch. 667..... 782
 1919 (Sp. Sess.) ch. 5..... 782

SUBROGATION.

↪23(3) (U.S.C.A.III.) Person lending money used in canceling bonds held an unsecured creditor and not entitled to subrogation.—In re Rogers Palace Laundry Co., 829.
 ↪35 (U.S.C.A.III.) Must rest on agreement.—In re Rogers Palace Laundry Co., 829.

TARIFF.

See Customs Duties.

TAXATION.

See Customs Duties; Highways, ↪122-138; Internal Revenue.

I. NATURE AND EXTENT OF POWER IN GENERAL.

↪12 (U.S.C.C.A.N.D.) Tax on national bank shares held invalid as discriminatory.—Eddy v. First Nat. Bank, 550.
 ↪13 (U.S.D.C.Mich.) State may levy license tax on corporation previously granted permission to carry on business.—Republic Acceptance Corporation v. De Land, 632.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

↪37 (U.S.D.C.Mich.) Michigan statute levying tax on corporations held invalid, as providing for payment into general fund, instead of into school fund.—Republic Acceptance Corporation v. De Land, 632.
 ↪40(2) (U.S.D.C.Mich.) Tax on corporations held not "property tax."—Republic Acceptance Corporation v. De Land, 632.
 ↪40(5) (U.S.C.C.A.Iowa) Assessment of property of a railroad company in a state as an entity held constitutional and valid.—Union Pac. R. Co. v. Christensen, 6.
 ↪40(5) (U.S.D.C.Mich.) Specific tax on corporations held not to violate uniformity clause of state Constitution; "class."—Republic Acceptance Corporation v. De Land, 632.

V. LEVY AND ASSESSMENT.

(G) Review, Correction, or Setting Aside of Assessment.

↪500 (U.S.C.C.A.Iowa) To authorize setting aside an assessment as discriminatory, the discrimination must be intentional and systematic.—Union Pac. R. Co. v. Christensen, 6.

TORTS.

See Collision; Negligence, ↪4-101.

↪13 (U.S.D.C.Cal.) Persons who participate in judgment debtor's disposition of his property with knowledge held liable to creditor.—Lineker v. Dillon, 460.

TRADE-MARKS AND TRADE-NAMES AND UNFAIR COMPETITION.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

↪3(1) (U.S.D.C.Ky.) Star cannot be appropriated as trade-mark.—Armour & Co. v. Louisville Provision Co., 92.
 Mere word cannot be appropriated, unless it indicates origin or has acquired secondary meaning.—Id.
 ↪3(4) (U.S.C.C.A.Pa.) "Coco-Quinine" held descriptive, and not valid as trade-mark.—Eli Lilly & Co. v. Wm. R. Warner & Co., 752.
 ↪18 (U.S.D.C.N.Y.) Trade-mark for candy held valid.—Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas, 357.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) What Constitutes Infringement.

⚡58 (U.S.D.C.N.Y.) Trade-mark for candy held infringed.—Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas, 357.

⚡64 (U.S.C.C.A.N.Y.) Use of trade-mark by competitor on genuine article not infringement.—A. Bourjois & Co. v. Katzel, 539.

(B) What Competition Unlawful.

⚡68 (U.S.C.C.A.Cal.) Dealer may refuse to trade with customer, but cannot agree to so do with others.—Western Sugar Refinery Co. v. Federal Trade Commission, 725.

⚡68 (U.S.C.C.A.Ill.) Giving by manufacturer of premiums to salesmen of retailers not "unlawful or unfair competition."—Kinney-Rome Co. v. Federal Trade Commission, 665.

⚡68 (U.S.D.C.N.Y.) Bill for unfair competition held to state a cause of action.—Public Ledger v. New York Times, 562.

⚡70(1) (U.S.C.C.A.Pa.) Simulation of another's product held unfair competition.—Elli Lilly & Co. v. Wm. R. Warner & Co., 752.

⚡70(1) (U.S.D.C.Ky.) Sales under distinctive mark held not unfair competition.—Armour & Co. v. Louisville Provision Co., 92.

⚡70(2) (U.S.D.C.N.Y.) Trade-mark for candy held infringed by imitation.—Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas, 357.

⚡75 (U.S.D.C.Ky.) Actual deception of buyers essential to proof of unfair competition.—Armour & Co. v. Louisville Provision Co., 92.

(C) Actions.

⚡80½ [New, vol. 8A Key-No. Series]

(U.S.C.C.A.Cal.) Evidence to sustain Federal Trade Commission's order must be sufficient to sustain finding as to each respondent.—Western Sugar Refinery Co. v. Federal Trade Commission, 725.

Order of Federal Trade Commission must conform to charges.—Id.

Evidence held sustaining finding of Federal Trade Commission that a concern was engaged in the wholesale grocery business.—Id.

Federal Trade Commission's finding, supported by legal testimony, conclusive.—Id.

Evidence held not to sustain findings of Federal Trade Commission as to conspiracy of sugar refiners against wholesale grocer.—Id.

Evidence held to sustain finding of Federal Trade Commission as to conspiracy to compel refusal to sell fairly to wholesale grocer.—Id.

Evidence held not to sustain finding of Federal Trade Commission as to brokers conspiring to compel refusal to sell fairly to wholesale grocer.—Id.

⚡98 (U.S.C.C.A.Ill.) Scope of accounting for unfair competition.—In re L. P. Larson, Jr., Co., 535.

Scope of accounting for unfair competition.—Id.

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Alps."—Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas (D. C. N. Y.) 275 F. 357.

"Coco-quinine."—Elli Lilly & Co. v. Wm. R. Warner & Co. (C. C. A. Pa.) 275 F. 752.

"Peaks."—Mason Au & Magenheimer Confectionery Mfg. Co. v. Chumas (D. C. N. Y.) 275 F. 357.

TREATIES.

⚡11 (U.S.D.C.Mich.) Not abrogated by statute by implication.—Hiram Walker & Sons v. Lawson, 373.

Foreign shipments in bond through United States lawful.—Id.

TRIAL.

See Continuance; Criminal Law, ⚡619-865; New Trial.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

⚡141 (U.S.C.C.A.Iowa) Court may direct verdict where evidence is undisputed.—Birkestrand v. Chicago, M. & St. P. Ry. Co., 194.

⚡141 (U.S.C.C.A.Wyo.) Each party held, under the pleadings, entitled to directed verdict on claim and counterclaim respectively.—Payne v. Card, 26.

(D) Direction of Verdict.

⚡181 (U.S.C.C.A.Wyo.) Charge of court held sufficiently excepted to.—Payne v. Card, 26.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

⚡193(2) (U.S.C.C.A.Okl.) Expression of court's opinion held not error.—One Buick Automobile v. U. S., 809.

(F) Objections and Exceptions.

⚡278 (U.S.C.C.A.Pa.) Objections to charge must be specific.—Wood v. W. E. Sexton Co., 660.

⚡284 (U.S.C.C.A.Pa.) Failure to call attention to error in instructions waives the error.—Wood v. W. E. Sexton Co., 660.

IX. VERDICT.

(A) General Verdict.

⚡343 (U.S.C.C.A.Mich.) Finding in favor of plaintiff implied finding against defendant on cross-action.—Michigan Lubricator Co. v. Ontario Cartridge Co., 902.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Monopolies, ⚡9-24.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names and Unfair Competition, ⚡58-98.

UNITED STATES.

See Army and Navy; Treaties.

V. ACTIONS.

↪127 (U.S.D.C.Del.) *Held* proper defendant in action for balance owing for coal requisitioned by Director General as agent of Fuel Administrator.—Dexter & Carpenter v. U. S., 566.

↪135 (U.S.D.C.Del.) Action for price of coal, requisitioned by Director General as agent of Fuel Administrator, *held* not against Director General.—Dexter & Carpenter v. U. S., 566.

↪140 (U.S.D.C.Del.) Petition for balance owing for coal requisitioned under Lever Act *held* sufficient, though not alleging necessity to common defense.—Dexter & Carpenter v. U. S., 566.

Petition to recover balance owing for coal requisitioned under Lever Act *held* sufficient, though not alleged fixing price deemed necessary for prosecution of war.—*Id.*

VENDOR AND PURCHASER.

See Sales.

I. REQUISITES AND VALIDITY OF CONTRACT.

↪18(3) (U.S.C.C.A.Ga.) Time is of essence of option.—Graham v. Jones, 790.

Conditional tender *held* not sufficient.—*Id.*

↪18(4) (U.S.C.C.A.Ga.) Letter of third party *held* not repudiation by vendor.—Graham v. Jones, 790.

↪37(5) (U.S.C.C.A.Ohio) Knowledge of falsity of statement of fact immaterial.—Herschberger v. Woodrow-Parker Co., 908.

IV. PERFORMANCE OF CONTRACT.

(D) Payment of Purchase Money.

↪170 (U.S.C.C.A.Ga.) Conditional tender not sufficient.—Graham v. Jones, 790.

VERDICT.

See United States, ↪343.

WAR.

↪12 (U.S.D.C.N.J.) Alien Property Custodian had power to determine alien enemies.—Garvan v. Marconi Wireless Telegraph Co. of America, 486.

Demand by Alien Property Custodian of transfer of stock vested title.—*Id.*

Property, tangible or intangible, could be seized under Trading with the Enemy Act.—*Id.*

Vesting of title in corporate stock of alien enemy by demand *held* reasonable.—*Id.*

Claims of third persons no excuse for not transferring stock on demand of Alien Property Custodian.—*Id.*

Corporation could be required to issue new certificates without cancellation of old on demand by Alien Property Custodian.—*Id.*

↪12 (U.S.D.C.N.J.) Alien Property Custodian's determination as to enemy property is

conclusive.—Garvan v. Commercial Trust Co. of New Jersey, 841.

That preliminary investigation whether owner was alien enemy was not made cannot be urged in suit to enforce Custodian's demands.—*Id.*

Property *held* in trust for joint account must be delivered, if either cestui an alien enemy.—*Id.*

Claims to property cannot be litigated in Alien Property Custodian's suit for possession thereof.—*Id.*

Report of holder of property *held* to show property was held for an enemy.—*Id.*

↪14 (U.S.D.C.N.Y.) Plaintiff bank *held* "person entitled to receive" compensation under Lever Act.—National City Bank of New York v. U. S., 855.

"Just compensation," under Lever Act, is free market value.—*Id.*

↪14 (U.S.D.C.Ohio) Evidence *held* to show market value of coal in action against government for compensation for requisitioned coal.—C. G. Blake Co. v. U. S., 861.

Compensation for requisitioned coal *held* measured by market value, and not cost plus a reasonable profit.—*Id.*

↪33 (U.S.D.C.N.J.) Armistice *held* not to affect court's construction of Trading with the Enemy Act.—Garvan v. Marconi Wireless Telegraph Co. of America, 486.

WATERS AND WATER COURSES.

See Navigable Waters.

IX. PUBLIC WATER SUPPLY.

(B) Irrigation and Other Agricultural Purposes.

↪222 (U.S.C.C.A.Ariz.) Secretary of Interior's notice of charges based on "estimated cost" of irrigation project sufficient under Reclamation Act.—Yuma County Water Users' Ass'n v. Schlecht, 835.

Correspondence between Secretary of Interior and Reclamation officials as to irrigation project estimates before contracts for payment of cost not binding, as public notice, on government.—*Id.*

Though Secretary of Interior's estimate of cost of irrigation project was materially lower than later estimate, court will not interfere, in absence of fraud.—*Id.*

That cost of irrigation project was greater than expected *held* no ground for equitable relief, in view of contract to pay amount to be determined.—*Id.*

Landowners not entitled to equitable relief from payment of increased charges on ground system not completed when suit filed, where public notice and Secretary of Interior's letters to them based on his determination project was completed.—*Id.*

WHARVES.

↪20(1) (U.S.C.C.A.N.Y.) Wharf manager *held* negligent in permitting scow to remain at end of pier with knowledge of approaching storm.—The John Carroll, 302.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

WILLS.

See Executors and Administrators.

V. PROBATE, ESTABLISHMENT, AND ANNULLMENT.

(F) Parties and Process or Notice.

⊕267 (U.S.C.C.A.R.I.) Beneficiary having interest antagonistic to others necessary party to suit against trustee to avoid gift to trustee.—Atwood v. Rhode Island Hospital Trust Co., 513.

VI. CONSTRUCTION.

(H) Estates in Trust and Powers.

⊕669 (U.S.C.C.A.R.I.) Devise to existing trust created by testator void, where under trust deed trustor could thereafter change disposition by trustee.—Atwood v. Rhode Island Hospital Trust Co., 513.

⊕680 (U.S.D.C.Mich.) Trust held active, and not passive.—Blossom v. Anketell, 947.

⊕681(2) (U.S.D.C.Mich.) Trustees held vested with absolute title after beneficiary's death.—Blossom v. Anketell, 947.

WITNESSES.

See Evidence.

III. EXAMINATION.

(C) Privilege of Witness.

⊕306 (U.S.C.C.A.III.) Privilege against self-incrimination is personal to witness.—Elwell v. U. S., 775.

⊕308 (U.S.C.C.A.III.) Whether testimony would tend to incriminate witness is question for court.—Elwell v. U. S., 775.

WORDS AND PHRASES.

"Accident of canals."—Gans S. S. Line v. Wilhelmson (U. S. C. C. A. N. Y.) 254.

"Act of bankruptcy."—In re C. W. Bartleson Co. (U. S. D. C. N. Y.) 390.

"Act of God."—Gans S. S. Line v. Wilhelmson (U. S. C. C. A. N. Y.) 254.

"Actual cash value."—Castner, Curran & Bullitt v. Lederer (U. S. D. C. Pa.) 221.

"All taxes."—In re F. G. Borden Co. (U. S. C. C. A. Wis.) 782.

"Any unincorporated company."—In re Parker (U. S. D. C. Ill.) 868.

"Appurtenance."—Hines v. Smith (U. S. C. C. A. Ill.) 766.

"Assignee."—Public Ledger v. New York Times (U. S. D. C. N. Y.) 562.

"Assignment."—Minerals Separation v. Miami Copper Co. (U. S. D. C. Del.) 572.

"Assignment for benefit of creditors."—In re C. W. Bartleson Co. (U. S. D. C. N. Y.) 390.

"Association."—Chicago Title & Trust Co. v. Smietanka (U. S. D. C. Ill.) 60.

"Because of insolvency."—Hilb v. American Smelting & Refining Co. (U. S. D. C. Ohio) 334.

"Carrying on or doing business."—Detroit Hotel Co. v. Brady (U. S. D. C. Mich.) 995.

"Chattel mortgage."—In re Pittman (U. S. D. C. N. C.) 681.

"Check-off system."—Borderland Coal Corporation v. International Organization of United Mine Workers of America (U. S. D. C. Ind.) 871.

"Citizen."—Gavit v. Irwin (U. S. D. C. N. Y.) 643.

"Class."—Republic Acceptance Corporation v. De Land (U. S. D. C. Mich.) 632.

"Compensation for personal services."—U. S. v. Vanderbilt (U. S. D. C. N. Y.) 109.

"Composition."—In re Wayne Realty Co. (U. S. D. C. Ohio) 955.

"Concurrent power."—U. S. v. Ratagczak (U. S. D. C. Ohio) 558.

"Constructive notice."—Ex parte Caplis (U. S. D. C. Tex.) 980.

"Defense."—Worden v. Gillett (U. S. D. C. Fla.) 654.

"Direct tax."—McElligott v. Kissam (U. S. C. C. A. N. Y.) 545.

"Doing business."—Michigan Lubricator Co. v. Ontario Cartridge Co. (U. S. C. C. A. Mich.) 902.

"Doing business within the state."—Stephan v. Union Pac. Ry. Co. (U. S. D. C. Minn.) 709.

"Duly authorized."—In re Brashear (U. S. D. C. Pa.) 481.

"Equity."—Worden v. Gillett (U. S. D. C. Fla.) 654.

"Estimated cost."—Yuma County Water User's Ass'n v. Schlecht (U. S. C. C. A. Ariz.) 885.

"Excise tax."—McElligott v. Kissam (U. S. C. C. A. N. Y.) 545.

"Felony."—Ex parte Margrave (U. S. D. C. Cal.) 200.

"Holder in due course."—Worden v. Gillett (U. S. D. C. Fla.) 654.

"Income."—Gavit v. Irwin (U. S. D. C. N. Y.) 643.

"Insolvency."—Hilb v. American Smelting & Refining Co. (U. S. D. C. Ohio) 334.

"Interstate commerce."—U. S. v. Yohn (U. S. D. C. N. Y.) 232.

"Invested capital."—Castner, Curran & Bullitt v. Lederer (U. S. D. C. Pa.) 221.

"Jitney."—Lane v. Whitaker (U. S. D. C. Conn.) 476.

"Jurors."—Williams v. U. S. (U. S. C. C. A. Cal.) 129.

"Just compensation."—National City Bank of New York v. U. S. (U. S. D. C. N. Y.) 855.

"Legally due and owing."—In re F. G. Borden Co. (U. S. C. C. A. Wis.) 782.

"Merchandise."—The Ivor Heath (U. S. D. C. Va.) 67.

"Narrow channel."—The Lexington (U. S. C. C. A. N. Y.) 279.

"Necessaries."—The Muskegon (U. S. D. C. N. Y.) 117.

"Necessary expense in carrying on business."—Laemmle v. Eisner (U. S. D. C. N. Y.) 504.

"Notify."—Ex parte Caplis (U. S. D. C. Tex.) 980.

"Officer of the United States."—McGrath v. U. S. (U. S. C. C. A. N. Y.) 294.

"Originally."—McElligott v. Kissam (U. S. C. C. A. N. Y.) 545.

"Other necessities."—The Muskegon (U. S. C. C. A. N. Y.) 348.

"Penalty."—Wilson v. Union Tool Co. (U. S. D. C. Cal.) 624.

- "Person."—Gavit v. Irwin (U. S. D. C. N. Y.) 643.
- "Person entitled to receive."—National City Bank of New York v. U. S. (U. S. D. C. N. Y.) 855.
- "Pledge."—In re Pittman (U. S. D. C. N. C.) 681.
- "Presumption of law."—In re John B. Rose Co. (U. S. C. C. A. N. Y.) 409.
- "Property."—In re Pittman (U. S. D. C. N. C.) 686.
- "Property tax."—Republic Acceptance Corporation v. De Land (U. S. D. C. Mich.) 632.
- "Proprietor."—Public Ledger v. New York Times (U. S. D. C. N. Y.) 562.
- "Prosecution."—McGrath v. U. S. (U. S. C. C. A. N. Y.) 294.
- "Soft-metal bushings."—Rajah Auto Supply Co. v. Belvidere Screw & Machine Co. (U. S. C. C. A. Ill.) 761.
- "State."—Mutual Life Ins. Co. of New York v. Lott (U. S. D. C. Cal.) 365.
- "Subrogated."—Star Brewing Co. v. Cleveland, C., C. & St. L. Ry. Co. (U. S. C. C. A. Ill.) 330.
- "Summary proceeding."—In re Rockford Produce & Sales Co. (U. S. C. C. A. Ill.) 811.
- "Taxable person."—Gavit v. Irwin (U. S. D. C. N. Y.) 643.
- "Unearned increment."—Seaboard Air Line Ry. v. U. S. (U. S. D. C. S. C.) 77.
- "Unlawful or unfair competition."—Kinney-Rome Co. v. Federal Trade Commission (U. S. C. C. A. Ill.) 665.
- "Value in actual cash."—Castner, Curran & Bullitt v. Lederer (U. S. D. C. Pa.) 221.
- "Willful default."—U. S. v. Smoller (U. S. D. C. Del.) 1011.

WORKMEN'S COMPENSATION ACTS.See Master and Servant, [§](#)347-398.**WRIT OF ERROR.**

See Appeal and Error.

WRITS.

See Execution; Injunction; Process.